The struggle between President Johnson...
The original of this book is in the Cornell University Library.

There are no known copyright restrictions in the United States on the use of the text.

http://www.archive.org/details/cu31924030433027
STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW

EDITED BY
THE FACULTY OF POLITICAL SCIENCE
OF COLUMBIA UNIVERSITY

VOLUME EIGHTH

COLUMBIA UNIVERSITY
New York
1896-1898
CONTENTS

1. The Struggle between President Johnson and Congress over Reconstruction.—Charles Ernest Chadsey, Ph.D. . 1

2. Recent Centralizing Tendencies in State Educational Administration.—William Clarence Webster, Ph.D. 143

3. The Abolition of Privateering and the Declaration of Paris.—Francis R. Stark, LL.B., Ph.D. . . . . . 221

4. Public Administration in Massachusetts. The Relation of Central to Local Activity.—Robert Harvey Whitten, Ph.D. . . . . . . . . . . . . . . . . . . 381
I

THE STRUGGLE BETWEEN PRESIDENT JOHNSON AND CONGRESS OVER RECONSTRUCTION
THE STRUGGLE
BETWEEN
PRESIDENT JOHNSON AND CONGRESS
OVER RECONSTRUCTION

BY
CHARLES ERNEST CHADSEY, Ph.D.

NEW YORK
1896
## CONTENTS

### CHAPTER I. THEORIES PRIOR TO THE CLOSE OF THE WAR.

1. The Problem ........................................... 7  
2. Common Belief at Opening of Hostilities: The Crit-  
tenden Resolution ..................................... 8 
3. The Democratic Theory ............................... 10 
4. Lincoln: The Development of his Theory .......... 14 
5. The Congressional Policy ............................ 18

### CHAPTER II. JOHNSON’S THEORY: THE EXPERIMENT AND ITS  
RESULTS.

1. Conditions at Accession of Johnson ................. 28 
2. Lincoln vs. Johnson .................................. 28 
3. Johnson’s views before Accession .................. 29 
4. Speeches in the Spring after his Accession .......... 30 
5. Secret of his Attitude .............................. 32 
6. Development of his Theory .......................... 34 
7. Attitude towards Enfranchisement of the Negro .... 41 
8. Legislative Action in the South ..................... 42 
9. The Defense of the South ........................... 46 
10. Effect of the Attitude of the South upon the North . 47

### CHAPTER III. ATTITUDE OF CONGRESS TOWARDS THE EXPER-  
IMENT: DEVELOPMENT OF THE CONGRESSIONAL THEORY.

1. Attitude of Parties towards the Administration at Be-  
ginning of the Session ................................ 49 
2. Opening Scenes in Congress .......................... 50 
3. The Annual Message: Debate on Reconstruction .... 55 
4. The Freedmen’s Bureau ............................... 59 
5
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Johnson’s Indiscreet Speeches in February, 1866</td>
<td>65</td>
</tr>
<tr>
<td>6. Civil Rights; Other Bills</td>
<td>68</td>
</tr>
<tr>
<td>7. Report of Committee on Reconstruction</td>
<td>73</td>
</tr>
<tr>
<td>8. Authorized Measures of First Session</td>
<td>80</td>
</tr>
</tbody>
</table>

CHAPTER IV. THE CAMPAIGN OF 1866.

1. Crisis in the Cabinet                          | 87   |
2. The New Orleans Riots                           | 88   |
3. Administration Conventions                     | 91   |
4. Anti-Administration Conventions                | 98   |
5. The Fall Elections                             | 103  |
6. Action on the XIV Amendment                    | 104  |

CHAPTER V. THE CONGRESSIONAL THEORY FULLY DEVELOPED.

1. The Second Session Convenes; The Annual Message | 107  |
2. First Reconstruction Bill                       | 109  |
3. First Supplementary Bill                        | 117  |
4. Second Supplementary Bill                        | 122  |
5. State Conventions                               | 124  |
6. Third Supplementary Bill                         | 125  |
7. Ratification of Constitutions                    | 125  |
8. Acts Re-admitting States to Representation in Congress | 125 |

CHAPTER VI. THE IMPEACHMENT OF THE PRESIDENT.

1. Why Congress Wished to Impeach                 | 127  |
2. What is an Impeachable Offense                  | 128  |
3. The Opening Attack                              | 129  |
4. The Work of the Judiciary Committee             | 131  |
5. The Attack Fails                                | 132  |
6. The Limitation of Presidential Powers           | 133  |
7. The Tenure-of-Office Act                        | 134  |
8. Struggle with Secretary Stanton                | 135  |
9. Articles of Impeachment                         | 138  |
10. Attitude of Conservative Republicans           | 140  |
11. Conclusion                                    | 141  |
The Struggle Between President Johnson and Congress Over Reconstruction.

Chapter I.

Theories of Reconstruction Prior to the Close of the War.

I. The war of the rebellion afforded opportunity for the people of the United States to obtain a far clearer conception of the powers and limitations of the federal constitution than had previously been possible, and settled beyond possibility of further debate some of the most important questions which had arisen since its interpretation as an "instrument of evidence" had begun. Yet when General Johnston had surrendered his army on April 26, 1865, virtually bringing the war to a close, the country found that one great constitutional question, a question of the highest practical importance, still remained unsolved; and for several years the best energies of our statesmen were occupied with its solution. Eleven of the States had for four years been in armed insurrection, but now, through superior force, they lay helpless at the feet of the Union. Under these circum-

[7]
stances, what was their constitutional relation to the federal government?

Previous to the passage of the ordinance of secession by the convention of South Carolina in 1860, the nation never had been called upon to determine the status of a State which declared its relation to the federal government severed. Certainly if a State could establish its independence by war, the question, so far as such State was concerned, would have no significance; but as such a conclusion of the difficulty could not be considered for an instant, the status of the seceded State, both before and after the cessation of hostilities, immediately became an important subject of discussion. The gradual evolution of popular sentiment, from the belief that the dignity of a State should not be tampered with, to the belief that by an act of secession a State divested itself of all its rights and privileges as a State, and reverted to the condition of a Territory, forms an interesting chapter in the history of the unwritten constitution of the United States.

2. When the 37th Congress met on July 4, 1861, in pursuance of Lincoln's proclamation, the war had not been in progress long enough to show to the country the extreme gravity of the situation and the wideness of the gap which had arisen between the Southern States and the rest of the Union. The common belief was that unprincipled agitators, who represented only a small minority of the legal voters in the insurrectionary States, had obtained temporary control over the governments of these States, and were waging a war against the Union, in which they were unsupported by the majority; and that the latter would joyfully resume control of their governments as soon as the opportunity should be given them, which it was confidently believed would soon happen. That is, the war was to be carried on, not against the States which claimed to have seceded, but against a certain element of the Southern population.
The extreme solicitude felt by Congress for the proper preservation of the sovereign privileges of these States is shown by the practical unanimity with which a resolution submitted by Mr. Crittenden, on July 22, was carried, there being only two dissenting voices. It declared the sense of the House to be that this war is not waged upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these objects are accomplished the war ought to cease.

Three days later, Andrew Johnson, then a Senator from Tennessee, submitted the same resolution in the Senate, where it was also carried with practical unanimity, although the discussion indicated a confused idea as to its exact significance.

But few months passed by before this staunch confidence in the rights of the States began to be shaken; a feeling of doubt had arisen which had not as yet resolved itself into a definite change of attitude, yet which was sufficient to prevent the re-endorsement of Mr. Crittenden's resolution, introduced by Mr. Holman, December 4, 1861, and tabled by a vote of 71 to 65.

A series of resolutions introduced in the Senate by Mr. Davis of Kentucky, on February 13, 1862, while preserving

1 Scott, Reconstruction during the Civil War, 245 ff.
3 Alexander H. Stephens, in The War between the States, uses this fact as a basis for the charge that Johnson was inconsistent in refusing to ratify the Sherman-Johnston Convention.
in the main the principles then in vogue, assumed a somewhat broader tone and expressed very clearly the belief of a large element of the thoughtful classes. Affirming the permanency of the privileges of the people of the United States, it denied the criminality of the citizen who does not perform "his duties of loyalty and obedience, when the government fails to give him protection and security," and declared that the powers of the nation and State in the State are simply in suspension during a period of insurrection, and should be resumed, unimpaired, when the insurrection ceases. Here also was affirmed, in unmistakable terms, the inability of the States to secede, and the consequent obligation of the United States to preserve in these States republican forms of government. The guilty leaders should be punished, but the masses should receive amnesty; and immediately following the important admission was made that "if the people of any State cannot or will not reconstruct their state government, and return to loyalty and duty, Congress should provide a government for such State as a territory of the United States, securing to the people thereof their appropriate constitutional rights."

Here, in connection with the positive statement that a State cannot secede, and the implication that the insurrectionary citizen may be upheld in his actions, was a clear expression of so-called extra-constitutional powers in treating incorrigible States as territories. It would be interesting to know how these resolutions were viewed by the Senate, but they were laid on the table and never taken up for discussion.

3. During the opening days of the 3d Session of the 37th Congress, the question of the right to interfere with the States as States, was brought fairly before the House by a series of resolutions in which the policy of the extreme wing
of the Democratic party was expressed. In them it is declared that "the Union as it was, must be restored and maintained, one and indivisible." When this declaration is examined, with the President's preliminary proclamation of emancipation in mind, the significance of the three italicised words can be seen. The resolutions, after quoting the substance of the Crittenden resolution, further declared that "whoever shall pervert or attempt to pervert the same to a war of conquest or subjugation, or for the overthrowing or interfering with the rights or established institutions of any of the States, and to abolish slavery therein, or for the purpose of destroying or impairing the dignity, equality, or rights of any of the States, will be guilty of a flagrant breach of public faith and of a high crime against the Constitution and the Union." The same guilt was declared to attach to all who should "propose by federal authority, to extinguish any of the States of the Union, or to declare any of them extinguished, and to establish territorial governments within the same."

These resolutions, which were an open attack upon the presidential policy, were tabled by a vote of 79 to 50, a party vote. This fact is of significance as an evidence of the growing feeling in the House, that the sovereign rights of the States might be too highly considered, and that decided discipline of some kind might be found a measure of necessity. It began to be doubted whether in some of these States there could be found a sufficient number of loyal citizens to carry on the government without modifications of the old constitution and laws. At the same time the small majority by which the resolutions were tabled shows

---


2 The italics are mine.
that the old idea still exercised a powerful influence in the House.

On December 14, 1863, resolutions were introduced by Mr. Finck, and others two days later by Mr. Rollins, which were very similar to the Crittenden resolution, and were introduced merely as expressions of the Democratic policy, since the Republican majority was too pronounced to permit their adoption.

From the beginning of the war, the policy of the Democratic party in the North was to bring about some agreement between the North and the South, by compromises and concessions, and should the issue finally be determined in favor of the Union even by dint of superior strength, to restore the Southern States to their former condition. In short, the theory held almost unanimously by Congress at the opening of the 37th Congress, was retained as the Democratic theory, while the Republicans gradually modified their opinions, and with the progress of events developed a theory different from both the Democratic and the presidential theory.

Even after the proclamation of emancipation had come to be recognized as one of the natural results of the war, the policy of the Democratic party was unchanged except as necessarily modified by emancipation, and in the House, on February 8, 1864, Jacob B. Blair submitted resolutions in which it was stated that "every State which has ever been, is still a State in the Union, and that when this rebellion shall have been put down, each of the so-called seceding States will have the same rights, privileges, and immunities under the Constitution as any one of the loyal States, except so far as the holding of African slaves in bondage is affected.

2 Ibid., pp. 65–6.  
3 See Cox, Three Decades of Federal Legislation, 123.  
by the President's proclamation." These resolutions also repudiated "the doctrine advanced by some, that the so-called seceding States have ceased to be States of and in the Union, and have become territories thereof, or stand in the relation of foreign powers at war therewith."

But besides political declarations, the Democratic theory found other ways of expression in Congress. From the very commencement of the war, many of the leaders of the party were confident that hostilities could be brought to an end and peaceful relations restored by a convention of States, and several attempts were made to induce Congress to consider favorably some such plan. As early as July 15, 1861, only eleven days after the convening of the extra session of Congress, Benjamin Wood introduced a resolution in the House, which recommended that the governors of the several States "convene their legislatures for the purpose of calling an election to select two delegates from each Congressional district, to meet in general convention at Louisville, in Kentucky, on the first Monday in September next; the purpose of the said convention to be to devise measures for the restoration of peace to our country."

Again at the opening of the second session on December 4, 1861, joint resolutions were introduced by Mr. Saulsbury, in the Senate, to appoint Millard Fillmore, Franklin Pierce, Roger B. Taney, Edward Everett, Geo. M. Dallas, Thomas Ewing, Horace Binney, Reverdy Johnson, John J. Crittenden, George E. Pugh, and R. W. Thompson, "commissioners on the part of Congress, to confer with a like number of commissioners to be appointed by the States" in rebellion,

1 For a very able discussion of the "Efforts at Compromise, 1860-61," see Frederic Bancroft's article in Political Science Quarterly, vi, pp. 401-423.

2 Congressional Globe, 1st Session, 37th Congress, p. 129.

3 Ibid., 2d Session, 37th Congress, part i, p. 8.
“for the preservation of the Union and the maintenance of the Constitution.” The resolutions also provided that when the several States should have appointed their commissioners, hostilities should cease, “and not be renewed unless said commission shall be unable to agree,” or “agreement shall be rejected either by Congress or by the aforesaid States.”

One year later, December 2, 1862, a third attempt \(^1\) was made by Mr. Davis, who submitted a joint resolution in the Senate (S. 104), proposing a convention from all the States to devise means for the reconstruction of the Union, and on May 30, 1864, Mr. Lazear submitted in the House, resolutions which were to authorize the President to “adopt or agree upon some plan upon which the decision of the great body of the people north and south may be secured upon the question of calling a convention composed of delegates from all the States, to which shall be referred the settlement of all questions now dividing the southern States from the rest of the Union, with a view to the restoration of the several States to the places they were intended to occupy in the Union.”

During the later years of the war, after hope of success had begun to die out, some of the Southern States looked very favorably upon the plan; but nothing approximating such a convention resulted.\(^2\)

4. At the beginning of his term of office, President Lincoln held the then prevailing belief in the supremacy of the States in all matters not directly under federal control, and as a matter of course believed that at the cessation of hostilities each State should immediately resume its old relations to the government, its local matters untouched by the central


\(^2\) See Pollard’s *Lost Cause Regained*, pp. 44–57, for a discussion of the growth of Southern sentiment favoring measures of peace.
administration. But the ability of Lincoln to modify his own beliefs on any subject as his experience widened was never better manifested than on this very question, and had he lived to control the administration through the period of reconstruction, it is not unreasonable to suppose that his attitude would have undergone still greater change. As the magnitude of the struggle became more apparent, he began to deliberate upon the advisability of striking at the root of the evil, despite the blow it struck at state liberty, and the two proclamations of September 22, 1862, and January 1, 1863, mark the basis of the executive plan of reconstruction. The Pierpoint government of Virginia had been recognized in 1861, but its recognition was in harmony with the early attitude of Congress towards the States, and involved no questions which could show a distinct executive policy.

In 1862, after the capture of New Orleans, a military governor of Louisiana was appointed, many persons in the vicinity of New Orleans were enrolled as citizens of the United States, and two districts elected representatives to Congress, under the provisions of the old state constitution. In this case there was a distinct development of the executive policy. Here was a military governor, appointed by the President and so an instrument of the Executive, interfering with the civil government of the State, controlling elections, deciding what districts were entitled to elections, and fixing the date of election. This was very different from simple restoration, with its theory that the national government must in no way interfere with the State govern-

1 It is improbable that he ever modified his views as to the continued existence of the States—views which were essentially those of his successor, though less dogmatically asserted. See Hurd, Theory of Our National Existence, 36 and Index; Pollard, Lost Cause Regained, 65.

2 Cooper, American Politics, pp. 141-3.

3 Blaine, Twenty Years of Congress, ii, 36.
ments. And when the two members elect, Messrs. Flanders and Hahn, presented themselves for admission into the House of Representatives, the Democrats, consistently with their belief in restoration, which up to that time had met with no serious opposition, opposed their admission strongly. In the discussion which arose, Mr. Voorhees well expressed the difference in theory between the Democratic view and that which was ultimately to be adopted. The problem was stated by him as follows:1 "If the Southern Confederacy is a foreign power, an independent nationality to-day, and you have conquered back the territory of Louisiana, you may then substitute a new system of laws in the place of the laws of that State. You may then supplant her civil institutions by institutions made anew for her by the proper authority of this Government—not by the executive, but by the legislative branch of the Government, assisted by the Executive simply to the extent of signing his name to the bills of legislation." "But if the theory we have been proceeding upon here, that this Union is unbroken; that no States have sundered the bonds that bind us together; that no successful disunion has yet taken place—if that theory is still to prevail in these halls, then this can not be done. You are as much bound to uphold the laws of Louisiana in all their extent and in all their parts, as you are to uphold the laws of Pennsylvania or New York, or any other State whose civil policy has not been disturbed."

The strong appeal to remain true to the theory first maintained by Congress, did not succeed in shutting the Louisianians out, and for one month, February to March, 1863, they were recognized as members. The later refusal to admit members from insurrectionary States was due, not to a supposed inconsistency with restoration proper, but to dislike of the presidential policy.

1 Congressional Globe, 3d Session, 37th Congress, part i, p. 834.
And now with emancipation still another element entered into the question, and in the future reconstruction, Congress was of necessity forced to follow to a certain extent a new path laid out by the President. A State after January, 1863, in order to resume its former relations, must at least make one change in its institutions, and perfect restoration could no longer be considered. True, a large minority opposed the emancipation policy of the President, and their discontent took expression in resolutions such as Mr. Conway introduced into the House on December 15, 1862, in which he says that "the seceded States can only be put down, if at all, by being regarded as out of constitutional relations with the Union," implying, of course, the inability of the President to extinguish their local institutions. But such resolutions were never considered, while resolutions endorsing the policy of the President were agreed to.¹

The next step in the development of the President's policy was the formation of a definite program, which States wishing to be restored to equal rights with the loyal States should follow. This plan of reconstruction, called by him at a later period the "Louisiana plan," was officially announced by the proclamation of December 8, 1863, and the annual message to Congress of the same date defended the stand taken.² This proclamation granted amnesty to all citizens (excepting certain specified classes) who would take an

¹ House Journal, 3d Session, 37th Congress, pp. 69, 70.
² Cooper, American Politics, bk. i, pp. 141-3. On Lincoln's plan of Reconstruction, Cf. Gillet, Democracy in the United States, pp. 297-9; Pollard, Lost Cause Regained, 65, which claims that Lincoln could have successfully carried out his policy had he lived, but does not sustain the statement; Cox, Three Decades, etc., pp. 336-345; Wilson, Rise and Fall of the Slave Power, iii, 519-20; Scott, Reconstruction during the Civil War, 267 ff.
³ These excepted classes were: (1) Confederate civil and diplomatic officers; (2) Confederates who had left U. S. judicial positions; (3) officers above colonel in army and lieutenant in navy; (4) those who had formerly been U. S. Con-
oath to support the Constitution, as well as all acts of Congress and proclamations of the President relating to slaves; and declared that whenever one-tenth of the voters of any insurrectionary State should take the oath, and re-establish their state government, "which shall be republican, and in no wise contravening said oath," that government would be recognized as the true government of the State and would receive the protection guaranteed to the States. But all questions concerning admission to Congress would, in accordance with the provisions of the Constitution, rest entirely with the respective houses of Congress. The questions of negro suffrage and federal supervision of the freedmen were not touched, and no provision was made to ensure good faith in reconstruction, beyond the mere oath exacted, and the general oversight of the President.

5. Under the provisions of the proclamation, three States, Louisiana, Arkansas, and Tennessee, set up new governments, which were recognized by the President as true governments. Congress, however, was by no means satisfied with this lenient way of treating the humbled States. The feeling that the executive was encroaching upon the legislative power added strength to the discontent. Many thought that if the presidential policy, without modification, were carried out, the reconstructed States would speedily revert to the control of the very element against whom the war had been waged. The House, by a strict party vote, authorized the appointment of a select commit-

gressmen and had aided the rebellion; (5) those who left U. S. Army and Navy to aid the rebellion; (6) those who had treated negroes captured while in U. S. military or naval service otherwise than as prisoners of war.

1 Wilson, Rise and Fall of the Slave Power in America, iii, 531–41; Cf. Gillet, Democracy in the United States, pp. 304–7.

2 For results of this reorganization in Tennessee, see chap. iii.

3 With one exception—a Republican, Whaley, of West Virginia, voted with the negative.
and Reconstruction

tee of nine, to consider that portion of the President's message relating to reconstruction, with authority to report by bill or otherwise. Henry Winter Davis was appointed chairman. Resolutions were submitted by Mr. Williams on March 14, 1864, which were backed by a sentiment in Congress that was of great significance. Congress began to feel its way towards a distinctive policy, which had herefore been supported by only a few, who were considered as holding extremely wild and untenable views. These resolutions stated that although the local laws were subverted, and the functions of the civil authorities suspended in the States under armed occupation, "as soon as the rebellion is suppressed in any of the revolting States," the President should communicate the fact to Congress, "in order that it may take the proper measures for the reorganization of the civil governments and the re-establishment of the civil functionaries therein, and prescribe such terms as it may deem wise and proper and consistent with the public safety for the readmission of those districts as States of this Union." The exclusive right of the legislative power "to say upon what terms those territories shall be allowed to return to the Union," was also asserted.

The issue between Congress and the President took more definite form through the Davis-Wade bill of 1864.1 This bill had been drafted during the latter part of 1863 by the select committee of nine, but it did not come before the House for consideration till March 22, 1864.

The objections of those who supported this bill to the Presidential plan, are clearly expressed in the speech of H. Winter Davis, in support of his measure. He says2 that

---

1 So called from the chairmen of the House and Senate committees reporting the bill.

2 Congressional Globe, appendix, 1st Session, 38th Congress, p. 84. See also
it (the Presidential plan), "proposed no guardianship of the United States over the reorganization of the governments, no law to prescribe who shall vote, no civil functionaries to see that the law is faithfully executed, no supervising authority to control and judge of the elections. But if, in any manner, by the toleration of martial law lately proclaimed the fundamental law, under the dictation of any military authority, or under the prescriptions of a provost marshal, something in the form of a government shall be presented, represented to rest on the votes of one-tenth of the population, the President will recognize that, provided it does not contravene the proclamation of freedom and the laws of Congress; and to secure that, an oath is exacted." This government "may be recognized by the military power and may not be recognized by the civil power, so that it would have a doubtful existence, half civil and half military, neither a temporary government by law of Congress, nor a state government, something as unknown to the Constitution as the rebel government that refuses to recognize it."

In place of this method of organization, which Mr. Davis justly thought so wretchedly loose, he proposed that the President should appoint provisional governors over these States, whose first duty should be to enroll the white citizens, through duly appointed United States marshals. Then when a majority of these citizens should have taken the oath of allegiance, they should be permitted to hold a State convention for the purpose of forming a constitution under which the government might be re-established. But all Confederate office-holders and those voluntarily bearing arms against the United States were to be ineligible as delegates to the convention. The bill further provided that the consti-

Lalor, iii, 546; Cox, Three Decades, etc., 339–341; Wilson, Rise and Fall of the Slave Power in America, iii, 520–28; Johnson's American Orations, iii, 242–260; Scott, Reconstruction during the Civil War, 274 ff.
tion should "repudiate the rebel debt, abolish slavery, and prohibit the higher military and civil officers from voting for or serving as governors or members of the legislature." When these conditions should have been fulfilled, and the assent of Congress to the recognition of the new government obtained, the President should be notified, and should then officially recognize the government by proclamation, after which senators and representatives would be admitted to Congress.¹

In the speech mentioned above, Mr. Davis claimed that "the bill challenges the support of all who consider slavery the cause of the rebellion, and that in it the embers of rebellion will always smoulder; of those who think that freedom and permanent peace are inseparable, and who are determined, so far as their constitutional authority will allow them, to secure these fruits by adequate legislation."

But in this plan there was no attempt to introduce negro suffrage. The only question of importance seemed to be: "How can we ensure the subservience of these States to the federal constitution?" The supporters of the Davis plan insisted that "the rebel States must be governed by Congress till they submit and form a state government under the Constitution"; otherwise "Congress must recognize state governments which do not recognize either Congress or the Constitution of the United States; or there must be an entire absence of all government in the rebel States; and that is anarchy." It was absurd, the argument continued, to recognize a government which did not recognize the Constitution; and "to accept the alternative of anarchy as the constitutional condition of a State is to assert the failure of the Constitution and the end of republican government. Until, therefore, Congress recognize a state government, organized under its auspices, there is no government in the rebel

¹Cooper, American Politics, bk. i, p. 169.
States except the authority of Congress." From this it logically followed that in the absence of all State government it was the duty of Congress to "administer civil government until the people shall, under its guidance, submit to the Constitution of the United States," and reorganize government under whatever conditions Congress might require.

These arguments appealed to sentiments which were becoming very popular in Congress. The theory that a State by seceding ceased to exist as a State was gradually gaining ground, and the Davis plan, by which the central government was to control the State as a territory, though for so limited a time, rapidly gained supporters.

Mr. Fernando Beaman, of Michigan, who also considered that the seceded States had ceased to exist, said in an extended speech favoring the adoption of this bill:1 "As a people without government or organization are in a state of anarchy, their efforts to establish law and order must be more or less impeded by caprice, by divided counsels, and by the want of forms, regulations, and methods. The passage of this bill is the establishment of incipient civil government, and provides at once rules, regulations and system, with the proper officials to carry them into execution."

Although the bill was avowedly drawn up to provide what the presidential plan failed to provide, a method of reconstruction so thorough that those elements which had produced the discord could no longer influence the state governments, it itself furnished no means to prevent any of these States from so amending their constitutions, after their senators and representatives had received recognition, that the very conditions of readmittance might be rendered nugatory.

But the bill seemed to the majority in Congress to offer a

---

1 Congressional Globe, part ii, 38th Congress, 1st Session, p. 1246.
more practical plan than any yet proposed, and it passed the House May 4, by a vote of 73 to 59; the Senate, two months later, adopted it by a majority of four. But it failed to become a law by the adjournment of Congress before it received the President's signature.¹

The President, in justification of his neglect to sign the bill, issued a proclamation on July 8.² This stated that while he was unprepared "to be inflexibly committed to any single plan of restoration," and also "unprepared to declare that the free State constitutions and governments already adopted and installed in Arkansas and Louisiana, shall be set aside and held for naught, thereby repelling and discouraging the loyal citizens who have set up the same as to further effort," nevertheless he was "fully satisfied with the system for restoration contained in the bill, as one very proper plan for the loyal people of any State choosing to adopt it," and that in such case when the people "shall have sufficiently returned to their obedience to the Constitution and laws of the United States," military governors would be appointed, "with directions to proceed according to the bill."

This attempt to modify the presidential plan virtually ended for the time the efforts of Congress towards the development of a distinctive theory, and the war thus closed with no well defined plan in operation, except that of President Lincoln, which was not well sustained by Congress. Only one thing seemed to be definitely decided. That was, that the seceded States, in whatever light they might be considered, were incapacitated from participating in presi-

¹ Congressional Globe, iii, p. 2106, 1st Session, 38th Congress.

² Cooper, American Politics, bk. i, 169-70. The President's action caused much dissatisfaction, Davis and Wade publishing a protest which impugned Lincoln's motives, declaring that he had committed an outrage on American legislation. See Johnson, in Lalor, iii. 5 and 6; Cox, Three Decades, etc., 341.
dential elections. A joint resolution to this effect was passed in 1865, and in accordance with its provisions the electoral vote of Louisiana was ruled out.

Two men in the Republican party wielded the chief power in influencing that party to adopt the theory of reconstruction which was finally to prevail as the Congressional theory. One was Thaddeus Stevens of Pennsylvania, and the other Charles Sumner, of Massachusetts. The latter was a recognized leader of the Senate, and his views concerning the mutual relations of the States in rebellion and the federal government were clearly expressed in a series of resolutions which he submitted February 11, 1862. These resolutions, although never brought forward for consideration, were printed, and coming from so influential a man had considerable influence in shaping the general attitude of Congress towards the question, and affected to some extent its future policy. They were nine in number, with a well-worded preamble which put forward as a premise that "the extensive territory, thus usurped by these pretended governments, and organized into a hostile confederacy, belongs to the United States, as an inseparable part

1 Senate Journal, 2d Session, 38th Congress, Feb. 8. Blaine (Twenty Years of Congress, ii, 46) explains that this joint resolution was intended as a rebuke to the President by the refusal of Congress to accept the proclamation of December 8, 1863, as a basis for the restoration of the States fulfilling its requirements. He then points out how Lincoln, with his usual tact, overthrows what triumph may have accrued to the leaders of the opposition by explaining that he "signed the joint resolution in deference to the view of Congress implied in its passage and presentation." His (Lincoln's) own opinion was that as a matter of course Congress had complete power to accept or reject electoral votes, and that the Executive had no right to interpose with a veto, whatever his own opinions might be. Blaine says that "his triumph was complete, both in the estimation of Congress and of the people."

2 See Cox, Three Decades of Federal Legislation, 123; Johnston, in Lalor, iii, 54; Wilson (Woodrow), Division and Reunion, 251–2.

thereof, under the sanction of the Constitution, to be held in trust for the inhabitants in the present and future generations. * * * The Constitution, which is the supreme law of the land, cannot be displaced in its rightful operation within this territory, but must ever continue the supreme law thereof."

The first resolution declares that a vote of secession is void as against the Constitution, "and when sustained by force it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body politic, so that from that time forward, the territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, *felo de se*, ceases to exist."

The second resolution denies the constitutional existence of the Confederate States. The third and fourth declare that the termination of a State terminates its peculiar local institutions, therefore slavery ceases to exist; and the fifth, sixth and seventh declare it necessary not to recognize or tolerate slavery. The eighth declares the obligation of the United States to protect all inhabitants, "without distinction of color or class." The ninth declares that Congress, in pursuance of the duties cast upon it by the total extinction of the States and by the constitutional obligation that the "United States shall guarantee to every State in this Union a republican form of government," 1 "will assume complete jurisdiction of such vacated territory where such unconstitutional and illegal things have been attempted, and will pro-

1 The inconsistency in declaring a State to be extinct, and at the same time acknowledging the obligation to guarantee to it a republican form of government, is due to careless phraseology. Obviously Sumner uses the word "State," in these resolutions, where he means state governments.
ceed to establish therein republican forms of government under the Constitution; and in the execution of this trust will provide carefully for the protection of all the inhabitants thereof, for the security of families, the organization of labor, the encouragement of industry, and the welfare of society, and will in every way discharge the duties of a just, merciful, and paternal government.”

Thaddeus Stevens, although recognized as one of the foremost men of the Republican party, advocated from the very commencement of hostilities views of so radical a nature, that he was looked upon by many as a fanatic. His influence accordingly worked in a different way from Sumner’s. At no time did he consolidate his views into a series of resolutions, but upon every occasion where the subject could be touched upon, no matter how indirectly the topic might refer to it, he would state his theory of the relation of the seceded States to the Union. Persistently and consistently he advocated it; and he took pleasure in considering himself as in advance of his party, a prophet, pointing out the only right road, confident that sooner or later his party would see the wisdom of his policy and adopt it. Throughout those tempestuous years, his undaunted faith in the infallibility of his plan served to keep it constantly in mind, and attracted to him a constantly increasing number of followers, until at the beginning of the 39th Congress he obtained control, and became the recognized leader of his party in all matters relating to the Southern States. Though the plan of reconstruction as finally adopted contained many modifications, it was to a great extent the logical outgrowth of the Stevens theory. His whole theory rested upon the simple premise that wherever there is resistance to the Constitution, and that resistance cannot be overthrown without appeal to violent methods, there the Constitution is theoretically as well as practically suspended. As long as such resistance continues, the Con-
stitution remains suspended, and only the law-making and war-making power is able to determine when resistance has ceased. Consequently the federal government would have the undisputed right to treat the South as a conquered territory until there should be no question as to the safety of granting greater privileges. Those States had ceased to be States, consequently the "guarantee clause" had no application. Congress had unrestricted power over them, as simple territories of the federal government. On May 2, 1864, during the discussion of the bill to guarantee republican forms of government to the rebellious States, he declared that the rebellious States "were entitled to no rights under the Constitution and laws, which as to them were abrogated; that they could invoke the aid of neither in their behalf; that they could claim to be treated during the war as belligerents according to the laws of war and the law of nations; that they could claim no other rights than a foreign nation with whom we might be at war; and that they were subject to all the liabilities of such foreign belligerent," and that "the property of the morally and politically guilty should be taken for public use." 

CHAPTER II.

JOHNSON'S THEORY: THE EXPERIMENT, AND ITS RESULTS.

1. We have briefly reviewed the theories that obtained greater or less consideration during the progress of the war, and have seen that no plan had been agreed upon by which the Southern States might resume their normal relations with the rest of the Union. Two or three States had, it is true, been nominally reconstructed under the provisions of the proclamation of December 8, 1863, but their good faith was strongly suspected, and their representatives were not able to secure recognition in Congress. The high personal esteem in which President Lincoln was held had prevented general demonstrations against his policy, but there was a wide-spread suspicion that he was inclined to deal too leniently with a people who had brought so much expense and misery upon the nation. The indignation of the North had increased with the progress of the war, and the belief that the South could be held in check only by the most stringent regulations and requirements was held by many.

2. So long as armed rebellion existed the question of reconstruction was a minor one, the attention of all being chiefly directed to the problem: "How can this rebellion be crushed out, and the South made thoroughly to realize that resistance is useless?" But when Andrew Johnson took the oath of office the rebellion was virtually a thing of the past, and the giant problem for the nation to solve during his administration was: "How shall we treat these conquered States?
lying helpless, awaiting whatever fate may be allotted them?" No other issue of importance served to offset it. The whole nation was debating the question, and all were waiting to see in what way the Executive would grapple with it. 1

3. Those who feared that Lincoln had lacked sufficient firmness and had been too tender hearted, believed that in Johnson the nation had as its Executive a man with correct convictions and a strength of character which ensured both the proper treatment of the South and the stability of the Union. Johnson had an excellent record as military governor of Tennessee, where his fearlessness and vigorous administration had given him a reputation which brought to him the nomination of vice-president. From his severity to the rebels while governor of Tennessee it was reasoned that he would still remain severe and unyielding in his treatment of them as President of the United States. He himself was always fond of alluding to his past record as indicating his future course. Thus, only six days after he took the oath of office, he said while addressing a delegation of citizens of Indiana: 2

"In reference to what my administration will be, while I occupy my present position, I must refer you to the past. You may look back to it as evidence of what my course will be; * * * mine has been but one straightforward and unswerving course, and I see no reason now why I should depart from it. * * * My past is a better foreshadowing of my future course than any other statement on paper that might be made." Moreover, an examination of the speeches made by him during the war shows the grounds on which the people were justified in expecting a severe policy. An extract from an address delivered in Nashville, June 9, 1864, shows his views at that time as to who should carry on the

1 See Wilson, Rise and Fall of the Slave Power in America, iii, 531–541.

2 McPherson, Reconstruction, pp. 44 f. Cf. Wilson, Rise and Fall of the Slave Power in America, iii, 592.
work of reconstruction. In calling a convention to restore the State, who shall restore and re-establish it? Shall the man who gave his influence and his means to destroy the government participate in the great work of reorganization? Traitors should take a back seat in the work of restoration. If there be but five thousand men in Tennessee loyal to the Constitution, loyal to freedom, loyal to justice, these true and faithful men should control the work of reorganization and reformation absolutely.

Later on in the same speech he said, referring to the traitor "born and reared among us": "My judgment is that he should be subjected to a severe ordeal before he is restored to citizenship. A fellow who takes the oath merely to save his property, and denies the validity of the oath, is a perjured man, and not to be trusted."

4. Emphatic statements such as these, often repeated, insisting that the government of the States must be carefully kept in the hands of those whose loyalty was above suspicion, and advocating severe ordeals for those considered traitors, warranted the people of the nation in their faith in his extreme devotion to a strong Union. Yet soon after his inauguration a change in his attitude could be noticed. In his numerous speeches and interviews he shifts his ground, very gradually at first, but soon meeting the issue squarely, pledging himself to a policy which he faithfully carried into execution, and which the candid student must recognize as being thoroughly believed in by the President. Clemency towards the masses, but severity towards the leaders of the rebellion, was his attitude in his speech of April 21, above alluded to. He expressed his views as follows: "It is not promulgating anything I have not heretofore said, to say that traitors must be made odious, that treason must be

1 McPherson, pp. 46-7.
2 McPherson, 44 ff; Moore, Life and Speeches of Andrew Johnson, 481 ff.
made odious, that traitors must be punished and impoverished. They must not only be punished, but their social power must be destroyed. If not, they will still maintain an ascendency, and may again become numerous and powerful; for, in the words of a former senator of the United States, 'when traitors become numerous enough, treason becomes respectable.' And I say that, after making treason odious, every Union man and the Government should be remunerated out of the pockets of those who have inflicted this great suffering upon the country. But do not understand me as saying this in a spirit of anger, for, if I understand my own heart, the reverse is the case; and while I say that the penalties of the law, in a stern and inflexible manner, should be executed upon conscious, intelligent and influential traitors—the leaders, who have deceived thousands upon thousands of laboring men who have been drawn into this rebellion—and while I say, as to the leaders, punishment, I also say leniency, conciliation and amnesty to the thousands whom they have misled and deceived."

As Johnson said, he promulgated nothing new in this statement of his beliefs regarding the treatment of the South, save possibly a more definite affirmation of clemency to the masses. In the Nashville speech of June 9, 1864, he had still more emphatically urged extreme measures towards the leaders.¹ "Treason must be made odious, and traitors must be punished and impoverished. Their great plantations must be seized and divided into small farms, and sold to honest, industrious men. 'The day for protecting the lands and negroes of these authors of the rebellion is past.' Again on April 24, 1865, in an interview with a number of Virginia refugees, he reiterated the necessity of severity. In this case, perhaps owing to the nature of the interview, and the character of those to whom he was speaking, he

¹ McPherson, p. 47.
makes no distinction between the leaders and their followers, his definition of treason apparently including all soldiers and their abettors. In it he says: "It is time that our people were taught that treason is a crime, not a mere political difference, not a mere contest between two parties, in which one succeeded and the other simply failed. They must know it is treason; for if they had succeeded, the life of the nation would have been rent from it, the Union would have been destroyed. Surely the Constitution sufficiently defines treason. It consists in levying war against the United States, and in giving their enemies aid and comfort."

The great liberality with which, beginning with the following month, the President used the pardoning power, and the extreme leniency with which all the leaders were treated, were in striking contrast with these sentiments. A situation was presented for Johnson to meet as President, which necessitated modifications of views held by him as governor. His attitude towards the leaders must be admitted to have undergone actual modification, notwithstanding his claim a few months later that he simply wished to make the leaders sue for pardon and realize the enormity of their offence.

5. The real secret of the apparently strange development of his policy, which we are about to trace out, lies in the fact that although at this time nominally a Republican, he was in reality a strict constructionist. He had always been a Democrat, and still held Democratic views. Only when secession began to be urged by the southern branch of the Democracy, did he break loose from his old ties. Accustomed to interpret the Constitution from a strict constructionist standpoint, accustomed to the belief that the power of the State was restricted only by the specific limitations of the Constitution, and that the federal government could exercise no power beyond that expressly granted it,

he naturally treated the question of reconstruction from the same standpoint. The surprising thing in Johnson's career is the fact that in spite of his strict construction views, he was strongly opposed to secession. He was therefore not strictly logical. The extreme strict constructionist claimed that the fact that the Constitution did not forbid a State from seceding, made secession constitutional. But Johnson's love for the Union was too great to permit him to carry his strict construction views to such an extreme. On the contrary, the fact that the Constitution offered no way for a State to secede from the Union proved to him that secession was unconstitutional, and he looked upon that fact as one of the greatest safeguards for the protection of the Commonwealth. To his mind it logically followed that because secession was unconstitutional, it was absolutely impossible for a State to secede, and therefore equally impossible for a State to commit treason. Individuals might commit treason and be punished therefor, but States never. However strongly at any time he may have urged the punishment of traitors, he never argued for or believed in the abrogation of any of the State's privileges. His reputation for belief in severity was based entirely upon severity on individuals. "Make treason odious" was his favorite expression, but always used in a concrete sense.2

1 See Gillett, _Democ. in the U. S._, pp. 333–337, for a discussion of Johnson's policy and mistakes from the Democratic standpoint.

2 Mr. Blaine in his _Twenty Years of Congress_, vol. ii, pp. 63–70, ascribes the apparently great modification of Johnson's attitude towards the South to two causes: First, the personal influence of Seward; second, the flattery of Southern leaders. He assumes Johnson to have been thoroughly determined to carry out a harsh policy of reconstruction, and points out that of the six members of the Cabinet, excluding Mr. Seward, three were radical and three conservative in their views, offsetting each other in their influence upon Johnson. He then calls attention to the fact that Mr. Seward's most conspicuous faculty was the power to convince listeners against their will through his personal conversation with them. With this remarkable faculty he believes Mr. Seward to have deliberately settled
6. After his accession to the Presidency, the only modification of his policy was an increased clemency to the conquered rebel. This can be accounted for easily as the natural result of actual contact with the problem. Rhetorically to assert that all traitors must be punished is one thing—to apply the punishment is another. Then Johnson's most able advisers approved his attitude and urged even greater moderation. Finally, his firm faith in the success of his provisional governments persuaded him to a still more liberal use of the pardoning power, while the growing opposition of Congress added the element of stubbornness to the complication. But, the true explanation of the change is to be found in his general constitutional views.

So early as April 21 he frankly states his position. In down to the task of reversing the President's views as to reconstruction. "Equipped with these rare endowments," he says, "it is not strange that Mr. Seward made a deep impression upon the mind of the President. In conflicts of opinion the superior mind, the subtle address, the fixed purpose, the gentle yet strong will, must in the end prevail." Mr. Seward's fervent pleadings, Blaine thinks, caused a marked change in Johnson's beliefs, and inclined him to look favorably upon the glory of a merciful, lenient administration. The leaders in the South, quickly noticing the change in Johnson's attitude, took advantage of the opportunity, and by judicious flattery completed the work which Seward had begun, and placed Johnson before the world as the ardent champion of immediate restoration. The theory impresses one with its apparent reasonableness, but as Mr. Blaine produces no evidence beyond his own authority, one is inclined to look upon it as an ingenious explanation based upon the environment of Johnson. Doubtless Seward presented his view on the situation with his accustomed ability, and probably it influenced Johnson's view to a certain extent. The second part of the supposition can also readily be granted—that the vanity of Johnson was played upon by those whose flattery was most pleasing to one who had sprung from the ranks of those accustomed to be dictated to and spurned by these same men. Yet to ascribe the adoption of so important a policy, affecting all the fundamental principles upon which strict and loose constructionists are divided, to these influences, appears to be a superficial judgment based upon opinions formed in the heat of the struggle, when extraneous influences are always given undue prominence by the participants. The whole career of Johnson proves the logical exactness with which he followed strict construction dogma in all points excepting the doctrine of secession.
his speech on that day he says: "Provision" (in the Constitution) "is made for the admission of new States; no provision is made for the secession of old ones. * * * The Government is composed of parts, each essential to the whole, and the whole essential to each part." ¹ He emphatically urges that the Constitution provides a panacea for rebellion. "The United States (that is, the great integer) shall guarantee to each State (the integers composing the whole) in this Union a republican form of government. Yes, if rebellion has been rampant, and set aside the machinery of a State for a time, there stands the great law to remove the paralysis and revitalize it, and put it on its feet again." He also harmonizes his strict construction views with the fact of emancipation. "A State may be in the Government with a peculiar institution, and by the operation of rebellion lose that feature; but it was a State when it went into rebellion, and when it comes out without the institution it is still a State."

President Johnson did not allow many days to pass by after his installation, before he began to give practical evidence of his attitude towards the conquered South.² The first step which he made was an order, issued April 29, re-

¹ McPherson, Hist. of Recon., 45, 46.

² The repudiation of the Sherman-Johnston agreement of April 18th was of a negative character, and did not commit the administration to any policy. Coming, as it did, so shortly after his inauguration, it was taken by those expecting harsh measures from the President as an indication of such a policy. An examination of the circumstances, however, shows that Johnson was merely following the policy supposed to have been adopted by Lincoln, and evidenced by instructions sent to Grant on March 3 in regard to a proposed conference with Lee. Stephens' charge (War between the States, ii, 632), that Johnson was bound to ratify the agreement as consistent with the Crittenden Resolution of 1861, is inadmissible. Generals in the field manifestly have no right to decide momentous political questions. For a copy of the Sherman-Johnston agreement, and the official dispatch giving particulars of its disapproval, see McPherson, Hist. of Recon., 121-2.
storing partial commercial intercourse to that portion of the
Confederate States lying east of the Mississippi river and
within the lines of national military occupation. This re-
moved at the outset one of the chief burdens that had re-
sulted from the insurrection, and would he thought act
powerfully in the restoration of peaceful pursuits in that
section. The following August another proclamation re-
moved all remaining restrictions on trade in those States,
declaring that all necessity for restriction had ceased.¹

On May 9, 1865, the order restoring the administration of
the United States in the State of Virginia was issued.² It
authorized the Secretary of the Treasury to nominate assess-
sors of taxes, collectors of customs, and other officers of the
Treasury Department, and further provided that in making
appointments the preference should be given to "qualified
loyal persons residing within the districts where their re-
spective duties are to be performed. But if suitable persons
shall not be found residents of the districts, then persons
residing in other States or districts shall be appointed." Post
offices and post routes were to be established, and dis-
trict judges empowered to hold courts, while "to carry into
effect the guarantee of the Federal Constitution of a repub-
lican form of state government, * * * Francis H. Pierpont,
Governor of the State of Virginia, will be aided by the Fed-
eral Government," in his administration of the state govern-
ment, in whatever way might be necessary.

The Amnesty Proclamation was issued on May 29, and
was in effect a renewal of the provisions of Lincoln’s procla-
mation of December 8, 1863, relating to amnesty; but it in-
creased the number of classes excepted from the benefits of
the proclamation, from seven to fourteen,³ and provided

¹ McPherson, p. 13–14.
² McPherson, p. 8.
³ See Appendix; Savage, Life and Public Services of Andrew Johnson, 370–373.
that special application for pardon might be made by any of the excepted classes, to the President, who would exercise liberal clemency. Inasmuch as the excepted classes included all those whom less than three weeks previously he had been denouncing as traitors to be punished and impoverished, such great liberality, displayed in so short a time, was somewhat surprising. The proclamation further empowered the Secretary of State to make all needful regulations for the administration and recording of the amnesty oath; and in accordance with this provision the Secretary of State ordered that the oath might be taken before any commissioned officer of the United States, or before any civil or military officer of a loyal State or Territory, who was legally qualified to administer oaths.

On the same day that he issued the Amnesty Proclamation, President Johnson appointed William W. Holden Provisional Governor of North Carolina. This was his first radical step in the carrying out of his policy of reconstruction. The order restoring the authority of the United States in Virginia was not of so great importance, as the State had nominally been under the Pierpont government since near the beginning of the war, and the mere restoration of certain United States officers in that State did not involve to any extent the vital questions of the hour. But with the appointment of Mr. Holden, and the instructions accompanying

1 Blaine, ii, 70–76, ascribes this amnesty proclamation to the personal influence of Mr. Seward, who favored all but the 13th excepted class (property holders above $20,000). This certainly offers a good explanation of the promptness of his action, and is not inconsistent with the theory of Johnson's attitude as outlined above.

2 McPherson, p. 11; Blaine, ii, 77, 78.

3 Tennessee, of course, having been reorganized during Lincoln's administration, under the direction of Military Governor Johnson, cannot be considered in connection with Johnson's policy as President. Louisiana and Arkansas also retained their reorganized governments until the reconstruction acts took effect. See Blaine, ii, 79, 80.
the order of appointment, President Johnson unfolded, in its entirety, his theory.

The order declared that the rebellion, though now almost entirely overcome, had deprived the people of North Carolina of all civil government, and that accordingly the United States was constitutionally bound to secure to them a republican form of government. Therefore for the purpose of enabling the people to organize a government, he appointed William W. Holden Provisional Governor of North Carolina, whose duty it should be “at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention, composed of delegates to be chosen by that portion of the people of said State who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof; and with authority to exercise, within the limits of said state, all the powers necessary and proper to enable such loyal people of the State of North Carolina to restore said State to its constitutional relations to the Federal government, and to present such a republican form of state government as will entitle the State to the guarantee of the United States therefor, and its people to protection by the United States against invasion, insurrection, and domestic violence,” provided, however, that all electors should have previously taken the oath of allegiance, and should be voters according to the law of North Carolina in force previous to secession. The order further directed that the Provisional Governor should be aided by the military power in carrying out the proclamation. The other clauses were similar to clauses in the order re-establishing the authority of the United States in Virginia.

Similar proclamations were issued as follows: June 13, for Mississippi; June 17, for Georgia and Texas; June 21, for Alabama; June 30, for South Carolina; July 13, for Florida.
Within three months after his inauguration, accordingly, Johnson had set the forces going throughout the South by which he hoped that peace and tranquillity might be established, and the Union once more become an undivided whole. In the execution of this most important work, he had not asked for the co-operation or advice of Congress. Confident of the correctness of his ideas, feeling sure that they were only the logical results of a true interpretation of the Constitution, he pursued his policy of reconstruction. In so doing he was also consistently following the path marked out by his predecessor. His plan was essentially that which Lincoln had advocated and attempted to carry into execution. But we have seen that even under a man enjoying such universal confidence as did Lincoln, the country viewed with distrust, and Congress openly resented, a policy which seemed to commit to a recently insurrectionary people the whole responsibility for proper reconstruction, requiring from them no surety for sincerity save an oath which all knew would be regarded by the majority as a mere form with little significance. The same policy when adopted by Johnson was naturally looked upon with still more suspicion.

Lincoln was a man of tact and judgment, who was capable of seeing and confessing a mistake, whose sole object was to do that which, all things being considered, should seem best for the Union.

Johnson, on the contrary, from his natural arbitrariness and narrowness, was a man who held most tenaciously to his views, had little consideration for the views of others, and who was always determined that his own way should be carried out. Under such circumstances it would have been little short of marvelous, had he been able to carry out a policy in itself disliked, without sooner or later coming into collision with those who disapproved his theory.

The provisional governors appointed were not slow in
carrying out the provisions of the proclamations, and conventions met in the various states as follows: Mississippi, August 14; Alabama, September 12; South Carolina, September 13; North Carolina, October 2; Georgia, October 25; Florida, October 25; and Texas in March, 1866. In all these conventions the secession ordinances were repealed, annulled or declared null and void, and slavery was declared abolished. All but Mississippi and South Carolina repudiated the rebel debt, and all but Mississippi and Texas ratified the 13th Amendment.

Meanwhile Johnson made liberal use of the pardoning power, and large numbers of the excepted classes were thus restored to all the privileges of citizens of the United States. The reconstruction was very rapid; so rapid, as Johnson himself said, that he could scarcely realize it; "it appears like a dream."

The extreme similarity of this method of reconstruction to that advocated by the Democracy could not escape attention, and Democrats freely asserted that in his ideas the President was "going over to them." This, while to a certain extent true, for he was always a Democrat in principle, was vigorously denied by Johnson in an interview with Geo. L. Stearns on October 3, 1865. In it he claimed that the Democratic party, finding its own views untenable, was gradually coming to adopt his principles, which he reasserted in the following form: "The States are in the Union, which is one and indivisible. Individuals tried to carry them out, but did not succeed, as a man may try to cut his throat and be prevented by the bystanders; and you can not say he cut his throat because he tried to do it. * * * Now we want to reconstruct the state governments, and have the power to do it. The state institutions are prostrated."

---

1 The phraseology differed in the different States, depending upon the sensitiveness and pride of the legislature.
laid out on the ground, and they must be taken up and adapted to the progress of events; this cannot be done in a moment. * * * We must not be in too much of a hurry; it is better to let them reconstruct themselves than to force them to do it; for if they go wrong the power is in our hands, and we can check them in any stage, to the end, and oblige them to correct their errors; we must be patient with them. I did not expect to keep out all who were excluded from the amnesty, or even a large number of them; but I intended they should sue for pardon, and so realize the enormity of the crime they had committed.”

7. Johnson realized that the sentiment in favor of negro suffrage was gaining great power in the North; and while feeling that pure manhood suffrage was undesirable and totally impracticable, because of the danger of thereby creating a “war of races,” which he seemed constantly to fear, he determined to use his influence towards a gradual introduction of the suffrage. He would give the suffrage to negroes who had served in the army, to those who could read and write, and to those owning real estate to the value of two hundred and fifty dollars. He made suggestions of this nature in letters to Governor Starkey of Mississippi, and Governor Hahn of Louisiana.\(^1\) By some such limited suffrage he hoped that the radical element in the North would be satisfied, while there could result no danger to those States in which the negro population predominated.

He had long believed that the apportionment of Representatives should be based on the number of qualified voters; while a member of the legislature of Tennessee he had moved that the apportionment in that State be so made; and in the interview with Mr. Stearns he said: “The apportionment is now fixed until 1872; before that time we might change the basis of representation from population to qualified voters,

\(^1\) McPherson, Reconst., 7, 8.
North as well as South, and, in due course of time, the States, without regard to color, might extend the elective franchise to all who possessed certain mental, moral or such other qualifications as might be determined by an enlightened public judgment."

But however desirable a limited suffrage might be, he insisted that the only safety for the nation lay in leaving the whole subject to the discretion of the individual State. The only approach which he would make to national interference would be through constitutional amendment. In an interview with Senator Dixon of Connecticut, on January 28, 1866, he suggested that such an amendment might be worded in the following manner:

"Representatives shall be apportioned among the several States which may be included within this Union according to the number of qualified voters in each State.

"Direct taxes shall be apportioned among the several States which may be included within this Union according to the value of all taxable property in each State."

The great advantage of an amendment of this kind, in President Johnson's opinion, was that Congress would thus shift all responsibility regarding negro suffrage to the States. Each State would determine the qualifications for voters, and its representation in Congress would depend entirely upon the narrowness or breadth of the suffrage.

In the same interview with Senator Dixon, he described the current contention over negro suffrage as "ill-timed, uncalled for, and calculated to do great harm."

8. While the President was expressing his belief in qualified representation, and advising the States in process of reconstruction to grant some form of limited suffrage, the States themselves manifested no disposition to follow his advice. While he was describing them in October as lying

1McPherson, Reconst., 49.
2Ibid., 51-2.
helpless, they were busy framing laws which were aimed to counteract, so far as possible, the force of the emancipation proclamation.

When Georgia declared slavery abolished she did so with the proviso that "acquiescence in the action of the Government of the United States is not intended to operate as a relinquishment, or waiver, or estoppel of such claim for compensation of loss sustained by reason of the emancipation of his slaves, as any citizen of Georgia may hereafter make upon the justice and magnanimity of that Government." Alabama, South Carolina, and Florida in their ratifications of the 13th Amendment stated their understanding to be that it did not confer upon Congress power to legislate upon the political status of the freedman. The Alabama legislature passed joint resolutions in which it was affirmed: "That Alabama will not voluntarily consent to change the adjustment of political power as fixed by the Constitution of the United States, and to constrain her to do so, in her present prostrate and helpless condition, with no voice in the councils of the nation, would be an unjustifiable breach of faith."

But most important of all was the legislation of these States respecting the freedman. All were confronted by a host of emancipated blacks, whose legal status had to be determined. The legislatures had before them work of the most delicate nature, inasmuch as it not only vitally affected every person in their own section, but also attracted the keenest interest from the whole North. All realized that Johnson's policy would here undergo the crucial test. Would the legislators of these States, so soon thrown upon their own responsibility, show due consideration for the new order of things, or would they take advantage of their opportunity and proceed to draw the color line as sharply as ever, discriminating against the negro, and deny-

1 McPherson, 20. 2 Ibid., 21–2.
ing him privileges which should be allowed him? Had the South proved equal to the situation, the wisdom of Johnson's policy would have been sustained, and the bitterness characteristic of the 39th and 40th Congresses would have been avoided.

Mississippi was the first to adopt "black laws" obnoxious to the North. Her vagrant act was passed November 24, 1865. This provided that freedmen found with no lawful employment or business, or unlawfully assembling together, should be deemed vagrants, and be fined and imprisoned at the discretion of the court. A poll tax for a freedmen's pauper fund was to be levied on all freedmen, and should any fail or refuse to pay, he was to be hired out by the sheriff to any one who would pay the tax and costs, preference being given to his former master. Two days later a civil rights act was passed. This allowed freedmen to sue and be sued, implead and be impleaded, and to own personal property, but added the important proviso that the section should not be construed "to allow any freedman, free negro or mulatto to rent or lease any lands or tenements, except in incorporated towns or cities," where they should be controlled by the corporate authorities. Intermarriage of a white with any freedman, free negro or mulatto, should be punished by imprisonment in the state penitentiary for life. A laborer quitting before expiration of term of service without good cause, forfeited to his employer all wages for that year up to the time of quitting. Any one was authorized to arrest and return a deserting freedman, receiving therefor five dollars reward and mileage, all costs to be paid from the wages of the deserter. Any one persuading or attempting to persuade any freedman to desert his employer before his term of service expired, was guilty of a misdemeanor, and liable to a fine of not less than twenty-five and not more than two hundred dollars, and if the offender attempted to persuade
the freedman to desert, with a view of employing him without the limits of the State, the fine was to be not less than fifty nor more than five hundred dollars. While it was made lawful for a freedman to charge a white man with a criminal offence against his person or property, and to make all needful affidavits, a supplementary act passed December 2 provided that where sufficient proof was made before a court or jury that the arrest and trial had been falsely or maliciously caused, the freedman should be fined, and charged with all costs, and on failure to pay should be hired out at public outcry for the shortest time necessary to discharge the debt. An act passed November 29, among other restrictions, forbade freedmen to carry any fire arms, ammunition, dirk or bowie knife, under penalty, and declared that a freedman exercising the functions of a minister of the gospel, without a license from some regularly organized church, should be guilty of a misdemeanor, and become liable to an imprisonment not exceeding thirty days and to a fine not exceeding one hundred dollars.

Similar laws were enacted in the other States, varying slightly in severity of punishment. The labor contract act of Louisiana, passed in December, is of especial interest as an evidence of the systematic way in which the Southern legislators hoped to mould the unwieldy mass of freedmen into a docile set of serfs. All agricultural laborers were required by this act to make their contract for the ensuing year before the tenth day of January; said contract to embrace the labor of the whole family. After the contract had been agreed to, no laborer was to be allowed to “leave his place of employment until the fulfillment of his contract, unless by consent of his employer, or on account of harsh treatment, or breach of contract on the part of employer,” under penalty of forfeiture of all wages to the time of leaving. “Failing to obey reasonable orders, neglect of duty, and
leaving home without permission, will be deemed disobedience; impudence, swearing, or indecent language to or in the presence of the employer, his family or agent, or quarreling or fighting with one another, shall be deemed disobedience. For any disobedience a fine of one dollar shall be imposed upon the offender. For all lost time from work hours, unless in case of sickness, the laborer shall be fined twenty-five cents per hour. For all absence from home without leave the laborer will be fined at the rate of two dollars per day.”

The cruelty and injustice possible in the administration of these acts is even greater than their casual perusal would indicate. Many of these acts, nominally applying to both races with equal severity, were in reality intended to apply solely to the negro. The vagrants always proved to be colored. The acts purporting to secure the protection of the freedmen were cunningly hedged in by limitations which made them worthless. The employer was made the sole judge of the acts of his employees—a privilege which could not but be flagrantly abused. Laws that made it almost impossible for the freedman to secure the just return for his labor, were followed by laws punishing him for his poverty. The fines for his so-called offences were excessively severe, and the punishments were almost always such as to reduce him to slavery for limited terms. The whole system, taken advantage of as it could not fail to be where the dominant classes were almost unanimously desirous to retain the negro in subjection, resulted in his practical slavery during those seasons of the year in which his labor was most needed, and in utter neglect and lack of support when his labor was not in demand.

9. Although the enactment of these stringent laws at this time was a political mistake, and was fraught with most

1 McPherson, 43; Blaine, ii, 102-3.
serious consequences for the South, it is proper to notice what was said in their justification. Many of them did not differ materially from similar statutes in the Northern States. Even some of the harshest laws, those which were received with wide-spread indignation throughout the North, could almost be duplicated by laws at that time in force in such States as Rhode Island and Connecticut. Even the phraseology, the using of the words master, mistress and servant, which was deemed objectionable and suggestive by Northern Republicans, could be found in Northern statutes.

The South felt confident that the negro was unable actively to assume the duties of citizenship. The Southern people feared, and with reason, that the immense mass of undeveloped humanity was liable to become turbulent and unmanageable, unless stringent laws could be framed which would hold it in check. They were sincere in their statements that they believed that the interests of property, peace and good order demanded these laws. Unfortunately, the humanitarian ideas of the North harmonized too well with the political ideas of Congress. The enactment of the laws against the negro seemed to strike at the one and make possible the success of the other. The radical majority were quick to see their advantage, and did not hesitate to make the most of the opportunity. They assumed that the South deliberately intended to defy Northern sentiment, and ignored the possibility that the legislation in question was sincerely believed to be a necessary act of self-defense.

10. To Stevens and his followers the South had proved its impenitent condition, and had justified the most stringent measures of reconstruction. They declared that Johnson’s policy had been fairly tested and that the results of the experiment were apparent. They argued that the South, em-

1 See Why the Solid South, edited by Hilary A. Herbert, for a detailed presentation of the Southern view.
boldened by the conciliatory conduct of the President, was permitting the old rebel leaders to continue to wield the chief influence in affairs of state. The exclusion of these leaders from participation in the preliminary work of the reconstruction conventions was no check upon their influence in the State; and with the completion of reconstruction there was nothing to prevent them from occupying the chief state offices. What the President in the previous April had feared, was coming to pass, through his failure to do that which he had then said must be done—to make treason and traitors odious. In proof of the ascendancy of the old elements, the highly questionable legislation of the South was cited, and the conviction of the Republican party that sterner measures were necessary was strengthened. As a natural result the doctrine of Thaddeus Stevens that the South should be regarded and governed as a conquered territory became practically the doctrine of the majority of Republicans, and Stevens became the leader of the House of Representatives. The year 1865 had made plain the necessities of the hour, the condition of the South, the attitude of the President, and in short had prepared the people for the great struggle which was to follow in the 39th and 40th Congresses.¹

¹The report of the Joint Committee on Reconstruction, June 18th (HouseReports, No. 30, 1st Session, 39th Congress; McPherson, 84–93), gives a spirited summary of the action of the Southern States since the appointment of the provisional governors. See also Blaine, Twenty Years of Congress, ii, 84–107.
CHAPTER III.

THE ATTITUDE OF CONGRESS TOWARDS THE EXPERIMENT: DEVELOPMENT OF THE CONGRESSIONAL THEORY.

1. The Thirty-ninth Congress began its labors on December 4, 1865, well aware that the President had separated himself from the Republican party so far that it was improbable that the executive and legislative departments would be able to work in harmony. The Democrats were beginning to commend the administration, and had even gone so far in some instances as to indicate, in resolutions passed in their state conventions, their approval of Johnson's plan of reconstruction. Republicans, on the other hand, were becoming quite reserved in their expressions of approval, and began to show a decided sentiment in favor of manhood suffrage as involving less danger and more benefit to the Republic than any plan which even partially excluded the negro from the franchise. The legislation of the Southern States had convinced many that without the negro vote there would be no way to keep the old insurrectionary element from completely monopolizing their state governments.¹

Congress with its large Republican majorities² in both

¹ Lalor, iii, 546.

² Senate: Republicans, 40; Democrats, 11; House: Republicans, 145; Democrats, 40. The work before Congress was well expressed by Schuyler Colfax in his speech made upon taking the Speaker's chair. Speaking of Congress he said: "Representing, in its two branches, the States and the people, its first and highest obligation is to guarantee to every State a republican form of government. The rebellion having overthrown constitutional State governments in many States, it is
houses was expected to deal with the problem, correct the abuses which had arisen from the too lenient policy of the President, and inaugurate a policy which should bring about an equality of individual rights throughout the Union.

2. The calling of the roll by the clerk of the House, Edward McPherson, marked the commencement of active opposition to the presidential policy. All of the late insurrectionary States excepting Texas, whose convention did not meet until the following March, had elected senators and representatives. Their action in choosing or these and other high official positions members of the Confederate Congress, and civil and military officers of the Confederacy, was very unwise and did much to strengthen opposition to the recognition of these States.¹

yours to mature and enact legislation which, with the concurrence of the Executive, shall establish them anew on such a basis of enduring justice as will guarantee all the necessary safeguards to the people, and afford what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights. * * * * Then we may hope to see the vacant and once abandoned seats around us gradually filling up, until this hall shall contain representatives from every State and district; their hearts devoted to the Union for which they are to legislate, jealous of its honor, proud of its glory, watchful of its rights, and hostile to its enemies.” Congres- sional Globe, 39th Congress, 1st Session, p. 5. See Blaine, Twenty Years of Congress, ii, 111, 112.

¹ Among the Senators elected were Alexander H. Stephens, Vice-President of the Confederacy, and H. V. Johnson, a Senator in the rebel Congress, both from Georgia; from North Carolina, W. A. Graham, Senator in the rebel Congress; from South Carolina, B. F. Perry, a Confederate States judge, and J. I. Manning, volunteer aid to General Beauregard at Fort Sumter and Manassas (McPherson, 106-7). Among the Representatives chosen were: from Alabama, Cullen A. Battle, a Confederate general, and T. J. Foster, a Representative in the rebel Congress; from Georgia, Philip Cook and W. T. Wofford, generals in the Confederate army; from Mississippi, A. E. Reynolds and R. A. Pinson, rebel colonels, and J. T. Harrison, in rebel provisional Congress; from North Carolina, Josiah Turner was a rebel colonel, and a member of the rebel Congress, and T. C. Fuller a rebel Congressman; from South Carolina, J. D. Kennedy was a colonel, and Samuel McGowan a general in the rebel army, and James Farrow, a rebel Congressman.
Louisiana, Arkansas and Tennessee, having been recognized by Lincoln as reconstructed, stood upon a somewhat different footing from the others, but in a caucus of the Republican members of the House, held previous to the organization of Congress, it had been decided to omit the names of their representatives from the rolls so as to reduce all to a common level, that no embarrassing distinctions might exist to hamper Congress in the adoption of whatever policy it chose.

In accordance with the instructions of the caucus, the clerk refused to call the names of these representatives elect. A lively discussion immediately arose, in which emphatic protest was made against forcing in this way a policy upon the House at a time when due deliberation could not be had. It was boldly asserted that the clerk was acting merely as the tool of the Republican party, and the claim was also made that the resolutions about to be introduced by Mr. Stevens of Pennsylvania were another part of the general plan to commit the House to a quasi-condemnation of the President, and virtually nullify in advance the recommendations which it was supposed he would make. But protest was useless; the names were not placed upon the rolls, and the first roll-call gave evidence that active resistance to the President was determined upon.

The Senate was almost equally prompt in making public its determination to take the process of reconstruction out of the hands of the President. It is the custom in Congress to refrain from the consideration of questions of public importance until the President's message has been received. At the opening of this Congress no such courtesy was observed. Among the very first proceedings of the Senate after its organization was the introduction of three

---

series of resolutions by Sumner. The first series was in reference to the Thirteenth Amendment, declaring it to have become a part of the Constitution without reference to the action of the late so-called Confederate States. Such States, the resolutions affirmed, should be required to ratify the Amendment as one of the conditions precedent to restoration. The second series related to the guarantees which should be required of the States prior to resuming their relations to the Union. These guarantees were five in number. First: "The complete re-establishment of loyalty, as shown by an honest recognition of the unity of the Republic, and the duty of allegiance to it at all times, without mental reservation or equivocation of any kind." Second: "The complete suppression of all oligarchical pretensions, and the complete enfranchisement of all citizens;" impartial justice, and equality before the law. Third: The repudiation of the rebel debt and the assumption of the proper proportion of the national debts and obligations. Fourth: "The organization of an educational system for the equal benefit of all, without distinction of color or race." Fifth: "The choice of citizens for office, whether State or National, of constant and undoubted loyalty, whose conduct and conversation shall give assurances of peace and reconciliation." The third series was declaratory of the duty of Congress to the loyal citizens in the rebel States. They, especially those who had served in the Union army and those excluded from the ballot at the time of secession, should have control of the conventions to be called for reorganizing the state governments. "No state law or state constitution can be set up as an impediment to the national power" in the reorganization of these States. No State recently in rebellion could be considered to have a republican form of government.

1 Congressional Globe, 1st Session, 39th Congress, p. 2; Blaine, Twenty Years of Congress, ii, 113-115.
"where the elective franchise and civil rights are denied to the Union soldier, his relatives, or the colored race."

The submission of these resolutions was of significance merely as a formal declaration that the President was to be ignored and an independent policy formed. The plan of reconstruction, as here presented, embodied many impracticabilities and impossibilities, but it indicated in broad outlines the propositions to be discussed in the succeeding months.

The House was still more active in its initiatory steps toward a policy. The resolution for the establishment of a joint committee on reconstruction was introduced by Mr. Stevens at the first opportunity on the opening day, and immediately adopted. This resolution, after having been discussed in a Republican caucus, was taken up for consideration in the Senate on December 12, was made a concurrent resolution, that it might not need the approval of the President, and was passed with amendments. The debate on this resolution is of especial importance as the first formal test of the attitude of the individual Senators towards the administration. It brought out the fact that Senators Cowan of Pennsylvania, Dixon of Connecticut, and Doolittle of Wisconsin, would support the administration and oppose the congressional policy. Senator Norton, of Minnesota, soon joined their ranks, and Senator Lane, of Kansas, broke from the party on the Civil Rights bill. The remaining Republican senators, while exhibiting natural differences of opinion, were united in their hostility to the existing method of restoration.

1 Wilson, History of Reconstruction, 16 ff.
3 Senator Lane committed suicide on July 11, 1866. Mortification caused by abuse, as the result of his action, is supposed to have unbalanced him mentally. Cf., Blaine, ii, 185.
The resolution, as amended and concurred in by the House, provided for a joint committee of fifteen, nine from the House and six from the Senate, "who shall inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they or any of them are entitled to be represented in either House of Congress, with leave to report at any time by bill or otherwise."

The appointment of this committee, with Thaddeus Stevens as a member, although Senator Fessenden of Maine was chairman, marks an important epoch in the history of reconstruction. Stevens, now the virtual leader of the House, represented a policy to which Johnson was thoroughly antagonistic, and from this time forth everything relating to the reconstruction of the Southern States was to be referred to this committee. In addition, the committee took large masses of testimony from southerners, federal officers, and northerners travelling through the Southern States, in order that an intelligent judgment might be reached regarding the actual condition of these States. The bills in which they embodied the results of their investigations constituted the basis of the final reconstruction. The ill-defined

1 The resolution as adopted by the House on the 4th contained in addition: "and until such report shall have been made, and finally acted upon by Congress, no member shall be received into either House from any of the so-called Confederate States, and all papers relating to the representation of the said States shall be referred to the said committee without debate." The Senate, however, considered such provisions to affect powers granted to each House separately, and which should not be entrusted to a joint committee. Therefore they were struck out, but on December 14 the House of Representatives passed resolutions binding itself to be governed by similar principles.

2 The other members of the committee were: on the part of the Senate, Howard of Michigan, Grimes of Iowa, Harris of New York, Williams of Oregon, and Johnson of Maryland; on the part of the House, Washburne of Illinois, Morrill of Vermont, Grider of Kentucky, Bingham of Ohio, Conkling of New York, Boutwell of Massachusetts, Blow of Missouri, and Rogers of New Jersey.
sentiment of the Republicans, that the proper mode of dealing with the Southern States had not been found, was to be replaced by a vigorous policy which looked primarily to the proper protection of the freedman.

2. The message of the President, which was read on the 5th of December, had been eagerly awaited. It had been expected that it would contain a decided statement of his exact views on reconstruction, and expectations were fulfilled. It was a clearly written document, and outlined in extreme simplicity his attitude. In it he says, referring to the rebel States: 

"Whether the territory within the limits of those States should be held as conquered territory, under military authority emanating from the President as the head of the army, was the first question that presented itself for decision."

His unhesitating answer to this question was that military rule was extremely undesirable, especially from the greatly increased powers which thereby would be held by the President. "The powers of patronage and rule * * * I could never, unless on occasions of great emergency, consent to exercise. * * * Besides, the policy of military rule over a conquered territory would have implied that the States whose inhabitants may have taken part in the rebellion, had, by the act of those inhabitants, ceased to exist. But the true theory is, that all pretended acts of secession were, from the beginning, null and void. The States cannot commit treason, nor screen the individual citizens who may have committed treason, any more than they can make valid treaties or engage in lawful commerce with any foreign power. The States attempting to secede placed themselves in a condition where their vitality was impaired, but not extinguished—their functions suspended, but not destroyed."

These sentiments were but the repetition, in almost the same language, of sentiments previously expressed in various

1 Blaine, Twenty Years of Congress, ii, 115.
interviews and speeches. The significance of the message was merely his recommitment to the policy he was applying in practice. But the consideration of the message in committee of the whole afforded a good opportunity for general discussions of reconstruction, which were continued at intervals throughout the whole session.

The great debate was opened on December 18 by Mr. Stevens, who reasserted his views, declaring that Congress has the sole power to receive back the States, the Executive concurring. The States as States made war. "The idea that the States could not and did not make war because the Constitution forbids it, and that this must be treated as a war of individuals, is a very injurious fallacy. Individuals cannot make war. They may commit murder, but that is not war. Communities, societies, states, make war." He earnestly pleaded for negro suffrage both on grounds of expediency and of right, closing his speech with the oft-quoted sentence: "Sir, this doctrine of a white man's government is as atrocious as the infamous sentiment that damned the late Chief Justice to everlasting fame, and I fear, to everlasting fire." Mr. Beaman, on February 24, after dwelling upon the horrors of the late war, said: "Those were sad, dark days, whose tinge was deepened by the frowns and hostile intrigues of foreign nations. But sadder still, and darker and more gloomy, will be that day in which the rebel States shall assume the control of our national government; when without guards or security for future good conduct, without protection to the blacks and loyal whites who have freely shed their blood in our defense, the seceded districts shall be declared recon-

1 Wilson, History of the Reconstruction Measures, 42–105, contains a summary of the debates on reconstruction; see also Blaine, Twenty Years of Congress, ii, 128 ff.

structed and restored States, and again launched upon their career of oppression, tyranny and crime.”

On March 10, Mr. Stevens made a speech upholding the right of the federal government to treat the conquered States in whatever manner was deemed advisable. “I trust yet to see our confiscation laws fully executed; and then the malefactors will learn that what Congress has seized as enemy’s property and invested in the United States, cannot be divested and returned to the conquered belligerent by the mere voice of the Executive. I hope to see the property of the subdued enemy pay the damages done to loyal men, North and South, and help to support the helpless, armless, mutilated soldiers who have been made wretched by this unholy war. I do not believe the action of the President is worth a farthing in releasing the property conquered from the enemy, from the appropriation made of it by Congress.”

Other speeches just as violent, condemning Johnson and his policy, were made during these general discussions. Thus Mr. Dumont of Indiana said: “Some gentlemen seem to be anxious to hear within this Hall the crack of the plantation whip, and to have a manifestation of plantation manners as in days of other years; and as sure as God lives they will be abundantly gratified, if the policy of letting in the rebel States without guaranties shall prevail.” And Mr. Moulton, of


2 *Congressional Globe*, 1st Session, 39th Congress, p. 1309. These strong statements of the advisability of confiscation alarmed the Southern States greatly, and caused them to hate and fear Thaddeus Stevens. See Lalor, iii, 546 ff. The following extract from General Taylor's *Destruction and Reconstruction* (pp. 243-4), is characteristic of the Southern estimate of the man. General Taylor had occasion to call upon Stevens while endeavoring to get permission to visit Jefferson Davis, then in confinement at Fortress Monroe. He goes on to say: “Thaddeus Stevens received me with as much civility as he was capable of. Deformed in body and temper like Caliban, this was the Lord Hategood of the fair; but he was frankness itself. He wanted no restoration of the Union under the Constitution, which he called a worthless bit of old parchment. The white people
Illinois, a week later declared that "Andy Johnson will go
down to posterity, not only as the betrayer of his party, but
as an ingrate, infamous in all time to come to all honorable
men." In the same speech he says: "No rights of the
South that were lost by the rebellion were revived or repos-
sessed by traitors on the cessation of hostilities. War destroys
all rights but the rights of war." Mr. Baldwin, of Massachu-
ets, described the attitude of the Southern States as follows:
"It is undeniably the aim of the old pro-slavery spirit to re-
duce them [the freedmen] to a condition as nearly like that of
slavery as circumstances will admit; a condition that would
yield all the advantages of slavery without any of its incum-
brances. The hatred which has declared the freedom of
these people a calamity conspires diligently to make it so;
the government is angrily forbidden to interfere with its
operations; and if there be an epithet of contumely and re-
proach that has not been hurled at those who would allow
these people the protection they need, it must be some
blackguard epithet not yet invented."

But the policy of the President was not without its vigor-
ous supporters, although they generally were found among
the Democrats. Thus Voorhees, on January 9, eulogized
of the South ought never again to be trusted with power, for they would inevit-
ably unite with the Northern "Copperheads" and control the government. The
only sound policy was to confiscate the lands and divide them among the negroes,
to whom, sooner or later, suffrage must be given. Touching the matter in hand,
Johnson was a fool to have captured Davis, whom it would have been wiser to
assist in escaping. Nothing would be done with him, as the Executive had only
pluck enough to hang poor devils, such as Wirz and Mrs. Surratt. Had the
leading traitors been promptly strung up, well; but the time for that had passed.
(Here, I thought, he looked lovingly at my neck, as Petit André was wont to do
at those of his merry-go-rounds.)"

1 Congressional Globe, 39th Congress, 1st Session, p. 1476.
3 Ibid., p. 1617.
4 Ibid., p. 1828.
Johnson's policy as having "cleared away the wreck of a gigantic fraternal war, laid anew the foundation of government throughout an extent of country more vast than the most powerful kingdoms of Europe, revived confidence and hopes in the breasts of a despairing people, and won for its author the respect and admiration of the civilized nations of both hemispheres." He also introduced a series of resolutions endorsing the policy of the President, and expressing confidence in him; but these, together with an amendment by Bingham, expressing confidence that the President would co-operate with Congress, were referred to the Committee on Reconstruction, from which they were never reported.

Mr. Thornton, of Illinois, thought that "if those States are ever to be bound together in an equal and enduring union by us, we must rise to the high dignity of true manhood and Christian charity, and bury forever the feelings of distrust which now haunt the mind. The charge is constantly made that the Southern people are perfidious; that they will keep no pledges; that no oath will bind them. Can they accept your conditions precedent tendered in such a spirit? Never!" Mr. Harding, of Kentucky, declared that the Republican party "with the cry of liberty on its tongue, is earnestly striving to subvert the foundations of republican government, laboring to centralize, consolidate and build up a frightful Federal despotism, under whose dark and deadly shadow self-government and all state rights would utterly sink and perish."

4. The objectionable "black laws" of the Southern States, and the many tales of the oppression and cruel treatment of negroes, brought about a strong sentiment in

---

1 Congressional Globe, 39th Congress, 1st Session, p. 155.
2 Ibid., p. 150.
3 Congressional Globe, 39th Congress, 1st Session, p. 1169.
4 Ibid., p. 2256.
favor of legislation by Congress giving additional protection to the freedman. The Act of March 3, 1865, had established in the War Department a "Bureau for the relief of Freedmen and Refugees," which was "to continue during the present war of rebellion, and for one year thereafter." This bureau was to assume control of all abandoned or confiscated lands in the insurrectionary States, and to assign tracts not to exceed forty acres each to freedmen and refugees at an annual rent of not more than six per cent. of the value. The occupants were to be allowed to purchase the land at any time within three years. The bureau was also authorized to supervise all matters that might concern freedmen and refugees from any of the rebel States or from districts occupied by the army, and to furnish supplies to such as were in need.

To extend the powers of this bureau and to continue it in operation until affairs had resumed their normal course, appeared to be a practicable way to protect the emancipated race. A bill to this effect was introduced in the Senate by Mr. Trumbull on January 5, 1866, and the Senate proceeded

1 Gillet's Democracy in the United States, pp. 309-13, discusses the Freedmen's Bureau from the Northern Democratic standpoint.

2 The first bill creating a Freedmen's Bureau was introduced in the House during the 37th Congress by Mr. Eliot, of Massachusetts, who during the 39th Congress was chairman of the Select Committee on Freedmen. It was not reported, but the same bill was presented in the first session of the 38th Congress, and passed the House by a vote of 69 to 67. It was returned from the Senate on June 30, 1864, amended so as to attach the Bureau to the Treasury Department. A committee of conference agreed upon a new bill creating a department of freedmen's affairs, reporting to the President. This passed the House, but failed in the Senate. The next attempt succeeded. Congressional Globe, 2d Session, 38th Congress, p. 1307. See Cox's Three Decades of Federal Legislation for an account of the Freedmen's Bureau; also Wilson, Rise and Fall of the Slave Power in America, iii, 472-485; Wilson (Woodrow), Division and Reunion, 263.

3 Congressional Globe, 39th Congress, 1st Session, p. 1299. Mr. Doolittle on the 19th of December, 1865, had introduced a bill relative to the Bureau of Freedmen, but when reported from the Committee on Military Affairs, to which it had been referred, it was indefinitely postponed.
to its consideration on the 12th. With certain amendments the bill passed the Senate on the 25th by a vote of 37 to 10. The Select Committee on Freedmen to which the Senate bill had been referred by the House, reported on January 30 a substitute bill. This passed the House on the 6th of February by a vote of 136 to 33; it was amended by the Senate on the 7th, the House concurring on the 9th. It was vetoed by the President on the 10th, and the Senate on the 20th attempted to pass the bill over the veto. The result showed 30 votes in favor, 19 against, less than a two-thirds majority, and the bill thus failed to become a law.²

The bill as presented to the President for his signature was entitled "An Act to amend an act entitled 'An act to establish a Bureau for the relief of Freedmen and Refugees,' and for other purposes." It continued in force the act of March 3, 1865, and extended the jurisdiction of the bureau to freedmen and refugees in all parts of the United States. The President was authorized to "divide the section of country containing such refugees and freedmen into districts, each containing one or more States, not to exceed twelve in number, and, by and with the consent of the Senate, appoint an assistant commissioner for each of said districts;" or in the discretion of the President "the bureau might be placed under

¹This committee had been established by a resolution introduced by Mr. Eliot, of Massachusetts, on December 6, 1865. So much of the President's message as related to freedmen, and all papers relating to the same subject, were to be referred to it. The following were appointed members of the committee: T. D. Eliot of Massachusetts, W. D. Kelley of Pennsylvania, G. S. Orth of Indiana, J. A. Bingham of Ohio, Nelson Taylor of New York, B. F. Loan of Missouri, J. B. Grinnell of Iowa, H. E. Paine of Wisconsin, and S. S. Marshall of Illinois.

²Cox confuses this act with the act passed over the veto on July 16, declaring that it was passed over the veto on February 21. Three Decades of Federal Legislation, p. 444.

³See Wilson (Henry), Rise and Fall of the Slave Power in America, iii, 490–97; Wilson, History of Reconstruction, 148–184; Blaine, Twenty Years of Congress, ii, 164–170; Wilson (Woodrow), Division and Reunion, 264.
a commissioner and assistant commissioner to be detailed from the army." Districts when necessary were divided into sub-districts under agents. Military jurisdiction and protection were to extend over all connected with the bureau. Unoccupied public lands in the Southern States, not to exceed three million acres, were to be set apart for freedmen. Military protection was to be extended over all persons denied civil rights on account of race, color or previous servitude, and punishment was provided for those who deprived such parties of their civil rights.

The debates on this bill, occurring as they did before the President's speech of February 22, which will hereafter be noticed, lacked the great bitterness which was frequently manifested in the later days of the session. The fact that the veto message was received before the 22d accounts for the failure of the attempt to override it.\(^1\)

The bill itself was moderate, the freedmen obviously needed the legislation, but the President considered the principles at stake of sufficient importance to justify him in further antagonizing Congress. His veto message cited a number of reasons for withholding the executive approval.\(^2\) In the first place he claimed that there was no immediate necessity for the measure. Then it also contained provisions which were unconstitutional and unsuited to accomplish the desired end. His chief objection, of course, was based upon the continuance of military jurisdiction into a time of peace. This he declared clearly unconstitutional, a violation of the right of habeas corpus and of trial by jury; and he added that "for the sake of a more vigorous inter-

---

\(^1\) Congressional Globe, 1st Session, 39th Congress. McPherson, History of the Reconstruction, pp. 73-4.

\(^2\) The veto messages of the Presidents of the United States, from Washington to Cleveland, inclusive, have been compiled by Ben: Perley Poore by order of the Senate.
position in behalf of justice we are to take the risks of the many acts of injustice that would necessarily follow from an almost countless number of agents, * * * over whose decisions there is to be no supervision or control by the federal courts. * * * The country has returned or is returning to a state of peace and industry, and the rebellion in in fact at an end. The measure, therefore, seems to be as inconsistent with the actual conditions of the country as it is at variance with the Constitution of the United States." He considered the provisions which proposed to take away land from its former owners without due process of law, unconstitutional. Other more general objections were mentioned, such as the immense patronage created and immense expense involved, the dangerous concentration of power in the Executive, and the ethical objection that legislation which implies that the freedmen "are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects."

The unification of opposition to the President, which was accomplished through his speech of February 22, afterwards impelled the friends of the Freedmen's Bureau bill to make another attempt to secure its passage, believing that it then could be passed over the President's veto.² The ball was again set rolling by Mr. Eliot, of Massachusetts, who on May 22 introduced a bill designed to take the place of the defeated bill, yet different enough to afford a plausible pretext for again bringing the question forward. Slightly amended, it passed the House on May 29 by a vote of 96 to 32. The bill, with amendments, reported from the Committee on Military Affairs, of which Senator Wilson, of Massachu-


² See Wilson, Rise and Fall of the Slave Power in America, iii. 497–99; Wilson, History of the Reconstruction, 184–195; Blaine, Twenty Years of Congress, ii, 171–2.
setts, was chairman, was taken up for consideration by the Senate on June 26, and passed. The House non-concurring, a committee of conference was appointed, which made some minor changes, to which the Senate on July 2, and the House on July 3, agreed. A veto message of the President was received on July 16, and the bill was passed over the veto on the same day.¹

To all intents and purposes this act differed but little from the first vetoed bill. It continued the original Freedmen's Bureau Act in force for two years, and contained certain additional provisions for the education of the freedmen, for the recognition of their civil rights, and for the protection of such rights by military power.

President Johnson, in his veto message, declared that a careful examination had convinced him that the same reasons assigned in his veto of February 19, applied also to this measure. Such legislation was justifiable only under the war power, and should not extend to times of peace. The now existing federal and state courts, he went on to say, were amply sufficient for the protection of the freedmen, and the existence of the prevalent disorders furnished no necessity for the extension of the bureau system. The practical operation of the bureau showed that it was becoming an instrument of fraud, corruption and oppression, while the civil rights bill, needless as it was, provided methods of protection far preferable to the military protection authorized by this bill. The legislation regarding the disposal of land was discriminating, unsafe, and unconstitutional, and in conclusion he urged upon Congress the dangers of class legislation.

¹The votes were: House, 104 to 33; Senate, 33 to 12. For the text of the bill, see Congressional Globe, 1st Session, 39th Congress; McPherson, History of the Reconstruction, pp. 149-50. Blaine, Twenty Years of Congress, ii, 172, states that the bill was far less popular than the measure vetoed on February 19. "It required potent persuasion, re-enforced by the severest exercise of party discipline, to prevent a serious break in both Houses against the bill."
5. The mere veto of the first Freedmen's Bureau bill would not have been of great significance had it been the only act of the President at this time offensive to the rank and file of the Republican party. But on two other occasions he acted very indiscreetly, February 7 and February 22, the latter coming so shortly after the veto message on the first bill that the antagonism of Congress was greatly intensified.

On February 7, 1866, a delegation of colored representatives from fifteen States and the District of Columbia called upon President Johnson in order to present their wishes concerning the granting of suffrage to their race. Geo. T. Downing and Frederick Douglass acted as spokesmen. In reply, President Johnson described his sacrifices for the colored man, and went on to express his indignation at being arraigned by incompetent persons. Although he was willing to be the colored man's Moses, he was not willing "to adopt a policy which he believed would only result in the sacrifice of his [the colored man's] life and the shedding of his blood." The war was not waged for the suppression of slavery; "the abolition of slavery has come as an incident to the suppression of a great rebellion—as an incident, and as an incident we should give it the proper direction." He went on to state that the negro was unprepared for the ballot, and that there was danger of a race war. The States must decide for themselves on the question of the franchise. "Each community is better prepared to determine the depository of its political power than anybody else, and it is for the legislature * * * to say who shall vote, and not for the Congress of the United States."

This plain statement of his opposition to negro suffrage greatly added to Johnson's unpopularity. This was not due to the fact that his views on that subject had not been made

public before, for he never had tried to conceal his attitude towards any of the questions before the people. But the attitude of the people themselves had greatly changed since the ill treatment of the freedmen and the objectionable legislation of the Southern States had been placed vividly before the public through the newspapers. The sentiment in favor of the extension of the franchise had rapidly gained strength; and the attitude of the President, made conspicuous anew by his almost harsh reply to so prominent a delegation representing such a wide extent of territory, called forth much hostile criticism, which, added to the vigorous letter published by the delegation in reply to the President, aided in unifying the opposition to him.

On February 22 he made a speech in which he not only attacked by name certain leading politicians, but also criticized in terms the legislative branch of the government. This speech marks a distinct epoch in the history of the struggle between the President and Congress. Prior to it, the latter, although conscious of the rapid divergence of the paths each was following, and determined to render as nugatory as possible the President's policy, had not permitted the feeling of personal antagonism to influence its actions to any great extent. But from this time forth the lines were sharply drawn, culminating in the impeachment. Johnson bitterly hated the Joint Committee on Reconstruction. The very manner in which it had been authorized—through a concurrent resolution instead of a joint resolution for the purpose of preventing executive action—had embittered him; the principles which its majority represented and the personnel of the committee were equally distasteful to him.

In connection with the speech of February 22, it should be noticed that Mr. Stevens had two days before introduced a concurrent resolution, which passed the House, providing
that no senators or representatives were to be admitted until Congress should declare the State entitled to representation. Such a provision, the practical effect of which would be to place the subject in the exclusive control of the Joint Committee on Reconstruction, Congress, as we have seen, struck out of the resolution authorizing that committee's appointment.\(^1\) The President had good reason to believe that Mr. Stevens' resolution would pass the Senate, as it did on the 2d of March, and he looked upon it as one more step in the usurpation of power by an "irresponsible directory." Sensitive to all tendencies towards centralization, he saw in the power granted to the committee, and the measures proposed by it, a tendency towards the conditions against which he had spoken on April 21, 1865, when he said: "While I have opposed dissolution and disintegration on the one hand, on the other I am equally opposed to consolidation, or the centralization of power in the hands of a few."

Public sentiment in Washington was very hostile to the Freedmen's Bureau, and on February 22 a mass-meeting was held to express popular approval of the action of the President in vetoing the bill. Adjourning to the White House, the crowd congratulated Johnson with tumultuous enthusiasm. A man more cautious would have limited his reply to a temperate expression of his views; but Johnson, ever eager to pose as the leader of the people, was led by the enthusiasm of the moment to abandon himself entirely to his prejudices, aggravated as they were by the circumstances above mentioned. Thus, on the anniversary of Washington's birthday, a day when he should have particularly refrained from par-

\(^1\) *House Journal*, 39th Congress, 1st Session, 300, 315. The resolution was carried particularly to silence the Tennessee claimants for recognition. The somewhat anomalous position of that State gave grounds for the argument that it should be classed in the same category with the other Southern States. Thus Mr. Stevens was able to get the power for the joint committee which he had originally claimed.
tisan politics, he took occasion to assail the committee violently, declaring that the end of one rebellion was witnessing the beginning of a new rebellion; saying that "there is an attempt now to concentrate all power in the hands of a few at the federal head, and thereby bring about a consolidation of the Republic, which is equally objectionable with its dissolution. * * * The substance of your government may be taken away, while there is held out to you the form and the shadow." He described the Joint Committee as an "irresponsible central directory," which had assumed "nearly all the powers of Congress," without "even consulting the legislative and executive departments of the Government. * * * Suppose I should name to you those whom I look upon as being opposed to the fundamental principles of this Government, and as laboring to destroy them. I say Thaddeus Stevens, of Pennsylvania; I say Charles Sumner, of Massachusetts; I say Wendell Phillips, of Massachusetts."

6. After the President had thus publicly stigmatized the opponents of his policy as instigators of a new rebellion, and classed Stevens, Sumner and Wendell Phillips as traitors to be compared with Davis, there could be no hope of reconciliation, and the Republican party grimly settled down to fight for its principles. The first important measure to take effect was the civil rights bill.  

On the first day of the session Senator Wilson, of Massachusetts, had introduced a bill looking to the personal protection of the freedmen. It was aimed directly at the "black laws" of the Southern States, and declared all laws, statutes, acts, etc., of any description whatsoever, which caused any inequality of civil rights, in consequence of race or color, to be void. In his speech of December 13, 1865, explaining his

reasons for introducing the bill, Wilson said that, while honest
differences as to the expediency of negro suffrage might
exist, he could not comprehend "how any humane, just and
Christian man can, for a moment, permit the laws that are on
the statute-books of the States in rebellion, and the laws that
are now pending before their legislatures, to be executed
upon men whom we have declared to be free. * * * To
turn these freedmen over to the tender mercies of men who
hate them for their fidelity to the country is a crime that will
bring the judgment of heaven upon us."

This bill and a similar bill introduced by the same senator
on December 21, and one introduced by Senator Sumner
on the first day of the session, never came to a vote, the last
two being postponed indefinitely by the Senate. In place
of these bills, Senator Trumbull of Illinois, chairman of the
Committee on the Judiciary, on January 5, 1866, introduced
a bill which, slightly amended, became a law. This measure
passed the Senate on February 2, was amended and passed
by the House on March 13, and the amendments were con-
curred in by the Senate on the 15th. It was returned to
the Senate by the President, without his approval, March 27,
and on April 6 the Senate passed the bill over the veto of
the President by a vote of 33 to 15. Three days later the
House passed the bill by a vote of 122 to 41, and the meas-
ure became a law.

As passed it was entitled, "An Act to protect all persons
in the United States in their civil rights, and furnish the
means of their vindication." It first declared "all persons
born in the United States, and not subject to any foreign
power, excluding Indians not taxed," to be citizens of the
United States. Such citizens, without regard to race, color,
or previous servitude, were declared to have the same rights
in all the States and Territories, as white citizens, to make

and enforce contracts; to "sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property;" to enjoy the equal benefit of all laws for the security of person and property, and to be subject only to the same punishments. The second section provided penalties for the deprivation of equal rights. The third gave to the United States courts exclusive cognizance of all causes involving the denial of the rights secured by the first section. The remaining sections specified the powers and duties of the district attorneys, marshals, deputy marshals and special commissioners, in connection with the enforcement of the act, the ninth section providing: "It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of the Act."

From this summary of the act its nature can be seen plainly. Up to this time there had been no legislation affecting the status of the freedman. This declared him to be a citizen of the United States, and thereby entitled to all the privileges of citizenship. The war having resulted in the anomalous condition of the several millions of freedmen, some such legislation was necessary, especially in view of the fact that discriminative legislation was being enacted in the South. The bill was moderate in its terms, the most questionable portion being the section empowering the President to enforce the act through the war department, but even that in the then unsettled condition of the country had much to justify it.

The President's veto message was a lengthy document and discussed in detail the significance of the bill.¹ He

questioned the policy of conferring citizenship on four million blacks while eleven of the States were unrepresented in Congress. He doubted whether the negroes possessed the qualifications for citizenship, and thought that their proper protection did not require that they be made citizens, as civil rights were secured to them as they were, while the bill discriminated against the intelligent foreigner. Naturally, he also declared that the securing by federal law of equality of the races was an infringement upon state jurisdiction. "Hitherto, every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States." The second section he thought to be of doubtful constitutionality and unnecessary, "as adequate judicial remedies could be adopted to secure the desired end, without invading the immunities of legislators, * * * without assailing the independence of the judiciary, * * * and without impairing the efficiency of ministerial officers. * * * The legislative department of the United States thus takes from the judicial department of the States the sacred and exclusive duty of judicial decision, and converts the State judge into a mere ministerial officer bound to decide according to the will of Congress." The third section he characterized as undoubtedly comprehending cases and authorizing the "exercise of powers that are not by the Constitution within the jurisdiction of the courts of the United States." He also considered the extraordinary powers of the numerous officials created by the act as jeopardizing the liberties of the people, and the provisions in regard to fees as liable to bring about persecution and fraud.

In addition to these objections he argued that the bill frustrated the natural adjustment between capital and labor.

in a way potent to cause discord. It was "an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers, and break down the barriers which preserve the rights of the States. * * * The tendency of the bill must be to resuscitate the spirit of rebellion, and to arrest the progress of those influences which are more closely drawing around the States the bonds of union and peace."

The next clash between the executive and legislative branches of the government was over the Colorado bill. This bill provided for the admission of Colorado into the Union, and was passed May 3, being vetoed by the President on May 15, in accordance with the policy which he was endeavoring to carry out. The nominal grounds, while strong in themselves, had less weight in Johnson's mind than the argument reserved for the final sentence of the message. This referred to the fact that eleven of the old States were unrepresented in Congress, and that it was in the "common interest of all the States, as well those represented as those unrepresented, that the integrity and harmony of the Union should be restored as completely as possible, so that all those who are expected to bear the burdens of the Federal Government shall be consulted concerning the admission of new States; and that in the mean time no new State shall be prematurely and unnecessarily admitted to a participation in the political power which the Federal Government wields." A second bill for the admission of Colorado was vetoed on January 29, 1867. In the message President

1 Senate Journal, 39th Congress, 1st Session, pp. 431-2; McPherson, History of the Reconstruction, pp. 82-3; Blaine, Twenty Years of Congress, ii, 275-80.

2 McPherson, History of the Reconstruction, 81-2; Congressional Globe, 39th Congress, 1st Session, 2609.

3 McPherson, 160-164.
Johnson stated that he could change none of his opinions expressed in the first veto, while he now saw many additional objections. Neither bill was passed over the veto.

Another measure of like nature was the Nebraska bill, which was passed on July 27, the last day but one of the session. The President "pocketed" it. Both bills were again introduced at the beginning of the second session by Senator Wade, and the Nebraska bill was duly passed. It was vetoed January 30, 1867, but within ten days was passed over the veto by both houses, Nebraska being able to present stronger arguments for receiving statehood than Colorado, and consequently obtaining more support from the conservative members of the Republican party. The principal objection expressed in the veto message was the incongruities existing in the bill, the first section admitting the State "upon an equal footing with the original States in all respects whatsoever," and the third section providing that "there shall be no denial of the elective franchise, or of any other right, to any person by reason of race or color, except Indians not taxed." This assertion of the right of Congress to regulate the elective franchise the President declared clearly unconstitutional, and incompatible with an equal footing with the original States.  

7. The central event, naturally, of the first session of the 39th Congress was the report of the Joint Committee on Reconstruction. Although during the session there was a great amount of discussion as to the theory and method of reconstruction, and, as has been shown, two important measures were passed over the President's veto, the majority in the House still felt uncommitted as to the policy they should favor, excepting so far as the measures already reported from the committee had given shape to

---

their plans. A definite platform had not been erected on which they could stand, and they were not certain of the foundations on which to base constructive legislation. It was quite evident from the resolutions and bills reported from the committee to Congress, that the testimony taken before it had not changed the views of the majority of the committee, and the general tenor of the report was not a surprise to any one. Its constitutional importance cannot be questioned, since the Republican party adopted its construction of the Constitution, and proceeded to frame, on the lines marked out by the report, the bills which changed decidedly the relations between the States and the Federal Government, affording precedents for an extension of federal power which previous to the close of the war few could have been found to support.¹

No theory as to the status of the Southern States was agreed on by the committee.² Among those signing the majority report several distinct views can be noted. The theory of Thaddeus Stevens, that the States were now merely conquered territory, at the mercy of the conqueror, has already been noticed. Mr. Boutwell, of Massachusetts, was one of those who theoretically differed from Mr. Stevens, preferring to consider the States as “dead States” within the Union. Mr. Bingham, of Ohio, was still less radical, simply calling them “disorganized States.” But realizing the futility of introducing distinctions which could not affect the main question at issue, the majority dropped “the profitless abstraction,” and agreed upon the general conclusions

¹ Hurd, in his Theory of our National Existence, p. 42, says that this report of the Joint Committee on Reconstruction “as being the most authoritative declaration of principles supposed to have been afterwards carried out in political action, is a document which, either for good or evil, will probably be regarded as one of the most important in the history of this country.”

² For an extended discussion of the constitutional views of the members of the committee, see Hurd’s Theory, etc., pp. 224 ff.
and recommendations. The report was finally presented to Congress on June 18, all the members signing excepting Johnson, Rogers and Grider, who submitted a minority report four days later.

The first portion of the report is a general review of the steps which had already been taken by the President, and of the powers of the executive and legislative departments. It was declared that at the close of the war the Confederate States were in a condition of utter exhaustion and complete anarchy. Congress having failed to provide for the contingency, the President had no power except to execute the national laws and establish "such a system of government as might be provided for by existing national statutes." These States "by withdrawing their representatives in Congress, by renouncing the privilege of representation, by organizing a separate government, and by levying war against the United States, destroyed their State constitutions in respect to the vital principle which connected their respective States with the Union and secured their federal relations; and nothing of these constitutions was left of which the United States were bound to take notice." The President had two alternatives: either to "assemble Congress and submit the whole matter to the law-making power," or to continue military supervision in his capacity as commander-in-chief of the army, until the regular assembling. Choosing the latter course, he appointed over the revolted States provisional governors who possessed military authority, but who "had no power to organize civil governments nor to exercise any authority except that which inhered in their own persons under their commissions." The President in his military capacity might properly permit the people to form local governments, execute local laws not inconsistent with national laws, and even withdraw military forces altogether if he deemed it safe. But to Congress,
not to the President, belonged the power "to decide upon the nature or effect of any system of government which the people of these States might see fit to adopt," and to fix terms by which the States might be restored to all their rights and privileges as States of the Union. "The loss of representation by the people of the insurrectionary States was their own voluntary choice. They might abandon their privileges, but they could not escape their obligations," and they could not complain.

None of the revolted States, the report continued, excepting perhaps Tennessee, were in a condition to resume their former political relations. Their so-called "amended constitutions" had never been submitted to the people for adoption, and when they were thus submitted there was nothing to prevent their repudiation. If these States were without state governments, they should be regularly organized, but in no case had the proper preliminary steps been taken. The conventions assumed that the old constitutions were still in force, and that only such amendments as the federal government required, were needed. "In no instance was regard paid to any other consideration than obtaining immediate admission to Congress, under the barren form of an election in which no precautions were taken to secure regularity of proceedings or the consent of the people." Before they were restored to their full rights "they should exhibit in their acts something more than unwilling submission to an unavoidable necessity." Great stress was laid upon the headstrong action of the States since Johnson's proclamation of amnesty: the character of the men elevated to the highest positions; the discriminating legislation; the arrogance of the Southern press, and the opposition to the Freedmen's Bureau. The testimony of witnesses as to the general disposition to repudiate the national debt, if such a thing should prove
possible, and as to the natural reluctance to pay taxes, were perhaps too seriously taken, as was also the "proof of a condition of feeling hostile to the Union and dangerous to the government."

But, whether acting on exaggerated estimates or not, the majority of the committee formulated their conclusions into three clauses, which were as follows:

1. "That the States lately in rebellion were at the close of the war disorganized communities, without civil government, and without constitutions or other forms by virtue of which political relations could legally exist between them and the Federal Government.

2. "That Congress cannot be expected to recognize as valid the election of representatives from disorganized communities, which, from the very nature of the case, were unable to present their claim to representation under those established and recognized rules, the observance of which has been hitherto required.

3. "That Congress would not be justified in admitting such communities to a participation in the government of the country without first providing such constitutional or other guaranties as will tend to secure the civil rights of all citizens of the Republic; a just equality of representation; protection against claims founded in rebellion and crime; a temporary restoration of the right of suffrage to those who have not actively participated in the efforts to destroy the Union and overthrow the government; and the exclusion from positions of public trust of at least a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence."

In addition, the report contained an enumerated statement of "general facts and principles" which it was claimed were "applicable to all the States recently in rebellion." In this statement it was asserted that from the time war was declared
the great majority of the Southerners "became and were insurgents, rebels, traitors; and all of them assumed the political, legal, and practical relation of enemies of the United States." The States did not desist from war till "every vestige of State and Confederate government" was obliterated, "their people reduced to the condition of enemies conquered in war, entitled only by public law to such rights, privileges and conditions as might be vouchsafed by the conqueror." They thus had "no right to complain of temporary exclusion from Congress," until they could "show that they are qualified to resume federal relations.

They must prove that they have established, with the consent of the people, republican forms of government in harmony with the Constitution and laws of the United States, that all hostile purposes have ceased, and should give adequate guaranties against future treason and rebellion—guaranties which shall prove satisfactory to the Government against which they rebelled, and by whose arms they were subdued."

The rebels "were conquered by the people of the United States acting through all the co-ordinate branches of the Government, and not by the Executive alone. The authority to restore rebels to political power in the Federal Government can be exercised only with the concurrence of all the departments in which political power is vested," and the proclamations of the President could only be regarded as provisional permission "to do certain acts, the effect and validity whereof is to be determined by the constitutional government, and not solely by the executive power." If the President had the power to "qualify persons to appoint Senators and elect Representatives, and empower others to appoint and elect them, he thereby practically controls the organization of the legislative department and destroys the constitutional form of government."

1 House Reports, No. 30, 39th Congress, 1st Session. McPherson, History of Reconstruction, pp. 84-93.
The report of the dissenting members of the committee, Messrs. Johnson, Rogers and Grider, was an ably prepared document embodying at length the doctrines of the minority in Congress, composed of the Democrats and the few Republicans who still sustained the President. As a matter of course the argument was built upon the premise that the so-called Confederate States were never legally separated from the Union, but were bound by all the obligations and entitled to all the privileges of other States. "In its nature the government is formed of and by States possessing equal rights and powers." A State cannot be held to have forfeited its rights. "To concede that by the illegal conduct of her own citizens she can be withdrawn from the Union, is virtually to concede the right of secession."

Were the States out of the Union, the minority continued, the submission to them of the proposed constitutional amendment would be absurd; and such submission virtually conceded that the condition of the States remained unchanged. The constitutional power to suppress insurrection is for the preservation, not the subjugation of the State. "The continuance of the Union of all the States is necessary to the intended existence of the Government," and a different principle leads to disintegration. The war power, as such, cannot be used to extinguish the States; the Government only seeks to suppress the insurrection, achieving which all the States resume their normal relations. The States now have organized governments, republican in form, and the manner in which they were formed is no concern of Congress. "Congress may admit new States, but a State once admitted ceases to be within its control and can never again be brought within it." There is nothing in the political condition of these States justifying their exclusion from representation in Congress. The proposed amendment would degrade the Southern States, as it would compel them to
accept either a lessened representation or negro suffrage. Further, it interfered with the right of every State to regulate the franchise; and, by joining several subjects and requiring them to be voted on as a whole, deprived the people of the opportunity of passing on this important question separately.

8. The Joint Committee on Reconstruction had already reported two bills and one joint resolution which in its report of June 18 were declared to be the fruit of its labors. These were introduced in the House by Mr. Stevens, April 30. The resolution proposed an amendment to the Constitution, which, as finally amended, became the 14th Amendment. The two accompanying bills were entitled respectively: (1) "A Bill to provide for restoring the States lately in insurrection to their full political rights." (2) "A Bill declaring certain persons ineligible to office under the Government of the United States."

The first of these bills prescribed the conditions on which a State lately in insurrection might secure representation in Congress, as well as a ten years' postponement of the exacting of any unpaid part of the direct tax of 1861. It provided that representation might be secured after the proposed amendment should have become a part of the Constitution, and the State seeking representation should have ratified such amendment. Postponement of the tax might be secured by ratifying the amendment. This bill served as a basis for general discussion of the best method of restoring to the States their political rights; but, no action was taken on it during this session, and it went over as unfinished business to the following December.

The second bill declared as ineligible to office: the President, Vice-President, and foreign agents of the Confederate States; "heads of departments of the United States, officers

1Gillet, Democracy in the United States, pp. 318-20.
of the army and navy of the United States, and all persons educated at the Military or Naval Academy of the United States," federal judges and members of the 36th Congress, who had given aid or comfort to the rebellion; Confederate officers above the rank of colonel in the army or master in the navy; governors of the Confederate States, and "those who have treated officers or soldiers or sailors of the army or navy of the United States, captured during the late war, otherwise than lawfully as prisoners of war." This bill was less fortunate than the first, since it failed even to receive consideration during the session.

The proposed constitutional amendment, however, fared better. It had been well demonstrated by the discussions during the session that an amendment to the Constitution would be submitted to the States, if a resolution could be framed which would satisfy the heterogeneous elements of the reconstruction party. But the framing of such a resolution had proved a very difficult matter. Stevens, and those most influenced by him, were especially radical in their doctrines, not hesitating to express their desire for the confiscation of rebels' property and for other extreme measures. Some believed that there should be nothing short of complete disfranchisement, for a term of years, of all who had aided the rebellion in any way—they had acted deliberately, and they must suffer the consequences. Others cared only for the disfranchisement of the more prominent offenders, and for the establishment of negro suffrage. Still another faction wished liberal terms to be offered to the States—limitations, but no interference.

The radicals recognized that their extreme ideas could not obtain congressional sanction, and made no effort to embody them in the plans submitted. From the beginning of the session various propositions were under discussion. Among these, the most attention was attracted by the various pro-
positions to modify the existing basis of apportionment of representatives in Congress. Emancipation had rendered this necessary. The “three-fifths clause” of the Constitution having become inoperative, the increased representation resulting from the freeing of the slaves necessitated a change. The first plan was “to apportion Representatives according to the number of voters in the several States.” It was then proposed to exclude from the basis of representation all whose political rights were denied or abridged by any State on account of race or color. This plan, supported by Blaine and Conkling, passed the House on January 31, 1866, but was defeated in the Senate. Many felt that the measure was too stringent. The object was virtually to force upon the Southern States the enfranchisement of the negro.

The Committee on Reconstruction hesitated for over a month after the defeat of this resolution in the Senate. It was finally decided that the only way in which the submission of the desired amendment could be effected, was to concede something to the conservative element of the Senate. Accordingly the draft of April 30 was presented as the recommendation of the committee. This passed the House without difficulty, but encountered fierce opposition in the Senate. The House resolution contained a provision which would have summarily and unconditionally excluded from the franchise all participating in the rebellion, until July 4,

1 *Congressional Globe*, 1st Session, 39th Congress, pp. 9, 10, 351.

2 Ibid., 141-2, 232. For general discussions and summaries of the debates on the 14th Amendment, see Wilson, *Rise and Fall of the Slave Power in America*, iii, 647-660; Wilson, *History of Reconstruction*, 218-266; Blaine, *Twenty Years of Congress*, ii, 193-214.

3 The vote was: yeas, 120; nays, 46.


5 Yeas, 128, nays, 37.
1870. This was virtually a complete disfranchisement of the Southern people, and although only temporary, it was felt to be contrary to the spirit of our institutions and too indiscriminate a punishment. It was accordingly stricken out by a unanimous vote. In its place Senator Howard proposed a clause which forms section 3 of the 14th Amendment as it now stands. This clause, while it withheld certain privileges of citizenship from participants in the rebellion who had previously held civil or military office and had taken an oath to support the Constitution of the United States, did not affect the vast majority of Southerners; and it provided that Congress might, by a two-thirds vote of each house, remove the disability of those who were excepted from the restoration of privileges. Moreover, in place of the plan supported by Blaine and Conkling for reducing the basis of representation, the Committee on Reconstruction presented a proposition which better satisfied the conservative element, and which stands to-day as section 2 of the 14th Amendment. It provided that in case the right of any male inhabitant of a State to vote was denied or abridged for any reason "except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." It was argued that in this way fairness was assured, as a State could have no right to claim representation for that portion of her population which was denied the franchise.

On June 8, 1866, the final touches were put on the resolution. Five days later the House concurred in the Senate's revision, and the 14th Amendment was ready for the ratification of the States.

Johnson's followers and the Democrats bitterly opposed

---

the submission of this amendment. The more extreme of them asserted that the Republican majority acted from purely partisan motives. Fearful for the continuance of its supremacy, it desired to place before the States a measure so distasteful to the South as to ensure its rejection. In that way there would be an excuse for additional legislation to prevent the States from obtaining representation, and to preserve Republican control. The composite character of the amendment provoked severe criticism. It was claimed that the sections should be submitted to the States as separate articles, to give opportunity for the rejection of some and the ratification of others. Senator Doolittle moved an amendment to this effect, but the solid reconstruction majority could not be shaken, and the five sections were submitted to the States to stand or fall together. Technical objections were deemed unworthy of consideration when it was supposed to be necessary for the safety of the Union that all the sections should be ratified.

The inadvisability of submitting a constitutional amendment while eleven of the States were not permitted a voice in legislation was strongly urged by the opposition. The President reiterated the protest in his message of June 22, affirming that the submission of the proposed amendment to the States through the executive department was a purely ministerial duty, in no way committing the department to an approval of the action. The first section of the amendment was condemned as a subtle plan eventually to force negro suffrage upon the people as an incident of negro citizenship. It was claimed that the second discriminated too severely against the Southern States with their large preponderance of colored population, and that the third virtually forced them to insult their most respected citizens—a humili-

1 See Pollard's *Lost Cause Regained*, p. 74.

tion which would drive them to renewed insurrection. The validity of some of the objections was proved by subsequent history; some have proved groundless; others still remain among the unsettled questions.

The reconstruction legislation of the first session of the 39th Congress closed with the restoration of Tennessee to the Union. Other measures were under consideration, but were not acted upon until the following session. The attitude of Tennessee, since her re-organization under the provisions of the proclamation of 1863, had been the most consistent of any of the Southern States. From March 3, 1862, until March 3, 1865, Johnson, as military governor, had preserved law and order to a great extent. The formal reorganization of the State was undertaken by a convention of the loyal citizens convened January 8, 1865, acting upon the recommendation and personal approval of Johnson. This convention proposed the amendments to the constitution of the State, made necessary by the changes brought about by the war, and they were adopted by the loyal voters of the State on February 22. On March 4 a governor and legislature were elected, who assumed their duties on April 3. The work of the legislature was characterized by an apparent eagerness to do all that should be done by a State loyal to the Union.

The popular ratification of the amendments to the Constitution distinguished the action of Tennessee from that of the other Southern States, and this fact, united to her uniformly consistent attitude, formed the ground for the recommendation of the Committee on Reconstruction that this State should be restored to her former rights and privileges. This recommendation, in the form of a joint resolution, was reported from the committee by Mr. Bingham on March 8

1 On the reorganization of Tennessee, see Blaine, *Twenty Years of Congress*, ii, 50-52, 214-17; Cox, *Three Decades of Federal Legislation*. 
5, but no action was taken until July 20. Tennessee's prompt action in ratifying the 14th Amendment was taken as good evidence that her government was thoroughly reconstructed, and the State entitled to representation. Accordingly a substitute resolution, noting these facts, was introduced and passed, the Senate amending and passing it three days later. This declared Tennessee to be restored to her former relations to the Union, and entitled to representation in Congress, but the preamble was used as a vehicle for the assertion of the sole power of Congress to restore State governments. President Johnson, while approving the resolution, explained in his message that his approval was "not to be construed as an acknowledgment of the right of Congress to pass laws preliminary to the admission of duly qualified representatives from any of the States," nor as committing him "to all the statements made in the preamble."

The session had proved far from fruitless, although nothing but the preliminary steps had been taken. The Freedmen's Bureau and civil rights bills constituted a temporary protection to the freedmen; the right of habeas corpus still remained suspended and military authority prevailed throughout the conquered region. The 14th Amendment was before the people, to be a rallying point for the autumn campaign. The lines between the presidential and congressional parties were now closely drawn. Each knew the strong and the weak points of its opponent. The issue must now be turned over to the people as final judges of its merits. The congressional elections of the fall would decide the issue, and also the future method of reconstruction.

---

2 Ratified by the Senate July 11, yea, 15, nays, 6; by the House July 12, yea, 43, nays, 11. Tennessee was the third State to ratify the amendment, Connecticut and New Hampshire being the first two.
CHAPTER IV.

THE CAMPAIGN OF 1866.

1. The four months following the adjournment of the first session of the 39th Congress were full of excitement. The public was thoroughly aroused, and all incidents were considered in the light they threw upon the question of the hour. The President’s uncompromising hostility to the 14th Amendment brought about a crisis in the Cabinet.' William Dennison, Postmaster-General, was the first to declare the impossibility of maintaining cabinet relations with the President. He resigned on July 11, and A. W. Randall, of Wisconsin, First Assistant Postmaster-General, was appointed in his place. Mr. Randall was a devoted adherent of the administration, and president of the National Union Club which called the convention of August 14. The second resignation was that of James Speed, Attorney-General, on July 18. Coming from Kentucky, Mr. Speed had had the reputation of being quite conservative in his views regarding reconstruction, and his formal notice of separation from the President created no little excitement. His intimate connection with the administration gave unusual force to his denunciation of its policy, made at the time of taking the chair as permanent president of the convention of Southern loyalists. Henry Stanbery of Ohio was appointed as his successor, and retained his position until he resigned to assist in the defense of the President in the impeachment trial. A few days after Mr. Speed’s withdrawal, the Secretary of the

1 Blaine, Twenty Years of Congress, ii, 219-220.
Interior, James Harlan, tendered his resignation, and O. H. Browning, of Illinois, was appointed to fill the vacancy.

It is altogether probable that these resignations would have been made earlier than they were, had it not been feared that the control of these important administrative departments would fall into the hands of those who would use their powers in opposition to Congress. But the time had come when the incumbents considered that by the retention of the offices they were being forced to share the odium attached to the President, and deemed total separation from him as the best method of justification.

The laws discriminating against the colored man, and the numerous instances of cruelty which had been reported to the North, were an important factor in creating and sustaining the common feeling of hostility to the administration. But the New Orleans riots, occurring on July 30, did more to rouse the people of the North, and convince them that stern measures were necessary, than all that had preceded. The massacre stood out vividly against the background of "black laws," and furnished an argument of the most effective kind to be used in the campaign.

2. The riots were of a peculiarly exasperating character. The constitutional convention of 1864, summoned by the proclamation of Major General Banks, had passed resolutions giving the president of the convention power "to reconvoke the convention for any cause." A majority of the members came to the conclusion, in the spring of 1866, that the State constitution should be amended, to place it in harmony with the congressional policy. They determined to have the convention reconvened for this purpose. The president,

1The Congressional committee of investigation, appointed at the beginning of the 2d session, in December, submitted a detailed report of the riots. See House Reports, No. 16, 2d Session, 39th Congress. See also Blaine, Twenty Years of Congress, ii, 233-237.
Judge E. H. Durell, declined to take advantage of his prerogative, but the delegates, not to be thwarted in this way, proceeded to elect a president *pro tem.* who was willing to issue the desired proclamation. The governor of the State, J. M. Wells, concurred in this rather questionable procedure, and issued a proclamation for an election to fill existing vacancies.

It being well understood that negro suffrage was one of the ultimate objects desired by the supporters of the proposed constitutional convention, active hostility to the movement rapidly developed. The proclamation of the president *pro tem.* called for the assembling of the delegates on July 30; and though the only object of this meeting was to determine officially the existing vacancies to be filled in the fall elections, the enemies to the enfranchisement of the freedmen determined to crush the movement in its incipient stage. It is an easy matter to stir up the passions and prejudices of the people, and the indiscreet speeches of certain of the delegates only added to the popular excitement. A negro procession organized in honor of the convention was attacked by a mob in front of Mechanics' Hall, where the convention was in session. The attack was soon extended to the hall itself, the police of the city joining hands with the assailants. When the riot was over nearly two hundred persons were found to have been killed or wounded, the greatest sufferers being the negroes, who were shot down in front of the hall without mercy.

The flagrancy of the act, the connivance of the city authorities, and the fact that, while legal steps were taken against the delegates and innocent spectators, the actual murderers were in no way molested, furnished to the people of the incensed North ample proof of the inability of the South to maintain local government, and of the advisability of refusing to restore these States to their former position in the Union.
New Orleans was taken as a fair example of what might happen at any place in the South. There was no satisfactory justification for these acts of violence, and there was little inclination in the North to consider the legal technicalities involved in the attempt to amend the constitution of Louisiana. They simply took cognizance of the fact that about fifty loyal citizens had been murdered in cold blood, with the city authorities silently acquiescing. In the face of such a fact, the solicitude of the President to preserve the "inherent rights of the States" did not appeal to the masses, and Johnson was forced to begin his campaign badly handicapped.

But, in addition to the blow given to the theory of the administration, Johnson was forced to labor against a certain amount of personal censure, brought about by his supposed attitude before the riots and his known attitude after them. It was freely charged that he was in full sympathy with the determination of the Mayor of New Orleans, and the Lieutenant-Governor and Attorney-General of Louisiana, to prevent the convention from accomplishing its plans. In support of the charge, his answer to the inquiry as to whether the military power would interfere with the attempt to arrest the members of the convention upon criminal process was cited. His reply was as follows: "The military will be expected to sustain, and not to obstruct or interfere with the proceedings of the court." While this may have indicated too great confidence in the civil authorities of Louisiana, it certainly did not imply any connivance in or sympathy with the summary proceeding of July 30. Possibly the well-known opposition of Johnson to negro suffrage may have stimulated the rioters to bolder defiance of Northern sentiment, but censure of him can extend

no farther. But, in his political canvass in the fall,\(^1\) while endeavoring in every way to discredit the 39th Congress in the eyes of the people, he committed a grave error by an indirect defense of the rioters, attacking the members of the convention as traitors who incited the negro population to rioting, and throwing the responsibility of the whole affair back upon Congress as having originated and fostered the plan to force negro suffrage upon Louisiana.\(^2\)

3. The fall campaign was formally opened by the supporters of the presidential policy, who had immediately accepted the report of the Committee on Reconstruction as the platform of the Republican anti-administration faction, and had determined to appeal on that issue to the people. Their hope was that the conservative element of the population, thoroughly worn out by the struggle, would uphold the speedy restoration of the Southern States, and that thereby a coalition might be made between the Democrats and the administration Republicans strong enough to unseat many of the radical members, reverse the majority, and so give the administration control in the 40th Congress.

The first steps were promptly taken. The executive committee of the National Union Club, a political organization established in Washington by supporters of the administration, issued on June 25, just one week after the submission of the report of the Committee on Reconstruction, a call for a national convention to be held in Philadelphia on August 14.\(^3\) Delegates to this convention were to be chosen by those supporting the administration and agreeing to certain "fundamental propositions" which formed the plat-

---

\(^1\) See below for an account of this canvass.


form of the conservatives. These propositions maintained
the absolute indissolubility of the Union, the universal
supremacy of the Constitution and acts of Congress in pur-
suance thereof, the constitutional guarantee to maintain the
rights, dignity and equality of the States, and the right of
each State to prescribe the qualifications of electors, with-
out any federal interference. They declared that the usurpa-
tion and centralization of powers infringing upon the rights
of the States "would be a revolution, dangerous to republi-
can government, and destructive of liberty;" that the ex-
clusion of loyal senators and representatives, properly chosen
and qualified under the Constitution and laws, was unjust
and revolutionary; that as the war was at an end, "war meas-
ures should also cease, and should be followed by measures
of peaceful administration;" and that the restoration of the
rights and privileges of the States was necessary for the pros-
perity of the Union. This formal call was approved, and
its principles endorsed by the Democratic congressmen,
who issued an address to the "People of the United States"
on July 4, urging them to act promptly in the selection of
dele gates to the convention.

In accordance with the call, every State and Territory was
represented in the convention. A glance at the list of dele-
gates shows that they included many of the prominent Dem-
ocrats of the country, re-enforced by a number of the prom-
inent Republicans 1 who were in sympathy with the adminis-
tration. The enthusiastic manner in which the summons was
answered seemed to the friends of the administration to in-
dicate an unquestionable overthrow of the radicals. They
thought that harmony was soon to reign over all portions of
the Union, which was once more being drawn closely to-
gether by the watchword "National Union."

1 Among these Republicans were Thurlow Weed, Edgar Cowan, James R. Doo-
little, A. W. Randall, O. H. Browning, James Dixon, Henry J. Raymond, R. S.
Hale, J. A. Dix, Marshall O. Roberts and Montgomery Blair.
Reverdy Johnson, who had submitted in the Senate the minority report of the Committee on Reconstruction, was chosen chairman, and Senator Cowan, of Pennsylvania, chairman of the committee on resolutions. The resolutions were reported on August 17, and unanimously adopted by the convention. They re-affirmed the fundamental principles set forth in the call of June 25, and appealed to the people of the United States to elect none to Congress but those who "will receive to seats therein loyal representatives from every State in allegiance to the United States." They reiterated the claim that in the ratification of constitutional amendments all the States "have an equal and an indefeasible right to a voice and vote thereon." In concession to Northern sentiment, they declared that the South had no desire to re-establish slavery; that the civil rights of the freedmen were to be respected, the rebel debt repudiated, the national debt declared sacred and inviolable, and the duty of the government to recognize the services of the federal soldiers and sailors admitted. A final resolution commended the President in the highest terms, as worthy of the nation, "having faith unassailable in the people and in the principles of free government."

These views were fully elaborated in an address prepared by Henry J. Raymond, and read before the convention. Little attempt was made to qualify or render less offensive the argument that the Southern States must be allowed their representation in Congress, whether or not such action was for the best interest of the Union. Referring to this the address declared that "we have no right, for such reasons, to deny to any portion of the States or people rights expressly conferred upon them by the Constitution of the United States." We should trust to the ability of our people

"to protect and defend, under all contingencies and by whatever means may be required, its honor and welfare."

A committee of the convention hastened formally to present its proceedings to President Johnson, who had taken the keenest interest in the plans of the National Union party. In his remarks to the committee he feelingly referred to the somewhat theatrical entrance of the delegates of South Carolina and Massachusetts, "arm in arm, marching into that vast assemblage, and thus giving evidence that the two extremes had come together again, and that for the future they were united, as they had been in the past, for the preservation of the Union." Speaking to a sympathetic audience, who applauded him to the echo, and believing that the people were now endorsing his opposition to Congress, he saw no necessity for tempering his statements, and cast aside his discretion. His characterization of Congress was as follows: "We have witnessed, in one department of the government, every endeavor to prevent the restoration of peace, harmony and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union, when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. Instead of promoting reconciliation and harmony, its legislation has partaken of the character of penalties, retaliation and revenge. This has been the course and policy of one portion of the Government." Again, to show the disinterestedness of his own course, he said: "If I had wanted authority, or if I had wished to perpetuate my own power, how easily could I have held and wielded that power which

1 Blaine, Twenty Years of Congress, ii, 222.
2 McPherson, History of the Reconstruction, 127.
was placed in my hands by the measure called the Freedmen's Bureau bill (laughter and applause). With an army, which it placed at my discretion, I could have remained at the capital of the nation, and with fifty or sixty millions of appropriations at my disposal, with the machinery to be unlocked by my own hands, with my satraps and dependents in every town and village, with the Civil Rights bill following as an auxiliary (laughter), and with the patronage and other appliances of the Government, I could have proclaimed myself dictator.” ("That's true!" and applause.)

But his indiscretions did not end with speeches before his sympathizers. Two weeks later he started on a trip, nominally to assist in the ceremony of laying the cornerstone of the Douglas monument in Chicago. As a matter of fact, however, he was merely taking advantage of an opportunity to defend his policy publicly. Johnson was of too impassioned a nature to be able to judge as to how far the President of the United States could afford to adopt the methods of the stump speaker. All constraint was thrown away, and he acted at many times the part most natural to him, that of a popular orator addressing the masses. His speeches at no time lacked clearness. All could see where he stood, and nothing was left for speculation.

His first important effort while on his journey was at New York on August 29, where he responded to a toast proposed by the mayor of the city. In this speech he defined the issue as follows: “The rebellion has been suppressed, and in the suppression of the rebellion it [the government] has * * * * established the great fact that these States have not the power, and it denied their right, by forcible or peaceable

---

1 McPherson, *History of the Reconstruction*, 129. This manner of indicating his disinterestedness caused great offense in some quarters. See the account below of the Pittsburg convention of soldiers and sailors of September 26.

means, to separate themselves from the Union. (Cheers, "Good!") That having been determined and settled by the Government of the United States in the field and in one of the departments of the government—the executive department of the government—there is an open issue; there is another department of your government which has declared by its official acts, and by the position of the Government, notwithstanding the rebellion was suppressed for the purpose of preserving the Union of the States and establishing the doctrine that the States could not secede, yet they have practically assumed and declared and carried up to the present point, that the Government was dissolved and the States were out of the Union. (Cheers.) We who contended for the opposite doctrine years ago contended that even the States had not the right to peaceably secede; and one of the means and modes of possible secession was that the States of the Union might withdraw their representatives from the Congress of the United States, and that would be practical dissolution. We denied that they had any such right. (Cheers.) And now, when the doctrine is established that they have no right to withdraw, and the rebellion is at an end * * * we find that in violation of the Constitution, in express terms as well as in spirit, that these States of the Union have been and still are denied their representation in the Senate and in the House of Representatives." Then, speaking of the people of the South: "* * Do we want to humiliate them and degrade them and drag them in the dust? (‘No, no!’ Cheers.) I say this, and I repeat it here to-night, I do not want them to come back to this Union a degraded and debased people. (Loud cheers.) They are not fit to be a part of this great American family if they are degraded and treated with ignominy and contempt. I want them when they come

1McPherson, History of the Reconstruction, 130.
back to become a part of this great country, an honored portion of the American people."  

Another representative speech was the one which he made in Cleveland on September 3: "I tell you, my countrymen, I have been fighting the South, and they have been whipped and crushed, and they acknowledge their defeat and accept the terms of the Constitution; and now, as I go around the circle, having fought traitors at the South, I am prepared to fight traitors at the North. (Cheers.) God willing, with your help we will do it. (Cries of 'We won't.') It will be crushed North and South, and this glorious Union of ours will be preserved. (Cheers.) I do not come here as the Chief Magistrate of twenty-five States out of thirty-six. (Cheers.) I came here to-night with the flag of my country and the Constitution of thirty-six States un tarnished. Are you for dividing this country? (Cries of 'No.') Then I am President, and I am President of the whole United States. (Cheers.)"

Speeches of this nature, coming at a time when the out-

1 McPherson, History of the Reconstruction, 131, 132.

2 McPherson, 135. The following is a good example of the manner in which Johnson lowered himself to the level of the disorderly element, who made a bedlam out of some of the meetings he attended. The extract is from the Cleveland speech: "Who can come and place his finger on one pledge I ever violated, or one principle I ever proved false to? (A voice, 'How about New Orleans?' Another voice, 'Hang Jeff Davis.') Hang Jeff Davis, he says. (Cries of 'No' and 'Down with him!') Hang Jeff Davis, he says. (A voice, 'Hang Thad. Stevens and Wendell Phillips.') Hang Jeff Davis. Why don't you hang him? (Cries of 'Give us the opportunity.') Have you not got the court? Have you not got the Attorney General? (A voice, 'Who is your Chief Justice who has refused to sit upon the trial?') (Cheers.) I am not the Chief Justice. I am not the prosecuting attorney. (Cheers.) I am not the jury.

"I will tell you what I did do. I called upon your Congress that is trying to break up the government. (Cries, 'You be d—d!' and cheers mingled with hisses. Great confusion. 'Don't get mad, Andy.') Well, I will tell you who is mad. 'Whom the gods wish to destroy, they first make mad.' Did your Congress order them to be tried? (Three cheers for Congress')," etc.
rages in the South had so greatly incensed the North, had a most depressing influence upon the fortunes of the National Union party, and failed utterly in the object for which they were intended. The trip proved to be a grave political mistake. The undignified spectacle of a President receiving coarse personal abuse and retorting in scarcely less coarse expressions was quickly taken advantage of by his opponents; and the phrase "swinging around the circle" has assumed historic dignity as a description of his journey.

4. The "off year" national convention plan adopted by the National Union Club was immediately accepted by the congressional party, which was no less active in preparations for the struggle. On July 4, the same day on which the Democratic congressmen issued their address to the people, representative Southern Unionists,¹ supporters of Congress, issued a call to "the Loyal Unionists of the South," for a convention to be held in Philadelphia on September 3.² The call stated that the convention was "for the purpose of bringing the loyal Unionists of the South" into conjunction with the true friends of republican government in the North.

* * The time has come when the restructure of Southern State government must be laid on constitutional principles. * * * We maintain that no State, either by its organic law or legislation, can make transgression on the rights of the citizen legitimate. * * * Under the doctrine of 'State sovereignty,' with rebels in the foreground, controlling Southern legislatures, and embittered by disappointment in their schemes to destroy the Union, there will be no safety for the loyal element of the South. Our reliance for protection is now on Congress, and the great Union party that has stood and is standing by our nationality, by the constitu-

¹ Tennessee, Texas, Georgia, Missouri, Virginia, North Carolina and Alabama were represented among the signers to the call.

² McPherson, History of the Reconstruction, 124.
tional rights of the citizen, and by the beneficent principles of the government."

The convention met at the time appointed, with representatives present from all the lately insurrectionary States. James Speed of Kentucky, Attorney-General until July 18, was elected permanent chairman. For purposes of cooperation, the Northern States had been invited to send delegations, and all responded. Thus the convention was as truly national as the "National Union" convention of August 14 had been. It was decided, however, that for the purpose of rendering the declaration of the Southern Unionists more significant, the Northern and Southern Unionists should hold their sessions separately, and Governor Curtin of Pennsylvania was accordingly elected chairman of the Northern section.

The resolutions of the Southern section were reported by Governor Hamilton of Texas, chairman of the committee on resolutions, and they naturally endorsed the action of Congress in its entirety. While demanding the restoration of the States, they declared Johnson's policy to be "unjust, oppressive, and intolerable," and that restoration under his "inadequate conditions" would only magnify "the perils and sorrows of our condition." They agreed to support Congress and to endeavor to secure the ratification of the 14th Amendment. Congress alone had power to determine the political status of the States and the rights of the people, "to the exclusion of the independent action of any and every other department of the Government." "The organizations of the unrepresented States, assuming to be state governments, not having been legally established," were declared "not legitimate governments until reorganized by Congress."

In addition to these resolutions, an address "from the loyal

1 Blaine, Twenty Years of Congress, ii, 224-228.
men of the South to their fellow-citizens of the United States," was prepared and adopted after the formal adjournment of the convention. This reaffirmed, in far stronger terms, the condemnation of President Johnson, specifying many ways in which he had wrought injury to them, and closing with the following significant and powerful declaration: "We affirm that the loyalists of the South look to Congress with affectionate gratitude and confidence, as the only means to save us from persecution, exile and death itself; and we also declare that there can be no security for us or our children, there can be no safety for the country against the fell spirit of slavery, now organized in the form of serfdom, unless the Government, by national and appropriate legislation, enforced by national authority, shall confer on every citizen in the States we represent the American birthright of impartial suffrage and equality before the law. This is the one all-sufficient remedy. This is our great need and pressing necessity."

A third convention of the year was the Cleveland convention of soldiers and sailors, organized on September 17, with General Wood of the regular army as chairman. This convention was composed of supporters of the administration, and, like the National Union convention, contained a considerable proportion of Democrats. The resolutions endorsed those of the National Union convention, and declared that "our object in taking up arms to suppress the late rebellion was to defend and maintain the supremacy of the Constitution, and to preserve the Union with all the dignity, equality, and rights of the States unimpaired."

The great mass of the soldiers, however, were earnest sup-

---

2 The address was prepared by Senator Creswell, of Maryland. See Blaine, *Twenty Years of Congress*, ii, 223–228.
porters of Congress, and the results of the Cleveland convention were disappointing to its originators; its principal effect was to create great enthusiasm over the anti-administration convention of soldiers and sailors, which met in Pittsburg on September 25 and 26.\(^1\) This demonstration was intended to offset whatever influence the Cleveland convention might have had over the people, and it proved wonderfully effective. It was estimated that at least twenty-five thousand old soldiers were in the city at the time. The cause for this enthusiastic support is not difficult to find. The policy of the administration appealed to the moderates—those who wished as rapid a restoration to former conditions as possible, and those who were most influenced by the appeal to so-called justice. The majority of the soldiers, on the contrary, those who had made the greatest sacrifices for their country, were the most sensitive concerning the results of their sacrifices. Thoroughly accustomed to the thought of their great accomplishments, the manumission of the slaves and the preservation of the integrity of national power, they were keen to resent any steps which they thought tended toward the annulling of these results. With this natural bias, the arguments which the congressional party brought to bear upon them were accepted with enthusiasm; and many of the leaders went into the political campaign to be followed by the same soldiers who had followed them through their military campaigns. The convention, however, was in no sense a convention of officers. While the permanent president, Jacob D. Cox, of Ohio,\(^2\) had been a general of volunteers, the temporary chairman, L. E. Dudley, had been a private, and the majority of the offices of the convention were filled by men below the rank of lieutenant.


\(^2\) General John A. Logan was first chosen president, but was unable to attend.
As was to be expected from the nature of the convention, the feeling against the administration was stronger and declared in more impassioned tones than in the previous anti-administration convention. Its influence upon the country was correspondingly greater. The army, recognized at this time as the great preserver of the commonwealth, had great influence over all classes of citizens. The anti-administration conventions, the New Orleans massacre, and the violent attacks on Congress by the President while "swinging around the circle," assured the triumph of the congressional party.

The resolutions adopted at Pittsburgh were presented by General Butler. They were emphatic in tone, commencing with the declaration that "the action of the present Congress in passing the pending constitutional amendment is wise, prudent, and just," and that it was unfortunate that it was not received in the proper spirit, the terms being the mildest "ever granted to subdued rebels." The President's policy was declared to be "as dangerous as it is unwise," and "if consummated it would render the sacrifices of the nation useless." The power "to pass all acts of legislation that are necessary for the complete restoration of the Union" was declared to rest in Congress. The declaration of the President to the committee of the National Union convention, that he could have made himself dictator through the Freedmen's Bureau, aided by the army and navy, was characterized as an insult to "every soldier and sailor in the Republic." The obligation of the soldiers and sailors to the loyal men of the South was acknowledged; and it was added: "We will stand by and protect with our lives, if necessary, those brave men who remain true to us when all around are false and faithless."

This, the most successful of the four conventions, com-

pleted the remarkable series of national gatherings organized for effect on the State elections. They were all characterized by frankness of statement, and by clear recognition of the points at issue. But, as frequently happens in political campaigns, the most important incidents were those which were not designed to affect national issues. The riot at New Orleans was intended, by its participants, to affect only Louisiana politics, yet all the Southern States were compelled to share the responsibility. The same thing was true of all other incidents through which the South manifested, during these critical months, an unwillingness to accept the political results of the war.

5. The fall elections resulted in a decisive victory for the congressional policy, which secured a two-thirds majority in both houses. The protests of the President were shown to lack popular support, and his vetoes in the coming sessions were to be considered as merely one necessary step in the legislative formality of passing a bill. The country had decreed that Johnson could not have a voice in legislation. The campaign had been in all respects disastrous to the President. The support which he had received was mainly drawn from the Democratic party, and was of a half-hearted nature; for, however nearly they agreed in theory, the fact still remained that he was nominally a Republican President, and that almost all of his patronage was bestowed upon Republicans. He had thrown out decided hints that he would reverse his policy. For example, in St. Louis, on September 8, he said: "I believe in the good old doctrine advocated by Washington, Jefferson and Madison—of rotation in office. These people who have been enjoying these offices seem to have lost sight of this doctrine. I believe that one set of men have enjoyed the emoluments of office long enough. They should let another portion of the people have a chance. * * * Congress says he [the President]
shall not turn them out, and they are trying to pass laws to prevent it being done. Well, let me say to you, if you will stand by me in this action (cheers), if you will stand by me in trying to give the people a fair chance—soldiers and citizens—to participate in these offices, God being willing I will kick them out. * * * God willing, with your help, I will veto their measures whenever any of them come to me.”

But all this failed to give him that which he prided himself so much on having, the support of the people; and, so far as reconstruction was concerned, his influence was ended by the fall elections of 1866.

6. While such was the general result of the campaign, the South voted to sustain the President’s policy. The fact that Johnson had taken direct issue with Congress, and was actively supporting Democratic principles, had a wonderful influence upon the South. The papers enthusiastically prophesied the complete overthrow of the Republican party. They reasoned that the enormous patronage of the President would ensure him a following so powerful that its coalition with Democracy could not but result in victory. Then, they reasoned, it would only be necessary to wait until the convening of the 40th Congress, when the obnoxious amendment would be discredited and the States re-admitted to the possession of all their rights and privileges without further delay or conditions. They utterly failed to realize the injury which their discriminative legislation, the New Orleans riots, the widely spread reports of cruelty and oppression, and the defiant attitude of their press, had inflicted on their cause. They only saw that the administration and Congress were estranged, and believed that to be a sure indication of final success.

In this frame of mind they came to the polls, and in all the Southern States overwhelming Democratic majorities

1 McPherson, History of the Reconstruction, 140.
evidenced the popular sentiment among the dominant classes. Accordingly, when the State legislatures convened, the 14th amendment was rejected almost unanimously in all except Tennessee, which had ratified it in July. Delaware, Maryland and Kentucky, the border Union States, also rejected the amendment, allying themselves with the Southern cause. Twenty-one of the remaining twenty-four States ratified the amendment, endorsing thereby the action of Congress.¹ Iowa, Nebraska and California did not act upon the amendment at this time.

Had Thaddeus Stevens and Charles Sumner been able to persuade Congress to adopt their theory of the status of the Southern States, the amendment would have been assumed to be a part of the Constitution, as twenty-one States were more than three-quarters of twenty-seven, the total number of States represented in Congress. But the majority of congressmen were never able to adopt, in its entirety, the theory that the rebellion had utterly destroyed the States and left them mere territory. It preferred to accomplish the same result by less violent means. The legislation enacted as a result of the attitude of the South towards the amendment practically treated the States as conquered territory, yet they were counted in determining the ratification of both the 13th and the 14th amendment.

The defiant attitude taken by the Southern legislatures was a grave mistake. The most of them did not convene until Congress was again in session, after the defeat of the administration, and when they should have been able to see that their only hope was in submission. But the South, ever too ready to act first and consider the consequences afterwards, only saw in the proposed amendment an insult to the white race and an injustice to their leaders. That they should be asked deliberately to inflict upon themselves

¹ McPherson, History of the Reconstruction, 194.
this punishment, seemed a humiliation which self-respect could permit them only to spurn. They did not stop to realize that the rejection of these terms would cause measures still more severe to be enacted.
CHAPTER V.

THE CONGRESSIONAL THEORY FULLY DEVELOPED.

1. The second session of the 39th Congress opened with its members in a far different frame of mind from that in which they had assembled in 1865. Then they had approached their work with hesitation; their plans were not formulated; they could not know how far the country would sustain them in their opposition to the President. Now, in the flush of victory, their policy sustained, the President discredited, with their two-thirds majority in both houses unbroken, they were prepared to proceed to enact legislation which not only should secure that which had been accomplished already, but also should settle finally the problem of reconstruction, and place the President in a position where he could do no harm.¹

Much curiosity had been felt as to the attitude which Johnson would take in his annual message. He believed thoroughly in the righteousness of his cause, and had such implicit confidence in the unerring judgment of the people that he had deemed it impossible that his policy would be repudiated. The results of the election were a great disappointment to him, and some had believed that he would introduce into the message the abuse which he had so unsparingly inflicted upon Congress during the campaign. The message, however, contained nothing approaching virulence, but on the contrary was a document eminently

¹Scott, *Reconstruction during the Civil War*, 290 ff.
creditable to the President. It restated in a powerful way the constitutional position of the administration, and defended its actions in a dignified yet spirited manner. The fearlessness of his attitude was characteristic; the argumentative brilliancy of its presentation was unsurpassed. Unmindful of the fact that Congress had assembled to complete the overthrow of his policy of reconstruction, he reminded Congress that "the Constitution of the United States makes it the duty of the President to recommend to the consideration of Congress" such measures as he shall judge necessary or expedient. "* * * I know," he said, "of no measure more imperatively demanded by every consideration of national interest, sound policy, and equal justice, than the admission of loyal members from the now unrepresented States. * * * The interests of the nation are best to be promoted by the revival of fraternal relations, the complete obliteration of our past differences, and the re-inauguration of all pursuits of peace." The message closed with the request: "Let us endeavor to preserve harmony between the co-ordinate departments of the Government, that each in its proper sphere may cordially co-operate with the other in securing the maintenance of the Constitution, the preservation of the Union, and the perpetuity of our free institutions."

Unfortunately for the country, there could be no harmony "between the co-ordinate departments of the Government," where there was such fundamental disagreement. Neither side proposed to retreat an inch from the stand taken, and the message served no other purpose than to leave a very excellent state paper as a memento of the session.


2 *House Journal, 2d Session, 39th Congress, 15.*
The Joint Committee on Reconstruction was immediately re-appointed by a concurrent resolution. Only one change was necessary—Mr. Grider, of Kentucky, one of the minority members, had died during the recess of Congress, and in his place Mr. Hise, of the same State, was appointed. The committee immediately resumed its labors, and proceeded to frame a bill "for the more efficient government of the rebel States." The developments of the last three months had created a sentiment favorable to more stringent conditions of re-admission, and the action of the various Southern legislatures, who were rejecting the 14th amendment during this period, served as a further stimulus to vigorous action.

2. Several weeks elapsed before the committee was willing to adopt any definite plan. Finally, on February 4, 1867, Mr. Williams reported from the committee, a bill to the Senate; it was referred back to the committee, and was formally reported to the House by Mr. Stevens on the 6th.

The preamble to the bill declared that in the absence of legal State governments there was no adequate protection for person and property, and that therefore it was necessary to enforce peace and good order until loyal State governments could be established. To this end "the so-called States shall be divided into military districts," five in number, Virginia to constitute the first, North Carolina and South Carolina the second, Georgia, Alabama, and Florida the third, Mississippi and Arkansas the fourth, and Louisiana and Texas the fifth. The General of the Army was "to assign to the command of each of said districts an officer of the regular army not below the rank of brigadier-general, and to detail a suffi-

1 The resolution passed the House on December 4, and the Senate on December 5. House Journal, 2d Session, 39th Congress, 30; Senate Journal, 2d Session, 39th Congress, 22.


3 House Journal, 2d Session, 39th Congress, 345.
cient force to enable such officer to enforce his authority.” The officer in command of a district was to have complete authority to protect the civil rights of all, suppress insurrection and preserve order. To assist him he could employ civil or military tribunals at his discretion, but no capital punishment, imposed by a military tribunal, should be executed without the approval of the officer in charge of the district. Writs of *habeas corpus* should not be issued by federal courts or judicial officers except on endorsement of some commissioned officer in the district.

The discussion of the bill began on the day following its introduction. Mr. Stevens, with his usual impetuosity, wished for an immediate vote. The bill seemed more moderate to him than the South deserved, and with the large Republican majority intent upon some such legislation, he could see no reason for delay. The bill was clearly worded and all could understand it perfectly. But there was an influential element that preferred to make haste slowly, and many hours were given up to debate before the final passage of the bill by the House, on February 20.

The measure certainly was exceedingly radical as it was reported from the committee. As Mr. Le Blond, of Ohio, said: “It strikes at the civil governments in those States. It ignores State lines. It destroys their civil governments. It breaks down the judicial system in those States.” The distrust of the President was evidenced by empowering General Grant to appoint the commanders of the military districts, ignoring the President as commander-in-chief of the army. Most important of all, the bill as it stood was the action of a conquering power over conquered territory. It provided for an indefinite military control over the territory, and specified no mode in which a State might free herself.

---

1 *Congressional Globe, 2d Session, 39th Congress, 1074.*
from the onerous conditions. It was not a measure of reconstruction; it was a measure of subjugation.

Of course none of its supporters had the slightest idea of its being more than a temporary measure, but even temporary measures must be considered in all their aspects. Their idea was that expressed by Mr. Brandegee of Connecticut when he said: "It holds those revolted communities in the grasp of war until the rebellion shall have laid down its spirit, as two years ago it formally laid down its arms."

Mr. Bingham took an active part in the opposition to the adoption of the bill as it stood. Representing the more conservative branch of the anti-administration party, he suggested on the opening day of the discussion amendments which would make the bill more desirable. On February 12 he submitted an amendment, the essential features of which were finally adopted, but which encountered the fiercest opposition and was only carried when compromise between the House and the Senate was found to be impossible. His amendment provided as conditions for re-admitting a State to representation in Congress: Ratification of the 14th amendment; such modification of State constitution and laws as would make them conform to that amendment; a constitutional provision for negro suffrage; and the approval of the constitution by Congress as republican in form and consistent with the Constitution and laws of the United States.

Mr. Blaine proposed an amendment similar in its aim to that of Mr. Bingham, who accepted it as a substitute. But the House was opposed to providing any loop-holes by which the States could escape the provisions of the act. The feeling that the South had been weighed in the balance and found wanting, that its whole attitude was that of defiance, and that it would endeavor to undo all that had

1 *Congressional Globe, 2d Session, 39th Congress, 1076.*
been done as soon as it could obtain an opportunity, was sufficiently strong to defeat an attempt to refer the bill to the Judiciary Committee with instructions to incorporate the amendment. Instead, a substitute measure, introduced by Mr. Stevens, which differed but little from the original bill, passed the House on February 13.

The great struggle now began in the Senate, where the Blaine amendment was moved by Mr. Johnson of Maryland, on February 15. There was an influential element which feared that its adoption would utterly nullify the object of the bill—to govern the States until they could be re-admitted with safety. Their objections were based on the same principles that had proved fatal to the amendment in the House. "I see," said Senator Howard, "in this amendment a fatal snare by which we shall be deceived in the end, by which we are to be deluded into a premature re-admission of the rebel States in such a manner as to make us ultimately repent of our folly and rashness. * * * It is a snare by which increased representation from the rebel States may come into Congress, * * * while we have no security at all that the extended elective franchise will be continued in the rebel States to the black population. They can disfranchise them whenever they see fit after having secured increased representation." 2

The Senate, more conservative than the House, could not muster such a strong opposition to the amendment. It was rejected, but rejected in order to open the way for another amendment in the form of a substitute bill, which was moved by Senator Sherman. 3 The substitute had been agreed upon in a Republican caucus, and was accordingly carried. Its first four sections contained nearly all the feat-

1 Congressional Globe, 2d Session, 39th Congress, 1360.
2 Ibid., 1381–2.
3 Ibid., 1360.
ures of the original bill; it substituted "President" for "General," in the second section, and, in place of the provision against writs of *habeas corpus*, the fourth section simply enacted that "all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted."

The fifth section contained the features proposed in the Bingham and Blaine amendments, amplified in a manner satisfactory to the majority of the Senatorial caucus. The conditions of readmission were as follows: The adoption of a constitution in conformity with the Constitution of the United States, and the ratification of the 14th amendment. The constitution, which must be examined and approved by Congress, must be framed by a convention of delegates chosen by "the male citizens of said State twenty-one years of age and upwards, of whatever race, color, or previous condition, who have been resident in the State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion, or for felony at common law;" must give the elective franchise to all qualified as electors for the delegates; and must be ratified by a majority of the persons voting on ratification, and qualified as such electors. To this the proviso was added that no person disqualified by the 14th amendment from holding office should be chosen as a delegate to the convention or vote for members of it. One more amendment to the bill was made on motion of Senator Doolittle. This added as a proviso to the fourth section: "That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."

The bill was returned to the House in this form, the Senate having passed it at six o'clock Sunday morning, February 17. The margin of time that could be used without permitting the bill to be killed by a "pocket veto" was now very
limited, but the House refused to concur in the amendment and called for a committee of conference, February 19. The Senate insisted on its amendment and the bill was again returned to the House, which on the following day concurred in the Senate amendment, but added an amendment of its own proposed by Mr. Wilson, of Iowa, and amended on motion of Mr. Shellabarger. This amendment, constituting the sixth section of the bill, was speedily concurred in by the Senate, and on February 20, 1867, the bill was finally passed and ready for the President's veto.

The sixth section, so hurriedly tacked on to the bill, was of no slight importance, as it declared in legal form the status of the Southern governments, and clinched the qualifications for the elective franchise. It provided that "until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment."

As had been expected, Johnson withheld his veto as long as it was possible for him to do so without permitting the bill to become a law, not returning the bill until March 2. This was done in the hope that the minority, by dilatory

1 Congressional Globe, 2d Session, 39th Congress, 1399.
2 McPherson, History of the Reconstruction, 192.
proceedings, might prevent action on the veto before the adjournment, on March 4, and so prevent the bill from becoming a law. But the plan failed, and the bill was immediately passed, "the objections of the President to the contrary notwithstanding."

The veto message embodied an exhaustive review of the bill, a criticism of its "cruelty," and an attack upon its constitutionality. It denied the statement in the preamble that "no legal State governments or adequate protection for life or property," existed in these ten States, and declared that "the establishment of peace and good order is not its real object. * * * The military rule which it establishes is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment." The despotic authority given to the commander of a district was vigorously denounced, and all the humane provisions of the bill were declared to depend upon the will of the commander, who could nullify them and oppress the people without limitations of any kind. "It reduces the whole population of the ten States—all persons, of every color, sex and condition, and every stranger within their limits—to the most abject and degrading slavery."

But aside from its injustice, Johnson went on to argue, the measure was unconstitutional and could not legally be carried into execution. In a time of peace martial law could not be established, in proof of which statement he quoted from the decision of the Supreme Court, in Ex parte Milligan, defining military jurisdiction. The denial of the right of trial by jury and of the privilege of the writ of habeas corpus was not counterbalanced by the poor privilege of trial "without unnecessary delay." In defiance of the constitutional prohibi-
tion of bills of attainder, "here is a bill of attainder against nine millions of people at once"—a legislative enactment "based upon an accusation so vague as to be scarcely intelligible, and found to be true upon no credible evidence." The primary purpose of the bill, to compel these States "by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves," was in itself unconstitutional. "The Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State."

Respecting the legality of the state governments, the important point was made that if they were illegal, their ratification of the 13th amendment could not have been legal. The message closed with an appeal for restoration "by simple compliance with the plain requirements of the Constitution."

Taken as a whole, the message unquestionably contained many strong arguments against the bill, and was virtually a summary of the arguments advanced by the minority in Congress. But the struggle had passed beyond the province of unbiased debate, and each side was equally determined not to yield any point. A measure open to the most serious suspicions regarding its constitutionality, was passed by an inflexible majority, settled in the belief that the condition of the South required the measure, and that the Constitution must accordingly be stretched to cover the case.

Those supporters of the bill who were recognized as the most careful in their judgments confidently asserted that that portion of it establishing the military districts contained nothing that could not have been carried out legally by the government as a military measure, without the formality of enacting the bill. The insurrectionary States would legally remain in a condition of insurrection until Congress should formally declare the insurrection to be at end. Conse-
quenty martial law could constitutionally prevail, trial by jury and the writ of *habeas corpus* be suspended, and civil government utilized as an aid to military rule, to any extent that might seem advisable to the general in charge. The claim that the measure amounted to an enormous bill of attainder was immediately dismissed as absurd, as no corruption of blood or forfeiture of estates was involved, and the whole measure was avowedly temporary, to cease as soon as the State should comply with the conditions of reconstruction.

Congress felt justified in passing the bill over the veto, and accordingly the general process of reconstruction was established with conditions far more onerous than had been intended in the first session of the 39th Congress. The provisions of the act immediately went into force, and the commanders of the districts were appointed on March eleventh.

3. The bill was conceded by all its supporters to be incomplete. It provided for the establishment of districts and the governing of these districts by military law, and it was hoped that the immediate crying need of a strong government to enforce order and prevent the continuance of the oppression of the freedmen was satisfied. This done, they could proceed more deliberately to the enactment of measures which would provide the mechanism for carrying out the provisions of the fifth section. The adjournment of the 39th Congress at noon of March 4 prevented any action until the next Congress; but preparation had been made for such an emergency by an act which provided that in future each Congress should convene upon the adjournment of its predecessor.¹

The 40th Congress at once settled down to work upon the problem. Chief Justice Chase prepared a bill which was used as a basis for the discussion. Senator Wilson and

¹ Act of January 22, 1867.
others modified the bill to some extent, and introduced it in the Senate on March 7. The same bill, slightly modified, was introduced in the House. Considerable trouble was experienced in agreeing upon the details of the bill, but on March 19 both houses finally adopted a compromise proposed by a committee of conference. The veto message of the President was received four days later; the bill was immediately passed over the veto and became a law.

As finally passed, the bill was entitled: "An Act supplementary to an Act entitled, 'An Act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration." It enacted that the commanding general in each district should cause a registration to be made before September 1, 1867, of those entitled to vote under the original act, and should require all registering to take the following oath: "I, ———, do solemnly swear (or affirm) in the presence of Almighty God, that I am a citizen of the State of ———; that I have resided in said State for ——— months next preceding this day, and now reside in the county of ———, or the parish of ———, in said State (as the case may be); that I am twenty-one years old; that I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State or of the United States; that I have never been a member of any State legislature, nor held any executive or judicial office in any State and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort


2 The Committee on the Judiciary was instructed on March 7 to report a supplementary bill (*Congressional Globe*, 17), and the Wilson bill was accordingly reported by it.

3 *Congressional Globe*, 1st Session, 40th Congress, 302-3; 313-14.
to the enemies thereof; that I have never taken an oath as a
member of Congress of the United States, or as an officer of
the United States, or as a member of any State legislature,
or as an executive or judicial officer of any State, to support
the Constitution of the United States, and afterwards engaged
in insurrection or rebellion against the United States or
given aid or comfort to the enemies thereof; that I will
faithfully support the Constitution and obey the laws of the
United States, and will, to the best of my ability, encourage
others so to do, so help me God." 1 After the completion
of the registration in any State, it was provided that there
should be held, after at least thirty days' public notice by
the commanding general, an election of delegates "to a con-
vention for the purpose of establishing a constitution and
civil government for such State loyal to the Union." This
convention was to consist of the same number of members
as the most numerous branch of the State legislature in
1860. 2 Those voting at the election of delegates were also
to vote for or against the holding of the convention, and it
was not to be held if a majority of the ballots was cast
against it, or if a majority of the registered voters failed
to vote on the question. Boards were to be appointed by
the commanding general to superintend the registration and
election, and make returns to him of the results of the elec-
tion. The convention was required to assemble at a place
and time appointed by the commanding general, by a notice
to be given by him within sixty days from the date of elec-
tion; and to frame a constitution according to the provisions
of the original and the present act. The constitution so
framed was then to be submitted to the registered voters at

1 Congressional Globe, appendix, 1st Session, 40th Congress, 39; McPherson,
History of the Reconstruction, 192.

2 Except in Virginia, where the number was modified in proportion to the
change made by the separation of West Virginia.
an election conducted by officials who were to be appointed by the commanding general, and who were to make returns to him. In case the constitution was ratified "by a majority of the votes of the registered electors qualified as herein specified, cast at said election (at least one-half of all the registered voters voting upon the question of such ratification)," it was provided that the president of the convention should "transmit a copy of the same, duly certified, to the President of the United States, who shall forthwith transmit the same to Congress," and that, if Congress should be satisfied that all the provisions of the acts were carried out, and that no force or fraud was used, and should approve the constitution, the State should "be declared entitled to representation, and senators and representatives shall be admitted therefrom as therein provided." It was further provided that all elections in the States mentioned in the original act should, during the operation of that act, be by ballot; that the officials in charge of the registration and elections must take the "iron-clad" oath of July 2, 1862;¹ that the expenses incurred by the commanding generals in carrying out the act should be paid out of the treasury, but

¹By the act of that date all persons elected or appointed to any office under the government of the United States were required to take the following oath previous to entering upon the duties of such office: "I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."
that the state conventions should provide for the levying of
taxes to pay other expenses.1

The veto message on this bill was much shorter than that
on the original reconstruction measure. The President said:
"No consideration could induce me to give my approval to
such an election law for any purpose, and especially for
the great purpose of framing the constitution of a State. If
ever the American citizen should be left to the free exercise
of his own judgment, it is when he is engaged in the work of
forming the fundamental law under which he is to live." He
animadverted upon the extreme looseness of the provisions
in regard to the registration boards, and upon the great
powers vested in them. The main objections to the bill
were of course those which he had stated in the veto of
March 2.

The passage of the supplementary reconstruction act, and
of a joint resolution providing for the expenses involved in
carrying out the provisions of the act, completed the work
of this session of the 40th Congress. It was hoped that no
further congressional action would be needed until the con-
stitutions of the States should be submitted for examination
and approval, preparatory to granting representation. But
the importance of the measures and the avowed hostil-
ity of the President caused hesitation on the part of Con-
gress as to adjourning till the regular December session. It
was realized that if any loop-hole could be found by
which the intention of the act could be evaded, Johnson
would have no hesitation in taking advantage of it. To
provide for such a contingency Congress passed a concurrent
resolution which provided for a recess until July 3, and
authorized the President of the Senate and the Speaker of
the House to adjourn Congress until the first Monday in
December if a quorum did not appear on July 3. In case

1 Appendix, Congressional Globe, 1st Session, 40th Congress, 39, 40.
everything appeared to be progressing with little friction, the members would not assemble; but if there should be any unfavorable developments, Congress could assemble independently of the President and enact legislation to remedy the difficulty.

4. July 3 found a quorum in both houses. The Attorney-General had rendered an opinion upon the act of March 2 which greatly hampered the work of the commanders of the districts. He advised the President that the act should be construed strictly, that the commanders should be allowed no powers beyond those specifically bestowed upon them. This prevented them from removing state officers, from making new laws for the government of the people, or from suspending the action of the state courts; and with state officers hostile to the federal authorities, and using every means to impede their work, the commanders found it impossible properly to discharge the duties assigned to them by the act. The intent of the reconstruction acts obviously was to make the commanders of the districts commanders de facto as well as de jure. Consequently remedial legislation was deemed necessary, and Congress convened for the purpose of framing additional acts defining more precisely the intention of the preceding acts and the powers of the commanders.

A few days' debate sufficed to bring Congress to an agreement as to the form of a second supplementary act. The bill passed both Houses on July 13, was vetoed on the 19th, and was immediately passed over the veto. It declared the true intent and meaning of the previous reconstruction acts to be that the governments then existing in the ten States specified in the acts were illegal, and that such governments, "if

continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.” It therefore provided that the district commanders should have the power to suspend or remove all incumbents of offices of “any so-called State or the government thereof,” and to fill all vacancies in such offices, however caused. The same powers were granted to the General of the Army, who was also empowered to disapprove the appointments or removals made by the district commanders. The previous appointments by the district commanders were confirmed and made subject to the provisions of the act, and it was declared to be the duty of these commanders to remove from office all who were disloyal to the United States, or who opposed in any way the administration of the reconstruction acts. The registration boards were empowered and required “before allowing the registration of any person to ascertain, upon such facts or information as they can obtain, whether such person is entitled to be registered.” ¹ No person was to be disqualified as a member of any board of registration by reason of race or color. The true intent and meaning of the oath prescribed in the supplementary act was fully explained, the most important portion of the explanation being that the words “executive or judicial office in any State” should be construed to “include all civil offices created by law for the administration of any general law of a State, or for the administration of justice.” The time of registration under the supplementary act was extended to October 1, 1867, in the discretion of the commander; and it was provided that

¹ Stanbery had ruled that the willingness of an applicant to take the oath must be regarded as final evidence of his qualification to register. Thus those notoriously incapacitated from taking the oath honestly, could not be prevented from registering. This additional power virtually enabled the boards of registration to exercise their own discretion as to whom they should enroll.
the boards of registration shall have power, and it shall be their duty, commencing fourteen days prior to any election under said act, and upon reasonable notice of the time and place thereof, to revise, for a period of five days, the registration lists," by striking out the names of those found to be disqualified, and adding the names of those qualified for registration. Executive pardon or amnesty should not qualify any one for registration who without it would be disqualified. District commanders were empowered "to remove any member of a board of registration, and to appoint another in his stead, and to fill any vacancy in such board."
The iron-clad oath was to be required of all registration boards, and of all persons elected or appointed to office in the military districts. Further possibility of unfavorable construction by the Attorney-General was prevented by the provision that "no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States." The closing section, taken in connection with this, was fully as significant: "All the provisions of this act and of the acts to which this is supplementary shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."

5. Reconstruction under the provisions of these three acts was rapidly accomplished in most of the States. In some of the districts the commanders probably were too severe upon the whites, but in the main the intent of the acts was carried out with as little harshness as could well be expected. Those qualified were registered, conventions were held, and constitutions were framed and submitted to the people for their ratification according to the provisions of the acts. Alabama was the first State to vote upon a new consti-

Scott, Reconstruction during the Civil War, 317 ff.
tution, and the Democrats, or Conservatives, as they styled
themselves, took advantage of the fifth section of the act of
March 23, which required at least one-half of the registered
voters to vote on the question of ratification, as a condition
of the validity of the election. Non-action seemed to be
the easiest method of defeating the constitution, and they
accordingly absented themselves from the polls, only 70,812,
out of 165,812 registered voters, casting their ballots.¹

6. There had been a strong minority in Congress opposed
to the insertion of this section, who had foreseen this
very outcome; and the action of Alabama converted the
minority into a majority. A third supplementary bill was
accordingly passed. Johnson neither signed nor vetoed it;
and it became a law without his signature on March 11, 1868.
It provided that in future all elections authorized by the act
of March 23, 1867, “should be decided by a majority of the
votes actually cast,” thus preventing any repetition of the
Alabama experiment.²

7. The constitution submitted in Mississippi was rejected.
Constitutions were not submitted in Texas and Virginia until
a later date. The other States ratified their constitutions by
large majorities, and on June 22 the act “to admit the State
of Arkansas to representation in Congress” became a law.

8. Three days later the act admitting North Carolina, South
Carolina, Louisiana, Georgia, Alabama and Florida to repre-
sentation, became a law. Both bills were passed over the
President’s vetoes, Johnson to the last refusing to recognize
even in the most indirect way the constitutionality of the con-
gressional plan.

Eight of the eleven States were now nominally recon-
structed, but in fact they were only entering upon that
most trying period of their history—the era of “carpet-bag

government." The whole period of reconstruction is marked by blindness and prejudice on both sides. The spirit of compromise could find no place in either's plans. "What might have been" is always a fruitless subject of discussion; but any student of the three tumultuous years following the war cannot but see that the attitude of both the North and the South prevented the adoption of the plan of reconstruction which would with the least trouble and delay, have remoulded the unwieldy mass of liberated blacks into an orderly, progressive class of citizens. At the same time he can see that the divergence of views was inevitable and that it is impossible to say to one side "You were right," and to the other "You were wrong."
CHAPTER VI.

THE IMPEACHMENT OF THE PRESIDENT.

I. In the preceding chapters we have traced step by step the development of the theory of reconstruction and the formulation of the reconstruction acts of the 39th and 40th Congresses. We have noticed the wide divergence between the ideas of Johnson and those of the Republican party, and have seen that the whole program was carried over the vetoes of the President by the overwhelming Republican majority. But the contest between the President and Congress, which had been embittered by so many personalities on both sides, did not come to an end with the passage of legislation which fully embodied the congressional theory, but continued until it culminated in a desperate effort of the Republican party to remove Johnson from the presidential chair.

The very conditions under which he assumed the presidential office rendered his position difficult, and made estrangement of the executive and legislative departments an easy matter. On the particular issue of reconstruction Lincoln and Congress were at variance; but the tragic nature of Lincoln's death caused this matter to be forgotten in the overwhelming sense of the loss of the man who had safely guided the government through the most trying years of its history. But, for a Congress so extremely Northern and Republican, with antagonisms and prejudices which only fratricidal wars can create, to be compelled to work with a man not only a Southerner, but practically a Democrat, must of necessity bring about a crisis.
Moreover, the flourishing condition of the spoils system served to aggravate the antagonism between the two departments. History shows that, while selfish motives are always indignantly repudiated by politicians, they account for many of the more important political movements of the century. With the immense federal patronage at his disposal, Johnson realized that he had a powerful instrument of revenge at hand, and he did not hesitate to use it. At a time when every congressman was under the strongest pressure from his home constituency, inability to gratify the demands of the voracious office-seeker was indeed a cause for bitterness.

We can thus easily distinguish three causes which, working together upon a strongly Republican Congress, resulted in the attempted removal of the President. First, the antagonism arising from different fundamental political ideas, the strained conditions of the times, and the woeful tactlessness of Johnson; second, the almost morbid yet natural fears of the Republican party regarding the sometime seceded States; third, the anger aroused by the use of federal patronage to further the interests of the President.

2. Impeachment, however, was too serious a matter for Congress to enter upon lightly. Art. II, sec. iv, of the Constitution provides for impeachment as follows: “The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” Obviously the President had not committed and would not commit anything that could legally be called treason or bribery: Had he done or would he do anything which could be construed as a high crime or misdemeanor? The answer largely depended upon the person’s point of view. The extreme radical held that Johnson’s whole career as President could be considered as an attempt treasonably to reinstate the Southern States in a position of power. The
more moderate Republicans could not be made to acquiesce in this view, and it soon became evident that Johnson would never be brought to trial on impeachment, unless he could be made to violate some clearly defined law. The radical element, however, did not easily accept this situation. By every means possible they tried to force the moderates into line. The whole past career of the President was critically studied, and every act which could by any possible means be construed as a breach of presidential duty was put in the list of offences for which he should be tried. But all to no purpose. Something more tangible must be produced, or the trial would never occur.

3. Notwithstanding the evident indisposition on the part of many to proceed to extreme measures, the radicals determined to force matters to an issue, if possible. Under Mr. James M. Ashley of Ohio as leader, the attack was begun shortly after the opening of the second session of the Thirty-ninth Congress. On December 17, 1866, Mr. Ashley moved to suspend the rules so as to permit him to report a resolution from the Committee on Territories. His motion was not agreed to, and the first step towards impeachment was therefore a failure. The motion is of interest, however, as evidencing the deliberate intention of the radicals to discover some act which would justify impeachment. The resolution provided for a select committee who were to inquire "whether any acts have been done by any officer of the Government of the United States which in contemplation of the Constitution are high crimes or misdemeanors, and whether said acts were designed or calculated to overthrow, subvert or corrupt the Government of the United States, or any department thereof."

Again on January 7 resolutions looking to impeachment were offered by Mr. Ashley and two other persons. Mr. Ashley's resolution was adopted, while the others were re-
ferred to the Committee on Reconstruction and the Committee on the Judiciary. The resolutions which were referred gave as a reason for impeachment, "the purpose of securing the fruits of the victories gained on the part of the republic during the late war, waged by rebels and traitors against the life of the nation"—a decidedly strong statement to make, in view of the predominance of the Republican party at the time, and its ability to render nugatory any attempt of the President to take away from the republic "the fruits of the victories gained." Exaggerated expressions of this sort show how far the contest had degenerated from a conflict of opinions as to the constitutional position of the revolted States, into a personal warfare. Another significant reason for impeachment given in these resolutions was, that it was necessary in order to give "effect to the will of the people as expressed at the polls during the recent elections by a majority numbering in the aggregate more than four hundred thousand votes." It has already been shown how disastrously the campaign resulted for Johnson, and how it furnished popular sanction for the radical reconstruction legislation which was passed over the presidential vetoes. But, to assume that a popular expression of disapproval of the President's political program made impeachment a moral necessity, was to assume a novel position. It was also declared in these resolutions that the President was to be impeached for the high crimes and misdemeanors "of which he is manifestly and notoriously guilty, and which render it unsafe longer to permit him to exercise the powers he has unlawfully assumed."

These expressions seeming to be too indefinite, the specific charges submitted by Mr. Ashley met with more favor, and were accordingly adopted. These charges centered about an alleged "usurpation of power and violation of law" which was to be found in corrupt uses of the appointing, pardoning,
and veto powers, improper disposition of public offices and corrupt interference in elections. These were clinched again by the general charge that the President had "committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors,"—a charge obviously introduced to include any points which might in the future be made against him.

4. As the event proved, the attempt to bring matters to a successful issue in the 39th Congress was a failure. The Committee on the Judiciary went to work vigorously, calling many witnesses and collecting as much material as possible; but on the 28th of February it reported, with only one dissenting voice, that in spite of all its efforts not enough testimony had been gathered to warrant any report beyond a recommendation that the investigation be continued. The ninth member of the committee, Mr. Rogers of New Jersey, reported emphatically that a careful examination of the subject had convinced him that "there is not a particle of evidence to sustain any of the charges," and that "the case is wholly without a particle of evidence upon which an impeachment could be founded." He further declared that but little of the testimony taken would be admitted in the courts, and that the whole matter should be dropped, as it would certainly end "in a complete vindication of the President." Logically, the standpoint of Mr. Rogers was a correct one. From a strictly legal view of the case, there was very serious doubt as to the advisability of attempting impeachment; but the opponents of the President counted upon their large majority to force the matter, and the line of action recommended by the majority of the committee was adopted.

As has been seen, the 40th Congress assembled immediately upon the adjournment of the 39th; and on March 7, 1867, the new Judiciary Committee was authorized to
proceed with the investigation, and to continue it during any recess the House might take. By another resolution agreed to March 29, the committee was requested to report immediately upon the reassembling of Congress, which was to be in the following July, if political conditions seemed to require it.¹

The committee accordingly continued its investigations, but, though the radicals felt sure that it was composed of men who would favor impeachment, it at first reported by a majority of five to four against impeachment. A recommitment resulted in the conversion of one member of the committee² to impeachment views; and on November 25 Mr. Boutwell, of Massachusetts, reported from the committee a resolution impeaching the President for high crimes and misdemeanors.

5. The debate on this resolution was entered upon in December, 1867, and was marked by the effort on the part of the radicals to support a most indefinite and general charge. In spite of the thoroughness of the investigation of the Judiciary Committee, in which neither time nor expense had been spared, the attitude of the moderates was justified. Nothing had been unearthed which from the legal standpoint could be considered a high crime or misdemeanor. Failing in this, Mr. Boutwell assumed the ground that the evidence showed that President Johnson had been deliberately using his office to bring back, so far as possible, the Democratic party into power, and that his efforts to restore the insurrectionary States to their former power had been in the interest of the rebellion.

Although most Republicans at this time could not believe that the inhabitants of the Southern States were sincere in

¹ McPherson, 190.
² Dunning, in Papers of the American Historical Association, iv, 473; Congressional Globe, 1st Session, 40th Congress, p. 565.
their protestations of a desire to lay aside all differences and once more become loyal citizens, there were many who could not agree to Mr. Boutwell's definition of high crimes and misdemeanors; and these moderate Republicans, aided by the Democrats, defeated the resolution by a vote of one hundred and eight to fifty-seven. The attempt to impeach without definite legal charges had failed.

But the President soon gave the House the very opportunity it desired. While the direct attack upon the President was being carried on by means of the effort to impeach him, an indirect attack was made by the legislative limitation of his powers. One of the cries of alarmists had been that there was danger that the President might in some way take advantage of his constitutional position as commander-in-chief of the army and navy, so as to injure the government and advance his own interests. Some went even farther and declared that he designed with the aid of the army to overthrow the government, and place the United States in the power of the rebels. Such charges, viewed from the standpoint of history, seem too absurd for consideration, but during the reconstruction period the feverish condition of the country made possible the acceptance of almost any startling rumor.

6. But even those who did not apprehend that Johnson would use the army for any improper purpose, were willing to limit his power and prestige by depriving him of his military authority; and this was accordingly done by a section introduced into the army appropriation bill. This section required all orders to the army to be made through the General of the Army, thus practically making his approval of them necessary. It also prevented the President or the Secretary of War from removing, suspending or relieving from command the General of the Army, and even forbade

1 McPherson. 264,

2 Ibid., 178.
his being assigned for duty away from headquarters, except at his own request. This had the effect of taking away from the President all his constitutional powers as commander-in-chief. As the section was put as a rider on an appropriation bill and a veto must cover the whole bill, Johnson contented himself with a simple protest and returned the act with his signature.¹

7. The attack upon the civil powers of the President was made through the Tenure-of-Office Act.² As the violation of this act was the ground of the most serious charge in the impeachment trial, a somewhat detailed study of its provisions, and of the views expressed by the President in his veto of it, is advisable. The bill provided that “every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate,” and every person so appointed in the future, should be entitled to hold such office until a successor should have been appointed in like manner, that is to say, with the advice and consent of the Senate. The only liberty of action allowed the President was during the recess of the Senate, when he was permitted to suspend an officer until the next meeting of the Senate, and appoint a pro tempore official. Within twenty days after the meeting of the Senate, however, he was required to give his reasons for the suspension. If the Senate approved of the removal, a permanent appointment was to be made; if they refused to concur, the suspended officer was immediately to resume his duties. Any violation of this act by the President was made an impeachable offense, by the declaration that “every removal, appointment, or employment made, had, or exercised, contrary to the provisions of this act * * * are hereby declared to be high misdemeanors.”

¹ McPherson, 178.
² Vetoed March 2, 1867, and repassed by both houses on the same day. For copy of the act, see McPherson, 176 ff.
The other provisions were of minor importance, and do not require notice here.

The veto message of the President was a calm, dignified and judicial discussion of the constitutionality of the bill, and was in every way a creditable document, sustaining fully the high character of his previous vetoes. He called attention to the fact that the whole question of the authority of the President in cases of removal from office had been discussed thoroughly in Congress as early as 1789, and decided in favor of the President. He quoted Madison's argument to prove that all executive power, except what is specifically excepted, is vested in the President, and that as no exception was made as to the power of removal, it must be vested in him. He also cited many possible cases, in which it would be absolutely necessary for the President to possess the power of removal. A decision of the Supreme Court was referred to, in which it was observed that both the legislative and the executive department had assumed in practice that the power of removal was vested in the President alone. When, for instance, the Departments of State, War and the Treasury were created in 1789, provision was made for a subordinate who should take charge of the office "when the head of the Department should be removed by the President of the United States." Story, Kent and Webster were all quoted as affirming the same legislative construction of the Constitution. The great practical value of the power during the Civil War was noticed, and its present and future necessity strongly urged; and the message closed with an earnest appeal to Congress not to violate the original spirit of the Constitution.

8. The passage of the bill over the veto placed Johnson

---

1 His argument here, however, is weak, as the power of suspension would easily have covered all such cases.

2 Ex parte Hennen, January, 1839, 13 Peters, 139.
in a situation in which a collision was almost sure to come. As the chief executive of the country he was charged with the duty of carrying out the provisions of the reconstruction acts, notwithstanding his strong personal repugnance to them. Under the advice of Attorney-General Stanbery he had construed the acts literally, and he had thus frustrated in part the object of the legislation. But the cooperation of the army was necessary, and unfortunately for President Johnson, the Secretary of War, Mr. Stanton, strongly opposed his views, and conducted himself as far as possible in accordance with the wishes of the congressional majority. The continued friction between the President and the Secretary of War seemed to President Johnson to necessitate Stanton's retirement, but repeated hints to that effect were not recognized by the latter. Finally, on August 5, 1867, the President informed him that "public considerations of a high character constrained" him to say that his resignation would be accepted. The Secretary's prompt reply was that "public considerations of a high character" constrained him not to resign until the next session of Congress. A week later, August 12, the President formally suspended him and appointed General Grant Secretary ad interim. Stanton then submitted "under protest to superior force."

When Congress met in December the President reported his suspension of Stanton, and after long discussion the Senate, on January 13, 1868, refused to concur. When informed of this action of the Senate, General Grant immediately turned over the Secretary's office to Stanton, thus definitely committing himself to the congressional interpretation of the law. Grant's action was a sore disappointment to the President. Johnson had refused to accept the Tenure-of-Office Act as constitutional, and had purposed to make this a test case. In the correspondence which passed be-

---

1 McPherson, 261.
2 Ibid., 262.
between him and General Grant after the latter's acquiescence in the action of the Senate, Johnson claimed that it was understood that Grant was either to refuse to give up the office to Stanton, or, if he should be unwilling to take so prominent a part in the contest, to resign and permit the office to be filled with some one whose views agreed with the President's, so that Stanton, if he sought to regain the office, might be compelled to resort to the courts. In this way the constitutionality of the act could be tested. Johnson's statements as to the understanding with Grant were substantially endorsed by the Cabinet, on the strength of a conversation between Johnson and Grant at a cabinet meeting. Grant, however, firmly denied that there was any such agreement or understanding.¹

A few days after Stanton had resumed his duties as Secretary of War, the President sought to put in operation a plan for rendering his possession of the office ineffective. On January 19, he ordered General Grant, in charge of the army, to disregard all of Stanton's orders unless he knew directly from the President that they were the latter's orders.² The order was repeated in writing at Grant's request on January 29. On the following day, Grant refused to carry it out, declaring that an order from Secretary Stanton would be considered satisfactory evidence that it was authorized by the Executive.³ This correspondence between Johnson and Grant was subsequently called for by Congress, and an attempt was made to frame articles of impeachment on the ground that the President was instructing Grant to disobey the orders of his superior. Careful examination of the legal bearings of the question convinced a majority of the Reconstruction Committee that nothing would be gained by inserting charges

¹ The text of the correspondence between Grant and Johnson may be found in McPherson, *History of the Reconstruction*, p. 282 ff.
² McPherson, p. 283.
based on this correspondence. The President had shrewdly worded his communication so as not to violate any legal technicalities.¹

Having failed in his first two attacks upon Stanton, Johnson finally resorted to a still stronger measure. Completely ignoring the Tenure-of-Office Act, he addressed a letter to Stanton, February 21, removing him from office, and directing him to transfer all the property of the War Department to Adjutant General Lorenzo Thomas. Thomas, having received his appointment as secretary _ad interim_, proceeded to the office and formally demanded possession. Stanton avoided giving a direct answer to the demand, and on the following morning Gen. Thomas was arrested for violation of the Tenure-of-Office Act. After bail had been procured he renewed his demand, but Stanton ignored his appointment. Several plans were devised by the President and Thomas' lawyers to make the contest center around Thomas, but the congressional managers decided to drop the matter, and concentrate their energies upon a presidential impeachment.²

The last step of the President opened the way for immediate action. Violation of the Tenure-of-Office Act was explicitly declared an impeachable offense, and as to the flagrancy of its violation by the order of February 21 there could be no question. Many of the wavering Republicans now had their doubts of the expediency of impeachment cleared away, and on February 24 the resolution formally impeaching the President of "high crimes and misdemeanors in office" was passed.³

9. On March 2, the first nine articles of impeachment

¹McPherson, 265. The fact also that Grant had refused to be governed by Johnson's instructions made the attempt still less serious.

²See Dunning, _Papers American Historical Association_, 1890, p. 481.

³McPherson, 266. The vote was 128 to 47, divided strictly on party lines.
were adopted; two additional articles were added on the 3d; and on the 4th they were presented to the Senate. On March 30, the trial began. The articles charged the President with high crimes and misdemeanors in respect of the order for the removal of Stanton, the appointment of Thomas as Secretary of War *ad interim*, the attempt to hinder Stanton in the exercise of his lawful duties, the wilful violation of the Tenure-of-Office Act, the attempt to seize the properties of the War Department, the attempt unlawfully to disburse moneys through the appointment of Thomas, an attempt to make General Emory violate the Tenure-of-Office Act, the attempt to injure the good reputation of the legislative department by speeches delivered at various specified places, and his determined opposition to the reconstruction policy as outlined in the various acts of Congress.¹

These articles were very sweeping, and were designed as a sort of drag-net to include all of the complaints which could possibly be brought against the President. Yet the House of Representatives, previous to the attempted removal of Secretary Stanton, after the most searching examination into the President's record, had failed to find sufficient ground on which to base an impeachment. Therefore the only charges that deserved really serious attention were those growing out of the violation of the Tenure-of-Office Act. In the President's reply to the charges he explains his attitude on this matter. In his opinion the Tenure-of-Office Act was unconstitutional. The very fact that he as Executive was legally held responsible for the acts of the Secretary of War made it necessary for him to exercise the power of removal or of indefinite suspension. He had at first complied with the letter of the act in order to avoid a further struggle with Congress; but, hav-

¹For the full text of the eleven articles, see McPherson, 266 ff. For a critical discussion of the legal points involved in the trial, see Dunning, in Papers American Historical Association, iv, 483 ff.
ing been frustrated by Congress in his design, the only alternative that remained to him, in view of his strained relations with the Secretary of War, was the latter's unconditional removal.

10. The President's case, as to the constitutionality of his action and the unconstitutionality of the Tenure-of-Office Act, was strong, and was presented with great ability by the President's counsel. But, from the very beginning, it was obvious that the case would be determined mainly on political lines.

If the Republican party could hold all the Republican Senators to the decision of the majority, a verdict of guilty was assured. Consequently, the strongest efforts were made to bring all into line. But some proved recalcitrant. The prospect that the President of the United States was to be forced out of his office as a punishment for his opposition to the Legislative Department was not edifying. Hitherto the presidential office had possessed great dignity. To be sure, Johnson's conduct had gone far towards the destruction of that dignity, but a conviction on impeachment charges would drag down the office immeasurably. Some of the Senators also realized that the tendency of Congress during the whole struggle had been towards an encroachment upon the executive powers, and that there was serious danger that the balance of the governmental system might be destroyed. While, therefore, they strongly disapproved of Johnson's conduct, they felt unwilling to expose the government to the shock which would accompany his removal from the presidential chair. The trial proceeded slowly and the case was ably contested by counsel on both sides; but the prosecution was practically brought to a close on May 16, by the vote which was taken on the eleventh article of impeachment. This article was chosen for the first test of strength, because it embodied those charges which had caused the most feel-
ing, and which were best calculated to cause Senators to cast aside judicial restraints and vote according to their prejudices. But, seven Republicans refused to line themselves with the radical majority. They and the twelve Democratic Senators voted for acquittal. Thirty-five Republicans voted "guilty," but this lacked one of the needful two-thirds majority. Ten days later another vote was taken on the second and third articles, with the same result. The fight was then given up, and the court of impeachment was declared adjourned.

11. It was a fortunate thing for the country that the attempt failed. The convulsions of the Civil War had unsettled most seriously our conceptions of the relations of the three co-ordinate departments of the government. Lincoln had not hesitated to assume powers totally outside the ordinary functions of the Executive. The country had sustained him in this; but, with the return of peace, and with Johnson in the presidential chair, Congress had determined to resume its powers. Again the country responded; but the violence of the reaction caused the pendulum to swing too far in the opposite direction; and our institutions were placed in greater danger than they were in before. But, just as the Civil War had settled the question as to the indissolubility of the Union, so no less emphatically did the failure of the impeachment trial confirm the equality of the three departments of our government.
AUTHORITIES.

Blaine, James G. Twenty Years of Congress. Norwich, 1884.
Dunning, Wm. A. Articles on Civil War and Reconstruction, in Political Science Quarterly, vols. i. and ii., and on The Impeachment, in Papers Am. Hist. Assoc., vol. iv.
Herbert, Hilary A. Editor. Why the Solid South? Baltimore, 1890.
Savage, J. Life and Public Services of Andrew Johnson. New York, 1866.
Williams, G. W. History of the Negro Race in America. New York, 1883.
II

RECENT CENTRALIZING TENDENCIES IN STATE EDUCATIONAL ADMINISTRATION
RECENT CENTRALIZING TENDENCIES
IN
STATE EDUCATIONAL ADMINISTRATION

BY

WILLIAM CLARENCE WEBSTER, Ph.D.
Seligman Fellow in Administration
CONTENTS

CHAPTER I
Introduction ......................................... 7

CHAPTER II
The Relation of State Aid to State Control of Education . . . 12

CHAPTER III
General Outline of Present State Educational Administration . 16

CHAPTER IV
The Rise and Fall of the "District System" ................. 23

CHAPTER V
Compulsory Education ................................ 32

CHAPTER VI
State Regulation of Text-Books ......................... 49

CHAPTER VII
State Regulation of Courses of Study ..................... 60
CHAPTER VIII
State Control of Teachers' Examinations . . . . . . . 63

CHAPTER IX
State Control of Teachers' Institutes . . . . . . . . . 68

CHAPTER X
Appellate Jurisdiction of State Superintendents and State
    Boards . . . . . . . . . . . . . . . . . . . . . . . . . . . . 73
CHAPTER I

INTRODUCTION

Although popular education, since the earliest days of New England history, has been fondly cherished as one of the chief characteristics and safe-guards of our American polity, and although public schools early became quite generally diffused, especially throughout the North, yet at the opening of the present century it could scarcely be said that any of the States had what could be dignified by the term a "public school system." Almost everywhere throughout the country the establishment and continued maintenance of free public schools depended chiefly upon local initiative and local public sentiment, while so far from there being any effective control and supervision of the schools, this factor was almost entirely wanting in every State. What little control and supervision existed was local, and took in no larger area than the township or county, and with the general establishment of the so-called "district system" was ushered in an era of the most extreme decentralization conceivable, during which a multitude of petty local boards and "directors" ruled supreme in their infinitesimal districts. Each district was a law unto itself; of uniformity and system there was none.

This extreme decentralization in educational administration lasted till quite late in the present century, but gradually as population advanced and wealth accumulated the primitive conditions gave way to modern complexities, and as a result the early decentralization has also been obliged
to give way at many points. During the first half of the present century (roughly speaking) township and county supervision over the expenditure of school moneys, the levying of local school taxes, the erection and repair of school houses, the fixing of school terms and salaries, and other matters of a purely business character, was constantly becoming more and more thorough. During the latter half of this century this control has been gradually extended to an oversight of educational methods and courses of study, the qualifications and selection of teachers, grading, classification, discipline and sanitation. And, furthermore, during the latter period, township and county supervision has been quite generally supplemented by more or less thorough State control over many branches of school administration. First of all there were developed in most of the States special school funds and a general system of taxation for the encouragement and partial support of public schools. Parallel with and closely connected with this movement was the differentiation and development of separate State educational departments, and this movement has in many States been attended with the downfall of the "district system" and the establishment of a quite thorough central control over such branches of educational administration as text-book supplies, courses of study, the examination and qualifications of teachers, compulsory attendance and truancy.

The first State to develop a permanent educational department was New York. In 1812 this State created the office of "Superintendent of Common Schools." A little later there was a retrograde movement in this State. In 1821 the above office was abolished, and until 1854 the Secretary of State was made ex-officio State superintendent of schools. In 1841, however, the office of deputy superintendent was created, and the duties of the Secretary were largely turned over to him. In 1854 the office of
superintendent was revived. In the meantime, eighteen other States had established similar offices, among the earliest of which were Vermont, Pennsylvania, Michigan, Massachusetts, Kentucky, Ohio, Missouri and Connecticut. For a time most of the States merged the office of superintendent of public instruction with some other office already established, and the former office was regarded as merely nominal. For example, Missouri, Ohio, Pennsylvania, Vermont and Louisiana, like New York, merged the office in that of the Secretary of State; Colorado, in that of the State Treasurer; Oregon, in that of the Governor. Of course there was no logical or organic connection between the offices thus merged, and whatever development there was in the public school system under this regime was in spite of the fusion; yet owing largely to political reasons, it proved very difficult to get the two offices permanently separated. But after a long and rather tedious development, there exists to-day a separate educational department in the administrative system of every State and Territory, except Alaska, headed in each case, except in Delaware, by a separate chief administrative officer.¹ In every State public education is looked upon as primarily a State affair subject to State regulation.

Furthermore, this changed condition of educational administration has already found clear and emphatic expression in the organic and statute law, and in the judicial decisions of nearly every State and Territory. The constitutions of all the States, except Delaware and New Hampshire, make it compulsory on the part of the legislature to provide a system of public schools, free to all children of

¹In Oklahoma the superintendent of public instruction also acts as territorial auditor. In Maryland the principal of the State normal school is ex-officio superintendent of public instruction. The schools of Alaska are supervised by a resident general agent of the Bureau of Education.
school age in the State. Most of the States have gone further, and provided in their organic law for State school funds the principal of which is not to be diminished, and the interest on which is pledged for the support of schools and forbidden to be used for any other purpose. Many of the State constitutions also make quite specific provision for central supervision by a State board or superintendent, or both. The underlying doctrine of these constitutional provisions for education is that “knowledge and learning, as well as virtue, generally diffused throughout the community, are essential to the preservation of a free government and of the rights and liberties of the people.” This principle, so early enunciated in the Massachusetts constitution, is found to-day, expressed in but slightly modified form, in at least fifteen of the State constitutions, and, as said above, is really the basis of all these provisions. Several other lines of State control are laid down in the constitutional law of some of the States, as for example a minimum school year, the prohibition of sectarian instruction, the prohibition of grants of public money to sectarian schools, and compulsory education.

It would seem, therefore, that State control is quite clearly asserted in the organic law of the States. We find also that the courts fully sustain the principle. The following extract from the opinion delivered in the case of State v. Haworth will serve as a typical expression of the opinion of the courts.

1 Const. Al., art. xiii, sec. 7; Cal., ix, 2; Col., ix, 1; Fla., xii, 2–3; Ga., viii, 1; Id., ix, 2; Ind., viii, 8; Ia., ix, 1st, 1–10; Kan., vi, 1 and 9; La., art. 225; Mich., xiii, 1 and 9; Miss., viii, 2–4; Mo., xi, 4; Mont., xi, 11; Nev., xi, 1 and 7; N. C., ix, 8–12; Or., viii, 1; S. C., x, 1; Tex., vii, 8; Va., viii, 1–2; W. Va., xii, 2; Wis., x, 1; Wyo., vii, 14.

2 Const. Ark., art. xiv, sec. 1; Cal., ix, 1; Id., ix, 1; Ind., viii, 1; Me., viii; Mass., chap. v, sec. 2; Minn., viii, 1; Mo., xi, 1; N. H., art. 83; N. C., ix, 1; N. D., viii, 1; R. I., xii, 1; S. D., viii, 1; Tenn., xi, 12; Tex., viii, 1.

3 122 Ind., p. 462.
regarding the present legal status of the schools in the different States: "Essentially and intrinsically the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of State and not of local jurisdiction. In such matters the State is a unit. . . . The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities; but on the contrary it is a central power residing in the Legislature of the State. It is for the law-making power to determine whether the authority shall be exercised by a State board of education, or distributed to county, township, or city organizations throughout the State."

In the Pennsylvania case of *Ford vs. Kendall Borough School District* the court went still further in its assertion of the power of legislature to centralize educational administration. The following brief extract from the opinion in this case will enable the reader to understand the doctrine of the court on this point: "We may assert positively and without hesitation that school districts are but agents of the commonwealth and are made quasi-corporations for the sole purpose of the administration of the commonwealth's system of public education."

1 121 Pa. St., 547.
CHAPTER II

THE RELATION OF STATE AID TO STATE CONTROL OF EDUCATION

American interest in popular education early took the tangible form of munificent State aid. As early as 1786 New York set apart two lots in each township of the unoccupied lands of the State for "gospel and school purposes," and fifteen years later ordered that the net proceeds of one-half million acres of vacant and unappropriated lands should be devoted to the school fund. In 1795, when Connecticut sold the Western Reserve for one million dollars, she turned this sum into the school fund, which had been started as early as 1733 from the proceeds of the sales of lands in the northwestern part of the colony. Tennessee, in 1806, prompted by Congress, devoted one million acres of land each to colleges and academies, and one-thirty-sixth of the remaining unoccupied lands to common schools. Other States soon followed suit by starting school funds of various descriptions: Virginia and New Jersey in 1810, South Carolina in 1811, Kentucky and New Hampshire in 1821, Maine about the same time, North Carolina in 1825, and Massachusetts in 1834.

But it is neither necessary nor profitable for present purposes to trace at all in detail the rise and development of these State school funds. Suffice to say that at present the principle of State aid to common school education is firmly established, every State in the Union adopting the principle either by setting apart special funds or by providing various
forms of taxation or appropriation for the same. It may be worth while, however, to note some of the almost endless varieties of State aid for education developed in the different States. The following are only part of the many species of funds and taxation for education: tax on banks, savings banks, trust companies, etc.; tax on dogs and other animals; tax on railroads; fines for intoxication and other offences against the State; licenses for auctioneers, brokers, circuses, liquors, taverns, restaurants, marriages, etc.; percentage of fees of justices of the peace, prothonotaries, recorders of deeds, and other public officers; poll taxes; proceeds of the sales of public lands; moneys arising from the lease of oyster lands; proceeds of the sale of escheats, estrays, unclaimed dividends, etc.; proceeds of tax sales; dividends on State Bank; riparian rents and sales; saline funds; convicts' hire; mill tax, etc., etc. The proceeds from the various funds and taxes are usually apportioned to the counties or towns by the State superintendents and paid out by the State treasurer (sometimes by the State auditor) on warrants issued by the apportioning authority. Sometimes, however, the apportionment is made by the State board of education, the school fund commissioners, the State treasurer or the State auditor. The usual basis of apportionment is the number of school children of school age, but sometimes the number of schools or teachers in the local area.

But from the standpoint of the present chapter it is only important for us to note the bearing of State aid upon State control of education. The one naturally and necessarily led to the other. The granting of aid on the part of the State implied conditions upon which the aid should be received by the localities. These school funds and systems of taxation were not established simply for the benefit of the localities as such. Had this been the case the support of schools might have been left wholly to the localities. But the estab-
lishment of these funds is an evidence in itself of a dawning sense of the need of a State system of education under State supervision and control. These funds were established for the promotion of the public good in a wider sense. The State had interests of its own to foster, and a policy of its own to carry out. The establishment of State school funds, then, became the basis of a distinctive State policy, and inaugurated a system of State control and intervention in the field of education.

In the first place these State funds led to a better system of school returns, with all that this implies. Prior to the granting of regular State aid to the localities, it was all but impossible to get even the most meagre statistical returns from the same, because there was no adequate incentive for compliance and no effective penalty for refusal and neglect. Now, when the localities understand that their share of the State appropriation will be withheld in case of non-compliance with the statistical demands of the central department, it is needless to say that even very extensive and detailed statistics are quite readily obtained. The very great value and importance of such statistics in developing a real system of public education is too apparent to require further mention.

But this vast fund of statistical information is not the only result of the granting of State aid to the schools, nor the only form of State control growing out of the same. It is primarily by the power of withholding appropriations from the localities that the State exerts its strong arm of control in other directions. It is the fear of losing their share of the State moneys that serves as the most effective method of inducing the localities to maintain schools during the entire period prescribed by law; to provide instruction in all the

1The earliest school reports and still earlier sources of information abound with evidence of the careless neglect and indifference of the localities in this respect.
required branches of study; to employ only those teachers who conform to various requirements made by law and by the various school administrative authorities of the State; to comply with numerous and important State regulations as to school property; in some cases to raise a certain required sum by local taxation; in some cases to enforce compulsory attendance laws and factory legislation with reference to children; in some cases to follow a State course of study, and to use text-books prescribed by the same authority; to carry out various rules of the State superintendent or State board too numerous to mention.

It is very evident, therefore, that State aid to education has proven a condition precedent to any and all effective State control over the same. The one led necessarily but almost insensibly to the other. Without detailed treatment, then, I point to the establishment of State school funds and State systems of taxation for public education as the first important step taken in this country towards a centralization of school administration.
CHAPTER III

GENERAL OUTLINE OF PRESENT STATE EDUCATIONAL ADMINISTRATION

The usual title given to the chief educational officer of the State is "Superintendent of Public Instruction." In some States, as in Georgia, Ohio and Rhode Island, he is called "State Commissioner of Schools;" in some, as in Connecticut and Massachusetts, "Secretary of the State Board of Education;" in some, as in Alabama, Louisiana, South Carolina and Vermont, "State Superintendent of Education." A few other titles are in vogue.

In the majority of the States this official is elected by the people, but in quite a number of cases he is an appointive officer. He is appointed by the governor, generally subject to confirmation by the Senate, in Maine, Minnesota, New Hampshire, New Jersey, Pennsylvania, Tennessee, Arizona, Oklahoma and New Mexico; by the State board of education in Connecticut and Massachusetts; elected by the legislature in New York, Vermont and Virginia. The term of office of this official varies from one to four years in the different States, but the evident tendency is to lengthen the term. At least seventeen States ¹ now prescribe a four years' term, and four States ² a three year term. Several States, which have a shorter legal term, make a practice of frequent reëlections.

² Me., N. J., N. Y., O.
The powers and duties of the State superintendent differ somewhat in the various States. The following are the most common functions assigned to him: to visit schools and consult with local officers and boards; to prepare registers and various blank forms to be used by the school officers of the State; to collect statistics concerning pupils, attendance, school taxes, etc., and receive reports from county superintendents, county examiners and various local boards; to report to the governor the condition of the public schools, the State normal schools and other educational institutions; to apportion school revenues among the different localities and frequently act as secretary of the board of commissioners of the school fund; to grant and revoke State teachers' licenses; to recommend (and frequently to prescribe) textbooks, library books, courses of study, and courses of reading for teachers; to publish the school laws; to decide appeals and points of school law, and publish his decisions; to bring actions for recovering misapplied moneys, etc.; to act ex-officio as trustee of normal schools, regent of the State university, etc. It is also worthy of notice here that the State superintendent in some cases exercises a rather important appointing power. For example, in quite a number of States he appoints institute conductors and instructors. In Vermont and Alabama, he appoints the county superintendents; in New York he appoints local boards for normal schools, can veto the appointment of normal school teachers, and can remove any school commissioner for neglect of duty; in West Virginia he appoints trustees of normal schools, commissions and removes county superintendents for cause; in Pennsylvania he commissions county, borough and city superintendents, fills vacancies in the office of county superintendent, and appoints trustees for normal schools and examining committees for the same; in Ohio and Kentucky he appoints the State board of examiners; in
Michigan he appoints a State board of school visitors; in Tennessee he appoints agents in each county to visit schools. In some States he can revoke teachers’ licenses for cause.

Most of the States not only have a State superintendent but also a State board of education. These boards are generally composed of some of the following State officials: governor, lieutenant-governor, secretary of State, State auditor, attorney-general, comptroller-general, surveyor-general, State treasurer, president of the senate, speaker of the assembly, and superintendent of public instruction. Sometimes in addition to one or more of the above officials, the board is composed of persons appointed by the governor, as in Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, South Carolina, Tennessee, and Washington; appointed by the State superintendent, as in Nebraska and Texas; elected by the legislature, as in Connecticut and Rhode Island; or elected by the people, as in Michigan. In some States this board is mostly or entirely a professional body, embracing in addition to the governor and State superintendent, such persons as the presidents of the State university, normal schools, and agricultural college, and sometimes a few leading city superintendents.

The functions of the State board differ quite widely in the various States. Most of these boards share with the State superintendent the exercise of part or all of the functions mentioned above as pertaining to the latter official. In addition to these functions, some of these boards, as we shall see, exercise an extensive control over text-books, courses of study, and the examination and licensing of teachers. Some are given the broad grant of power to “adopt rules

---

1 All except Al., Ark, Ill., La., Me., Minn., N. H., N. D., N. Y., O., Wis., Pa., Vt., S. D., Utah, Wy. Several of these States have boards for supervising the State Normal Schools.

2 Eg., Cal., Ind., Kan., N. Mex., Ok., Utah.
and regulations for the government of the public schools of the State."¹ The State board of Michigan,² Tennessee,³ Maryland,⁴ Florida,⁵ New Jersey,⁶ and perhaps a few other States "controls" the State normal schools. Some of the State boards exercise an important appointing power. For example, the State board of Mississippi,⁷ New Jersey and Virginia appoints county superintendents. The board of the latter State also appoints city superintendents and district trustees. The Louisiana board appoints parish boards of directors and in conjunction with the governor, 8 out of 20 of the city board of New Orleans. The South Carolina board appoints county boards of examiners. The Florida board fills vacancies in county boards. As noted above, the State board in several cases appoints a secretary who virtually acts as State superintendent. In some cases also the power of suspension and removal is expressly conferred upon this board. The Florida board can remove any subordinate officer for incompetency. The Virginia board can remove city superintendents and district trustees and "punish" county superintendents for neglect. The Mississippi board can suspend county superintendents for incompetency. The Maryland board can suspend any examiner or teacher for gross neglect or inefficiency. In quite a number of the States this board can revoke teachers' licenses for cause. The most common and important functions, however, of this board are the examination of candidates for State teachers' licenses and the management of the State school funds.⁸ Some

¹ Cf., for example, the school law of Cal., Col., Ky., La., N. J., N. C., Or., Miss., and a few other States.
² Const. Mich., art. xiii, sec. 9.
³ Code Tenn., 1884, art. ix, ch. 4.
⁵ Sch. Law, 1895, sec. 18.
⁶ Sch. Law, 1895, p. 6.
⁷ Appointed by the State Board in 14 cos.; elected by the people in the others.
⁸ Sch. Law, 1894, sec. 4258.

⁸ Some States have a State board of examiners in addition to the State board of education.
States which do not have the typical State board of education do have a corporate board solely for the control of the school funds.¹ A few other States have central boards with the sole function of examining and licensing teachers.² Minnesota has a State high school board, which will be described in Chapter VII.

It is interesting to note right here that the school law of Massachusetts and Connecticut specifically provides for State agents to be appointed by the State board. Connecticut has one such paid agent at present, who is empowered "to secure the due observance of the laws relating to the instruction of children," but his main function is to enforce the compulsory attendance law.³ Massachusetts has six paid State agents who do a great deal in the way of investigating local school matters, but do not seem as yet to exercise any very thorough control.⁴

Descending in the official scale, the next grade of administrative officials is that of the county. All of the States outside of New England, except Ohio and North Carolina,⁵ have a county superintendent or county examiner in each county, and one State in New England, Vermont, has a county examiner. The term of service of these officials varies from one to four years, with a preponderant majority in favor of a two-year term. In the majority of States these officials are elected by the people. In some States they are appointed by the county board; in some by the county court; in some by town superintendents or trustees; in a few, as we have seen above, by the governor, State superintendent, or State board.

The following are the usual functions of these officials: to visit periodically each school in the county, for the pur-

¹ Ark., N. D., W. Va., Wy.
² Ia., O., N. Y., W. Va., Wis.
³ Sch. Law, 1896, secs. 14, 15, 30, 35.
⁴ Sch. Law, 1892, p. 15.
⁵ This office was abolished in N. C. in 1895.
pose of examining the discipline and mode of instruction in the same and noting the condition of school property; to counsel teachers and local boards; to hold teachers' institutes; to make reports to the State superintendent concerning the condition of the schools of the county; to apportion the school moneys to the districts and to withhold the same in certain cases; to fix boundaries of districts in case of disagreement; to condemn school-houses; to examine candidates and grant certificates and frequently with power to revoke the same for good cause; to draw orders for school moneys; to decide appeals on various local questions subject to final appeal to the State superintendent or other State authority; to appraise school-lands lying in the county; to act as chairman or secretary of the county board; to appoint school officers and locate school-houses when districts fail to do so; in some States to fill vacancies in district boards; in some to prescribe the county text-books and course of study; in a few cases to remove township or district officers for cause. All but eighteen of the States also have a county board appointed in various ways. In some cases this board is simply a board of examiners, but in most cases it shares with the chief county school official most of the functions noted above. In quite a number of States the county board levies school taxes and in a few States employs the teachers of the county.

It thus appears that these county superintendents and boards generally occupy about the same position with reference to the schools of the county as the State superintendent

1 For example, Al., Ind.

2 All except Ark., Col., Del., Id., Ill., Ia., Minn., Mont., Neb., N. J., N. Y., N. D., Pa., Tenn., Vt., W. Va., Wis., Wy.

3 In a few cases appointed by the central authorities (the governor or State board); in some by the county board of supervisors; in a few by the county court or grand jury; in some by the county superintendent; in some cases they are elected by the people.
and board do with reference to those of the entire State, subject, however, in a more or less tangible manner to the State authorities. The school law of many of the States declares specifically that these county officials are subject to such rules and instructions as the State superintendent or State board may make, and frequently also directly commands them to carry the same into effect. This subjection of local officials to State authority seems to be made quite effective by the fear of losing the State appropriation, also in some cases by central appointment of these officials, and still more so in a few cases by the power of suspension and removal granted to the central authorities.

In New England the town school committees or supervisors occupy the same place with reference to the schools of the town as do the country authorities with reference to the schools of the county in the States just noted. In many States having the above county school organization there are township officials occupying an administrative position midway between that of the county and "district" authorities, and exercising in the township extensive powers of regulation with greatly varying degrees of subjection to county authority. The powers of "district" officials will be considered in the next chapter.

1 In some States the central educational department makes quite detailed and elaborate regulations for the localities concerning such subjects, for example, as length of daily sessions, hours for beginning and closing school, hours when teachers must be present, length of intermission, excuses for tardiness and absence, cleanliness of pupils, keeping of school registers, minimum passing grade for all local teachers' examinations, etc., etc.
CHAPTER IV

THE RISE AND FALL OF THE "DISTRICT SYSTEM"

In 1789 the general court of Massachusetts enacted the following seemingly innocent and salutary law: "And whereas, by means of the dispersed situation of the inhabitants of the several towns and districts in this commonwealth, the children and youth cannot be collected in any one place for their instruction, and it has thence become expedient that the towns and districts, in the circumstances aforesaid, should be divided into separate districts for the purpose aforesaid. Be it therefore enacted," etc.¹ Fifty years later Horace Mann, commenting on this law, declared it to be "the most unfortunate law on the subject of common schools ever enacted in the State of Massachusetts."

Before considering the evil effects of the above law thus severely condemned, it may be well to note that its content was not really new: it simply legalized existing usages. During the 17th and 18th centuries, as the exigencies of rapid migration and settlement widely scattered many of the farming settlements, the people had hastily solved the new educational problems thus presented in a very primitive and crude manner, without calculating the consequences. As it became impossible for the children of the township to go to the school, the school went to the children. We therefore begin to frequently read of "moving schools." This process was often called in military fashion "squadroning out the schools." By a gradual transition small school-houses were

¹ Act, 1789, chap. xix, sec. 2.
erected in the different "squadrons," and the towns became definitely divided into "districts," each district being allowed to draw its share of the school money and expend it in its own way. Thus by the middle of the 18th century the earlier "township system" practically ceased, and the era of the "district system" began. For more than fifty years, therefore, before the law of 1789, towns had been forming "districts." The importance of this law lies in the fact that by sanctioning, it greatly encouraged this splitting up of towns into districts, and the "district system" thus received a new impetus. And yet to be quite accurate we should note that no powers were conferred on the district by the law of 1789. The district was not made a corporation, and was not distinctly authorized to furnish school-houses, elect officers, contract with teachers, nor indeed to do any act whatever concerning the schools. Furthermore, not a single duty in regard to schools was imposed upon the district. Of course this state of affairs could not long continue, and in 1800 the power to tax was conferred upon the people of the district. The next step was to make school districts corporations with full power to sue and be sued, to make and enforce contracts, etc. This was done in 1817. The final touch to this process of minute subdivision of power was given in 1827, when school districts were empowered to elect prudential committees, to whom were confided the care of school property and the important trust of selecting and contracting with teachers. At last the school district has become a full-fledged political institution, and American sovereignty split up into the minutest conceivable fragments. Surely the principle of "local self-government" here reaches its most extreme and absurd development. And unfortunately the evil effects of the "district system" were not con-

---

fined to Massachusetts. The spirit of the law of 1789 and its sequels was altogether too much in harmony with the extreme American predilections of the time toward local self-government, to prevent it being rapidly transplanted into the other New England States, thence via New York into nearly all the other Northern States of the Union; and this was mostly accomplished before the worst features of the "district system" had been demonstrated in Massachusetts or known outside of that State. This rapid adoption by other States, therefore, of the Massachusetts "district system" in the earlier part of this century marked the extreme limit of decentralization in American school administration. The latter half of the century, on the other hand, is witnessing a very general undoing of this faulty early administrative development. I point to this very general downfall of the "district system" as one of the important and salutary tendencies towards centralization in American State school administration, which is characteristic of the times.

What, then, to be more definite, is the "district system," and what are its attendant disadvantages and evils? To what extent are they being recognized and avoided in the recent school administration of the different States? This is a term applied to a system under which a State becomes divided into nearly or quite as many independent units of school government as there are individual schools to be governed, except in cities and incorporated towns, where all the public schools of the community are generally under one management. Each "district" has its separate body of officials, intrusted, to a greater or less extent, with the management of its school affairs. These officials, variously called "school committees," "school visitors," "school directors," "school trustees," "school boards," "school commissioners," etc., are generally elected by the voters of their respective districts, for terms varying in different States from one to four
years. Their duties in the various States are quite similar, viz., the levying of local school taxes and expending of the same, the employment of teachers, the provision and maintenance of school-houses and other school property, the selection of text-books and regulation of courses of study, and the general supervision of the school or schools of the district. Too often these officials have no qualifications whatever for these important duties, and are always comparatively irresponsible in the performance of the same.

It will aid us not only in trying to understand the evils of the "district system," but also in judging the extent to which these evils are now being recognized, to note the objections most frequently urged against it in the school reports of various States. The following are some of the most important evils of the system which I find quite generally recognized:

(1) It fosters a very narrow provincialism, and is fatal to a broad and generous public spirit in school administration. The constituencies of the district officials are generally so small as to represent little more than individual caprices and prejudices rather than real public sentiment or policy. The parsimony of the typical school directors has long since become proverbial. Speaking of this one writer very wittily, but quite correctly, says: "Questions involving the fate of nations have been decided with less expenditure of time, less stirring of passion, less vociferation of declamation and denunciation, than the location of a fifteen-by-twenty district school-house. . . . I have known such a question to call for ten district meetings, scattered over two years, bringing down from mountain farms three miles away men who had no children to be schooled, and who had not taken the trouble to vote in a presidential election during the period."¹

It thus appears that under the "district system" public sentiment is very likely to be neutralized by private selfishness.

Average public sentiment has no real opportunity for vigorous action when the township is split up into ten or twenty infinitesimal political units. This extreme localization of administration inevitably tends to breed irresponsibility of the worst sort, and school offices are very apt to become mere perquisites used solely for selfish personal ends.

(2) The "district system" is much more expensive in proportion to what it accomplishes than a more centralized system. By means of it hundreds of schools in every State in which it exists are kept in operation which really ought to be abandoned. The school reports are full of evidence to this effect.\(^1\) It is not at all unusual to find from one to two hundred schools in a State in which the average attendance is less than ten pupils.\(^2\) In the Massachusetts Report for 1873 (p. 16) an instance is given where a school was taught some months for the solitary benefit of one scholar, at an expense of $60. The Pennsylvania Report for the same year (p. 135) instances a district in which the school was composed solely of members of one family. Cases nearly or quite as bad frequently occur under the "district system." The system evidently stands condemned on the ground of economy.

(3) The "district system" enormously increases the number of officials. The following typical quotation well illustrates this point: "We have in Illinois in round numbers 20,500 teachers, for whose employment and supervision 34,602 directors—supposing that each district has but three—and 8,000 trustees and treasurers seem necessary, making in all 42,602 school officers. Counting the boards of education in districts with over 2,000 inhabitants, it is certainly


\(^2\) There were 3387 districts in New York having an average attendance of 10 or less pupils during the school year 1894-5.
not too much to say that 4,300 school officers, or one-eightieth part of the population of the State, are to be kept in office for the schooling of 750,000 children, or one school officer for every 20 children, and when we except the city of Chicago, one school officer for every 15 children.\(^1\)

(4) Closely connected with the above defect is the increase in the number of school elections which the "district system" begets. And no class of elections causes more feuds and animosities than school elections. The smaller the territory and the pettier the office, the greater are the enmities and strife engendered.

(5) The "district system" occasions glaring and unjust inequalities in school taxation and school privileges. Unquestionably the intent of the school law of the various States is that school taxes and school privileges shall be uniform; but even a cursory study of the State school reports reveals the most ridiculous inequalities in these respects, even in different parts of the very same township. In most of the States the principle of taxing the wealthier parts of the State for the benefit of the poorer is well established. The State school fund and the State school tax is apportioned to the various counties or towns according to some uniform plan, generally in proportion to the number of children of school age or the number of ratable polls; but under the "district system" the principles comes far too short of effective application. Even as regards the further distribution of State moneys among the various districts, the poorer districts manifestly receive by far too small a share when the distribution within the township is according to either of the above plans.\(^2\) But this is not all of the inequality. The State tax

\(^1\) *Ill. Sch. Rep.*, 1885–6, p. cxxii.

\(^2\) I have counted all told more than 30 plans of distribution within the township in the different States. The most usual plans besides those noted above are (1) the number of families; (2) the number of able-bodied persons over 21 years of age; (3) the number of houses; (4) equal amounts.
is generally only a small part of the actual cost of the schools. Most of the money is raised by district taxation, and precisely here is where the inequality presses most heavily.\(^1\) This leaving the poorer districts to shift for themselves gives rise to shockingly meagre school privileges in many cases. In almost any county or town in any State where the "district system" exists, there are some districts in which school is held only long enough to draw the State money. In fact this auction plan seems to be in high repute in some sections of the country, and consequently we frequently find that within the very same town one child can attend school only 12 weeks, while another in a different district can attend 36 weeks. Furthermore, in one district children are well taught, in another near by they are grievously mistaught; in one district they can sit in cheerful and healthful school-rooms, and have the advantages of good libraries and apparatus; in another just the reverse is true.

(6) The "district system" does not admit of any continuous and steady-school policy. Committees are generally chosen for short periods, and the changes of teachers are correspondingly frequent and hap-hazard. Furthermore, committees are seldom elected because of their fitness or familiarity with present educational needs, but are in fact generally conspicuously unfit. The result is that school policy is spasmodic, and continuity is lost in the maelstrom of petty district politics.

(7) It does not admit of any effective system of grading or classification.

(8) It bars out all really effective supervision.

(9) It fosters boundary quarrels.

Such then are the principal weaknesses and defects of the extremely decentralized "district system." That they are

\(^1\) It is not at all unusual to find one district paying 5 to 8 times the per capita tax of an adjoining district, and for about the same privileges.
now being very generally recognized and discussed is proven by the fact that the recent school reports of many States frequently refer to them and condemn the district system. And the defects of the system are not only being recognized quite generally, but are also being actually checked and overcome. Even in Massachusetts, the State where the system originated, attempts were early made to check and regulate its evil tendencies. As early as 1824 and 1826\textsuperscript{1} laws were passed in that State requiring every town to annually choose a school committee which should have a general supervision of all the town schools, and which could determine the text-books to be used and control the examining and licensing of teachers for the whole town. It was not long before the educational leaders began to despair of any effective regulation of the system, and began to work for its abolition. For many years the State board of education through its secretaries kept up a continuous fire against it, and as a result a \textit{permissive} law was passed in 1853,\textsuperscript{2} authorizing school committees to discontinue districts unless the town voted triennially to continue them. This law was repealed in 1857. In 1859\textsuperscript{3} the "district system" was summarily abolished, but this law was also soon repealed. Ten years later, in 1869, the system was again abolished, but this law was practically repealed the very next year by allowing any town to reestablish the system by a two-thirds vote. Finally, however, in 1882,\textsuperscript{4} the system was again abolished, and this \textit{compulsory} law still remains unrepealed.\textsuperscript{5} It thus appears that the "district system" died a hard death in Massachusetts, its native home. For many years, in many places, its abolition had been stoutly opposed as the entering

\textsuperscript{1} Laws, Feb. 18, 1824, and Mar. 4, 1826.  
\textsuperscript{2} Acts 1853, ch. 153.  
\textsuperscript{3} Acts 1859, ch. 252.  
\textsuperscript{4} Acts 1882, ch. 219.  
\textsuperscript{5} Only 45 towns were really affected by this law. All the rest had voluntarily abolished the system under the earlier \textit{permissive} act.
wedge to centralization and despotism, and backwoods orators had for long eloquently appealed to the memories of Patrick Henry and the heroes of Lexington and Bunker Hill in its defense, but all their warnings and pleadings did not avail to keep this anomalous administrative monstrosity alive.

In other States also the question of abolishing the "district system" has been almost constantly agitated for over half a century. As a result at least twenty-three States have already abolished the system in whole or in part, and bills looking to this end have been introduced into quite a number of other States during the present decade. These facts and a careful study of the State school reports and other sources shows that the almost unanimous verdict of those who have given this subject most careful study is unqualifiedly against the decentralized "district system" and in favor of thorough and complete control by a higher body, sometimes the town, sometimes the county, sometimes the State. The "district system" is evidently doomed.

CHAPTER V

COMPULSORY EDUCATION

The principle of compulsory education is by no means a new one in our country. Massachusetts and Connecticut were among the States of the world which earliest established education on a compulsory basis. Please note the following mandatory and somewhat paternal language of the good and famous law passed by the Massachusetts Bay colony in 1642: "Be it ordered, that the selectmen of every town shall have a vigilant eye over their brethren and neighbors, to see, first, that none of them shall suffer so much barbarism in any of their families as not to endeavor to teach, by themselves or others, their children and apprentices so much learning as may enable them perfectly to read the English tongue, and knowledge of the capital laws."

This law also imposed what was then quite a heavy penalty for non-compliance with its provisions. The Connecticut code of 1650 contained very similar provisions. And the earlier judicial and municipal records show quite conclusively that these early statutes were by no means dead-letters in either colony. For many years they were quite rigidly enforced, but later legislation for various reasons relaxed. Then, early in the present century, when population began to rapidly centralize, the evils of truancy became greatly aggravated; and this fact brought about a new movement in the direction of


2 The first annual report of the Mass. board of education (p. 37) states that only 1/3 of the children of school age in the State attended summer schools (short as they were), and only 2/3 attended winter schools.
compulsion, which first came to a head in the Massachusetts law of May 18, 1852, the first compulsory attendance law in the Union.

It will be worth while to quote the language of this law because of its influence on legislation in other States. Section I. "Every person having under his control a child between the ages of eight and fourteen years, shall annually, during the continuance of his control, send such child to some public school in the city or town in which he resides at least twelve weeks, if the public schools of such city or town so long continue, six weeks of which time shall be consecutive; and for every neglect of such duty the party offending shall forfeit to the use of such city or town a sum not exceeding twenty dollars; but if it appears upon the inquiry of the truant officers or school committee of any city or town, or upon the trial of any prosecution, that the party so neglecting was not able, by reason of poverty, to send such child to school, or to furnish him with the means of education, or that such child has been otherwise furnished with the means of education for a like period of time, or that his bodily or mental condition has been such as to prevent his attendance at school or application to study for the period required, the penalty before mentioned shall not be incurred." Section II. "The truant officers and the school committees of the several cities and towns shall inquire into all cases of neglect of the duty prescribed in the previous section, and ascertain from the persons neglecting the reasons, if any, therefor; and shall forthwith give notice of all violations, with the reasons, to the treasurer of the city or town; and if such treasurer wilfully neglects or refuses to prosecute any person liable to the penalty provided for in the preceding section, he shall forfeit the sum of twenty dollars." 1 It is very evident that the above law contained

too many exemptions and loop-holes for effective execution. It was a task far beyond the power of the average legal machinery to probe the psychology of offending town treasurers, and prove their neglect to be "wilful." It is not surprising, therefore, to learn that this early law remained a dead-letter. For about two decades it was almost completely ignored, even in the reports of the State board and its secretaries. Apparently public sentiment was not yet ripe for such a measure, and no attempt was made to enforce it.

Although the law of 1852 was defective and remained a dead-letter, its passage was by no means unimportant. It was something to have the principle of compulsion recognized by law. About 1870 the State board began to urgently recommend the amendment of the law. This resulted in the act of 1873, which cut down the age limit from 8 to 14 years to 8 to 12 years, but at the same time extended the annual compulsory period from 12 to 20 weeks. The most decided improvement, however, was in the provisions for enforcement. The old loop-hole of "$20 penalty for willful neglect" was omitted, and instead truant officers were required to prosecute for infractions of the law, "when so directed by the school committee." Thus responsibility was no longer divided, but rested solely upon the school committee. And yet, as it turned out, school committees obeyed the law almost as reluctantly as the town treasurers, and in many cases truant officers were not even appointed. On account of this latter neglect it was provided, in 1878, that their share of the income of the school fund should be withheld from towns not complying with the law of 1873. If one could safely trust the reports of the town committees for

1 Acts 1873, ch. 279.  
2 The age limit was changed back to 8–14 years in 1874.  
3 In 1875 truant officers had not been appointed in 211 out of the 341 towns in the State. Cf., 39 Mass. Sch. Rep., p. 124.  
4 Acts 1878, ch. 171.
1879, one would conclude that this penalty worked admirably, for in that year 214 towns reported the law "enforced." This sudden increase, however, is somewhat suspicious, and probably represents some exaggeration in the returns.

But before considering the further changes in the Massachusetts compulsory law and its present operation, let us briefly summarize the provisions of the similar laws passed by other States and Territories since the above law of 1852. The following list gives the names of those States and Territories which have thus far passed compulsory attendance laws, as well as the dates of the passage of the first law of such character: District of Columbia (1864), Vermont (1867), Michigan (1871), New Hampshire (1871), Washington (1871), Connecticut (1872), New Mexico (1872), Nevada (1873), New York (1874), California (1874), Kansas (1874), Maine (1875), New Jersey (1875), Wyoming (1876), Ohio (1877), Wisconsin (1879), Montana (1883), Rhode Island (1883), Illinois (1883), Dakota (1883), Minnesota (1885), Nebraska (1887), Idaho (1887), Oregon (1889), Colorado (1889), Utah (1890), Pennsylvania (1895) and Arizona (date not ascertained). The great majority of these States prescribe an annual compulsory attendance period of 12 weeks; some prescribe 14 weeks; others, 16 weeks; a few, 20 weeks; one, 30 weeks; one, 36 weeks. The age limit during which attendance is made compulsory also varies somewhat. In some States it is 6 to 14 years; in some, 8 to 14 years; in some, 10 to 14 years; in some, 7 to 16 years; in some, 8 to 16 years; in some, 7 to 12 years; in some, 7 to 15 years; in some, 9 to 15 years; in some, 8 to 13 years. The usual penalties imposed for non-compliance with these laws are fines, which vary from one dollar to two hundred dollars for each offence. A few States inflict a short term of imprisonment.

1 Both North and South Dakota since entering the Union have passed such laws.
It thus appears quite evident that there has been in recent years a growing tendency to adopt compulsory attendance laws in the different States and Territories. In all, thirty States and Territories have passed laws of this character since the Massachusetts law of 1852. Furthermore it is to be noted that many States which at first had very weak and indefinite laws have recently replaced them with more stringent ones and have provided more and more effective machinery for enforcing the same.

On the other hand a close study of both the earlier and the later compulsory laws, as well as the various school reports, reveals the fact that in many States and Territories the principle of the right of the State to interfere with the affairs of the communities to the extent of compelling school attendance is as yet little more than a beautiful theory. Many of these States have with a loud hurrah caught up the cry for compulsory education and have spasmodically rushed into premature legislation on the subject, most of which has been defective in the extreme, either containing many loopholes for evasion or else failing utterly to provide any definite or effective machinery for enforcement. Many of the States have provided so many exceptional cases in which attendance is not compulsory that the whole system has been thus thoroughly honeycombed; others have nominally required towns to provide special truant officers for enforcing the law and yet have not provided any penalties for failing to do so; still worse, in many cases, either no provision whatever has been made for enforcement or else the provision was so

---

1 Later laws or amendments have been passed as follows: Vermont (1888), Michigan (1883, 1885 and 1895), Washington (1883 and 1890), New York (1876 and 1894), Maine (1887), New Jersey (1885), Wyoming (1887), Ohio (1889, 1890, 1891 and 1892), Wisconsin (1882: in 1889 the so-called "Bennett Law," repealed in 1891, but replaced by a law containing nearly all of the Bennett law, except the obnoxious sec. 5), Rhode Island (1887), and Illinois (1889, the so-called "Force Act").
intangible as to be absolutely worthless. For example, many States have made prosecutions for neglect on the part of parents and guardians dependent upon the complaint of voters or tax-payers in the district. This is manifestly an absurdly inefficient provision and consigns the law in advance to the dead-letter domain. So loose and defective in fact are many of these laws, especially the earlier ones, and so frequently are statements found in the State school reports and other sources to the effect that these laws are defective and not enforced, that there may have been some slight justification for the following sweeping verdict of the Colorado State superintendent, made in 1877: "Compulsory education in America is no longer an experiment. It is a well proven failure. . . . If American experience has settled anything during the last ten years, it has established the fact that education can not be made compulsory in the United States." 1

But on the whole I think that the development in educational administration during the past twenty years would go to prove the above radical statement entirely wrong and quite out of date. Several of the States, as I have said, have been marching right ahead, passing more and more stringent compulsory laws and coming nearer and nearer to a proper and effective system of administration of the same; and there is very evidently a growing tendency in this direction in several other States. 2 The tendency is undoubtedly more and more towards State interference in this field.

Undoubtedly the two States which have gone the farthest in this direction are Massachusetts and Connecticut. I have purposely reserved the consideration of the present condition and tendency of compulsion in these two States


2 Quite encouraging reports, for example, have been received from Massachusetts, Connecticut, New York, New Jersey, Ohio, Illinois, Maine, Rhode Island, and a few other States.
for the last part of the present chapter. And we shall at once encounter two widely different systems of administration of the same in these States. In his Report for 1888–89, (p. 470) the Commissioner of Education says: "In the two States, viz., Massachusetts and Connecticut, in which the compulsory attendance laws have been the most effective (though not the most elaborate or intricate), a tendency may be noticed towards two distinct types or systems: In Massachusetts, though the law is in its terms obligatory upon all towns, the system is practically a local-option one, and is administered by the towns. In Connecticut, on the other hand, a more centralized system has been developed, in which the State executes the laws through its own agents, with the cooperation of the local authorities. It would seem that the latter method is more generally effective."

Let us therefore examine the two systems and ascertain which is really the better and more effective, and which seems more certain of being permanent and of being copied by other States. First let us study the local system of Massachusetts. The prominent features of the present Massachusetts law are the following:¹

1. Children between the ages of eight and fourteen years, and in towns affording opportunity for industrial education, children between the ages of eight and fifteen years, are required to attend a public or approved private school (where instruction is given in the English language) for a period of 30 weeks each school year, subject to an allowance of two weeks' time for absences.

2. Persons having control of children of the above description are held liable for the attendance of the same for the above period, and forfeit to school use the sum of $20 for each five days' absence of any such child in excess of two weeks' allowance.

3. If any such child has been otherwise instructed for a like period in the required branches or has already acquired said branches, or his physical or mental condition renders attendance inexpedient, then said liability is removed.

4. Truant officers, appointed by the school committee of each town, are required to vigilantly inquire into all cases of neglect of the above duty, and, when so directed by the school committee, to prosecute the offender. Police, district and municipal courts, trial justices and judges of the probate court have jurisdiction.

5. Provision is also made for dealing with habitual truants and incorrigible children. Chapter 508 regulates the employment of children.

We will now inquire concerning the operation and execution of the above law. It might seem at first glance that a State like Massachusetts, which can show an average attendance of 92 per cent. of the children of all ages enrolled in the public schools, might be safe from criticism concerning the operation of its compulsory attendance law. But we should remember that this remaining fraction, though very small, may greatly menace the peace and prosperity of the Commonwealth. We must, therefore, look more definitely into the operation of the above law. In this we may be safely guided by the recent very careful investigation conducted by Mr. George A. Walton, Agent of the State Board of Education.¹ The investigation, embracing 50 representative towns and cities selected from different parts of the State, shows that there must be 13,570 persons in the State who fail by reason of parental neglect to get the prescribed amount of schooling.² This is over 5 per cent. of the entire school population. Furthermore, it appears that in only seven cases have parents been brought into the courts on the charge of neglect, and six of these cases are reported

² Ibid., p. 535.
from a single town. In some of the larger cities the law seems to be remarkably well enforced. This is due to a higher public sentiment, and a well-organized local administration of the law. But the trouble lies in the fact that the law is very unequally enforced throughout the State. The following examples will illustrate the inequality: The average school population to one truant in truant schools was in Fall River, 1,355; in Lawrence, 601; in Worcester, 533; in New Bedford, 410; in Lynn, 303; in Lowell, 247. The report comments as follows on these examples: "With conditions in population and in schools so similar, the differences in the number sent to truant schools from different places can be accounted for only by referring them to the difference in the manner of executing the truant laws. That the laws are not well enforced will further appear if the ratio (488) of the number of the school children to one truant actually sent to the truant schools from the cities cited be compared with the number of truants found in the 50 places investigated. We discovered 125 truants in the investigated school population of 26,968 children. This means 1 truant to every 216 children, a ratio in striking contrast with that of 1 to 488. Applying the ratio deduced from the investigation, 1 to 216, to the above cities, it appears that less than 45 per cent. of the truants of these cities are committed to truant schools."

These few extracts from the Report prove that the Massachusetts law is by no means generally well enforced (though by far better than in any other State except Connecticut). We next inquire, Why not? Without attempting to enumerate the different reasons, it is sufficient to state that the one most important reason is that enforcement is left wholly to

---

1 For example, in Boston there are 17 truant officers, including one chief; and in Cambridge 4.

local officers. In the language of the report, "local officers are too closely related to the offenders against these laws to make such officers the best persons that can be found to execute the laws." In recommending alterations in the law and its administration, the Report still more bluntly confesses the weakness of the local system, and advises centralization, as follows: "It is a well-understood fact, that in a large population, as in a city, officers, appointees of the government, treat cases which we are considering with more independence than is likely to be exercised in smaller places, where an officer is liable to be influenced by his neighbors. Without taking from the law any of the provisions now belonging to towns and school committees concerning local truant officers, it would seem to be wise to make provision in it for one or more State school attendance officers. They should supplement the local truant officers, and be possessed of all the powers throughout the State conferred by law upon these officers, and be responsible to the State board of education. In the investigation carried on in fifty towns and cities, the remedy suggested by superintendents and committees for the neglect to enforce the laws is the appointment of a State officer, with power to make presentments of cases charging parental neglect, truancy and disobedience to the reasonable rules of the schools. Connecticut, employing such an officer, has had marked success in enforcing the compulsory laws of that State. . . . Upon the enforcement of the compulsory law on a few parents in different parts of the State, other parents would take warning, and a perceptible decrease would take place in the number of absences on account of parental indifference and neglect, and there would be a consequent improvement in the regularity of attendance. . . . It is in towns where there is not a proper public sentiment demanding the effective enforcement of the laws that

2 Ibid., 542.
such an officer would do his best work. He would create a public sentiment in favor of the law by the good effects which would soon be evident.\footnote{Mass. Sch. Report, 1894-5, pp. 567-8.} More than once before this the Massachusetts Reports have cited the example of Connecticut and urged greater centralization.\footnote{Cf., for example, vol. 1, p. 184; vol. liii, p. 235; vol. liv, p. 113.}

It appears, therefore, from the foregoing that while the principle of compulsory education has taken a very deep hold on public sentiment in Massachusetts, and while the law relating thereto is being well enforced in many parts of the State, still the law is very unequally executed throughout the State, owing to absence of a strong central administration of the same; (2) that the defects of the local system of administration are being recognized, and a centralized administration of the laws is more and more becoming to be recognized not only as innocent and safe, but salutary and necessary. Perhaps it is not too much to predict that in the near future Massachusetts will wisely follow the lead of Connecticut, and turn in practice from the "local option" system to a "centralized" system.

It is interesting to turn to a brief consideration of the compulsory system of Connecticut, which State has from the start set the example for Americans of a system of administration in this field which is at once rational and effective. The vital part of the Connecticut compulsory law is contained in the following language: "All parents and those who have the care of children shall bring them up in some honest and lawful calling or employment, and instruct them or cause them to be instructed in reading, spelling, writing, English grammar, geography and arithmetic. And every parent or other person having control of any child over eight and under sixteen years of age, whose physical or mental condition is not such as to render its instruction in-
185] CENTRALIZATION IN EDUCATION 43

expedient or impracticable, shall cause such child to attend a public day school regularly during the hours and terms while the public schools in the district wherein such child resides are in session, or elsewhere, to receive thorough instruction during said hours and terms in the studies taught in said public schools. But children over fourteen years of age shall not be subject to the requirements of this section while lawfully employed to labor at home or elsewhere.”

Section 29 fixes a penalty not to exceed five dollars fine for each week’s failure to comply with the above. Penalty is not incurred, however, when the child is destitute of clothing suitable for attending school and the parent is unable to provide the same, or when the mental or physical condition of the child renders such instruction impracticable. Sec. 40 requires towns to appoint truant officers. The language of the law is singularly clear and specific throughout and difficult of evasion. But the most important and characteristic feature of the Connecticut law is its system of execution. The significant language of the law concerning this is as follows: “The State board of education may appoint agents, under its supervision and control, for terms of not more than one year, who shall be paid not to exceed $5 per day for time actually employed, and necessary expenses, and whose accounts shall be approved by said board and audited by the comptroller. The agents so appointed may be directed by said board to enforce the provisions of the law requiring the attendance of children in school, and to perform any duties necessary or proper for the due execution of the duties and powers of the board.”

Here then we have a thoroughly centralized system of administration for the compulsory law—a very definite law, definite local officials subject to the direction of a central machinery. We have seen this system cited by way of con-

1 Sch. law, 1896, sec. 28. 2 Ibid., sec. 15.
contrast with the Massachusetts system. Let us see directly how compulsory education has operated in Connecticut under this system of administration, which has practically existed ever since the passage of the Act of 1872. Perhaps we can show the workings of the system in no better manner than by making a few quotations from the State Reports from 1872 to the present time. As early as 1873 we find the following statement: "The law is generally approved and I learn of no opposition to it. . . . It is certainly increasing the attendance in many places." In the report for 1875 (p. 27) we find the following statement: "In Connecticut public sentiment is steadily growing in favor of the legal prevention of illiteracy. Stringent as are our laws on this subject, they have awakened no public opposition. . . . A few parents—I have not heard of a dozen in all—openly defied the law, but as soon as they found that the law was imperative and that legal complaints were made out against them, they were glad to stay proceedings by compliance with its provisions." The same report (p. 29) contains the following important direct allusion to the work of the State Agent: "A journey of the Agent or Secretary to the remotest district of the State would be amply compensated by the addition of a single child to the regular attendance at school. For the very purpose of increasing the attendance, the Agent is now chiefly occupied in visiting schools, school officers, and in some cases parents." We get a good idea of the efficiency of the centralized administration of the law from the number of prosecutions. There were nine prosecutions of employers between 1875 and 1886, and fifty-two prosecutions of parents and guardians during the same years. Mr. Giles Potter, who has been the State Agent ever since the adoption of the law, says "there have been prosecutions of parents or employers every year since 1878. But

1 Sch. Rep., 1873, p. 140.
constant efforts have been made to secure the due observance of these laws by other means. . . . In enforcing these laws, much has been done by school visitors and other local officers by cooperating with the agent of the State Board."

In 1887 there were six prosecutions of employers and thirty prosecutions of parents and guardians. Concerning this unusually large number of prosecutions Mr. Potter says: "I have endeavored to follow up more thoroughly than formerly cases where it had been found that there had been criminal neglect on the part of parents and others having control of children. In doing this a much larger number of parents have been prosecuted . . . than in any former year." In 1889 there were seven prosecutions of employers and twenty-nine prosecutions of parents. In this year 764 children illegally absent were sent to school. In 1894 there was a total of twenty-two prosecutions. Concerning these prosecutions in general Mr. Potter says: "Prosecutions of parents and others having control of children have been made only in cases where there has been continued neglect of the children and defiance of law. It is not pleasant to resort to such means, but it is doubtless well that some do make themselves objects for the enforcement of the law and examples of what the law can do." He further comments as follows: "There is evidently an increasing tendency to regard violators of these school laws as deserving punishment quite as much as those who do violate any other criminal statutes." It is very doubtful if such a sentiment could have been created under any mere local option system.

It is very interesting to note the change in public sentiment in Connecticut during the past twenty-five years regarding compulsory education, as developed by this thoroughly business-like and centralized system of administration,
especially as contrasted with all the other States in which a merely local and ineffective executive machinery has been established. At first twelve weeks' attendance each year was all that could be exacted, and that somewhat reluctantly; now thirty-six weeks are required in every district in the State. At first the age limit was eight to fourteen years; now it is eight to sixteen years. At first the people were opposed to the system, and cried out against what was thought to be excessive centralization; now they send in numerous requests from all parts of the State each year for the services of these same agents of the central board. In short, everything goes to show that the system is working admirably.

And what has proven true in Connecticut probably might and perhaps will prove true in other States of the Union. When compulsory education, even in its dilutest form, was first agitated in this country, it was everywhere declared to be unsuited to the "genius" of the people; "the first step towards centralization," "opposed to the spirit of American institutions," and other like shocking epithets were hurled at it from every quarter. But as the Commissioner of Education says: "The arguments and discussions of 30 years or more have been gradually silencing opposition, and public sentiment is slowly crystallizing in the direction of requiring by law all parents to provide a certain minimum of school instruction for their children. This tendency is unmistakable."\(^1\) Facts indicate very plainly that Americans are getting over their proverbial fear of such phrases as the above, and are being converted to compulsory education by its evident practicability. It is no longer deemed sufficient in a free public school system like ours to simply give every child an opportunity to acquire an elementary education, but the very safety of the State imperatively demands the

certain securing of this great essential of good citizenship to every child.

Furthermore it is noticeable that our State officials are no longer afraid to quote favorably European precedents and models in educational administration. For example, as early as 1872, State superintendent Bateman of Illinois said: “It has been proved that the intervention of the legislature, by means of compulsion, is necessary to perfect the American school system—that such intervention is not unconstitutional or tyrannical; that the allegations as to the incompatibility of such laws with the nature and spirit of our political system are unfounded, as also are the apprehensions concerning the assumed harshness and severity of their enforcement; that the operation of such laws in many of the most enlightened States of Europe is a vindication of their wisdom and beneficence, affording an example that may be safely followed.”1 Three years later, the State superintendent of California uttered the following pungent truth concerning this point: “There can be nothing un-American in adopting non-American means to eradicate non-American evils which refuse to yield to American means.”2 And since the above comments were made, one finds in the various State reports very many references to the more effective centralized administration of European countries, and of Connecticut, in the line of compulsory education, as something desirable for other American States to copy. What is indeed wanted in America to make compulsory education thoroughly successful, is a strong administrative department at the head of the system in each State. Connecticut, one of the earliest and staunchest upholders of local self-government, has taken the lead in asserting that, in this one realm at least, this time-honored and hoary principle must be supplemented by efficient State control; and while many

States still lag and none have come up to the standard set by Connecticut, a few are following close in her tracks, and the tendency is already quite strong in the direction of a wise centralization of administration in this realm.¹

¹It may be well to also note here that the State superintendent of New York is authorized “to employ such assistants as he may deem necessary” to enforce the compulsory attendance law of that State. Cf., Act 1894, sec. 10.
CHAPTER VI

STATE REGULATION OF TEXT-BOOKS

During the past twenty-five years a great many laws have been passed by the various States and Territories regulating the selection, adoption and supply of school text-books. A brief examination of these laws will, I think, prove interesting and profitable, as they reveal another strong tendency towards centralization in educational administration. Let us examine these laws with reference to the following three subjects:

A. The various kinds of uniformity established.
B. The various periods of use prescribed.
C. The various systems of supply.

(A) A very few of the States and Territories have no laws whatever on the subject of text-book uniformity. Many of the States have as yet only made district uniformity compulsory. In a few of these States, however, the State superintendent is authorized to recommend text-books for uniform adoption. Several States go one step further and make township uniformity compulsory. The next stage of centralization would naturally be county uniformity, and at least seven States have made this system compulsory. Furthermore two other States have passed permissive county uniformity laws. New Jersey has a system which is a cross

1Ark., Col., Ill., Ia., Kan., Mich., Neb., N. Y., N. D., S. D., O., Pa., Tenn., Wis., 2Wisconsin and Arkansas. In the latter State the attorney general has held that district directors in adopting text-books are confined to the list prepared by the State superintendent.
3Mass., Me., Ct., N. H., R. I.
4Fla., Ga., Ky., Md., Miss., Vi., N. C.
5Ia., Kan.
between district and county uniformity. In this State district boards "in connection with the county superintendent" prescribe text-books for the schools under their charge. In Tennessee, county superintendents recommend text-books "with a view to securing" county uniformity. At least sixteen States and Territories have gone to the extreme of centralization in the direction of text-book uniformity by establishing a system of compulsory State uniformity under the control of the central educational authorities. The Kentucky State board of education recommends lists of text-books from which county superintendents must select. The school law of Connecticut empowers the State board of education to prescribe text-books for the State, but the power has never been exercised. Several of the States which have not established a general system of State uniformity have prescribed a text-book in physiology and hygiene for use in all the schools of the respective States. Some of the above States impose the penalty of forfeiture of their share of the school fund upon all localities not complying with the above laws.

(B) The majority of the States have asserted the principle of State control over the local authorities by prescribing a period during which text-books cannot be changed. This period is three years in Arkansas, North Carolina, Pennsylvania, Rhode Island and Wisconsin; four years in California, Colorado, Idaho, Illinois, Louisiana and Virginia; five years in Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, Mississippi, Nebraska, New Hampshire, New York, South Carolina, Vermont and Washington; six years in Indiana, Montana and Oregon. The Minnesota law of 1877 prescribed a period of 15 years;

1 Ariz., Cal., Del., Id., Ind., La., Mo., Mont., Nev., Or., S. C., Utah, Va., Wash., W. Va., Wy.
2 Sch. law, 1896, sec. 13.
the law of 1893 a period not less than 3 nor more than 5 years.

(C) Several systems of supplying text-books to pupils are prevalent in the various States, the most important of which are the following:

I. Individual purchase in an open market. This plan, which implies no State control whatever, is perhaps as yet the most common one. It is established in at least fifteen States.

II. Contract system. Under this system either the State or the local authorities, by means of contracts with the publishers, regulate or control the wholesale or retail price of text-books, or both. Such contracts are made by county authorities in five States; by State authorities in twelve States. The general practice under the State contract system is for publishers to make bids for furnishing all the schools of the State with one or more of the State series of text-books, and for the State board of education to decide which proposition it will accept. In Montana and West Virginia the prices of text-books are directly fixed by law; in Ohio by the so-called "School-book board."

It is interesting to here allude to the complicated and highly centralized State contract system established by the Minnesota law of 1877. Although this law has now been repealed, it illustrates most admirably the fact that the principle of "local self-government" is sometimes cast completely to the winds and the most extreme centralization adopted in order to achieve some much desired end. Under this Minnesota law the State entered into a 15-year contract with Mr. D. D. Merrill to furnish a series of text-books for the

---

3 Id., Ind., Ia., Mo., Mont., Nev., O., Or., Va., Wash., W. Va., Wy.
schools of the State. The State fixed the standard of quality and the maximum price of said books. The law was to be executed by school districts under penalty of forfeiture of their share of the State school moneys.

It seems that the various plans of State uniformity and State contract have attracted considerable criticism in different parts of the country. The following stinging denunciation by Supt. A. P. Marble, now of New York, may perhaps be taken as a sample of the kind of criticism and opposition aroused: "These attempts at State interference with that which does not belong to the State have not been successful. . . . They are contrary to the genius of our institutions. . . . State decree is usurpation. . . . State contract, the next step towards Russia, is a further usurpation; it perverts the functions of the State from government to business, from making laws for the general good to selling school books, with a purpose, by no means accomplished with any certainty, of saving a few cents yearly to the individual citizen." 1 I have no desire or intention to attempt to discuss the merits of State uniformity and State contract or to refute the objections raised. Certainly it is true that this system is a long step towards centralization; but I simply accept the actual conditions as facts showing a tendency in this direction, whether salutary or otherwise. It is only fair, however, for me to briefly quote from the opinion of representative officials in the States which have actually tried these more centralized systems. We may then be better able to judge of the real strength and probable durability of this tendency. The State superintendent of Louisiana in 1889 said: "To date, so far, the scheme to secure uniformity in the use of books at reduced prices has proven unsatisfactory to those upon whom devolve the expenses of purchasing them." 2 The West Virginia superintendent said in

1890: "Since 1879 the State has by law contracted through the State superintendent for all public school-books and fixed the maximum price at which these books shall be purchased from the publisher and sold by the retail dealers throughout the State. This system gives our people uniform books at uniform prices. This system just described is at the present time in operation in this State, and in my judgment gives very reasonable satisfaction. The obstacles in the way of making it entirely satisfactory are that in remote sections of the State the per cent. of profit to the retail dealers does not offer sufficient inducement to handle the books, and so the people do not always find a convenient supply at hand. When these obstacles are removed and some other changes made, I believe our system will render almost entire satisfaction." The Montana superintendent wrote in the same year: "I believe in a uniform series of books for use in the State, as children are continually changing residence, and the expense of books for use in the public schools is reduced to a minimum. . . . Our present series meets as a whole with popular approval." The same year the Oregon superintendent said: "This system is satisfactory to the people generally, so far as I know;" and the Washington superintendent said: "The law requiring uniform textbooks has given very general satisfaction, so much so that our legislature, which has just adjourned, readopted it as a part of our State code, . . . I think no better system could be adopted for our use than the one referred to." In 1894 the Idaho superintendent said: "The State is to be congratulated upon the success of the system, not only in the increased efficiency of her schools, but in the great saving of expense in the purchase of books." A similar verdict was rendered in 1890 by the Nevada superintendent.

Without citing further expressions of opinion, I will simply say, on the other hand, that in judging this question due weight must be given to the fact that Minnesota, after a long trial, and North Carolina, after a short trial, have both abolished the system of State contract. But in judging the general tendency in this direction, we must also remember that Indiana, which has one of the best school systems in the country, established a system of State contract in 1889; Missouri, in 1891; and Idaho, in 1893. Friends of the system seem to be raised up more rapidly than its enemies. Furthermore, it may not be amiss to say that the system recently abolished in Minnesota was not the typical State contract system, and contained some special features which were objectionable in themselves, but not necessarily condemnatory of the general system. As far as concerns the abolition of the State contract system in North Carolina, it is known that this was done by a Legislature which was proverbially ruthless in its treatment of the existing school law of the State, and this in face of strong opposition by prominent educators and officials of the State.\(^1\)

It may also aid us in judging of the strength of this tendency towards centralization to glance at the legal and constitutional phase of the question. Of course, the enemies of State uniformity and State contract have frequently contested its constitutionality, but it would seem that they have been clearly defeated on this phase of the question. The following quotation, from the opinion in the Indiana case of \textit{State vs. Haworth},\(^2\) may be taken as a type of the opinions rendered on the same or similar questions in several States: "It is impossible to conceive of a uniform system of common schools without power lodged somewhere to make it uniform; and, even in the absence of express constitutional provisions, that power must lie in the legislature. If it does

\(^1\) \textit{N. Car. Rep.}, 1893–94, p. 34.  
\(^2\) 122 Ind., 462.
reside there, then that body must have, as an incident of the principal power, the authority to prescribe the course of study and the system of instruction that shall be pursued and adopted, as well as the books which shall be used. . . . Having this authority, the legislature may not only prescribe regulations for using such books, but it may, also, declare how the books shall be obtained and distributed. If it may do this, then it may provide that they shall be obtained through the medium of a contract awarded to the lowest bidder. . . . The statute is not within the constitutional provisions directed against monopolies. . . . The object of the act is to secure books for the public schools, by means of open competition after full notice."

In a similar opinion the Supreme Court of Minnesota, in the case of Currier vs. Merrill, held that the State could compel the patrons of the schools to buy the books from its officers; and the Supreme Court of California held, in the case of the People vs. State Board of Education, that the decisions of the State board as to text-books were final, and must be obeyed by all local boards and officers. It seems quite clear, from the cases cited, that this form of centralization is already recognized in our jurisprudence and upheld by our courts as constitutional, in spite of the strong American predilections towards local self-government.

Furthermore, while one can easily find in some States which have not adopted any such centralized system many expressions of holy horror over the desecration of American institutions and departure from the straight and narrow path of local self-government, one notes that these objections have weighed very lightly in those States which have made up

1 The same general doctrine has been distinctly asserted in other cases, e.g., State v. Hawkins, 44 Ohio St., 98; Currier v. Merrill, 25 Minn., 1; Bancroft v. Thayer, 5 Sawyer, 502 (Oregon); State v. State Bd. Educ., 18 Nev., 173; People v. State Bd. Educ., 49 Cal., 684.
their minds that this form of centralization is wise and expedient. It seems fair to conclude, therefore, that whatever may be the merits or demerits of State uniformity and State control, there is as a matter of fact quite a decided tendency towards this form of centralization, and seemingly this tendency is increasing rather than waning.

III. Free Text-Book System. Under this system textbooks are purchased by the district, township or county and loaned to the pupils free of charge, subject to such rules and regulations as the authorities may prescribe. The following States have practiced State interference to the extent of making this system of supply compulsory: Delaware, Idaho, Maine, Massachusetts, Nebraska, New Jersey, New Hampshire and Pennsylvania. Permissive laws authorizing local authorities to adopt this system have been passed in at least all of the following States: Colorado, Connecticut, Michigan, Minnesota, North Dakota, Vermont and Wisconsin. Since 1888 the county boards in Maryland have been authorized to sell, rent or furnish text-books free, at their own option. Text-books are also furnished free in a number of cities, towns and districts in New York and Rhode Island. Quite a number of other States require local authorities to furnish free text-books to indigent children, and still others authorize this.

From the foregoing brief statement it is evident that there is a very strong tendency in the eastern section of the country toward this system of free text-books, and also a slight tendency in the West in the same direction. Six eastern States and two western States have thus far made this system compulsory; and there are at least five other eastern States and five other central and western States in which this system is either practiced or authorized by law. It is fair to infer, I think, that the permissive laws in the above States will soon prove to be steps toward compulsory laws, as they
have already in some. It is quite evident, therefore, that there is a strong tendency in this field towards State control, and the probability that this tendency will grow stronger and stronger in the near future is increased by the fact that the system seems to be very enthusiastically indorsed in many school reports and elsewhere, and on very substantial grounds.¹ I think it interesting to quote in conclusion on this point the following positive statement and prediction contained in the Indiana school report for 1888 (p. 431): "Free books are a logical consequence of free schools. The people need not be scared by the bugbear of paternal government, which the advocates of laissez-faire in this country perpetually invoke. Many things that may be left to individual enterprise in a frontier country, such as our own was fifty years ago, can no longer be trusted to such agencies when civilization thickens, the struggle becomes severe, and the whole machinery a hundred-fold more complex. The question of State schools is pretty fairly settled in this country in favor of that system. When once it is established that free books are essential to the efficiency of these schools in the training of the masses, question as to expediency will be at an end."

IV. State Publication. A very extreme and unique case of centralization in school administration is the California system of State publication of text-books. This system was established in 1885 in conformity to a constitutional amendment of the previous year. Under this system the State board of education has had compiled and copyrighted a series of text-books, and the same has been printed under the direction of the government printer. The books are furnished to pupils at cost, and retail dealers are required to make an affidavit that they will not sell them at a price ex-

ceeding that fixed by the State board. County school boards are required to provide a "revolving fund" in order to enable county superintendents to purchase the State textbooks.\(^1\)

It is not within my purpose to fully discuss the merits and demerits of State publication. It will suffice to make a few quotations from the statements of the California State superintendent concerning the same. In the school report for 1890 (pp. 37-42) he says: "The advantages of State publication are that it has relieved county boards of education from the solicitations of book agents; that it has reduced the prices of the books from former rates, and that the money spent therefor has been retained in our own State. The disadvantages claimed are: first, that it costs the State more to manufacture the books than it would cost a private publishing house. This is true, because the State pays its employés a higher rate of wages and requires only eight hours of daily service; second, the lack of all competition in the authorship; third, the intrusting of the work of supervision to a board whose members are already burdened with duties and which is subject to frequent changes." Again he says, in the same report: "The State publication of text-books in California has undoubtedly been one factor in causing the publishers of school books generally to reduce their prices, and there is not now so great a difference between the prices of our State series and those of private publishers." It would seem that some of the disadvantages mentioned are not necessarily an incident of State publication. Lower wages \textit{might} be paid, if it were desirable, and the expense of printing thus reduced; and the supervision of the work might be given to a special board. But whatever the advantages or the disadvantages of the system may be, the fact remains that the system has

\(^1\) Act of 1885, secs. 1-10; also Act 1887, secs. 1-7.
been in operation for over ten years, and its creation and present existence furnishes a most admirable example of centralization in administration; and it furthermore shows, that California is not at all afraid of paternal government and extreme centralized administration in the department of education when supposed advantages accrue from the same. Local self-government has certainly here been left far behind in the search for better administration.

While referring to this California plan of State publication, it may be well to note that the Connecticut State board of education is required by law to prepare a text-book in physiology and hygiene for use in the public schools of the State.¹ In accordance with this provision the State board, in 1886, not only prepared but published a small text-book, which was widely circulated throughout the State. It has not been the practice of the board, however, to insist on the exclusive use of this text-book.² It is also interesting in studying the recent tendencies, to note that within the past few years bills have been introduced into the Legislatures of Indiana, Ohio, Illinois, Wisconsin, Missouri, Kansas, Kentucky, New York, Iowa and Texas looking towards State publication of text-books. One of these bills, that of Illinois, proposed to employ convict labor in this work.

CHAPTER VII

STATE REGULATION OF COURSES OF STUDY

Closely connected with the subject of text-book regulation is that of regulation of courses of study. Here again we find a strong tendency toward direct State control and extreme centralization in administration. The school law of at least thirteen States\(^1\) empowers either the State superintendent or the State board of education to prescribe a uniform course of study for the common schools of their respective States.\(^2\) The Territorial board of Arizona is also given the same power. The school law of Texas after prescribing a minimum course of study provides for such other studies as may be "directed by the State Superintendent."

At least eleven States,\(^3\) which have no yet gone so far in this direction as the above, have made a certain minimum course of study compulsory upon the local authorities, the course varying considerably in the different States. Several States not only make a certain minimum course of study compulsory in all the common schools, but also a further, more extensive course for high schools. For example, every town in Massachusetts containing 500 families or householders is compelled by law to establish a high school in which shall be taught, in addition to the subjects ordinarily required, general history, book-keeping, surveying, geometry, natural philosophy, chemistry, botany, Latin, and the civil


\(^2\) Many of these States make very minute regulations concerning the course of study.

\(^3\) Cal., Col., Ct., Ind., Ky., Md., Mass., Tex., Tenn., Va., Wis.
polity of the State and of the United States. Towns containing 4000 or more inhabitants are still further required to maintain instruction in Greek, French, astronomy, geology, rhetoric, logic, intellectual and moral science, and political economy. Towns containing over 10,000 inhabitants are required to furnish to every person over fifteen years of age free instruction in industrial and mechanical drawing. By an act of June 14, 1894, towns containing 20,000 or more inhabitants are required to maintain a course in manual training, "the course to be pursued in said instruction shall be subject to the approval of the State board of education." In Vermont all towns containing 2500 or more inhabitants are required, in addition to the subjects noted above, to maintain instruction in English literature, higher mathematics, the sciences, political economy, civil government, general history and rhetoric. The school law of Maine requires that "the course of study in the free high schools shall embrace the ordinary English academic studies, especially the natural sciences in their application to mechanics, manufactures and agriculture."

Most of the States thus far mentioned in this chapter, and some others which have not gone quite so far in State regulation as these, have made compulsory in all the schools of the several States instruction in physiology and hygiene, "with a special reference to the nature of alcohol and narcotics, and their effects upon the human system." Among the States which have practiced State interference in this respect are the following: Massachusetts, Wisconsin, California, Colorado, New York, North Carolina, Iowa, New Hampshire, Minnesota, Vermont, Maryland, Michigan, Nebraska, Indiana, Pennsylvania, West Virginia, Texas, Connecticut, North Dakota, Washington and Montana.

1 Sch. law, 1892, ch. 44, sec. 2.  
2 Ibid.  
3 Ibid., sec. 7.  
4 Vermont Stat., 1894, sec. 700.  
5 Sch. law, 1895, sec. 31.
A very good example of State control over courses of study is displayed in the Minnesota high school board, referred to in Chapter III. This board is also a good illustration of the fact referred to in Chapter II, that State aid inevitably leads to central control. The degree of centralization reached in this Minnesota board may be judged from the following brief quotations from the school law. The board is required to periodically “visit each school receiving aid.” It has “full discretionary power to consider and act upon applications of schools for State aid, and to prescribe the conditions upon which said aid shall be granted.” It also has the “power to establish any necessary and suitable rules and regulations relating to examinations, reports, acceptance of schools, courses of study, and other proceedings under this act.”

1 Stat. Minn., 1894, sec. 3873.  
2 Ibid., sec. 3871.
CHAPTER VIII

STATE CONTROL OF TEACHERS' EXAMINATIONS

In no department of school administration is effective central control and supervision more necessary and vital than in the examination and determination of the qualifications of teachers, and yet, in all the States, until quite recently, this element has been conspicuously lacking. The time-honored practice has been to leave this matter to the unrestricted action and caprice of local authorities. But experience and "grinding necessity" have gradually developed a tendency toward centralization, and direct State control in this administrative field. In many States this tendency is still rather weak, but, on the other hand, it is quite strong in others.

Undoubtedly the State which has gone the farthest in this direction is New York, she having developed a very complete system of uniform State examinations under thorough central control. The system has been in nominal existence for a number of years, but has recently been greatly improved and rendered a reality. As the system now stands it is uniform throughout the State, except in certain school districts organized under special acts. The questions for examination are uniform and are prepared under the direction of the superintendent of public instruction. Examinations occur on the same date in every commissioner district in the State. But the special point of superiority in the New York system is the fact that there is a really effective and permanent State board of examiners, consisting of experienced professional officers long identified with the educa-
tional work of the State. This board, consisting of five members and two clerks, was organized June 1, 1894. All answer papers submitted by candidates throughout the State are forwarded to the central department, and there examined and marked by the State board free from the influences of favoritism and personal prejudice. This board is established on a non-partisan basis.¹

The reports of the operation of the above briefly-outlined system are certainly favorable and enthusiastic in the extreme. The State superintendent, in January, 1895, commented on the system as follows: "This change in the method of determining who are entitled to certificates is one of the greatest reforms that has been inaugurated in our school system for many years. . . . It removes the possibility of any commissioner exercising unfair discretion for or against any teacher. It has lifted the system of examining and licensing teachers above all considerations except their fitness to enter the service. . . . The uniform system is of great advantage and convenience to teachers. Under this system a certificate of any grade issued in one county stands for the same value as a certificate of corresponding grade in any other county in the State, and a teacher who becomes entitled to a certificate of any grade may receive the benefits to which he or she is entitled under such certificate in any commissioner district in the State without further examination. . . . It is gratifying to report that the system is meeting with success from every standpoint, is giving entire satisfaction, and has the hearty support of all the educational forces of the State. . . . Its results thus far have more than met our most sanguine expectations."²

Mississippi also has a State board of examiners, appointed by the governor, whose duty it is to grade the papers of all

² Ibid., pp. 31-32.
applicants for certificates, and which is empowered to hear and decide all appeals regarding examinations. The weak point in the Mississippi law seems to be the fact that the compensation of the board consists entirely of examination fees.

In at least sixteen States and Territories, the school law provides that uniform examination questions shall be prepared either by the State superintendent, State board of education, or State board of examiners. In most of these States the same authorities are empowered to fix uniform dates for examinations and to prescribe rules and regulations for conducting the same. Without specifically conferring this power of preparing uniform questions, the law of New Hampshire provides that examinations shall be conducted "by such persons and in such manner as the State superintendent may designate." The Wyoming State superintendent is empowered to "regulate the grade of county certificates." In Missouri the county superintendents are to be guided by the instructions of the State superintendent in the examination, grading and licensing of teachers." The New Jersey State board, acting under its general power to make regulations, has provided quite in detail for a system of uniform examinations." In Indiana a system of uniform examinations under the direction of the State board of education has been evolved from the following broad grant of power made in 1865: "The State board of education is empowered to take cognizance of such questions as may arise in the practical administration of the school system not otherwise

1 Sch. laws of 1896, no. 1, sec. 4.
3 Act March 19, 1895, Sch. law, 1895, p. 41.
5 Ibid., p. 1220.
6 Sch. law, 1895, pp. 137-42.
The system thus evolved received direct legislative sanction in 1883 by the enactment of the following section: "Whosoever shall sell, barter, or give away, to applicants for license, or to any other person, the questions prepared by the State board of education, to be used by the county superintendents in the examination of teachers, or in any way dispose of said questions contrary to the rules prescribed by said State board of education, shall be deemed guilty of a misdemeanor; and on conviction shall be fined in any sum not less than ten nor more than two hundred dollars."

It would seem, therefore, that the laws of the above States afford ample basis for quite thorough central control over the examination of teachers. It is well to note, also, that in a very large number of States which have not gone so far in this direction as have the above, there is a system of special State certificates granted by the State board, which certificates are valid in any portion of the State. Generally the State board is given very large powers of regulation and control over these certificates. In most of the States also the subjects in which candidates are examined are prescribed by the central authorities. It is also very common for the State to fix the general average which all local examining boards must require, and to prescribe certain qualifications and disqualifications for teachers. Furthermore, in many States which have not yet established a complete system of uniform examinations under central control, this question is being

1 *Annot. Sch. law*, 1895, p. 53.  
3 The law of many States provides that diplomas from State normal schools shall be accepted by local authorities in lieu of the regular examinations. A few of the States provide for the same exemption for holders of teachers' diplomas from the State university and certain colleges.  
4 Generally certificates are revocable for good cause by the authorities granting the same. The New York State superintendent can annul for cause any certificate granted by any authority in the State.
favorably agitated and urgently recommended by school officers and others. It seems very safe to conclude, therefore, from all the foregoing facts, that there is a very strong and growing tendency among the States to place the examination of teachers under direct State control, and to centralize the administration of the same. Here again, in this field, the new tendency at first met with violent opposition in some States. As the State superintendent of Arkansas recently said, "The opponents of the system frequently called up the spook 'centralization,' and used it in their arguments to frighten the bystanders. The dead heroes turn over in their graves when this term is applied to the machinery of a State." But, in spite of the "spooks" and the "dead heroes," the system has, as we have seen, gained a firm foothold, and has rapidly banished its enemies. In this field, also, it has been clearly demonstrated that the extreme application of the principle of "local self-government" must give way if the best possible school system is to be developed.

CHAPTER IX

STATE CONTROL OF TEACHERS' INSTITUTES

During the past fifty years there has been a very general development of teachers' institutes until to-day, they are established in nearly, if not quite, all of the States and Territories of the Union. There is still, however, a very great diversity among the various States in respect to the mode of organizing, regulating and supporting these institutes. In some States they are wholly voluntary associations, and in others they are made compulsory by law; in some they are held directly under State authority, and in others under local authority; in some they are organized into a State or district system, and in others into a county system. In some States the expenses are paid out of State funds; in others out of county funds; in others by the fees for teachers' licenses; and in still others by contributions from teachers. In some cases the institutes are held at regular times when the schools are closed, and in others they are held at any time the various local authorities may decide and when the schools are in session; in some the schools are closed during the sessions of the institute and in others they are not; in some the teachers are paid their regular wages while in attendance and in others they are not; in some attendance on the part of teachers is made compulsory and in others it is not.

The degree of State control and centralization existing in the organization and management of teachers' institutes will appear by examining the laws of the various States with reference to some of the above characteristics. First, let us
notice that in twenty States the holding of State, district, county, or township institutes (in some cases both State and local institutes) has been made unconditionally compulsory. The holding of institutes is made conditionally compulsory as follows: in Washington, in every county containing 25 or more school districts; in California, in every county containing 20 or more districts; in Mississippi, in every county containing 15 or more districts; in Montana, in every county containing 5 or more districts; in Alabama, in every county containing 10 or more teachers of either color; in Missouri, in every county voting to employ all the time of the county commissioner. In Michigan one annual State institute is made compulsory and one county institute in every county containing 1000 or more children of school age. In Wisconsin the State superintendent and the board of regents of the Normal Schools decide what counties shall have institutes. In Minnesota the State superintendent alone decides.

State authority has been still farther exercised in twenty-three cases by making attendance at institutes compulsory on the part of teachers. In eight of these States this require-

---

1 Ark., Col. (Sch. law, 1891, sec. 81), Del., Ind., Ill., Kan., Ky., Neb., Fla., Md., N. D., N. H., N. Y., Pa., Tex., Vt., W. Va., Or., Wy., N. J. (a regulation of the State board makes county institutes practically compulsory. Cf., Sch. law, 1895, p. 143.)

2 Sch. law, 1893, sec. 72.

3 Sch. law, 1895, p. 12.

4 Sch. law, 1894, sec. 4061.

5 Sch. law, 1895, sec. 1900.

6 Code Ala., sec. 995.


8 Sch. law, 1895, ch. 15, sec. 3.


10 Stat. Minn. of 1894, sec. 3727.

11 Al., Ariz., Ark., Cal., Del., Id., Ind. (by a decision of the State superintendent, cf., Sch. law, 1895, sec. 4520, n. 3), Ky., Minn., Mo., Mont., Neb., Nev., N. Y., N. C., N. D., S. D., N. J., Or., Tex., Wash., Wy., W. Va. (until prescribed graded course of institute work and professional study is completed.)

ment is rendered effective by making the certificates of non-attending teachers revocable. Two of these States impose the additional penalty of forfeiture of wages during institute session. Louisiana imposes the sole penalty of forfeiture of one day's wages. Quite a number of the above mentioned States have offered an incentive for attendance at institutes by providing that teachers shall suffer no loss of wages for attendance upon institutes held when the schools are in session. The school laws of at least seventeen States contain provisions of this character. In Colorado 5 per cent. is added for attendance to the examination grade of all candidates for teachers' certificates. Some of the States not only make attendance at institutes compulsory and require local authorities to secure teachers against loss of wages during said attendance, but also specifically require the schools to be closed during institute sessions.

Teachers' institutes have been made the subject of annual State appropriations, as follows: In New York, $30,000; Arkansas, $10,000 (for county normal institutes); Minnesota and Wisconsin, $7,000 each; Massachusetts and Connecticut, $3,000 each; Tennessee, $1,500; West Virginia and Rhode Island, $500 each; Michigan, $400 for State institute and $60 for each county institute, if county fund is not sufficient; Nevada, $100; New Jersey, $100 for each county; Iowa, $50 for each county institute

1 Mont., N. D.
3 Sch. law, 1891, sec. 81.
4 Among these are Ky., Ind., Neb., N. Y., N. D., Pa.
5 Consol. Sch. law, 1895, title x, sec. 8.
6 Sch. law, 1895, p. 24, Act 1895.
9 Sch. law, 1892, ch. 42, sec. 2.
10 Sch. law, 1896, sec. 13.
12 Code W. Va., 1891, p. 378.
14 Sch. law, 1895, ch. 15, secs. 4 and 7.
15 Sch. law, 1895, pp. 49-50.
actually held; Kansas, $50 for each county institute with fifty registered attendants; Colorado, $50 for each district institute with twenty registered attendants; North Dakota, $50 for each county containing ten or more teachers. In New Hampshire the proceeds of the sales of certain lands are set apart as a permanent institute fund. The Vermont school law provides for a State appropriation of a sum not exceeding $30 per day for 4 days for each institute, and a sum not exceeding $25 per day for 10 days for summer schools held during years when no institute is held in the county.

Quite a number of States have not only exercised an extensive control over teachers' institutes through the law-making body as shown above, but have specifically conferred upon the State board or the State superintendent an extensive administrative control.

For example, these central authorities are very frequently specifically empowered to "select the times and places" for holding institutes; to fix the duration of the same; to employ the instructors and conductors, and fix their compensation; in a few cases to prescribe the programmes and courses of study; in a few cases to determine the number of institutes to be held each year. But in addition, quite a number of the States have conferred on these central educational authorities the power to "prescribe all rules and regulations," to "make suitable arrangements" for institutes, or to have "full charge" of the same. Such clauses in various school laws furnish, I think, a sufficient legal basis for full administrative control, and have in most cases been so acted upon. Clauses of this nature, or others from which the same power can, I think, be fairly inferred, are contained

1 Sch. law, 1892, sec. 1584.
3 Sch. law, 1891, sec. 81.
4 Sch. law, 1896, p. 61.
5 Sch. law, 1895, ch. 94, sec. 4.
6 Vermont Stat., 1894, secs. 598 and 601.
in the school laws of at least all of the following States: Arkansas,\(^1\) Connecticut,\(^2\) Florida,\(^3\) Louisiana,\(^4\) Massachusetts,\(^5\) Michigan,\(^6\) Minnesota,\(^7\) Mississippi,\(^8\) Nebraska,\(^9\) Nevada,\(^10\) New Hampshire,\(^11\) New Jersey,\(^12\) New York,\(^13\) North Dakota,\(^14\) Rhode Island,\(^15\) Vermont,\(^13\) West Virginia\(^17\) and Wisconsin.\(^18\)

\(^1\) Act, April 20, 1895, sec. 2, cf., Sch. law, 1895.
\(^2\) Sch. law, 1896, sec. 13.
\(^4\) Sch. law, 1895, ch. 15, secs. 3, 4 and 7.
\(^5\) Sch. law, 1894, secs. 4062–63.
\(^7\) Rule 36, Sch. law, 1895, p. 143.
\(^8\) Sch. law, 1896, pp. 24 and 62.
\(^9\) Vermont Stat., 1894, sec. 598.
CHAPTER X

APPELLATE JURISDICTION OF STATE SUPERINTENDENTS AND STATE BOARDS OF EDUCATION

Quite a sharp entering wedge towards centralization has been driven in many States by vesting either in the State superintendent or the State board of education the power of hearing appeals and deciding controversies among local authorities arising under the school laws. This appellate jurisdiction has been expressly conferred by law upon the central educational authorities in at least twenty-eight States. Although the extent of this jurisdiction varies somewhat in the different States, it will be fair, I think, to quote the New York law as somewhat typical of at least quite a number of the above States. The provisions of the present New York law on this subject are as follows:

Title XIV. Section 1. "Any person conceiving himself aggrieved in consequence of any decision made:

(1) By any school district meeting;

(2) By any school commissioner or school commissioners and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys in any such district or part of a district;

(3) By a supervisor in refusing to pay any such moneys to any such district;

(4) By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school;

(5) By any trustees of any school library concerning such library, or the books therein, or the use of such books;
(6) By any district meeting in relation to the library;
(7) By any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools, may appeal to the superintendent of public instruction, who is hereby authorized and required to examine and decide the same; and his decision shall be final and conclusive, and not subject to question or review in any place or court whatever."

The superintendent of public instruction is also empowered to regulate the practice in these appeals, and to make all orders "necessary or proper to give effect to his decision."

The express statement of the law in quite a few of the States besides New York, and the evident intent of the law in most of the above States, is that the decisions of either the State board or the State superintendent shall be final, although the law of some of these States subjects this appellate jurisdiction of the educational department to the control of the courts.¹ The absence of contested cases in the courts in most of these States would also seem to indicate that in practice the appellate jurisdiction of the State educational authorities is final.

Although the question of the appellate jurisdiction of the State superintendent and the State board has not often been taken into the courts, there have been a few cases, and these have served to define more clearly the nature and the extent of this jurisdiction. Indeed, we cannot get a correct idea of this appellate jurisdiction without noting some of these cases.

One of the earliest cases bearing on the general question was that of Joint School District No. 7 vs. Wolfe,² rendered by the

¹ Cf., for example, Neb. Sch. law, 1895, p. 48; N. D. Sch. law, 1896, p. 27; Wash. Sch. law, 1893, p. 8.
² 12 Wis., 765.
Wisconsin Supreme Court in 1860. In this case, in connection with a decision that the assistant State superintendent could not hear appeals, the court admitted that the decision of the State superintendent was final concerning the formation and alteration of school districts, "or concerning any other matter under the school law of the State." Eighteen years later (1878), in the case of State ex rel. Burpee vs. Burton, the same court held that the decisions of the department of public instruction upon questions within its jurisdiction are entitled to great weight, and should not be overruled by the courts unless clearly contrary to law. Closely related with this latter decision was that rendered in the Appeal of Cottrell (1873), which held that such decisions of the department are of value in construing the school law when it admits of different constructions.

In 1867, the New York Supreme Court, in the case of People vs. Collins, held that the decision of the State superintendent was "final and conclusive, and not subject to question or review in any place or court whatever," regarding "all questions relating to the holding of school district meetings, and any and all official acts of school officers, trustees, commissioners, supervisors, or others, relating to the conduct of common schools, or concerning any matter, act or duty required or performed under the law providing for the organization and maintenance of common schools, or any law relating or pertaining thereto." In 1880, in the case of People ex rel. Yale vs. Eckler the same court held substantially the same opinion. This was a case of a school trustee engaging a teacher and then discharging him before the expiration of the time of the contract and refusing to pay. On appeal the State superintendent decided in favor of the teacher and directed the trustee to pay the amount claimed. The court upheld this decision of the State super-

1 45 Wis., 150.  2 10 R. I., 615.  3 34 How. Pr., 336.  4 19 Hun., 609.
intendent, again declaring that his decision was "final and conclusive, and not subject to question or review in any place or court whatsoever." At the same time the court declared that the trustee waived any right he may have had to a trial of the question by a jury, by answering the appeal and submitting the case without objection to the superintendent. Again in 1892, in the case of People ex rel. Clingan vs. Draper, the Supreme Court upheld the decision of the State superintendent and declared that the court would not reverse the decision of that official as to a matter where the statute made his decision conclusive. This was a case of the State superintendent declaring a certain action of a certain district void, and removing a trustee for not closing up the affairs of said district pursuant to a law passed in 1891. On the other hand, this court has decided, in the case of People ex rel. Trustees vs. Town Auditors, that "the power to hear and determine an appeal from the action of the town auditors is not included in the jurisdiction conferred by the legislature upon the superintendent in the statute relating to schools."

In 1887 the Iowa Supreme Court, in the case of Newby vs. Free, held that, as to such questions as are by law within the jurisdiction of the various school officers of the State, "the decision of the superintendent of public instruction must be regarded as final and conclusive, and binding on the parties, and it follows that such decisions must be enforced by the courts."

The Maryland Court of Appeals, in the case of Wiley, et al., Trustees vs. School Commissioners of Alleghany Co., held that the power of the State board of education to decide controversies was a "visitorial power of the most comprehensive character, ... and wherever that power exists, and is comprehensive enough to deal with the ques-

1 63 Hun., 389. 2 126 N. Y., 528. 3 72 Ia., 379. 4 51 Md., 401.
tions involved in an existing controversy, courts of equity decline all interference, and leave parties to abide the summary decision of those clothed with the visitorial authority.”

It has also been decided that the State superintendent may make all needful rules and regulations for the hearing of appeals, “including a rule requiring the evidence to be submitted in the form of affidavits, and the arguments of parties or their counsel in writing, without a personal hearing or oral examination of witnesses before him;”¹ and further that he has the power to correct mistakes made in rendering judgment in a case before him possessed by all courts and judicial officers.²

It appears, therefore, that the appellate jurisdiction of the central educational authorities has become quite firmly established in law and practice in a large number of our States. And only a moment’s reflection will reveal the vast importance of this power. Such a power and jurisdiction offers almost endless opportunity for central control of local authorities and for securing a more uniform administration of the school law. Indeed in some States these decisions of the State superintendent constitute quite an extensive body of supplementary school law, as an examination of even the decisions printed in the school reports will show. And it is not too much to predict that wherever firmly established this power will surely bring about a more and more thorough central control and regulation. This appellate jurisdiction of the State superintendent is one of the really strong tendencies toward centralization which the latter half of the century has developed.

We have now passed in review some of the leading features of the school systems of the various States, and have

¹ State ex rel. Moreland v. Whitford, 54 Wis., 150.
² Desmond v. the Independent District of Glenwood, 71 Ia., 23.
discovered quite a strong under-current toward centralization in educational administration. In spite of our extreme devotion as a people to the principle of local self-government, we have not hesitated to reject the principle to a great extent in order to secure greater efficiency in the administration of our public school systems. And it is well to note before leaving our subject that this tendency discovered in educational administration is in accord with a similar tendency in other departments. Already our whole national system of administration has become quite thoroughly centralized, and, although we have by no means gone so far in our commonwealth administration, yet even here education is not the only department in which this centralizing tendency can be discovered. The same tendency is every year becoming more and more evident in public health and poor-law administration, in the assessment of taxes and the auditing of local accounts. In conclusion the writer wishes to express his opinion that this tendency is a wholesome and safe one, and our people need not be frightened by the bugbear of paternal government which the opponents of this tendency continually invoke. It is an incontestable fact that in the field of educational administration, as well as in the other fields just mentioned, this centralization has led to increased administrative efficiency; and it is not too much to predict that as our civilization becomes more complex this tendency, which is already quite marked, will become more and more pronounced and felt in other States and other fields of administration.
III

THE ABOLITION OF PRIVATEERING AND THE DECLARATION OF PARIS
THE ABOLITION OF PRIVATEERING

AND

THE DECLARATION OF PARIS

BY

FRANCIS R. STARK, LL.B., Ph.D.

University Fellow in International Law

COLUMBIA UNIVERSITY
New York
1897
I desire to express my great indebtedness to Professor John Bassett Moore, not only for his kind and courteous advice, but also for placing in my hands a great deal of valuable material with regard to the abolition of privateering, especially some unpublished papers of Mr. Marcy.

F. R. S.

Columbia University,
February 13, 1897.
# CONTENTS

## PART I

**THE RIGHT OF CAPTURE OF PRIVATE PROPERTY AT SEA**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>INTRODUCTION</td>
<td>11</td>
</tr>
<tr>
<td>II</td>
<td>CHAPTER I. <strong>The Theory of Individual Enmity</strong></td>
<td>13</td>
</tr>
<tr>
<td>II</td>
<td>CHAPTER II. <strong>The French School</strong></td>
<td>19</td>
</tr>
<tr>
<td>III</td>
<td>CHAPTER III. <strong>The English School</strong></td>
<td>32</td>
</tr>
<tr>
<td>IV</td>
<td>CHAPTER IV. <strong>The Attitude of the United States</strong></td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>SUMMARY</td>
<td>45</td>
</tr>
</tbody>
</table>

## PART II

**COMPARATIVE SKETCH OF PRIVATEERING BEFORE 1856**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>CHAPTER I. <strong>Privateering in England</strong></td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>1. The Ante-Elizabethan Period</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td>2. From the Reign of Elizabeth to the Prize Act of Anne (1708)</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>3. From the Prize Act of Anne to the First Armed Neutrality (1780)</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>4. From the First Armed Neutrality till the Declaration of Paris</td>
<td>78</td>
</tr>
</tbody>
</table>
# CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER II. Privateering in France</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The French Marine before Colbert</td>
<td>89</td>
</tr>
<tr>
<td>2. From Colbert to the Peace of Versailles (1783)</td>
<td>94</td>
</tr>
<tr>
<td>3. The Era of Revolution</td>
<td>105</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER III. Privateering in the United States</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. During the Revolution</td>
<td>117</td>
</tr>
<tr>
<td>2. During the War of 1812</td>
<td>127</td>
</tr>
</tbody>
</table>

**PART III**

THE ABOLITION OF PRIVATEERING

<table>
<thead>
<tr>
<th>CHAPTER I. The Declaration of Paris</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>139</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER II. The Working of the Declaration</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>153</td>
<td></td>
</tr>
</tbody>
</table>
PART I

THE RIGHT OF CAPTURE OF PRIVATE PROPERTY
AT SEA
INTRODUCTION

When the progressive people of a state wish to bring about a reform in their municipal law, their course, however full of obstacles in practice, is theoretically simple. The sovereign, as represented in the supreme legislature of the land, is appealed to, persuaded of the reality of the grievance, and induced to enact a "law" for its abolition. The grievance disappears instantly; and the historian of that people, tracing the fate of that grievance, can lay his hand upon the hour and the minute when it was eradicated from the law.

A reform in the Law of Nations is a very different proceeding. There is no supreme legislature, because there is no sovereign. There is not even a collective sovereignty, so that the majority may bind the minority; for there is no organization in the concert of the nations. The reformer, therefore, since he can find no one in authority, must seek the consent of all in turn; and instead of being able to point out the exact instant when the reform is effected, he is able to say only this: that the greater the number and weight of the states which have adopted it at a given time, the more fully has it become a part of International Law.

International Law resembles other law in this, that its tendencies are of greater importance than its decisions. It is not what has been decided, but what is likely to be decided next time, that the average litigant is interested to know. And therefore, in estimating the progress of our international reform, we are not confined to the mere enumeration of the states pro and con. Just as the private lawyer can shrewdly
guess which of his book rules are on the verge of being regarded by the courts as “no longer applicable to existing conditions,” and obsolete, so the publicist, weighing two theories between which the nations of the earth are divided, is able to decide which is the theory of the future and which is the theory of the past. And if he is writing about the law of the present, he will be influenced more by the former than by the latter.

The right of capture of private property on the high seas in time of war was once universally recognized. At some time in the future, it will not be recognized at all. In order to appreciate the present state of the question as to the existence of this right, it may perhaps be worth while to glance briefly at the two great theories with regard to the nature of war itself, as they developed and as they exist to-day. And first:
CHAPTER I

THE THEORY OF INDIVIDUAL ENMITY

In the earliest times there was but one theory with regard to the nature of war; the theory that every subject of one belligerent state was the enemy of every subject of the other. There were two reasons, in early times, for assenting to this theory: one itself theoretical, the other practical.

The theoretical reason was this: the conception of the state as distinct from the king or other legal sovereign had not yet developed. The legal sovereign was also the sovereign of political science. War was waged, not by states, but by kings. As it is impossible to conceive a state of war without enemies on either side, and as the idea of the state as a body politic independent of the absolute monarch in whom was concentrated the power of managing its affairs had not yet arisen, it became necessary to regard the absolute monarchs themselves as the primary enemies in every armed conflict; something which was the more easy because in a great many cases the absolute monarchs did, in point of fact, hate each other—i.e., stood to each other in a relation of actual personal enmity. Given, however, the theory of enmity between the monarchs, it likewise became necessary, on feudal principles, to consider their subjects enemies; for the great crown vassals in each land held their immense territorial grants of the king on the condition, among others, that they should follow him to war—i.e., make his enemies their own; and their tenants held from them on the same principle, and so on. And thus, when war broke out, every one found himself an enemy of every one upon the other side.
The second and practical reason was that, as wars were in point of fact carried on, the private individuals on each side were always treated as enemies. Military commanders took it for granted that war gave them absolute rights over the persons of all subjects of the foreign prince, and *a fortiori* over all their property, movable and immovable, wherever found; for, as Cicero logically remarks, "It is not improper to despoil the man whom we have the right to kill."2

Both of these principles—the absolute right over (1) hostile persons and (2) hostile property—were firmly established in the time of Grotius. Indeed, it would have been folly to have put forward any other theory at that time, with the Thirty Years' War raging and the sack of Magdeburg going on before the almost indifferent eyes of Europe. According to Grotius, a declaration of war against a prince is a declaration against his subjects, who may lawfully (*impune*) be killed wherever found,3 and whose property is all subject to absolute confiscation.3 Not only were these principles considered political axioms in Grotius' time, but they were constantly reiterated by writers in the first half of the succeeding century. Wolf states the theory of individual enmity as something unquestionable,4 and allows the seizure of private property as a consequence, partly to indemnify the captor (*tum ad consequendum debitum*), partly to weaken the resistance of the owner (*tum ad imminuendum vires agendi*).5 Bynkershoek (1751) lays down the doctrine in its extreme form. It is lawful, says he, to put down the enemy by force.

---

1 "Non est contra naturam spoliare eum, quem honestum est necare." Quoted by Grotius, *De Jure Belli ac Pacis*, III., v., 1.

2 *De Jure Belli ac Pacis*, III., iv., 8.

3 *Id.*, III., v., 2.

4 When sovereigns (rectores) declare war, "... utriusque subditi sunt invicem hostes." *Jus Gentium*, § 723.

"I said, by force. Not just force, for all force in war is just; * * * so much so that it is legitimate to destroy the enemy even when unarmed, or by poison or assassination * * *. When he comes to speak of hostile property, we find, of course, that everything is confiscable."

In 1758 M. Emeric Vattel published his Droit des Gens. Although in some ways a distinct improvement upon Bynkershoek and even Grotius, he too considered all the subjects of two belligerent states mutual enemies, even the women and children, though the latter, being "inoffensive" enemies, should be dealt with gently by Christian armies. With a curious inconsistency, which escaped notice only because Rousseau had not yet written, Vattel gives, as a reason for the theory of individual enmity, the very strongest reason against it: "For the sovereign," says he, "represents the nation, and acts in the name of the whole body politic (au nom de la société entière); and nations have nothing to do with one another except collectively, in their quality of nations."

If the sovereign is the representative of the nation, and nothing more; if he acts, not in his own name, but in that of the "société entière," it can hardly be correct to say that he individually is an enemy. The agent who does an act on behalf of his principal is not usually, in contemplation of law, a party to the act. It is then the nation which declares war, and "nations have nothing to do with one another except collectively," from which it follows plainly, it would seem, that a declaration of war does not affect the relations between individuals as such at all.

Nevertheless, up to this point the publicists were practically unanimous; and their princes, if possible, even more so. The latter sometimes displayed the greatest ferocity

1 Quaestiones Jūris Publici, I., i. 2 Id., III.
3 Droit des Gens, III., v., § 70. 4 Ibid., § 72.
towards the inoffensive subjects of their rivals; and the language of some of the manifestoes of the seventeenth and eighteenth centuries is almost as violent as that of the recent memorable declaration of war by China against Japan. Thus Louis XIV. in his declaration of war against the Dutch in 1672: "* * * His Majesty hath declar'd, as he does now declare, that he has determin'd and resolv'd to make war against the said States-General of the United Provinces, both by Sea and Land; and so consequently commands all his Subjects, Vassals, and Servants to fall upon the Hollanders, and forbids them, for the future, to have any Commerce, Communication, or Correspondence with them, upon pain of death."¹ So in 1689, the States-General, in declaring war against France, required all their subjects "to pursue and everywhere in a hostile manner to attack the countrys, people, inhabitants and subjects of the King of France,"² and the Lieutenant-Governor of the Netherlands issued at Brussels a manifesto in which he exhorted the Spanish troops to "resist the subjects of France, to fall upon them, and to commit all Acts of Hostility against them, as against Enemys, Aggressors, and Violators of Treatys."³

As yet no hint of any contrary theory is to be found in the proclamation of any prince or the language of any text-writer. But many forces were at work, paving the way for progress in this as in other directions. The belligerent practices were insensibly becoming less savage; and this tendency was being manifested especially in three ways.

¹ A General Collection of Treatys and other Publick Papers (London, 1732) I., 167.
² Id., I., 260.
³ Id., I., 272. See also Queen Anne's declaration of 1702, p. 422 (all acts of hostility against France and Spain or their subjects), and the Emperor's against France and Anjou, 1702, p. 430 (attack our said enemies, and those which belong to them).
First, a well-defined distinction was beginning to be drawn between combatants and non-combatants. The absurdity, as well as the cruelty, of robbing and butchering women and children and harmless peasants was beginning to be apparent even to the imbruted wits of the men who had studied war in the school of Tilly and Wallenstein. When a town fell into the possession of the enemy it was no longer given up to pillage, but a certain sum was raised by the citizens and paid over to the hostile army by way of ransom—a system which soon gave place to the modern one of contributions and requisitions. Secondly, even as to combatants, properly so called, the usage was relaxing. Bynkershoek has been quoted as saying that it is lawful to destroy an enemy even when disarmed; but the spirit of the year 1751, in which Bynkershoek wrote, was far from sanctioning any such general principle. It is difficult to find any satisfactory distinction between the soldier who has thrown away his arms and the peasant who has never taken them up; and as nearly all the nations of the day, Bynkershoek to the contrary notwithstanding, were agreed upon sparing the peasant, it was a natural consequence that the soldier should begin to be spared as well.

A third and important change of usage was that in relation to the treatment of prisoners of war. Formerly, on the feudal theory of personal enmity between belligerents, the body of a prisoner, as well as his property, belonged to the indi-

---

1 Except, for a long time, the peculiar case of a town defended against overwhelming odds and finally taken by assault. For a criticism of this exception see Hall, Intern. Law (1880), 336 n. 3.


3 Wolf states the principle in his logical, dogmatic way: “Quamprimum hostis in mea potestate est, hostis esse desinit. Hostes enim sunt, inter quos bellum est.” Jus Gentium, § 795.
A man might do what he would with his enemy, with the captive of his bow and spear. Now, however, we find the right of the individual over his prisoner's person, with its accompanying right of ransom, dying out; and substituted for it we find the practice of exchange. The remarkable significance of this transition, in the history of the theory of war, must be obvious, when it is recalled that the exchange of prisoners is a process which does not benefit the individual captor at all, but does benefit the captor's state. What did all this mean but the substitution of the state for the individual as the real party to the war, and the devolution of the individual into the position of a mere agent, to be treated as an enemy only when busy with the state's business?

It was reserved for the French genius—the French republican genius—by simply altering the point of view to suit the growth of political science, to turn a mere bunch of disconnected changes in the practice of war into a revolution in its theory.

Except where the prisoner was a king or other great personage, in which case his ransom went to the captor's sovereign.
CHAPTER II

THE FRENCH SCHOOL

The changes noted at the close of the last chapter may be ascribed to three concurrent causes: First, humanity; the world was becoming more civilized. Secondly, self-interest—the fear of reprisals and, worse still, disciplinary relaxation. And a third cause underlying both the other two—the development of the conception of the state as a body politic distinct (1) from its ordinary members, and (2) from its legal sovereign.

Given the principle that the state and the king are distinct entities, it follows that states may have relations with one another as states without altering in any respect the relations existing between two or more subjects as individuals. The theoretical reason for the conception of individual enmity in war has entirely disappeared. Even the kings are no longer enemies, but have degenerated into mere officers of the state, mere agents, obnoxious to each other only while acting about the affairs of their principals. There is no longer any legal reason for raising a fictitious enmity between individuals who are not enemies in fact—between parents and children, brothers and sisters, and bosom friends whom there is no magic in a frontier and a declaration of war to separate.1 Moreover, the old doctrine was objectionable as inhuman


239]
and unchristian. The only ground upon which war was justifiable at all, from a Christian point of view, was that of self-defense; the very etymology of the word depends upon this idea. It is unnecessary to dwell upon the fact that no principle of self-defense can require us to predicate enmity of non-combatants. "The foundation of a just war is a wrong," says Franciscus à Victoria, "but wrong does not proceed from the innocent, therefore it is not lawful to make war upon them." That which was most important of all, however, and which assisted most the decay of the old theory on the Continent, was the change in the practice, which had in fact been so great as fairly to take the kernel out of it and leave little except the bare shell.

Briefly to sum up, if individuals taking no active part in the war were enemies, they were enemies (1) who could not be killed, (2) who could not in any manner be molested in their persons (except in a few cases on the ground of military necessity), and (3) whose property on land was exempt from seizure except by way of contribution and requisition. What, then, was left of the *jus hostilis*?


2 *Relect. Theol.*, VI. Quoted by Hall, *Intern. Law* (Ed., 1880).—"Fundamentum justi belli est injuria, sed injuria non est ab innocence; ergo non licet bello uti contra illum."

3 If, for example, England and France are at war, and X is a French subject, his personal property on land may be divided into three classes: (1) Property in France; (2) Property in England; (3) Property on land elsewhere. The first class is exempt from seizure except by way of contribution and requisition. The second and third classes are exempt absolutely in practice, though the English writers say, as a sort of sop thrown to consistency, that they are "theoretically subject to seizure." The real property everywhere is exempt, though it may, of course, be occupied by either army during military invasion. The irreconciliability of these exemptions with the old theory that X is the enemy of the English Crown and of every individual Englishman can hardly fail to be apparent.

4 The right of contribution and requisition is not a hostile right, but depends
Theoretical progress is made in a straight line, but the paths of practical progress are devious. It is not surprising, therefore, that something really was left of the *jus hostilis* in regard to non-combatants. The different methods of warring upon harmless individuals had been falling out of use by degrees, not abolished by one happy stroke; and there was one method which was in use still, for no other reason than that it had not yet been abolished. The capture of private property was still allowed on the high seas. That is to say, if England is at war with Prussia, a bale of Prussian goods is safe on an English wharf, but the same bale found by an English cruiser outside the three-mile line is good and lawful prize. Mably, in 1754, called attention to this unfair discrimination. "We should regard with horror," says he, "an army which made war on citizens and robbed them of their goods; * * * How, I ask, can that which is infamous on land be just or at any rate permissible at sea?"

A few years later Rousseau, in his Social Contract, found the words to express the great principle toward which the laws of war had been tending. "War," said he, "is not at upon the principle that the invader displaces, temporarily, the sovereignty of the invaded state over the territory invaded. It is a right analogous to that of the original sovereign to levy war taxes. It is a right exercised by superior over political inferior—not by belligerent over belligerent. Cf. Ercole Vidari, *Del rispetto della proprietà privata fra gli Stati in guerra* (Pavia, 1867), III., 3.


1 *Droit Public de l'Europe fondé sur les traités*, II., 310.

2 "La guerre n' est donc point une relation d'homme à homme, mais une relation d' état à état, dans laquelle les particuliers ne sont ennemis qu' accidentellement; non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs."—*Du Contrat Social* (1762), I., IV.
all a relation of man to man, but a relation of state to state, in which individuals are enemies only accidentally—not as men, not even as citizens, but as soldiers; not as members of their state, but as its defenders." Principles, he says, which are not those of Grotius, and are not founded on the authority of poets, but which spring from the nature of things and are based on reason.

Obviously the logical result of this theory is the abolition of capture of private property at sea. So clear, indeed, is the connection, that the English claim that it was invented for that purpose. The dilemma was difficult for the supporters of the old system. If non-combatants are enemies, why spare their persons and property on land? If they are not, why interfere with them at sea?

The spread of the new doctrine was very rapid in France. Linguet adopted it in 1779. Portalis substantially quoted Rousseau in his opening speech to the Conseil des Prises on the 14th floréal, an VIII. (1801). From this time on there is a perfect chorus of French writers and diplomatists laying down the Rousseaunian principle as established, and treating the theory of individual enmity as fallen into innocuous desuetude. Vergé, the celebrated annotator of Martens, says that "for a long time" (longtemps) war was waged between individual and individual, but that to-day states only are enemies, and consequently private property at sea is no longer justly subject to capture. Talleyrand, writing to Napoleon in 1806, declared that, "in consequence of the principle that war is not a relation of man to man, but of state to state, * * * the law of nations does not permit the right of war

3 Quoted *Ibid*.
4 Vergé, note to Martens, § 289.
and the resulting right of conquest to extend * * * to private property, to merchandises of commerce, * * * in a word, to private persons and their goods."1 Napoleon himself expressed an ardent wish for the coming of a time "when the same liberal ideas should be extended" to both maritime war and terrestrial, and when private merchant vessels and harmless sailors should no longer be subject to capture.2 Cauchy, writing after the Declaration of Paris, and holding the same views, for the same reasons as his predecessors, dilates with perhaps a shade too much optimism on the step taken toward their realization by the abandonment of privateering.3 In the same breath with the French writers may be mentioned the celebrated Argentine publicist Calvo, who writes in French as well as in Spanish, and who says positively that "war exists between states, and not between individuals,"4 and that as a consequence the practice of capturing private property, even at sea, "tends to-day to give way to a more liberal doctrine."5

Modern French support of the right of capture at sea is practically confined to Hautefeuille and Ortolan. It is to be observed, however, that the theory of the former depends upon the now false premise that private property on land is also subject to seizure.6 The case of Ortolan is more peculiar, for while thoroughly Rousseauian about the theory of war,7 and the exemption of private property on land, he attempts to distinguish the latter from property at sea, in a laborious and at times amusing way. He says, for example,

---

1 Quoted by Hall from the Moniteur of Dec. 5th, 1806.
2 "Il est à désirer," etc. Mémoires de Napoléon, t. 3, ch. 6, p. 304. The preamble of the Berlin decree is much more positive in its language. Cf. infra.
3 Ed. 1862, II., 472.
4 Droit International, § 1784.
5 Ibid., § 1994.
6 Propriétés Privées des Sujets Belligérants sur Mer (1860).
7 Cf. Règles Internationales et Diplomatie de la Mer (1864), II., 27.
that at sea “no conquests or requisitions are possible. Yet
the enemy must be injured in some manner” (il faut bien
nuire à l'ennemi d'une manière quelconque). This certainly
cannot be an argument in favor of the capture of private prop-
erty, for, as M. Ortolan himself admits, war is not a relation
of individual to individual, and hence private merchants
cannot be the enemies whom “il faut nuire.” He says,
again, that seizing a ship and its cargo is a very different
proceeding from seizing a man’s household goods;” waiving
which—it is not so very different after all—it must be
remembered that it is not only the household goods, but
factories, and stores, and things of a wholly professional
kind, which are spared on land. Next, M. Ortolan refers to
the fitness of the merchant marine of a state, both as to
matériel and personnel, for immediate belligerent use. But
this argument, in these days of iron-clads, is obsolete as to
the ship, and explains nothing about the confiscation of the
cargo; while as for the crew, if they are to be made prisoners
of war because they may at any moment join the navy, why
not capture farmers on land on account of their intrinsic fit-
ness for the army? Finally, M. Ortolan suggests that, were
capture at sea abolished, a belligerent with a weak navy

1 Cf. Regles Internationales et Diplomatte de la Mer (1864), II., 42. There
is something humorous about M. Ortolan’s theory that the absence of our real
enemy justifies the beating of an innocent person who happens to be present.
In the language of Bluntschli—“Allein niemals kann die Schwäche der recht-
mässigen Kriegsmittel ein Grund sein, um die Zulässigkeit unrechtmässiger
Kriegsmittel zu rechtfertigen.” (Das Mod. Völk., 45.) And Lavaleye says
(Rev. de Dr. Intern., infra): “C'est comme si sur terre on brûlait systémat-
iquement des fabriques, parce qu’elles sont une source de richesse pour l’ennemi.”

2 II., 43. In 1870 the wine in the cellars of Champagne was valued at
50,000,000 f., yet no one ever thought of it as subject to seizure by the Germans.
Would M. Ortolan embrace the wine-casks within his description of household
goods, or as he expresses it, “objets servant à l’usage d’un habitant paisible
... où il a son foyer domestique?”

3 Dip. de la Mer., II., 49.
would simply withdraw its vessels of war from the seas; but what possible harm that could do to any one but the weak belligerent itself, which would thus be unable to maintain blockades or to shut off contraband, is not made apparent. The means of prolonging the war, of course, are obtained, indirectly, from commerce; they are also obtained, however, from factories, yet the latter are exempt.

Though the French were the first to advocate what we shall now speak of as the modern theory of war, the writers of other continental nations did not hesitate to follow their lead.

At the outbreak of the Franco-German war, the King of Prussia issued to the German army a proclamation calling upon them to respect private property, and adding that he waged war against the French army, not the French people. Hefter, writing shortly after the war, strongly discountenances the *confiscation* of private property at sea, although, indeed, he admits the right to seize and hold it in order that it may not benefit the enemy during the war. His objection, however, to the French system in its entirety is only the rather pessimistic one that strong maritime powers could never be induced to give their consent. On the other hand, Bluntschli adopts all the French theories as unques-

1 *Dép. de la Mer.*, II., 49. See, for the same argument, Riquelme (*Elementos de Derecho Público Internacional*, Madrid, 1849, I., 136): “Fundase esta diferencia en que en las guerras marítimas no hay otro medio de debilitar a un enemigo que encierra en sus puertos las escuadras y esquiva el combate, sino el de destruir su navegación y su comercio.”


3 *Das Europäische Völkerrecht* (1873), § 139. Captor to have “kein Eigenthum ... sondern lediglich das Recht der Beschlagnahme während der Dauer des Krieges.”

4 “Ein solches System würde allerdings mit gutem Grunde für eine fromme Chimäre zu erklären sein.”
tionable. War is waged by states, not private persons, and, as a logical and necessary consequence, capture of private property at sea is to be condemned. Similarly Aegidi and Klauhold, in their Frei Schiff unter Feindes Flagge (Hamburg, 1866) condemn the old practice and look forward hopefully to the time when their state will be able "to obtain for the fundamental principle [of immunity for private property at sea] the consent of England and thus the recognition of the world." The Italian writers appear to be even more unanimous than the German. Azuni states the Rousseaunian theory of war without qualification, and formulates certain maritime rules of which the first abolishes capture of private property other than contrabrand. Galiani calls it an "absurd and lamentable consequence" to allow capture at sea. Ercole Vidari thinks that respect for private property is an absolute principle, applicable in war as well as in peace, on sea as well as on land. War is a relation of state to state, not of individual to individual. Fiore and Pierantoni take the same view.

The sentiment of Holland, as expressed by Jan H. Ferguson, an eminent Dutch publicist and official, in 1884, is as follows: "War is a relation between States alone. * * * The state of war entails no jus in personam against every private individual in the state. * * * The savage maxim that when war is de-

1 Das Moderne Völkerrecht (1878), §§ 530, 531; p. 35.
2 Id., § 665.
3 Einleitung, 38.
4 Sistema Universale dei principii del diritto maritimo dell' Europa (Ed. 1797, Triest), II., 303.
5 Dei doveri de principi neutrali (1782).
6 Del rispetto della proprietà privata fra gli Stati in guerra (1867), II., 2, 4.
7 Fiore (Fr. ed.), II., 270; ch. VII, ch. VIII.
clared between the two nations every individual member of
the one is on the warpath against every person belonging to
the other, is happily banished from the usages of warfare be-
tween civilized states." 2 Capture of private property at sea,
therefore, is "anomalous" and a "conspicuous deviation
from the principles of the law of war." 2

Belgian writers, also, have voiced a ready assent to the
modern theory. Laveleye, in a strong article in the Revue
de Droit International, 3 the brilliancy of which called forth
an astonishing tribute from the usually placid Calvo, 4 reviews
all the arguments of Ortolan, and all the practice on the sub-
ject, and concludes that the old doctrine is already extinct
on the continent and has not much longer to live anywhere.
And Nys, in his Guerre Maritime, 5 speaking of the difference
in the treatment of private property on land and at sea, ex-
claims, "The contradiction is flagrant, and * * * imperi-
ously demands a reform."

In Russia the sentiment is the same. When President
Monroe, in 1824, entered into negotiations with the French,
British and Russian governments for the purpose of abolishing
capture at sea, the Russian government, through Count Nesselrode,
expressed hearty approbation of the scheme, but very naturally was unwilling to act alone. 6
Later, in 1856, when Mr. Marcy re-opened the question, the
Russian chargé d'affaires at Washington, acting under the
orders of Prince Gortschakoff, 7 replied that the Emperor ac-

1Manual of Intern. Law for the Use of Navies and Consulates (1884), II,
247, 248.
2Id., II., 308. 8VII. (1875), 560. 4Calvo, § 1992.
3(Brussels, 1881), I., 134.
6Nesselrode to Middleton, Feb. 1, 1824.
7Gortschakoff to Stoeckl, Sept. —, 1856: "La proposition d'Amérique est
dévelopée d'une manière si habile et si lumineuse qu'elle commande la conviction;
* * * elle recevra un appui décidé de la part du représentant de Sa Majesté Im-
périale." Quoted in Rev. de Dr. Int., VII., 569.
cepted, for his part, the condition on which the United States consented to abolish privateering—namely, that all private property on the seas should be respected. Finally, in 1874, the Russian projet for a Declaration of Brussels embodied the following articles:

“1. An international war is a state of open hostility between two independent states and their armed and organized forces.

“2. The operations of the war must be directed only against the forces and means of war of the enemy state, and not against its subjects, as long as the latter take no active part in the war.”

The various extracts which have been quoted may, it is believed, be taken as fairly representative of the spirit of continental publicists and diplomatists as it exists to-day. It remains before concluding this chapter to review briefly some of the practical attempts which men of action have made to abolish the capture of private property at sea.

The United States made the first effort. Principally through the endeavors of Franklin, who was strongly opposed to the old practice, the principle of the immunity of private property at sea was embodied in our treaty of 1785 with Prussia. In 1792 the National Assembly of France resolved, that the executive power be “invited” to negotiate with foreign powers for the abolition of privateering and the free navigation of commerce. M. de Chambonas, consequently, issued a circular to the French diplomatic agents abroad, requesting them to discuss the matter with their respective governments. Only the United States made any satisfactory response; Jefferson, then Secretary of State, referring to and approving the treaty with Prussia, which was, perhaps, not unnatural on Jefferson’s part, as he had helped to make it.

1 Stoeckl to Marcy, Nov. 28th, 1856. (Aegidi, p. 20.)
2 Cf. Art. 23.
In 1806 Napoleon recognized the fact that the right of capture of private property at sea was no longer properly a part of the law of nations, by apologizing for its exercise against England, and justifying it on the ground of reprisal. In 1823 the French refrained from capturing private property at sea in their war with Spain. In the same year President Monroe renewed the efforts of the United States to make the new doctrine general. The favorable answer of Russia has been referred to; Chateaubriand for France replied similarly; England alone escaped discussion of the question upon technical grounds which will be considered hereafter. In 1832, however, the latter power restored the ships captured in her war with Holland. In 1854 President Pierce announced his intention to continue the efforts of Monroe. In 1856 came the Declaration of Paris, abolishing privateering and confirming the rule that free ships make free goods. Immediately afterwards Marcy proposed his famous amendment to the Declaration, by abolishing all capture at sea except under the law of contrabrand and blockade; and Russia's favorable reply to that proposal has been mentioned. In the same year (June 11) the Marcy amendment was incorporated into a treaty of commerce between Costa Rica and New Granada (Art. II.). In 1858 Sr. Da Silva Paranhos, Brazilian minister of foreign affairs, declared, that while the

1 Cf. the preamble to the Berlin decree (Nov. 21, 1806):
"Napoléon, Empereur des Français, roi d'Italie, considérant,
1. Que l'Angleterre n'admet point le droit des gens suivi universellement par tous les peuples policiés;
2. Qu'elle répute ennemi tout individu appartenant à l'état ennemi et . . .
3. Qu'elle étend aux bâtiments et marchandises de commerce . . . le droit de conquête qui ne peut s'appliquer qu'à ce qui appartient à l'état ennemi— . . .
"Nous avons résolu d'appliquer à l'Angleterre les usages qu'elle a consacrés," etc.

2 "La marine royale," declared Chateaubriand, "ne prendra que les bâtiments de guerre espagnols; elle n'arrêtera les bâtiments marchands."

3 Chateaubriand to Sheldon, Oct. 29, 1823. (Aegidi.)
world owed much to the Declaration of Paris, consistency required the adoption of the Marcy amendment in toto. In 1859, by the treaty of Zurich, France restored the Austrian vessels captured during the war. In 1860 England and France together proclaimed the principle in their war with China. In 1865 France restored vessels captured during the Mexican War. In the Seven Weeks' War of 1866 the immunity of private property at sea was declared by all three powers—Austria, Italy and Prussia; Italy in fact having adopted a permanent rule of immunity, on condition of reciprocity. Innumerable German diets, and chambers of commerce the world over, have resolved in favor of the new principle. In 1870, at the outbreak of the Franco-Prussian war, the King of Prussia announced the exemption of French merchantmen; but on Jan. 12, 1871, Bismarck sanctioned a relapse into the old practice by way of reprisal. In 1871 the United States again embodied the immunity principle in a treaty, this time with Italy; the treaty is still (1897) in force.

1 British and For. State Papers, Vol. 48, p. 137.
2 Art. 3. (Except such as had already been condemned.)
3 Order in Council, March 7th, 1860.
4 Dépêche du ministre des affaires étrangères du 28me Mars, 1860.
5 "Les navires marchands et leur cargaisons ne pourront être capturés que s'ils portent de la contrebande de guerre ou s'ils essaient de violer un blocus effectif et déclaré."
6 Codice per la marine mercantile, Art. 211 (1865).
7 They are all collected in Aegidi, Einleitung, p. 24 n. The principal cities represented are London, Bremcn, Lübeck, Rotterdam, Breslau, Bordeaux, Marseille, Stuttgart, St. John's (N. B.), Liverpool, New York, Baltimore, Triest, Riga. The Bremen resolution is thus worded—
"* * * Beschliesst die Versammlung:
"(1) Die Unverletzlichkeit der Person und des Eigenthums in Kriegszeiten zur See, unter Ausdehnung auf die Angehörigen kriegführender Staaten, so weit die Zwecke des Kriegs sie nicht nothwendig beschränken, ist eine unabweisliche Förderung des Rechtsbewusstseins unserer Zeit. * * *"
8 Art. 12. (Feb. 26, 1871.)
In 1877 the Institute of International Law, at Zurich, fully recognized the principle of immunity. And finally, in the code of the Institute for wars on land, recommended in 1880, the theory of individual enmity is distinctly negatived.¹

In view of all these facts, it is respectfully submitted that Heffter cannot sustain his statement that the hope of abolition of capture at sea is a "pious chimera." Pious, yes. Chimera, no.

¹Art. 1.
CHAPTER III

THE ENGLISH SCHOOL

The continental writers, then, maintain that the theory of war has changed; that individuals who take no part in the war are no longer enemies; and that, consequently, the right of capture of private property at sea is no longer recognized in International Law.

English writers, on the contrary, are for the most part of the opinion that the theory of war has not changed; that individuals are still enemies; and that all the positive immunities which non-combatants enjoy owe their origin simply to humanity, and must be regarded as exceptions to a rule which, where not expressly suspended, still controls.

Perhaps the ablest, because the most serious, attack upon the continental theory is that of Mr. Hall. He maintains that the relation of enmity between individuals must still exist, because otherwise certain practices which are still recognized would be illegal. These practices are chiefly five—(1) the replacing of the civil government of an invaded state by military control, and the “making of any changes necessary” for the invader’s “safety and success”; (2) the bombardment of fortified towns; (3) the right of contribution and requisition; (4) the right of compelling the personal service of members of the enemy state, and (5) the destruction of buildings and fields for military purposes.1

The first and fifth of these practices are, however, justified on the simple ground of military necessity. It is not because

1Hall (Ed. 1880), p. 59.
individuals are enemies—that is shown by the fact that no more damage may be done than is reasonably necessary for military operations. They are simply in the way, and so long as they remain in the way they must endure the temporary consequences. Such a relation is very far from a relation of enmity. It is as if I have a quarrel with X, and give notice to the world that I am going to shoot him, and thereupon A, B and C come and stand about X, and are accidentally hurt by the bullets.

The second practice is explained in substantially the same manner. Bombardment is a weapon aimed at individuals only incidentally. If the latter are enemies, why not bombard unfortified towns as well as fortified ones? Then the right of contribution and requisition has already been explained, and besides, there is, as has been seen, a strong tendency at the present time to pay for what is taken; and the supposed fourth practice, of compelling personal service, is, to say the least, of very doubtful legality. Certainly the citizens of either state cannot any longer be forced into the other's army or navy; and if they are occasionally compelled to hew wood and draw water, it does not follow that the compulsion is just and legal.

There are two reasons, concludes Mr. Hall, against the adoption of the continental theory. First, it is a fiction, for "to separate the state from the individuals which compose it, is to reduce it to an intangible abstraction." A railroad company is an "intangible abstraction," but is that any reason for confusing it with its stockholders? It is the second reason of Mr. Hall, however, which is particularly worthy of note—the continental doctrine is mischievous, he says, because "it is the argumentative starting-point of attack upon the right of capture of private property at sea." And

1 (Ed. 1880), p. 60.
2 (Ed. 1880), p. 61.
this, it is conceived, is the trouble with the whole English school; and it is for this reason that a thoroughly unprejudiced opinion of the French theory of war is rarely obtained from an English publicist. The latter, in starting out to discuss the legitimacy of capture at sea, invariably begins by assuming it.

The late Sir Travers Twiss, therefore, is perhaps not entitled to as much weight on this subject as on most others. Besides, Twiss, like Hautefeuille, maintains the general confiscability of property on land, and naturally, therefore, is not yet converted from the theory that "all the individual members of the one nation are enemies of the individual members of the other nation." Similarly Phillimore, though calling war a "conflict of societies, that is, of corporate bodies recognizing and governed by law," evidently believes in individual enmity, and declares the person of the "enemy," strictly speaking, liable to seizure and his property to confiscation. The other theory he considers to have a tendency toward the prolongation of the war.

Phillimore, Twiss and Hall may be said to be fairly representative of the English school; but even in England there are dissenting voices. An early number of the Edinburgh Review contains a striking appeal for the abolition of mari-

---

3 *Commentaries*, III., 79.  
4 *Id.*, Preface, p. 37.  
5 Mr. Phillimore refers, with a frivolity which may be pardoned on account of its intrinsic humor, to the "famous but perhaps legendary precedent of the two Dutch admirals, who, commanding antagonistic fleets, sold powder to each other, and, commercially, contributed to their own destruction." (Preface, p. 39.) Phillimore differs from Bluntschli, who refuses to excuse a barbaric practice because it shortens the war (*Das Mod. Völk.*, p. 45). If it were the theory of nineteenth century statesmen to render wars barbarous in the hope of rendering them infrequent, it would have been false humanity to sign the Declaration of St. Petersburg or the Convention of Geneva.  
time capture on the ground of humanity. Lord Palmerston in 1856, could "not help hoping" for such such abolition. The letters of Mr. Cobden are full of passages showing his sympathy with the Marcy amendment to the Declaration of Paris. He regretted, as an Englishman, that the proposal did not originate in England, and declared that if England did not at least support it, required as it was by the general sentiment of the age, "we should indeed deserve the title of the Chinese of the West." It has been seen that the chambers of commerce all over England and the British possessions took the same view. Mr. Lindsay, M. P. from Lancaster, urged it constantly in the House of Commons. The report of the Select Committee on Merchant Shipping, ordered by the House of Commons to be printed Aug. 7, 1860, declared that "the time has arrived" for it. Altogether it is not necessary to be unduly optimistic to believe that the active opposition of England is on the wane. That opposition was formerly prompted by economic considerations, and since the adoption of the principle Free Ships Free Goods, the economic considerations seem rather to point the other way. Under the present law, in the wars of the future all the carrying trade of both belligerents would be driven into neutral bottoms, which, in case of war between England and another power, would always damage England more than her adversary in the ratio of the superiority of her carrying trade. If, moreover, we contrast the case with which France or any continental nation could dispose of its produce through neutral ports in case of blockaded coasts, with the helpless position of England, if it should happen that her coasts were effectively blockaded, it will be seen that the change will

1 Liverpool Address, Nov. 7th, 1856. (Aegidi.)
2 Cobden to Bayley, Nov. 8th, 1856. (Aegidi.)
3 Cobden to Carr, Dec. 15th, 1856. (Aegidi.)
benefit Great Britain more than any other power in the world.

To quote from a speech of Mr. Liddell's in the House of Commons: "What did they do in the Russian war? They went to war with Russia in 1854. The first thing they did was to blockade the Baltic with a gigantic and expensive fleet, under pretence of distressing the enemy by cutting off the supplies which she furnished of raw material. They took a number of her ships, belonging chiefly to the poor inhabitants of the Baltic seaboard. * * * But did they stop Russian commerce? Why, the whole of the linseed, and the flax, and the tallow, and the hemp, the raw materials from Russia which England most wanted, were conveyed through neutral ports and arrived in this country at enhanced prices, which the consumer had to pay in consequence of the circuitous route which they had been obliged to travel."

In other words, blockade St. Petersburg, and Russia can use Königsberg; blockade Hamburg, and Germany will use Amsterdam; blockade Triest, and Austria will use Venice; but blockade the coasts of England and the produce must stay at home. That is why the policy of that country is likely soon to change.

In the meanwhile a small minority of foreign publicists adheres to the English school in its ancient notions of enmity. We have mentioned Hautefeuille and Riquelme. Klüwer and Negrín are referred to by Hall as taking the same view. And Bello, of the University of Chili, believed that the old

1 March 11th, 1862 (Aegidi, p. 116.)


3 Klüber, § 232. His authorities are Grotius and Kant.

4 Tratado Elemental de Derecho Internacional Marítimo, 141.
"maxims" were still (in 1847) the better established, and that their "rigor" had been mitigated much in practice—nothing more. A good deal, however, has happened since 1847.

1"Según el derecho de la guerra, * * * luego que un soberano la declara á otro, todos los súbditos del primero pasan á ser enemigos de todos los súbditos del segundo." *Principios de Derecho Internacional* (Caracas, 1847), 139.
CHAPTER IV

THE ATTITUDE OF THE UNITED STATES

The Supreme Court of the United States has gone very far towards justifying the English assertion that this country agrees with England on the question of individual enmity. For example, it has held that property of the "enemy," found in the country at the breaking out of war, is "stricti juris" subject to confiscation. And it has adopted for the United States the barbarous "commercial domicile" rule, which allows not merely subjects of the enemy state, but neutrals domiciled in the enemy's country, to be treated as enemies for the purposes of the law of capture at sea. As

1Brown v. U. S., 8 Cranch, 110 (seemle). Fortunately for the national honor, Chief Justice Marshall declared that an act of Congress would be necessary to render the confiscation complete, and reversed the circuit court's judgment of condemnation on the ground that no such act had been passed. The declaration of war gave the right to confiscate, but did not of itself operate as a confiscation. For comments on the unfortunate dictum mentioned in the text, see Woolsey, § 118, and Dana, note to Wheaton, § 355.

2The Prize Cases, 2 Black., 671; Miller v. U. S., 14 Wall., 268. This rule has never been shaken in England. "The following persons are enemies," says Lushington (Manual of Naval Prize Law, 1866, Art. 251): "(a) any person who has his domicile in the Enemy's territory, whatever be his Nationality by birth." And see the Johanna Emilie, Spinks, 12; the Baltica, Spinks, 266; the Indian Chief, 3 C. Rob., 18. What is thought of it elsewhere may be gathered from the criticism of Bluntschli (Das Mod. Volk., § 532 n.): "Die ganze Theorie ist nur erdacht um möglichst viel Seebeute zu machen. Sie hat keinen Grund in den natürlichen Rechtsverhältnissen, und gelangt zuletzt zu der Abenteuerlichkeit, dass England das Eigenthum eines in den Vereinigten Staten wohnenden Eng-landers als feindliches Eigenthum behandelt, wenn England mit den Vereinigten Staten im Kriege ist." This monstrous doctrine has indeed been pushed so far as to lead to the condemnation of the property of consuls of one belligerent state
might be expected, certain of our writers have simply followed the Supreme Court and declared for individual enmity without, it may be, fairly hearing the other side. Thus Kent approves the old theory, and attempts to fortify it by the somewhat cumbrous fiction that "every man is, in judgment of law, a party to the acts of his own government;" and Wheaton considers that a "perfect" war does not exist unless "all the members of both nations are authorized to commit hostilities against all the members of the other." But the value of these opinions must depend largely upon that of the decisions upon which they are based; and it is to be remembered that during our war of 1812, when the first important decisions were rendered, the modern theory was not nearly so widely known or so strongly supported as it is now. The Supreme Court, being called upon not to legislate, but to declare the law as it found it, very naturally followed English traditions, and, with judicial conservatism, has held to them ever since, oblivious of the changes which fourscore years have brought. On the other hand, the executive department of our government has been hampered by no obligation, real or supposed, to adhere to English precedents, and it is therefore in the records of the Department of State, rather than in those of the Supreme Court, that the real sentiment of the country is to be found. Now the history of American diplomacy, from beginning to end, is full of attempts to abolish the capture of private property at sea. Through the influence of Franklin, who always regarded it as a sort of piracy, and its strongest supporters, the English, as "the first piratical state in the trading from the port in the other in which they are exercising their consular functions.

1 Abdy's Kent, pp. 192, 193.
2 Elements, § 296. See also Dana's note to § 355.
world," the following provision was incorporated into our treaty of 1785 with Prussia, in case of war:

"And all merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessaries, conveniences and comforts of human life more easy to be obtained, and and [sic] more general, shall be allowed to pass free and unmolested."

When M. de Chambonas, in 1792, expressed the desire of the French government to secure the general adoption of such a principle, his efforts were warmly seconded by Jefferson, then Secretary of State. President Monroe, on December 2, 1823, sent the following message to the eighteenth Congress:

"At the commencement of the recent war between France and Spain it was declared by the French government * * * that neither the commerce of Spain herself, nor of neutral nations, should be molested * * *. This declaration, which appears to have been faithfully carried into effect, concurring with principles proclaimed and cherished by the United States from the first establishment of their independence, suggested the hope that the time had arrived when the proposal for adopting it as a permanent and invariable rule in all future maritime wars might meet the favorable consideration of the great European powers. Instructions have accordingly been given to our ministers with France, Russia and Great Britain to make those proposals to their respective governments, * * * and an earnest hope is indulged that these overtures * * * will ultimately be successful."

The instructions referred to by the President had been

1 Franklin's Works (Sparks), IX., 41, 467.
3 Am. State Papers, For. Rel., V., 245.
ABOLITION OF PRIVATEERING

26lj

drawn up by John Quincy Adams, then Secretary of State, in the latter part of July. Mr. Adams declared that by an exception in the laws of war, "the reason of which it is not easy to perceive," private property at sea did not share the immunities of private property elsewhere; that the capture of such property was "a system of licensed robbery bearing all the most atrocious characters of piracy;" that its abolition had been one of the "favorite objects" of the United States "from the time when the United States took their place among the nations of the earth," and that the time had come to press these considerations "upon the moral sense" of other governments.¹

Both the French and the Russian government expressed great willingness to make the matter the subject of a convention as soon as the consent of England could be obtained, but the course of the negotiations with the latter power was a most devious one. Our minister, Mr. Rush, seems at first to have entertained some hope of success,² but a more important maritime question, that of impressment, overshadowed this one, and resulted in an absolute disagreement of the plenipotentiaries. The British plenipotentiaries (Huskinson and Stratford Canning) refused to abandon formally the right of impressment, and gave it as their opinion, moreover, that "any discussion of the question at the present moment of general tranquillity would be altogether inadvisable."³ Finally, at their twenty-second conference, Mr. Rush stated that the question of abolishing private war upon the ocean "was considered by him as standing apart from the other questions of maritime law * * * and he wished it understood that he was ready to treat on that question alone * * * ." The British plenipotentiaries said, in reply to this statement,

¹ Instructions to Mr. Rush, July 28th, 1823. (Aegidi.)
"that under the circumstances, which prevented any present discussion of the questions of maritime law discussed in former negotiations, there would be manifest inconvenience in now going into a question of the same class."\(^1\) The diplomatic relations between the two countries had now arrived at such an unpleasant stage that when, in 1826, Mr. Clay, Adams' successor as Secretary of State, wrote to Mr. Gallatin in London that the American government still desired, "with unabated force," all the things that Mr. Rush had proposed, he felt compelled to add a caution against pushing them as persistently as Mr. Rush had done.\(^2\)

In J. Q. Adams' annual message, 1825, "abolition of private war upon the ocean" was again referred to as one of the cherished objects of the diplomacy of the United States.\(^3\) President Pierce, in his message of December 4, 1854, declared that if other powers should concur in proposing immunity for private property at sea, "the United States will readily meet them on that broad ground." On July 28, 1856, after the United States had been asked to accede to the Declaration of Paris, Mr. Marcy wrote his famous note proposing the amendment of the Declaration by the abolition of all capture of private property at sea.\(^4\) The withdrawal of this proposition by the Buchanan administration was due to no sympathy with the existing practice, for Buchanan himself had always opposed it, and Mr. Cass, in 1859, in his instructions to our minister at Paris, distinctly declared that it was "not adapted to the sentiments of the age in which we live."\(^5\) At the beginning of our civil war, when it became manifest that the Confederate States were going to

---

2 Clay to Gallatin, June 19th, 1826. (Aegidi.)
5 Mr. Cass to Mr. Mason, June 17th, 1859. (Aegidi.)
issue letters of mark, Mr. Seward did, it is true, offer to accede to the Declaration of Paris and abolish privateering without insisting on the Marcy amendment, hoping thus to bind the Confederate States; but he spoke of the bare Declaration as the "lesser good" and the Marcy amendment as the "greater," and when the negotiations were broken off, expressed a hope that they might, in some happier time, be resumed. Finally, in our treaty with Italy of 1871, we find the following provision (Art. 12):

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere."

Mr. Hall, in his desire to show that the theory of individual enmity is adopted by our government, quotes article 21 of the United States' Instructions for the Government of Armies in the Field:

"The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subject to the hardships of the war."

But Mr. Hall does not think it necessary to quote the next article:

"Art. 22. Nevertheless, as civilization has advanced, during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honor as much as the exigencies of war will permit." A strange enemy, whom we are enjoined to spare in "person, property and honor!" An

1 Circular of April 24th, 1861.
2 Treaties and Conventions of the U. S., p. 584.
enemy, that is to say, with whom we have no quarrel; whose "enmity" exists neither in fact nor in law, but only by a figure of speech.

Mr. David Dudley Field, in his Draft of an International Code, says:

"War is a relation of nation to nation, or of community to community, and does not affect the relations of individuals * * * ." Of the contrary doctrine he says: "This legally imputed hostility is now so far mitigated by treaty provisions, and by ameliorations in the usages of war, and is so much opposed to the tendency of modern opinion, that it seems proper to recognize a different rule." Similarly, among the numerous American publicists who do not follow Kent and Wheaton, is Dr. Woolsey, who calls the present practice "an antique usage" founded upon

"the good old plan
That they should get who have the power
And they should keep who can,"

and who clearly and scientifically states the modern rule:"

"The true theory seems to be that the private persons on each side are not fully in hostile relations, but in a state of non-intercourse, * * * while the political bodies to which they belong are at war with one another, and they only." 3

It cannot, then, be said that the "United States" is in favor of the English practice. Against our Supreme Court and its followers, Kent, Wheaton and Story, must be balanced such names as Adams, Jefferson, Franklin, Monroe, J. Quincy Adams, Pierce, Clay, Marcy, Cass, Seward, Lincoln—all declaring the contrary doctrine one of the principles "proclaimed and cherished by the United States from the first moment of their independence," not to mention such

1 Draft Outlines of an International Code (N. Y., 1872), Art. 705, 705 n.
3 Introduction to the Study of International Law, § 119.
jurists as Field and Woolsey, who consider the English doctrine a thing of the past. If we have, in a certain sense, recognized that doctrine as still existing, we have spared no pains to show the world, and England in particular, that we do not agree with it. Which is the more remarkable, as it is matter of grave doubt whether abolition of capture at sea would at all accord with our belligerent interests.

SUMMARY

There are two conclusions from the foregoing chapters:

First, that the theory of individual enmity is no longer defensible; and, secondly, that the practice of capturing private property at sea is dying. It exists to-day, when it exists at all, for historical reasons purely; it is the logical result of a principle that is dethroned, and the student of history can deduce but one future for it. The end may be distant, it may be as Mr. Seward said in 1861, "even now near," but sooner or later the end is bound to come. Even now it is practically extinct upon the Continent. Germany, Italy, Austria, France, Russia—all have been prominent in promoting its downfall; it is the abhorrence of Belgium and of the Dutch. The United States has attacked it consistently from the first moment of its national existence. In a word, the overwhelming weight of the sentiment of the civilized world is against it; and when we have found the overwhelming weight of the sentiment of the civilized world, we have found the tendency of international law.
PART II

COMPARATIVE SKETCH OF PRIVATEERING BEFORE 1856
CHAPTER I

PRIVATEERING IN ENGLAND

I

The Ante-Elizabethan Period

The insular situation of England is responsible for her very ancient ambition to dominate the seas. The spirited foreign policy which she has always striven to maintain was checked by the loss of the French possessions in the 13th century, and the Anglo-Norman monarchs were compelled to abandon all hopes of acquiring a vast empire on the Continent; they turned, therefore, to the sea as the element which it would be at once the most easy and the most advantageous for them to rule. Britain, thrice conquered from without, could not itself be safe from foreign invasion without such dominion; and it could exercise no influence on continental politics without commanding the only avenue of approach to the Continent. Moreover, the sea-faring tastes of a large portion of the population, hardened and dedicated to the sea through generations of struggling with the Danes, gave promise that marine dominion would not be hard to acquire; and shaped for the English sovereigns the policy in which they have persevered with such success till the present day. It is on this subject—the mastery of the seas—that the national vanity has ever shown itself most monstrous. Said Lord Coke, "The King's navy exceeds all others in the world for three things, viz., beauty, strength and safety. * * * Amongst the ships of other nations, they are like lions amongst silly beasts, or falcons amongst fear-
ful fowle." The dramatic incident of the English admiral who fired upon the vessel in which Philip II. was coming to marry Mary, because, forsooth, it had not lowered its flag in "English" waters, was simply another exhibition of the same sentiment, which, indeed, is so indestructible that even after its rude shock in 1812, Englishmen were to be found triumphantly accounting for the maritime successes of the Americans on the ground of the "English blood in their veins."

The original pretensions of England amounted not merely to control, but to government, of the sea. During the reign of John a mandate was issued to the fleet to seize and make prize of all foreign ships found on English seas. And all foreign vessels, wherever they were met, were to be required to strike their colors by way of salute to the English flag. Only long afterwards, when Spain and Portugal had surpassed England in the extravagance of their claims, did the latter power reverse her early policy and contend for *mare liberum*. Since that change of principles, which occurred in the reign of Elizabeth, her effort has been simply to maintain so great a naval superiority as to be able to dictate to the world on questions of maritime law.

The royal navy, as a permanent institution, is not older than the fourteenth century. Previous to that time, the practice of the Norman kings had been to depend on the coast towns, and particularly on Hastings, Romney, Hythe,

1 Fourth Institute.

2 Southey (*Lives of the Admirals, II.*) places the time when the king's ships "became a distinct class" as late as 1497. But, in 1328, Edward III. had 500 vessels (*Nicolas, History of the Royal Navy, I.*), and apparently the navy never quite died out from his time till that of Elizabeth. Of course, there were spasmodic attempts at a navy very much earlier. Alfred was in possession of quite a large one; so was Henry I. in 1106; and in 1190 the fleet which bore Coeur-de-Lion to the Holy Land contained, besides 38 galleys and 150 small vessels furnished for war, nine ships of "extraordinary size."
Dover and Sandwich, known as the Cinque Ports, to furnish a sufficient number of ships to tide them over any emergency. In 1242, the King simply ordered the vessels of the Cinque Ports to commit every possible injury upon the French at sea, thus practically converting every vessel in those ports into an uncommissioned privateer. The consequences are interesting to note: "Not satisfied with obeying these commands, the sailors of the Cinque Ports * * * slew and plundered like pirates, as well their own countrymen, as foreigners." In the succeeding year, 1243, the first privateers' commissions of which there is any evidence in the public records were granted, in the form of "licenses," by Henry III.; the one to Geoffrey Piper and the other to Adam Robernolt and William le Sauvage. The latter was worded as follows:

"Relative to annoying the king's enemies. The King to all, etc., greeting. Know ye that we have granted and given license to Adam Robernolt and William le Sauvage, and their companions whom they take with them, to annoy our enemies by sea or by land, wheresoever they are able, so that they share with us the half of all their gain; and therefore we command you neither to do nor suffer to be done, any let, damage or injury to them or their barge, or other ship or galley that they may have; and they are to render to the King, in his wardrobe, the half of all their gains."

In this document there is, it will be perceived, no use of the terms "mark," "countermark," or "reprisal." Robernolt and Le Sauvage had suffered no private wrongs at the hands of the subjects of France, for which they sought compensation. Their prospective prizes are spoken of as "gain."

1 Thus, Hastings was required to furnish 21 ships, of 20 men or above; and each of the other four towns 5 ships, with 21 men or above. Hervey, Hist. of the Royal Navy, I., 61.


3 Id., I., 239.

4 Rot. Patent. 27 Hen. 3, m. 16. Quoted by Nicolas, I., 239, with the remark: "Privateers, the disgrace of civilized states, are thus shown to have existed in the thirteenth century."
They are, therefore, privateers,² pure and simple. It was half a century later before the first letter of mark, or what is supposed to be the first,² was issued in England. In 1295, one Bernard D'Ongressil, of Bayonne, then part of the English dominions, had a vessel, the St. Mary, laden with figs, etc., driven by stress of weather into Lagos, Portugal. Some Portuguese sailors from Lisbon seized the vessel and cargo, and after committing various depredations, declared them “confiscated.” Vessel and cargo were sold, and when the matter came to the ears of the King of Portugal, the latter, instead of punishing the robbers, appropriated to himself one-tenth of the spoil. D'Ongressil, who had suffered damage to the amount of about £700, and who was unable to obtain any redress in Portugal, “prayed Sir John of Brittany; then lieutenant of Gascony, to grant him letters of marque; literally, ‘license of marking the men and subjects of the kingdom of Portugal, and especially those of Lisbon, and their goods by land and sea,’ until he had obtained compensation (licentia marcandi homines et subditos de regno Portugallie, etc.).”³ In June, 1295, the king's lieutenant accordingly granted D'Ongressil, his heirs, successors and descendants, authority for five years “to mark, retain and appropriate” (possit marchare, retinere et sibi appropriare) the people of Portugal and their goods, until he had obtained satisfaction. On the third of the following October the king confirmed the authority, with the provision that if there should be any surplus, i. e., if D'Ongressil should take more than his claim, it should be accounted for to the king.

The peculiar use of the word “marcare” or “marchare”

¹The term “privateer” was not known at this time, nor indeed for nearly four centuries afterwards. Probably the first use of the word is that occurring in a letter of Sir Leoline Jenkins of Dec. 5th, 1665 (Life of Sir L. J., II., p. 727). See Twiss, War, 375.


³Nicolas, Hist. of R. N., I., 276.
in this connection, has led some writers to the conclusion that here is the etymological source of the term “letter of mark.” In other words, a letter of mark is a license to mark, to set apart, the goods of the tortfeasor nation and its subjects from those of all the other nations in the world, as a source of compensation for the tort. But the more probable origin of the term is to be found in the German mark (alt-hochdeutsche marcha), “boundary” or “frontier.” When a subject had been wronged by a fellow-subject, and the prince was too weak or too inert to punish the wrong-doer, he frequently delivered to the plaintiff what were called letters of reprisal, which substantially allowed him to take the law into his own hands and keep what he could get. If the wrong-doer, instead of a fellow-subject, happened to be a foreigner, the letters were known as letters of mark and reprisal, or, shortly, letters of mark, from the fact that they contained permission to cross the frontier (mark) and seize the goods of the wrong-doer abroad.¹ If the derivation is from anything else, it is difficult to understand why the term letter of mark was never used in connection with anything but international seizures. If mark has no reference to frontier, why not call permission to prey on the goods of a fellow-subject a letter of mark? For it is just as true as in the case of an alien that his goods are being “marked and set apart” for seizure.

About these early letters of mark there are several interesting things to be noted. In the first place, they were absolutely and essentially distinct, at the beginning, from the “license” or “commission” of a privateer, applying that term to the kind of vessel used by Robernolt and Le Sauvage

¹ Littré, Dict. de la Langue Française; Webster's Dict.; Woolsey, Internat. Law, § 121. Still other, and not a few, authorities are content with the shallow explanation that the term was primarily French; i.e., that lettre de marque = stamped letter, in precise analogy to lettre de cachet, or letter sealed. See Johnson's Encycl., The Century Dict., etc.
in 1243. The privateer was used only in time of war; the letter of mark was of no value\(^1\) to any one except in time of peace, which in theory it did not break.\(^2\) The avowed object of the privateer was "gain," half of which, be it great or small, must be paid to the king; there was no limit to the amount of booty which it might acquire. The object of the letter of mark was compensation, more than which it had no right to take, and the surplus beyond which, if any, had to be accounted for; as for the king, he received nothing at all. Privateers were to "annoy the king's enemies." The letter-of-mark was to redress a purely private wrong. The king, in granting the privateer's license, exercised a belligerent right; in issuing the letter of mark he conferred a sort of property grant, which ran to the "heirs, successors and descendants" of the grantee. Two things more dissimilar in theory it would be hard to find; yet in a few years from this time we find them in a state of hopeless confusion; and today the commission of a privateer is spoken of indiscriminately as a commission, a license, a letter of mark (marque, mart) or script of mart. Add to this that the term is some-

\(^1\)In June, 1778, lettres de reprisailles were given by the French king to Sieurs Basmarin and Raimbaux, who had had eleven vessels taken by the English before any declaration of war, on the pretence that they were carrying aid to the American colonies. The alliance between the latter and Louis XVI. being soon after made known, Basmarin and Raimbaux complained that they could not use their letters of reprisal on account of the war. Lebeau, Nouveau Code des Prizes, I., 104 n.; II., 45.

\(^2\) A letter-of-mark was one of those peculiar things spoken of in the old books as "Measures Short of War." Now, the conception of war without a declaration having been at last developed, thanks to the English practice in the 18th century, we no longer call such things as the issuance of a letter-of-mark in time of peace a "measure short of war"; we call it an act of war itself. Formerly, however, the action was regarded as leaving the peace unbroken, because war could not exist unless formally declared. "La délivrance de lettres de représailles ne rompait nullement la paix entre les deux états."—Nys, La Guerre Maritime (Brussels, 1881), p. 147. Cf. also Carlos Testa, Dr. Pub. Int. Mar. (1866), p. 160.
times printed in full, "letter of mark and reprisal," and sometimes called "letter of reprisal" or "letter of mark" for short; and that it has come to cover (1) the piece of paper, (2) the ship, and (3) another totally different kind of ship, viz., a peaceful merchant vessel armed to resist attack; and it will be seen how hopeless must be all endeavor to set the terminology right. Just how the confusion arose it is hard to say. In 1295, as has been shown, a privateer and a letter of mark were clearly distinct, at least in England. Probably the course of affairs was something like this: Whenever a war broke out, each party always claimed to be the party aggrieved, and when it justified its acts of hostility at all, it did so by connecting them in some way with the notion of "reprisals." Of course, from reprisals to mark was but a step; and as the practice of a letter of mark was almost identical with that of a privateer, the two ideas became fused.

The issue of letters of mark, in the original sense, was very frequent during the early part of the fourteenth century. There being no regular navies of any size, the seas were infested with pirates and quasi-piratical adventurers of all nations, who despoiled with more or less discrimination those who came in their way. "A mariner called Dennis was committed to Newgate in 1227, for being present when a Spanish ship was plundered and her crew slain at Sandwich." Some time later nine marks were given to "Alexander the goldsmith and seven companions, and a woman called Margaret," for their support, they having been "despoiled" by rovers from the Cinque Ports.

1 See, for this use of the term, Bouvier's Law Dict.; Am. & Eng. Enc. of Law; Coggeshall's Hist. of Am. Privateers, etc.

2 In England the practice is to issue an Order in Council directing "general reprisals" against the hostile power; this was done as recently as 1854, at the opening of the Russian war. See, on this practice, Twiss, War, p. 334, and De Burgh, Maritime Int. Law (London, 1868).

3 Nicolas, Hist. R. N., I., 233. 4 Ibid.
The conduct of the Cinque Ports, in using the king's permission to cruise against his enemies as an opportunity for piracy, has already been noticed. From 1303 to 1338 the English pirates were unusually active and daring. In the latter year one "Gomyz," a Spanish envoy, was "spoiled" on his way to England, and actually confined in a dwelling on shore: on the matter becoming known to the king, he directed the spoilers to be arrested as for "contempt." The kings of France and Spain, and the counts of Flanders, were in a constant state of altercation with England on the subject of the wrongs done to their commerce by the English pirates. In 1340 Edward III. had to pay "out of his own pocket" for spoils committed by his British subjects on his Genoese allies. On the other hand, in 1318 the French Admiral of "Caleys" committed spoil on the English; and the Spaniards and Portuguese retaliated constantly. The result was a great stream of applications, on the part of the innocent English, for letters of mark; and after they had satisfied their claims from innocent Spaniards, French, Flemish or Portuguese, the latter turned naturally to their governments for letters of counter-mark, which were almost invariably granted. Yet, as has been seen, no one ever thought of this state of things as war.

At this time letters of mark were issued by the chancellor, and it was one of the most important and honorable functions of that officer to grant them. But with the introduction of the title of admiral in 1300 there gradually sprang up in

1 In 1315 some Flemings were spoiled at Oswald House; in 1321 Brittany uttered threatening complaints; Aragon followed suit in 1324, Castile in 1333; France in 1335; and Genoa 1336.

2 Select Pleas in the Court of Admiralty (Publications of the Selden Society, vol. 6 for 1892), Introduction.

3 Ibid.

4 Ibid.

5 The Black Book of the Admiralty is wrong in the supposition that the title of admiral antedates the fourteenth century in England. See Select Pleas, etc. In
connection with his office a sort of marine jurisdiction which not very long after developed into the court of admiralty. In 1295 the master of a ship was summoned before De Sestas, admiral of the "Baion" fleet, and subjected to a fine. On the other hand, in England proper, the common law courts, the king's council and the chancellor, all jealous of the new jurisdiction which encroached upon their own, did what they could to hinder its development. In 1314 French piracy claimants were told to sue at common law; in 1320 Flemish piracy claims were arbitrated. 1 But in 1340 occurred the battle of Sluys, which left the English, for the time, masters of the northern seas; and the consequent increase of their maritime pretensions 2 led to a sudden dignifying of the post of admiral, and an extension of its administrative and judicial power. The first reference to proceedings in a case of spoil before the admiral, would seem to indicate the year 1357 as the time when the court of admiralty as such began. 3 From this time it gradually took cognizance of nearly all marine matters, and, of course, it robbed the chancellor of his right to issue letters of mark.

The piratical conduct of the Cinque Ports continued all through the fourteenth and the early part of the fifteenth century. Their adventurers, on account of their incalculable

1295 (23 Ed. I.) one De Sestas is made admiral (admirallus) of the "Baion" fleet. But later, in 1297, the titles "Keeper of the Sea Coasts" and "Captain of the King's Mariners" are used instead. And the first admiral who existed in England proper was Gervase Alard, admiral of the fleet of the Cinque Ports, 1300. (Wardrobe Accounts, 29 Ed. I., Select Pleas, etc.)

1 Select Pleas, etc.

2 There is no mistake about the claim of sea sovereignty (Superioritas, Custodia, Admirallitas) put forward by the English after the battle of Sluys. In 1372 a petition to parliament actually contained the monstrous statement that "then and in all times past all countries held and called the King of England 'King of the Sea'—(tous les pays tenoient et appelloyent nostre avan dit seignour le Roi de la mier)." Select Pleas, etc.

3 Ibid.
utility in time of war, were not restrained by the king in time of peace, for fear, perhaps, that they might fall out of practice. Their continued depredations, however, became too troublesome to the English themselves to be allowed to continue; and with the advent of Henry V. in 1413, a statute was passed making piracy high treason. But the hold which the custom had gained upon the seaports, made it difficult to check; and the men of good birth who supported it with their brains or capital and derived large incomes from it in return, kept the institution from going to utter ruin. In 1425, Marcellus, abbot of St. Augustine in Canterbury, was fined for piracy.\

In the fifteenth and the early part of the sixteenth century, privateering and piracy are closely allied. The conduct of privateers and pirates was about the same; the only difference being that the former had a commission, or letter of mark, as it was now beginning to be called, while the latter had not. Now this letter of mark was an expensive luxury. From 1360, when Sir John Beauchamp was appointed admiral of all the fleets, there had developed, in addition to the more ancient office of Lord Warden of the Cinque Ports, the dignity of Lord High Admiral. As in France, this honor was usually bestowed upon some one absolutely ignorant of nautical matters, nearly always some member of the royal family. In 1525 it was held by young Prince Henry, a child of six. This nominal head of the admiralty derived a large income from his position; and, inter alia, always shared largely in the prizes taken by private adventurers who acted under a commission. The Lord Warden of the Cinque Ports also had a share; so that it was much more profitable to cruise against the enemy without a commission than with one. Neither was the danger incurred

1 Stat. 2 Hen. V. c. 6.  
2 Southey, Lives of the Admirals, vol. II.  
3 Select Pleas, etc.
very much greater; for while a captured pirate was, as a matter of course, disposed of at the yard-arm, a captured privateer was very likely to be so treated as well, the duty of giving quarter not being as yet generally recognized. As the restrictions against pirates, however, came to be more and more zealously enforced, and as more and more of the booty taken by privateers came to be appropriated by the Lord Warden and the Lord High Admiral, the falling off of the English marine became but too noticeable; and led, in 1544, to heroic measures on the part of Henry VIII. The latter being then at war with France, issued a general call for privateers; requiring them to obtain no license and to give no security, but simply to arm, equip, and fall upon the French wherever found; and they were to have the whole property in the prizes which they took, without any bonus for the Lord High Admiral or the Lord Warden of the Cinque Ports. Henry VIII. in 1544 foreshadowed the Prize Act of Anne; and the consequences of his system foreshadowed the consequences of hers. First, a general awakening, then an enormous activity of the private adventurers, nearly every able-bodied man in England who owned a boat equipping it for war; momentary annihilation of hostile commerce; and then the abuses with regard to neutrals. The English privateers covered the seas; French merchantmen became few and far between; and rather than go home bootyless, the adventurers fell upon the Spanish, the Portuguese and the Flemings. However, they had answered their purpose, and were recalled.

1 "Adventurers," says Southey (Lives of the Admirals, II., 214), "hastened to take advantage of the general license; and being so numerous, they scoured the Channel with extraordinary good fortune. More than 300 French prizes were brought into English ports: and so large a part of their cargoes was brought to London that the Grey Friars' Church was filled with wine, and both St. Austin's and the Black Friars' with herrings and other fish intercepted on the way to France."
One more curious fact deserves to be chronicled before we pass to the Elizabethan period. It appertains to the reign of Mary, and tends to show the hardiness of the early privateers and their equality for most purposes with ships of war. In 1557, during the struggle with France and Scotland, "the trade of the kingdom suffered considerably from the swarm of privateers which issued from the different ports of Scotland." Sir John Clare, Vice-Admiral of England, was sent "to those parts with twelve sail of ships, to revenge these insults;" but the bold Scotch adventurers met and defeated him, and during the action "the boat which he was on board over-set, and himself, with several others, were drowned."  

From the Reign of Elizabeth to the Prize Act of Anne (1708).

"In spite of its insular position and its pretensions," says a French historian, "England never played a great part on the seas before the end of the sixteenth century." The battle of Sluys had established her maritime supremacy over France, which, dismembered and disorganized, was in no condition to regain it, but the Spanish and Portuguese remained masters of all the seas except those in the immediate neighborhood of England, and were everywhere recognized as the first naval powers of the day.

Theretofore the interests of Spain and England had not clashed. But with the accession of Elizabeth, and the restoration of Protestantism, the hatred of Spain which had begun to develop in England during the reign of Mary burst

1 Hervey, History of the R. N., I., 325.  
2 Ibid.  
3 "Malgré sa position insulaire, son commerce avec les Flandres, et ses prétentions, qui datent de loin, à la souveraineté des mers, l'Angleterre n'avait pas joué un grand rôle maritime avant la fin du seizième siècle." Doneaud, Hist. de la Marine Française, ch. i.
forth with violence. The religious differences arising from the inquisition on the one side and the persecution of the Catholics on the other, contributed, as well as Elizabeth's refusal to wed with Philip II., to embitter the political controversy arising out of the Spanish claim to exclude foreigners, and particularly English, from the New World, under the papal bull of 1493. So that, while war was not declared until 1588, there was a condition of private hostility much earlier. The rich Spanish possessions in America offered a tempting bribe to the privateering instincts of the men of the coast towns; and the sea dogs, as they were called, with the secret connivance of Elizabeth's government, committed enormous depredations upon Spanish commerce.

The practice of Sir Francis Drake may, perhaps, be considered as typical. In 1568, Drake was ruined in an expedition of Sir John Hawkins which committed an unprovoked attack on San Juan de Ulloa and was defeated. A naval "divine" having told Drake that he would be justified in making good his losses at the expense of the king of Spain, he commenced by two or three voyages to the West Indies, where he obtained "some store of money by playing the seaman and the pirate." Then followed his expedition of 1577 to the South Sea. During this memorable voyage, he entered the port of Valparaiso, and after taking a Spanish ship, plundered the port. At Tarapacá the English found

1 A more excusable case was that of Andrew Barker, whose property was seized, in 1576, by the Inquisition in the Canaries, and who "fitted out two barks to revenge himself." The state papers of Elizabeth's reign are full of querelae, or ex parte proceedings for letters of reprisal against Spain and Portugal. Select Pleas, etc.

2 The circumstances of the taking of this ship are interesting. It appears that the Spaniards, on the entry of the English, in the simplicity of their souls took them for friends, "saluted them with beat of drum and made ready a jar of Chili wine to drink with them;" but the English coming on board, one of them cried to the nearest Spaniard, "Down, dog" (abaxo perro), and all began to lay about them. Southey, L. of the Adm., III., 143.
a Spaniard lying asleep, with thirteen bars of silver beside him, and Southey significantly says, "no personal injury was offered to the man." At Arica, Drake took two ships with their cargoes; and on his return home Elizabeth, to whom all of these things were known, visited his ship and knighted him.  

In 1585, Drake's tastes being no longer satisfied with mere robbery, he took to arson. Santiago and St. Augustine were burned, and St. Domingo and Carthagena were compelled to pay a heavy ransom to escape the like fate. Nombre de Dios, Rio de la Hacha and Santa Marta were all burned by Drake at various times. His last expedition, that of 1596, was the most unsuccessful of all, the Spaniards repulsing him in several places; and in the course of it, he died. His death is said by the Spaniards to have been the result of mortification at his ill success.  

The exploits of Cavendish are of a more barbarous character even than those of Drake. In 1586, on an expedition to the South Sea, he finds a little Spanish colony starving; he sails away and leaves it in its misery. After plundering two settlements, he at last falls in with some Spanish vessels, of which he makes prize; some of the prisoners are tortured; those who are not killed are put on shore. Paita

1 The absolute approval which Elizabeth accorded to Drake's piracies is evidenced by her remark as she presented the sword: "We do account that he which striketh at thee, Drake, striketh at us."

2 The Spanish admiral, Don Bernaldino Delgadillo de Avellaneda, wrote to Pedro Florez in 1596, "que Francisco Draque mortio en Nombre de Dios, de pena, de ayer perdido tantos Baxales y gente." This letter was characterized by Mr. Henrie Savile, Esq. (Hakluyt's Voyages, IV., 75), as a "Libell of Spanish lies;" and so indeed it would seem, for the Don also states, incautiously enough, that Drake's fleet fled before him leaving their oars behind; whereas it is conclusively proved that there was not a galley in the expedition.

3 "But he was fain to cause them to be tormented with their thumbs in a wrinch . . . also he made the old Fleming believe that he would hang him, . . . and yet he would not confess" (Hakluyt, IV., 316 at 324). One of the prisoners actually did have a rope put about his neck, whereby he was "pulled up a little from the hatches."
and Guatulco, little settlements aggregating 300 houses, are both burned; at Puna island he sinks a ship "with all her furniture."

Another famous adventurer was George Clifford, third Earl of Cumberland. His first expedition was sent out under one Withrington, for the purpose of plundering Bahia; but the gallant defence of the Jesuits with their Indian archers compelled it to return unsuccessful, the resolution to do which "was taken heavily by all the company, for very grief to see my lord's hopes thus deceived and his great expenses cast away." This failure, however, was more than balanced by the success of Cumberland's voyage of 1589, in which he took no less than thirteen prizes, including one laden with sugar and silver, and having on board a private venture of the captain's to the amount of 25,000 ducats. The town of Fayal, about 500 well-built houses, was abandoned at his approach, and ransomed for 2000 ducats, "mostly in church plate." So great was the terror inspired by his approach, that while he was yet miles away the governor of Graciosa, to "deprecate a visit," sent him sixty butts of wine. In 1592, on his fourth voyage, he obtained, by threats of torture, some information from a captured vessel which led to the taking of the Madre de Dios, a very large and rich East Indiaman, to which, however, the greatest courtesy was extended. He "sent them his own chirurgeons," and freely dismissed the captain and most of his followers, who, however, "had the ill hap to fall in with other English cruisers who took from them, thus negligently dismissed, 900 diamonds, besides other odds and ends." Those were profitable days for the

1 Southey, L. of the Adm., III., 3.
2 Two of these prizes were French, but, "belonging to the party of the League, were deemed fair prize" (Southey, III., 4). Similarly, on his fifth voyage, in 1593, he captured two French vessels from St. Malo, for "that port held for the League; the ships, therefore, were accounted Spaniards." (Id., p. 24.)
3 Southey, III., 21.
English privateers. Yet, out of 159,000 l. which the Madre de Dios was worth, only 36,000 l. went to the earl and his crew. The queen, one of whose ships was in the engagement, took the rest.

On his last voyage, in 1597, Cumberland took the town and fort of Porto Rico. "As he designed to make this city and harbor his station, from whence to cruise upon the Spanish coast, he drove out all the inhabitants." And yet Monson tells us, with an air of great pride, and as a proof of the good discipline and courtesy required by the earl from his followers, that he "publicly disgraced a good soldier for over-violent spoiling a gentlewoman of her jewels." The defeat of the Armada established the maritime supremacy of England over Spain, as that over France was already assured; and for some years afterwards the English privateers ruled the sea with an iron hand. The queen having resolved to attack Spain, organized for that purpose a large expedition consisting almost entirely of privateers, "the queen only furnishing a few ships, and giving the enterprise the sanction of her authority." Incidentally, this also furnished the queen with an excuse for taking the lion's share of the booty. The ostensible purpose of the expedition was to recover Portugal for Donna Antonia; in which design it was foiled by a large Spanish fleet which had assembled at Lisbon. Here the privateering character of the expedition made itself apparent. "The object of the expedition being private again," says Hervey, "a scrupulous adherence to the rights of neutral powers was not likely to be observed; here, therefore, by way of indemnification, they seized upon sixty hulks, or fly boats, belonging to the German Hanse-Towns." The interesting part of the matter is the fact that the English government supported and attempted

1 Hervey, Hist. R. N., I., 469. 2 Monson (Tracts in Churchill), 193. 3 Hervey, Hist. R. N., I., 454, 455. 4 Ibid.
to justify this act, so that "at length a total breach between England and the Hanse-Towns ensued."

In addition to the outrageous conduct of this Spanish expedition, Drake and Cumberland were very active, and spread terror among the Spanish colonies. The naval successes were not all on the side of the English; for Sir Richard Grenville was captured by the Spaniards, with his ship, the Revenge, in 1591; and five years later Sir Richard Hawkins met the same fate. But about this time Raleigh landed in Trinidad and burnt San José de Oruño, putting all the garrison to the sword; and in the same year (1593), Sir Amyas Preston ravaged and burnt Porto Santo and put Cumaná to ransom. Raleigh, coming upon the unfortunate town soon afterwards, would not ransom it again, but burnt it to the ground. Caracas was set on fire by Preston, but not completely destroyed.

Altogether, at the death of Elizabeth in 1603, it might fairly be said that England had attained her ambition and was mistress of the seas. The royal navy had been almost doubled; but that had played a very unimportant part in the naval history of the reign, nearly all the triumphs of which had been due to private adventurers. The commercial marine had increased enormously. The New World had been opened up to English trade and civilization, and the strength of Spain was broken forever. Everywhere on the seas an English cruiser was known and feared.

1 Hervey, Hist. R. N., I., 454, 455. 2 Hakluyt, IV., 120.

3 Southey, Lives of the Admirals, IV., 294. In spite of these excesses, Gibson mournfully complains of the "gentlemen captains" of Elizabeth's time, in the following language: "I find punctilluses of honor oft insisted on by gentlemen, and the loss of many a good design; when, on the other hand, the tarrpawlings observe noe grandure, but, like devells, count themselves most happy that can doe most and soonerest mischief to their enemies." Southey, V., 207. "What a worthy privateer this Gibson would have made, to whom the exploits of Raleigh appeared full of "punctilluses of honor"!
With the accession of the Stuarts in 1603 there came a change. A treaty of peace and alliance was concluded with Spain; and as James I. and his Most Catholic Majesty were really friendly, without any arrière pensée, the English free-booters felt that they were doomed. A few of the more daring spirits continued their depredations for a while, but the example of Raleigh showed that the king was honestly trying to preserve the peace, and finally checked their ardor. The unfortunate Raleigh, taking it for granted that James, like Elizabeth, would secretly connive at violations of the treaty with Spain, ventured to attack the Spanish settlement of San Tomas, on the Orinoco. The governor of Guiana, Diego Pala-meque de Acuña, having heard of the approaching visit of one "Walter Reali," had prepared himself for defence; but the English were the first to break the peace, and after a short conflict, in which the governor was killed, they burnt the town and the surrounding plantations, even the churches and the convent not being spared. As they embarked for their return, carrying with them all the public papers, the church ornaments, and 2000 reales in gold, they exultantly told the Indians that they would return the following year and complete the destruction of the Spaniards. News of this exploit having reached London, the Spanish ambassador became so violent in his complaints that James I. was obliged to throw Raleigh into prison, where, as is well known, he was ultimately executed. The shock to the national spirit occasioned by the execution of Raleigh was very great,¹ and privateering as an institution began from that moment to decline.

During the seventeenth century the principal rivals of the English for marine supremacy were the Dutch,² from whom

² The rivalry which existed between the English and the Dutch is well illus-
no such rich booty was to be gained as that which Drake and Raleigh had brought from the Spanish possessions in America. The share of the Lord High Admiral, therefore, began to be more and more oppressive; and the privateers fell off in number as well as in hardihood. As a sort of compensation for this, the royal navy rose into more prominence than it had before enjoyed. Between 1603 and 1618 James I. had added to the latter no less than seventeen ships, one of them of 1400 tons. The profligacy of the later Stuarts, however, and their necessity for money in the midst of their domestic broils with Parliament, led them frequently to use for private purposes the appropriations destined for the navy; the latter, therefore, enjoyed but a precarious prestige, which was sadly interrupted when Ruyter sailed up the Thames in 1667 and destroyed a great deal of English shipping, including several men-of-war. On the other hand, two years before, the English had captured the entire Bordeaux fleet of the Dutch, consisting of 130 sail, and Sir Thomas Allen had dispersed a fleet of forty Dutch vessels

trated by the following somewhat ludicrous incident: In 1605 Sir William Monson, with a vessel of the royal navy, encountered two Dutch ships in the Channel, which saluted his "in the usual way; but, by way of putting a disgrace upon her, the trumpeter blew his trumpet, which is held a scorn at sea" (Southey, Lives, etc., V., 115). For this offence the Dutch captains were compelled to come on board Monson's vessel and apologize, besides agreeing to punish the trumpeter; the insult they attributed to the latter's "lewdness."

1 In 1667 the Lord High Admiral, brother of the king, although a man of some experience and perfectly able to serve, "remained safe at home and by virtue of his post... took to himself a large share of the prizes which were made; besides which the parliament voted him a handsome present." Hervey, Hist. R. N., II., 241.

2 The Prince Royal.

3 The indifference of Charles II. to the naval decline during his reign, and particularly to the success of Ruyter, is caustically described by Lavisse and Ramband in their Histoire Générale du IVme Siècle à nos Jours, vol. 6, chapter on the Restoration: "On se demande où est le roi... On répond qu'il donne la chasse à un papillon avec une serviette chez Lady Castlemaine."
coming home richly laden from Smyrna. The Peace of Breda in 1667 left New York with the English; but the British Navigation Act was altered in a very material particular to the advantage of the Dutch.¹

Privateering did not revive to any great extent under William and Mary. The days of the government’s conniving at piracy were past, and in 1694 Governor John Easton of the colony of Rhode Island is recorded as having refused a privateer’s commission to one Thomas Tew, on account of his past history.² On the other hand, the French privateers had been very active ever since the ministry of Colbert; these were the days of Jean Bart, Duguay-Trouin, and the filibusters; and during the war immediately preceding the Peace of Ryswick, 4200 English vessels fell a prey to them. The total loss to English merchants is estimated at £30,000,-000.³ Such was the situation when Anne ascended the throne in 1702 and the war of the Spanish succession began.

From the Prize Act of Anne (1708) to the First Armed Neutrality (1780).

The experience of the seventeenth century had shown that, except where the hostile commerce was prodigiously rich, privateering would not flourish under the existing prize law. The 4 and 5 William and Mary, c. 25,⁴ had reserved to the crown only one-fifth of all prizes taken by private individuals; yet even under this and the act of March, 1702, mari-

¹ So as to permit the importation into England, in Dutch bottoms, of the produce of the Rhenish States.
² W. P. Sheffield, Privateersmen of Newport, Appendix, note 2.
³ Nys, La Guerre Maritime, p. 29; Cauchy, Du Respect de la propriété privée, etc., p. 37.
time enterprise did not seem to revive. Heroic measures were necessary to restore the institution which had done so much for Elizabeth and for Henry VIII.; and on March 26, 1708, a new prize act,\(^1\) passed by Parliament, was approved by the queen. This act is a crucial point in the history of English privateering. It marks the close of the period of decline and the opening of the period of greatest activity. It provided, briefly, for the transfer of the entire interest in the prize to the privateer,\(^2\) and for an additional sum by way of bounty, based on the number of men on board the captured ship at the commencement of the action.\(^3\) It was a definite change of policy on the part of the British government. From this time the government ceases to expect any direct benefit from privateering, and sanctions it only for the indirect benefit which it hopes to derive from the injury to the enemy and the enrichment of its own subjects.

Some time, however, was necessary before the effects of the new system could be felt by a generation of sailors long discouraged from great enterprises; and the Peace of Utrecht was concluded without much help from private adventurers. In 1739 war broke out with Spain, and in spite of a substantial re-enactment of the act of 1708 (April, 1740), the records of the years 1739–1741 show only thirty prizes taken by individuals as against 259 taken by the regular navy.\(^4\)

---

\(^1\) An Act for the better securing the Trade of this Kingdom by Cruisers and Convoys, and for the Encouragement of Cruisers, 6 Anne, c. 13.

\(^2\) "... That from and after the 26th of March, 1708, if any ship or ships of war, privateer, merchant ship or other vessel shall be taken as prize in any of her Majesty's Courts of Admiralty, the flag-officer or officers, commander or commanders, and other officers, seamen and others who shall be actually on board such ship or ships of war or privateers, shall after such condemnation have the sole interest and property in such prize or prizes."

\(^3\) § VIII. (£5 for each man). Compare the French system of bounties, infra, based on guns instead of men.

\(^4\) These and the other figures in this subdivision are those given by Leeder, Die Englische Kaperei und die Thätigkeit der Admiralitätsgerichte (Berlin, 1881).
And in March, 1744, when the war with France began, the English adventurers were not quite holding their own against the Spanish. A royal proclamation in May offered free pardon to certain minor criminals under sentence or in jail awaiting trial, who should consent to serve on board a ship of war or privateer. In addition to the smugglers and outlaws thus turned loose upon the world as representatives of the King of England, the mercantile circles began at last to awake to the advantages offered them by the new prize law. In 1744 the merchants of London alone equipped thirty-nine privateers, and those of Bristol eighteen; by the close of the next year 190 were on the seas. Out of 440 French and Spanish prizes taken during these years, 200 were taken by privateers. On the other hand, great damage was done to English shipping by the French and the Spaniards, and it became slowly and painfully apparent to the British government that the real gainers by the war were the Dutch, into whose hands, as neutrals, the entire colonial trade of the French and Spanish had fallen. Making but little stir, the Dutch were quietly regaining the commercial supremacy of which they had been robbed by the English in the preceding century; with the result that their complaints of the outrages of English privateers were received with deaf ears by George II. and his Privy Council. This fact was quickly observed by the privateers, whose excesses increased daily. The order of Parliament that "whatsoever vessel shall be met withal transporting any soldiers, arms, powder, ammunition, or other contraband goods" was stretched ad libitum by each individual privateer, there being no limit to the number of things which the admiralty courts might decide to call "contraband." At any rate, it scarcely ever

1 The subsisting treaties between England and several neutral powers defined contraband precisely, and that of 1674 with Holland provided Free Ships, Free Goods. Nevertheless, privateers constantly brought in Spanish goods in Dutch
did any harm to bring them in, for the admiralty courts, recognizing the national policy to harass neutral commerce, were almost sure to find some technical ground on which to tax the neutral master with costs, even if the vessel and cargo were restored. Moreover the damage done to neutrals by the delay necessary for putting in motion the ponderous machinery of the admiralty, was incalculable. The Danish ship *Junge Benjamin* was detained six and a half months; out of eighteen Prussian ships taken without any probable cause, three were detained for periods ranging from eight to ten months, and one for thirteen months, and the Swedish ships *Carlshaven* and *Prinz Gustav* were released only after a detention of twelve and fifteen months, respectively.

The Dutch, although their losses during the war amounted to nearly £1,300,000, found themselves unable to do anything but threaten; and they remained the butt of the privateers till the peace in 1748. With Prussia, however, the question was more serious. The case of Captain Bugdahl bottoms, and a new kind of “contraband” was invented in order that they might be condemned.

1“... so sorgte doch die Thätigkeit des englischen Admiralitätsgerichts, dass die Kaptoren wenigstens keinen Schaden durch Kostenersatz litten, und daher bis zum Ende des Krieges das müthelose Anbringen der neutralen Schiffe fortsetzten.”—(Leeder, p. 25). Out of 14 Dutch ships and cargoes wholly or partially restored in 1748, costs and damages (£2801) were awarded to only one.

2See Bugdahl’s report, Leeder, 20, 21. On May 5 he left Bordeaux; on the 7th he was boarded by an English privateer, which, after looking at his papers, tried to induce him to say that some of the goods on board were French (*habe er ihm sehr karesiert doch zu sagen, ob nicht französische Güter an Bord seien*); when he denied this, they fell without more ado to plundering him, taking his maps, charts, etc., maltreating him and his crew, and piercing holes in the wine-casks so that the wine ran out upon the deck. Finally, after an unsuccessful attempt to burn the ship, they left him. Next day about dusk came two other privateers, one of which boarded him, and, being shown his papers, carried them off, whereupon the other privateer boarded, and not finding any papers sent him into Liverpool!
had aroused the ire of the great Frederick, and, less impotent than the Dutch, he proceeded to retaliate by sequestrating the Silesian loan and applying the interest thereon to the indemification of the outraged Prussian merchants. So matters stood when the Peace of Aix-la-Chapelle was signed in 1748.

Disputes as to boundaries in America, and as to the ownership of some of the Caribbean islands, provoked, as between England and France, the Seven Years' War in 1756. By a strange combination of circumstances Prussia was obliged to forget the past and form a coalition with England; and Austria, in the hope of recovering Silesia, as well as for the purpose of strengthening the Netherlands, united herself with France. Long before the declarations of war, English privateers, scenting booty as vultures scent carrion, had covered the seas, and, taking the fighting in America as an excuse, had fallen upon great numbers of French merchantmen. It is estimated that they took, "dans cette première surprise," more than 300 vessels and nearly 10,000 peaceful sailors.

In the following year (1757) privateering became a craze the like of which had never been seen in England. The Duchess of Nottingham, with some ladies of the court, equipped three large vessels; companies were formed all over Great Britain and Ireland for the purpose of carrying on the trade of plundering the French; the fishermen of Jersey and the Channel islands left their nets and patrolled the coasts in little boats, armed only with clubs, knives and pistols. Heretofore, the average strength of the English privateers had been something like 20 guns and 120 to 150 men; now we find "privateers" with three and four guns, and even no guns at all, stopping large neutral vessels and exercising the right of visitation and search. The result is

1 Anquetil, Motifs des Guerres, p. 323. See also Doneaud, Hist. de la Marine Francaise, ch. iv.
forcibly illustrated by the experience of the Jonge Katharina, a Dutch ship which sailed from Amsterdam in April, 1757, bound for San Sebastian:

On April 20 she was stopped by a fishing-boat off Dover; of nine men in the boat seven came on board and plundered. On the same day another fishing-smack, containing twelve men, came alongside, and all twelve came on board and plundered. A mile further on she encountered a third, armed with clubs and pistols; the crew of this one broke a great deal of stuff, besides stealing after the fashion of the others. At midnight she was boarded again, but it was too dark to see what was stolen (man konnte aber in der Nacht nicht sehen, was sie mitnahmen). Next day early came a fifth little privateer, which loaded itself with goods, and later a sixth, which demanded gold from the Dutch captain. At noon came two together, ten men in each, and committed various thefts. Still later another came in sight, this time a large one; the searching boat which it sent out, however, was filled with goods from the unfortunate Dutchman, and soon afterwards the same privateer sent out another boat which "loaded itself to the gunwales." On the 27th came a tenth and last, which really did no damage of any kind (ohne etwas zu beschädigen). It is not unlikely, indeed, that by this time there was nothing left on the Jonge Katharina to damage. Nor was this a solitary instance. A list of 33 ships wrongfully plundered by privateers was

1 Leeder, Die Englische Kaperei, p. 34.

2 The account is taken from Leeder's condensed translation of the Verklaring van't Schip de Jonge Katharina (Die Englische Kaperei, p. 34). Other cases almost as bad were those of the Katharina Maria, Princess Karolina, Gertruida, Juliana, Pieter. From the Verklaring van't Schip de Goode Resolutie, we find that it was robbed by a small privateer and taken into Guernsey, where, although there was no admiralty court, it was detained seven months. It was then released without trial, "aber kaum auf dem Mecre von einem anderen Kaper geplündert."
presented on Nov. 11, 1757, to the Dutch ambassador at London; on July 27, 1758, a list of 56 cases was submitted by the merchants of Amsterdam to their High Mightinesses, and Leeder mentions still a third list of 100 cases.¹

The great master-stroke of English maritime policy, however, was what has since been known as the “Rule” of the war of 1756, which was announced to foreign powers for the first time in 1758, by the English ambassador at the Hague. According to that rule, the Dutch and other neutrals were prohibited from carrying on any trade, directly or indirectly, with the French colonies, which trade was not guaranteed to them in time of peace.² This arbitrary innovation, which was received with the utmost joy and enforced unspARINGLY by the privateers, was a death-blow to the Dutch commerce, which had been growing rich on the French colonial trade for many years. Other neutrals suffered in less degree. In 1757, before the proclamation of the rule, the English privateers had brought in for adjudication 153 French and 35 neutral vessels.³ In 1758, after its proclamation, they brought in 128 French and 130 neutrals.⁴ And this does not include the captures of the public vessels of war, which from seven neutral ships in 1757 rose to 33 in 1758.

But now, in addition to the complaints and reprisals of Spain and other neutral powers more able to resent injury than the Dutch, the protests of the English insurers became so alarming that the government was obliged to rouse itself

¹*Es war im Laufe eines Jahres,* says he (p. 37), “aus der englischen Kaperei in Europa eine Piraterie geworden . . .; damals waren es die Admiralitätsgerichte gewesen, welche den Neutralen den Hauptschaden zufügten; jetzt teilten sich Gerichte, Kaper und Piraten in diese Aufgabe.”

²*Annual Register, 1758.*

³17 Dutch, 9 Swedish, 4 Spanish, 3 Danish, 2 Hanseatic.

*101 Dutch, 10 Spanish, 11 Swedish, 4 Danish, 2 Hanseatic, 2 Portuguese.
from its policy of inactivity. A great deal of the loss was falling on English shoulders, and prudence and economy both suggested the advisability of reform. Moreover, the Dutch were already ruined, and the principal motive for secretly encouraging piracies had therefore disappeared. The 32 Geo. 2, c. 25,\(^1\) provided that no privateer commission should be granted for the future unless the ship applying for it should be "of the burthen of a hundred tons, and carry ten carriage guns, being three-pounders, and forty men at the least," except in the discretion of the lords of the Admiralty and upon proper security; and all existing commissions to vessels under the required strength were revoked (Section XVII). Further, privateers agreeing for the ransom of neutral ships without bringing them into port were to be deemed guilty of piracy (Section XII). The effect of this act was, of course, to sweep away the little fishermen-privateers which infested the Channel, and to produce a marked improvement in the conduct of the larger ones. Some twenty-five privateer captains were tried for piracy under its provisions, for ransoming neutral vessels or cruising without a commission; and from June, 1759, till the Peace of Paris (1763), the neutral complaints fell off gradually in number and the London insurers thrived. The Peace of Paris demonstrated forcibly how little influence privateering usually exercises on the result of a war; the losses of the English shipping were more than double those of the French, yet the treaty of peace was the most disgraceful, perhaps, that France ever signed. The English captures at sea had far less to do with the treaty than Madame de Pompadour.

Whatever its causes, however, the Peace of Paris was a triumph of English maritime policy and a confirmation of

\(^1\) An Act for the Encouragement of Seamen and the Prevention of Piracies by Private Ships of War.
English sea-despotism.¹ But, under the vigorous administration of Louis XVI., the French navy increased with rapid strides, and the national desire to renew hostilities with England became impossible to restrain after the American Revolution assumed serious proportions. The Franco-American alliance of 1778 was followed by the Franco-Spanish alliance of 1779, the Family Compact and the possibility of recovering Gibraltar being the arguments which Vergennes had used to procure the latter. The great, oppressive maritime system of Great Britain was revived, the Rule of 1756 re-established, and privateers, better equipped than ever before,² were sent out with commissions against the three powers. To all appearances the sickening proceedings of the Seven Years' War were about to be repeated, when two outrages committed by British cruisers upon Russian commerce³ aroused the ire of the latter power, and led to Catharine II's declaration of the 26th of February, 1780.⁴ This famous

¹ Jacobsen (Seerecht der Engländer und Franzosen, Hamburg, 1803), says mildly of this despotism, that neutrals had naturally to pay "ein unerbürtes und schmerzhaftes Lehrgeld zu einer Zeit, wo die Engländer über ihr jetziges System noch selbst nur sagen konnten, docendo discimus, indem sie noch selbst nicht wussten, wo sie hinaus wollten" (I., 556). It seems more than likely, however, that if the nation generally was kept in ignorance, the men who controlled the maritime policy of Great Britain knew very well "wo sie hinaus wollten."

² See James, Naval History, I., 59. In 1779 the "smasher" gun, or carronade, had not yet been adopted in the royal navy, but many privateers were equipped with them.

³ Two Riga vessels, Der Emmanuel and Der Junge Prinz, hemp and flax, for Bordeaux and Nantes respectively, were captured and sent into England, where, "allen Vorstellungen des russischen Generalconsuls in London zum Trotz," they were detained a year. Bergbohm, Die Bewaffnete Neutralität, p. 116.

⁴ More appropriately, Count Panin's declaration. It is well known that Catharine II. was herself a cordial friend of the English, and was simply tricked into the armed neutrality by Panin, who induced her to believe that it would be most galling to Spain. The Spanish seizure of two Russian vessels carrying corn to Gibraltar, urged the minister, should be resented, and resented in a way which should enable Russia to pose as the protector of neutral rights against the world. So
document, which declared that all neutral vessels might, of right, navigate freely from port to port and along the coasts of nations at war; which laid down the principle Free Ships Free Goods, and defined contraband so as to exclude materials of naval construction, besides denouncing as invalid all "paper" or ineffective blockades, was hailed with joy by all the belligerent powers except Great Britain. By a convention, signed at Copenhagen on the 9th of July, Denmark adopted the Russian declaration and agreed to assist in its enforcement, if necessary, by war; Sweden acceded to this convention on the 9th of September; and the three great northern powers, by mutual consent, declared the Baltic closed to the belligerents. Austria acceded to the "Armed Neutrality" Oct. 9, 1781; Portugal, July 13, 1782; and the two Sicilies, Feb. 10, 1783. Holland also acceded, before she became involved in the war; and the United States, in its eagerness to acquiesce in the principles of the Russian declaration, declared an intention to "accede" as early as April 7, 1781, oblivious of the fact that a belligerent power could not technically become a member of a neutral alliance.

This portentous league, which "continued to hang as a dark cloud constantly menacing the safety of the British empire until the peace of 1783," destroyed, for the time, the great blind was the Czarina to the consequences of the declaration, that she is recorded as saying confidentially to Sir James Harris, the English minister at St. Petersburg, that she would shortly issue a manifesto which would be most acceptable to England. In Harris' despatch to Lord Stormont, of the 24th of December, 1780, he reports the following conversation with the empress (Cf., Fauchille, *La Dipl. Française*, p. 589):

"Harris: Il [Panin] est déjà lui-même dans une intelligence parfaite avec le cabinet de Versailles.

"L'Impératrice (piquée): Ne croyez pas que cela signifie quelque chose; je connais à fond M. Panin; ses intrigues ne font plus rien sur moi; je ne suis pas un enfant; personne ne m'empêche de faire ce que je veux, je vois clair."

British scheme of maritime despotism. "In 1781 and 1782," says Fauchille; "secret instructions were issued to the English privateers to moderate their zeal (pour tempérer leur zèle)." The neutral flag protecting hostile goods, and the other powers being determined to prevent the enforcement of the Rule of 1756, there was little booty left for the adventurers, and in the last three years of the war they fell off greatly in number. The excesses of the Seven Years' War had not helped to procure the advantageous Peace of Paris; they had helped to produce the exceedingly anti-English sentiment which raised the world in arms against England in 1780, and compelled her ultimately to accept the disadvantageous Peace of Versailles.

4

From the First Armed Neutrality to the Declaration of Paris (1856)

How far the maritime pretensions of England have depended upon the maritime condition of France must already have been apparent. The weakness of the French marine under Louis XV. was the occasion for the invention of the Rule of 1756; the strength of the French marine under Louis XVI., together with its Russian support, caused the abandonment of that rule in 1780.

When the war of 1793 began, the French navy was broken up and demoralized; the revolution had carried away its great commanders; even D'Estaing was about to fall under the guillotine; and the time, therefore, seemed ripe for a revival of English domination. The Anglo-Russian treaty of March 25, 1793, engaged both parties to do all in their power, "on this occasion of common concern to every civilized state," to prevent other powers from giving, "in consequence of their

1 Fauchille, La Diplomatie Francaise et la Ligue des Neutres, p. 580.
neutrality," any protection to French property or commerce. Similar provisions are found in the Spanish, Prussian and Austrian treaties with Great Britain of May 25, July 14 and August 30, respectively. Stringent provisions were made for starving France into submission, under the ingenious pretext of treating provisions as contraband. The Convention answered by the decree of the 9th of May, ordering the pre-emption of all provisions bound for an English or other hostile port. An Order in Council then issued (Nov. 6, 1793), revive the rule of 1756, and as Russia was then allied with England, the northern powers interposed no objection. Of course the neutral flag was not recognized as protecting French goods, even Russia, in view of the importance of the occasion, departing from her former policy in this regard. The English privateers, therefore, appeared in great numbers, attracted by the wide range of booty which the government offered them. They were, it will be seen,

1 *Amer. State Papers, For. Rel.,* III., p. 263.

2 See Hall, *Int. Law,* ch. on Contraband. It was not till the 8th of June, 1793, that British privateers were formally instructed to "detain all vessels laden with corn, flour, meal," etc. But the privateers had begun to do so on their own responsibility before the French decree of the 9th May. France must not be judged too harshly for that decree. To-day, with plenty of corn in our granaries, we can hardly appreciate the terrible condition of France in 1793, nor the excuses which the Comité du Salut Public had for its remark, "There is no immorality in ruining those who starve us."


4 The 33 Geo. 3, c. 66, *An Act for the Encouragement of Seamen,* and for the better and more effectually manning His Majesty's Navy, is in some respects a model privateer act. Sec. IX. provides that the owner of any vessel registered under the 26 Geo. 3, whom the Lord High Admiral, or the Commissioners, etc., shall deem fitly qualified, may obtain a commission or "letters of marque and reprizal" and enjoy the whole benefit of the prizes taken. Sec. XIV. provides for security "such as hath been usual in such cases." Sec. XV. requires that applications shall be in writing, and contain description of ship, etc. Sec. XXI. provides that offences on board privateers shall be punished as if committed on board ships of war.
entitled to seize: (1) French vessels, (2) neutral vessels laden wholly or in part with French merchandise, (3) neutral vessels laden with provisions bound for France, (4) neutral vessels laden with contraband for France, (5) neutral vessels laden with French colonial produce. In addition, the system of paper blockades was revived, and this became the most oppressive, perhaps, of all the maritime pretensions of Great Britain, particularly to Americans. The practice was to issue a circular notification of blockade, announcing that "the King has judged it expedient" to institute one, and that therefore it must be considered as existing. As a matter of fact it might be several weeks afterwards before any English squadron approached the town or harbor declared blockaded. Under these arbitrary rules American commerce suffered heavily. The list of British captures during the year 1796 and the list of captured vessels belonging to the Messrs. Smith of Baltimore, deposited in the Department of State June 17, 1797, contained matter well calculated to inflame the American mind against England. The same old principle of seizing everything and relying on the court of admiralty to allow at least costs, seems to be present; else how explain the capture of vessels laden with flour and coffee on their way to Baltimore; of the schooner Lively, on the sole pretext that she carried ten casks of nails; of the brig Jefferson, because her owner, Mr. Longchamp, "had been in France in the last three years" and had a brother who was a conscript in the French ser-

1 See Lord Harrowby's Circular of Aug. 9, 1804 (Fécamp) and Lord Grenville's of March 22, 1799 (all ports of Holland).

2 Am. State Papers, For. Rel., II., 30.

3 See the cases (in the Smith's list) of the Sidney, the Fell's Point, the Fanny, and the Sally.

4 Which, by the way, were condemned. Am. St. Papers, For. Rel., II., 30.
vice; or the schooner *St. Patrick*, direct from Curaçao to an American port, and carrying only American property, notwithstanding which she was decreed to pay costs on the ground that the captor had had "probable cause." The *Susanna*, of Charleston, with sugar, to Cadiz, was captured while trying to ascertain whether Cadiz was blockaded (for under the British practice it was impossible to discover except by asking), and tried and condemned in Gibraltar while she, with all her crew, was at Lisbon. Mr. Fitzsimons, in a letter of February 17, 1801, on behalf of the Philadelphia Chamber of Commerce to the Secretary of the Navy, declared that without convoys all trade to Cuba would have to be abandoned. Premiums to Havana rose twenty per cent. in a few days. "Not one in ten vessels," wrote Mr. Fitzsimons, "can escape; from New Providence alone there are above forty privateers who subsist principally by the plunder of the Americans." "The enforcement of the Rule of 1756," he continued, "was the more mortifying, as they themselves ship the goods of which they plunder the Americans to the countries to which they do not permit us to carry them." Perhaps, however, the most remarkable case of outrage before the Peace of Amiens was the capture of the *Crocodile*, Curaçao to New York, carrying only Dutch and American property: "The captors, immediately on the capture, made a privateer of the Crocodile and sent her on a cruise."  

Russia, once more neutral, began to be restive under this revival of British aggression. Not only did she refuse to

---

2 "... without even the captain being present." U. S. Consul at Gibraltar to Secretary of State, Nov. 19, 1800.
3 *Am. State Papers, For. Rel.,* II., 347.
4 *Am. State Papers, For. Rel.,* II., 345.
acknowledge the Rule of 1756, but she returned to her ancient dogma, Free Ships Free Goods, and moreover contended for the immunity of convoyed vessels from visitation and search. The case of the Danish convoy, 15th July, 1800, which the English stopped and searched by force, precipitated matters and led to the Second Armed Neutrality. On the 16th of December, 1800, there was signed by Russia and Sweden a convention,\(^1\) to which Prussia and Denmark afterwards acceded, providing for a renewal of the principles of the old Armed Neutrality and for the immunity of convoyed vessels. Article III. also provided that probable cause should be necessary for capture, and that there should be no unnecessary delay in the matter of trial—thus introducing a sort of habeas corpus principle into maritime law.

The announcement of the Russo-Swedish alliance was followed by an Order in Council directing an embargo on Russian and Swedish vessels (Jan. 14, 1801). Lord Grenville declared that “the maritime code of 1780, now sought to be revived, was an innovation highly injurious to the dearest interests of Great Britain.”\(^2\) Hostilities followed, during which the emperor Paul died; and though the Anglo-Russian convention of June 17, 1801, is on its face a compromise, it was really a triumph of Russian policy and a severe check to Great Britain. Russia gave up Free Ships Free Goods, but her adversary abandoned the Rule of 1756 (art. III. § § 1, 2) and conceded the immunity of convoyed vessels from search by privateers (art. IV. § 1).

The brief Peace of Amiens gave way in 1803 to the most

---

1 This convention refers to the First Armed Neutrality as the system “suivi avec tant de succès pendant la dernière guerre d'Amérique,” and the Czar Paul, in his declaration of Aug. 15, says of it enthusiastically: “Chacune [of the signatory powers] en recueilli les avantages sans nombre.”

violent and lawless period of war, and especially maritime war, that the modern world has ever seen. During this period we are dealing no longer with questions of international law. That, with all other law, was laid upon the shelf, and its retirement justified by the magic word, Reprisal!

From 1803 to 1806, the British pretensions, not yet recovered from the shock of the Second Armed Neutrality, were, indeed, asserted gradually and with care. The Rule of 1756, in accordance with a report of the king's advocate of March 16, 1801, was enforced only against direct trade from the colony to the mother country; and under a decision of the High Court of Admiralty the landing of the goods and the payment of duties in the neutral country was held to break the continuity of the voyage and render the trade indirect. This interpretation of the rule, sent by Lord Hawkesbury to Mr. King in 1801, and published, at Mr. King's suggestion, in all the American newspapers, was faithfully followed until the summer of 1805. Then, however, "when a large amount of American property was afloat, undeniably entitled to the protection of the above rule, and committed to the high seas under an implicit reliance upon a strict adherence to it, the rule was suddenly abandoned, and British cruisers fell upon this trade" under a new decision that the intention of the importer of colonial produce to export the produce to the mother country constituted the trade in such produce a direct trade.

Sir Evan Nepean's assurance (Jan. 5, 1804) that Commodore Hood was instructed not to treat any blockade of Martinique or Guadalupe as existing "unless in respect of particular parts actually invested," did not prevent the

1 British and For. State Papers, I., 1204.
2 Messrs. Monroe and Pinckney to Lords Holland and Auckland, Aug. 20, 1806.
4 Sir E. Nepean to Mr. Hammond, British and For. State Papers, I., 1207.
seizure of the schooner *Nancy* and other vessels on the theory of a paper blockade;\(^1\) and the indefensible British method of search, which consisted in compelling the vessel visited to *send her papers in her own boat* to the privateer, instead of leaving the burden with the searchers,\(^2\) was practised with unabated frequency. The masterly inactivity of the admiralty courts in this and the preceding period is forcibly illustrated by the case of Ira Allen. Mr. Allen, sent to Europe by the governor of Vermont to procure arms for his militia, was induced, by the difference in price, to buy the arms in a French market rather than an English one. In 1796, while returning with his purchase, he was taken into England by a 74-gun cruiser, and, in the following year, the cargo was condemned, Mariott, J., "suggesting that it was intended to arm the rebels of Ireland." On appeal, the vessel was detained under the form of restoration with bail "for more evidence;" and it was not actually restored until the bail became bankrupt, which was seven years afterwards (1804).\(^3\) Incidentally it is to be noted in connection with the case that *no more evidence was ever adduced*; so that if there was enough for restoration in 1804, there must have been enough in 1797.

All of these practices, however, were moderation itself, in comparison with the series of acts which began in 1806. Early in that year (May 16) the numerous little blockades which the British had instituted on the northern coast of France and the low countries, were consolidated, and one general blockade from the river Elbe to the port of Brest was announced.\(^4\) Napoleon, master of Prussia, seized the

---

\(^1\) *Am. State Papers, For. Rel.,* II., 765.


\(^3\) *Am. State Papers, For. Rel.,* II.

\(^4\) *British and Foreign State Papers,* I., 1512.
opportunity to issue his famous Berlin decree (Nov. 21), declaring the British Isles "en état de blocus," and forbidding neutrals to have any commerce or intercourse with them.\(^1\) Thereupon (Jan. 7, 1807), an Order in Council issued, which, after reciting that France had proclaimed a blockade of Great Britain "at a time when the fleets of France and her allies are themselves confined within their own ports by the superior valor and discipline of the British navy," forbade neutrals to trade from one port to another in France.\(^2\) This, however, was found inadequate, and one of the three Orders in Council of Nov. 11, 1807,\(^3\) provided that "all ports in Europe from which the British flag is excluded, shall be subject to the same restrictions as if the same were actually blockaded by His Majesty's naval forces." The same Order in Council directed vessels of war and privateers to make prize of neutrals complying with the French requirement of carrying "certificates of origin" to show that their cargoes were not English; and certain neutral vessels were to be obliged to "proceed to some port or place in the United Kingdom or to Gibraltar or Malta," and be subjected to certain exactions. Another Order in Council of the same date declared that vessels belonging to French subjects at the beginning of the war should continue subject to seizure till the end, regardless of all transfers or pledges to neutrals; in other words, once French, always French.\(^4\) Napoleon, on the 17th of December, 1807, issued his Milan decree, declaring that the French would make prize of any vessel "submitting" to the Orders

\(^{1}\) Cf. Arts. 1 and 2. The preamble reviews the British practice of declaring blockaded places "devant lesquelles elle n'a pas même un seul bâtiment de guerre," and of applying the law of blockade not only to fortified towns, but to the mouths of rivers and generally "des côtes entières." This conduct the Emperor of the French stigmatizes as "digne des premiers âges de la barbarie."

\(^{2}\) British and For. State Papers, VIII., 468.  
\(^{3}\) Ibid., 491.  
\(^{4}\) Id., I., 1512.
in Council of the 11th November, and continuing the imaginary blockade of the British Isles. By this time the sea had become no place for neutrals. It was a strife between Titans, and the onlookers must keep out of the arena. Both England and France were unable, even if willing, to control the hordes of desperate privateers and quasi-privateers who were nominally subject to them. During the Peninsular war, on account of the difficulty of feeding the army, it was customary to issue licenses to certain American vessels, exempting them from seizure on any ground by British cruisers, in consideration of their supplying provisions; and it is on record that "the captain of a Scotch merchant vessel, engaged in the same trade, and having no letter of marque, had the piratical insolence to seize, in the very mouth of the Tagus, and under the Portuguese batteries, an American vessel sailing under the license of Mr. Foster, and to carry her into Greenock, thus violating at once the license of the English minister, the independence of Portugal, and the general law of nations."*

It is unnecessary here to go into the complicated question as to whether the decrees of Berlin and Milan were ever really repealed. It is practically certain, at any rate, that the revocation of the British Orders in Council, on the 23d of June, 1812, five days after the Congress of the United States had declared war, was not in consequence of, or in any way connected with, the French decree of April 28, 1811, purporting to effect that repeal. The revocation of the Orders in

---

1 "Any vessel which "se sera soumis à un voyage en Angleterre, on aura payé une imposition quelconque au Gouvernement Anglais, est par cela seul déclaré dénationalisé," etc. The preamble sets forth that this is absolutely necessary, because if, "par une faiblesse inexcusable, on laissait passer en principe et consacrer par l'usage une pareille tyrannie, les Anglais en prendraient acte pour l'établir en droit," etc.

2 Napier's History of the Peninsular War, IV., 30.

3 "The real cause of the revocation," wrote Mr. Russell to Mr. Monroe, June
Council was the result of economic considerations purely, and not of any desire on the part of the British government to return to the paths of law and order. Every one knows the effect of the American war upon British maritime policy. The Treaty of Ghent is the bow of a world’s champion to a newly-discovered equal. Between, though not in its lines, we read Great Britain’s confession that the day of marine despotism is over; that the policy of marine despotism can never be revived. For there cannot be two despots.

During the American war every effort was made to recede from the high-handed position previously assumed, with as little shock as possible. The blockades were raised from each port as soon as the power of France was driven back sufficiently to afford the slightest excuse for so doing. The ports of the Netherlands were declared open December 13, 1813; Triest and Dalmatia were relieved on the same day; and on January 14, 1814, many ports of France itself were proclaimed free. The check at the hands of the United States was compensated for by the victory over France; the British despotism-system imparted to its own death a sort of éclat by dragging with it in still more hopeless ruin the “Continental System” of Napoleon.

The fall of the latter marks the close of the history of English privateers. Though they had done nothing to promote the peace, though they had succeeded only in injuring neutrals and causing the name of England to be execrated throughout the earth, they were so essential a part of the English system that the prince regent revived them as a

30, 1812 (Am. St. Papers, For. Rel., III., 615), “is the measures of our government,” i. e., the embargo of December, 1807, to March, 1809, and the non-intercourse act of May, 1810, which produced acute suffering in England. See also the elaborate argument of the Secretary of State, in his report of July 12, 1813 (Am. St. Papers, For. Rel., III., 609).

Brit. and For. State Papers, I., 1267
matter of course during the Hundred Days.' But in the long interval of peace from 1815 to the Crimean war, there was ample time for the digestion of facts with regard to this institution, and in consequence, its popularity decidedly declined. Its inhumanity, its invariable effect of producing complications with neutrals, and above all its ineffectiveness, made it no fit weapon to use against Russia in 1854, and both France and England refused to issue "letters of mark." Indeed, the Russian commerce was so small, and the British regular navy so powerful, that privateers would have been superfluous. The regular navy captured 205 Russian vessels (all, except one, unarmed); 136 were wholly condemned.3

1 Order in Council, June 21, 1815, British and For. State Papers, II., 1044.
3 Return of the Names and Number of Russian vessels captured, etc., ordered by the House of Commons to be printed, July 29, 1856.
CHAPTER II

PRIVATEERING IN FRANCE

1

The French Marine before Colbert

“La marine en France,” says Doneaud,1 “est un élément de puissance, mais non pas la puissance même du pays, comme en Angleterre.” Always a naval power of the first class, France has never been the chief of naval powers, nor, with the exception of a few years under Louis XVI., does she seem ever to have had any ambition to be such. There have been no “sailor kings” in France. Her monarchs have almost invariably been content with bare equality upon the sea; and the dream of reviving the empire of Charles the Great has been to them what that of maritime supremacy was to England. The motives for the employment of privateers in France and England have not therefore been altogether identical. To cripple the enemy by cutting him off from his colonies and generally destroying his trade is a purpose which was common to both; but to direct the excesses of private adventurers against neutrals, who, if allowed to escape unscathed, might become commercial rivals, was a policy which France, in the absence of any wish to establish a maritime despotism, never adopted. Privateers were used in England as something auxiliary to the royal navy; in France very often because there was nothing else to use. In early times, when there was no regular navy, and in later

1 Hist. de la Marine Française, Preface.
times, when the regular navy was now and again driven off
the seas by the English, it was a question of commissioning
private individuals, or of allowing the French flag to disap-
ppear from the ocean altogether. In this position Louis XIV. found himself after the battle of La Hogue, and Napo-
leon after Aboukir and Trafalgar.

Before the royal marine became permanent under Col-
bert, the kings of France, like those of England, relied for
their maritime operations upon impromptu navies raised by
the impressment or hiring of merchant vessels. In France
there was nothing analogous to the Cinque Ports, and the
method of raising the contributions varied with the exi-
gencies of each particular war. The decentralized state of
the country, moreover, made it possible for private adventure
to develop an amount of importance and independence
which would have been impossible in England under the
strong and jealous Anglo-Norman kingship. The most re-
markable illustration of this tendency to independence is the
case of Ango of Dieppe in 1525. The Portuguese having
seized one of his ships and denied him redress, Ango, at his
own cost, fitted out seventeen armed vessels with which, in
due form, he blockaded the Tagus. Francis I, in answer
to the Portuguese complaints, is said to have remarked,
"Messieurs, ce n'est pas moi qui fais la guerre; allez trouver
ANGO, et arrangez-vous avec lui." A certain Vandervelde
is said to have been created Chevalier de Saint Jacques for
presenting the king with twelve vessels of war, "en pur don
et par munificence." Again, on the failure of Ribaut's
colonizing expedition in 1562, and the massacre of its leader
by the Spaniards, a gentleman of Gascony, Dominique de
Gourgues, in order that the act might not go unpunished,

1 Doneaud, ch. i.
2 Guérin, Histoire Maritime de France, t. II., p. 69.
3 Eugène Sue, Histoire de la Marine Française (Paris, 1845), t. I., p. 17.
equipped three vessels and "exerça sur les Espagnols de sanglantes représailles." 1 In the preceding century there were numerous cases of this sort; and it is interesting to note that Jacques Cœur (afterwards so poorly recompensed!), was accustomed to furnish Charles VII. whole fleets at his bidding; and that in 1403 a party of Norman gentlemen partially "conquered" the Canaries. 2

Nevertheless, from the time of St. Louis the French monarchs had really been struggling to centralize their marine. In 1270 the title of Admiral was borrowed from the Arabs and conferred upon Florent de Varennes; in 1322 Charles IV. created the dignity of Grand Admiral. Meanwhile there had begun the great quarrel with England, which lasted almost without intermission till 1493, and which arose out of piracy or "spoil" claims on both sides. The facts were, substantially, that in 1292 some Norman sailors complained of English piracies to Philippe le Bel, who without investigating the matter authorized them to use reprisals. Accordingly, "on their first rencontre with an English ship, they attacked it, took it, and hung between two dead dogs (pendirent entre deux chiens morts) a majority of the crew." 3 It was obvious that, to maintain peace with the hardy English, it would be necessary to subject the piratical Normans and Britons to the curb of a strong central authority, and this authority naturally formed around the person of the Admiral as a nucleus. The judicial functions of the Admiral certainly ante-date 1350, for in that year an Ordonnance was issued giving an appeal to the royal courts from the Admiral's jurisdiction in Normandy. 4 The extent of those functions does not seem to have been definitely determined until Charles V., in December, 1373, issued an Ordonnance providing that the Admiralty should "take

jurisdiction, both civil and criminal, of all acts committed on the sea and its dependencies” (connoit de tous faits sur la mer et ses dépendances, tant criminellement que civilement). As one of the droits of his office, the Admiral became accustomed to claim as his share one-tenth of all prizes taken. In order that this tenth might be secured, as much as for the protection of neutrals, it was necessary that prizes should be brought in for fair adjudication in an unpillaged state, and it was also necessary to keep account of those who were engaged in the work of making prizes. The Règlement sur le fait de l’Admiraulté of July, 1517, provided, that if prizes were not brought in, or were brought in pillaged, the offenders should be punished at the discretion of the Admiral (seront punis à la discrétion de nostredict Admiral, etc.). Much earlier than that, as early in fact as 1400, privateers were required to obtain the consent (congé et consentement) of the Admiral before starting on a cruise. By ordonnances in 1398 and 1498 they were required to give security not to injure any but the enemy. It is to be noted that the distinction between a privateer’s commission and a letter of mark and reprisal was just as clear in France as in England. The former was always issued by the Admiral, the latter only by the king personally. Two early

1 Pardessus, Collection des Lois Maritimes (Paris, 1837), t. IV., p. 224.
2 Ibid., p. 295, Ord. of March, 1584. “... et de toutes les prises faites... nostredict Admiral aura son droit de dixiesme.”
3 Lebeau, Nouveau Code des Prises, ou, Recueil des édits, etc. (Paris, an VII.), t. I., p. 5. See, for two cases of punishment occurring in 1696, ibid., pp. 229, 230.
4 Lebeau, t. I., p. 1. Ordonnance du 7me Dec., 1400. Art. 3 provides: “Se aucun de quelque estat qu’il soit, mettoit sus aucun navire à ses propres despens pour porter guerre à nos ennemis, ce sera par le congé et consentement de nostredict Admiral ou son lieutenant, le quel a ou aura au droit de sondit office la connaissance, jurisdiction, correction et punitiou de tous les faits de ladite mer et des dépendances, criminellement et civilement,” etc.
5 Lebeau, t. I., p. 80, note.
ABOLITION OF PRIVATEERING

Attempts of the Parlement de Paris to assume sovereign functions in this particular were effectually deprived of all value as precedents by the Ordonnance of 1485.

The dignity of Admiral at last became attended with so many burdensome feudal privileges, and became moreover so purely honorary in its nature, that Richelieu took the bold step of procuring its abolition, and the substitution for it of the post of “Grand-maître, chef et surintendant” of the marine. The advantages which the navy derived from being placed under the immediate control of the energetic cardinal- duke instead of the feeble and nominal leadership of Henri de Montmorenci, may best be observed in the exploits of D’Harcourt, Pont-Courlay, Jourdis and Brézé, during the Thirty Years’ War, in the rise of the naval “ arsenals” of Havre, Brest and Brouage, and the increased attention to naval matters, and particularly to the teaching of naval discipline, in the Académie Royale. The national interest in the navy had been excited in 1627, by the defeat of the large English fleet sent to the relief of La Rochelle, and by the consequent reduction of that centre of disturbance. Richelieu’s efforts to encourage private adventurers, however, seem to have met with but little success, and his good work for the regular marine was all undone under Mazarin, who prac-

1 Arrêt du 12me Juillet, 1345, and 14me Fév., 1392.

2 Lebeau, t. I., p. 104, note.

3 Edit of Oct., 1626. By an edit of January, 1627, the ancient office of connétable was also abolished, and Louis the Just, perhaps for fear of changing his mind, added the following: “Défendons à toutes personnes généralement quelconques, etc., de quelque dignité, qualité et condition qu’elles soient, de nous demander ou faire demander aucune des dites charges, sous peine de notre indignation.”

4 Doneaud, ch. i.

5 “The despotic governments of Paris and Madrid,” says Crowe, “vainly strove to imitate the freer Dutch. Capitalists would not trust the lawless extortions of absolute minister and monarch” (History of France, Vol. III., p. 468). This is particularly true of the crafty, parsimonious ministry of Mazarin.
ABOLITION OF PRIVATEERING

2

From Colbert to the Peace of Versailles (1783).

If we regard legislation only, the period from Colbert’s appointment till the battle of La Hogue, in 1692, would not seem to have been very favorable for the development of privateers. The prodigious centralization which Louis XIV. loved fell heavily upon the liberty-loving freebooters. Everything was regulated for them in advance. The security which they must give (formerly, by the Ordonnances of 1398 and 1498, required only in general terms), was fixed at 15,000 livres by the great Marine Ordonnance of 1681. They were forbidden to ransom their prizes above a certain sum. Baionne was the only town excepted from the rule that privateers must carry at least six guns. Further, the post of Admiral was revived in favor of the Comte de Toulouse, a natural son of the king, with the provision that a prize court should meet in his house “when he should be of

1 Titre des prises, Art. 2. Lebeau, t. I., p. 80. Art. 1 provides that a commission shall be necessary, and that the Admiral shall have one-tenth of all prizes and ransoms. Art. 1 of the Ordonnance provides that justice shall be administered in the name of the Admiral in all Admiralty courts. For the full Ordonnance see Pardessus, Collection des Lois Maritimes, t. IV., p. 325.

2 The Ordonnance of Feb. 6, 1697, made this sum 30,000 livres for privateers in America. Formerly it had been 15,000 livres. Lebeau, t. I., p. 233. Privateers were forbidden to ransom prisoners, under heavy penalties, by the Ord. of Oct. 9, 1666. Lebeau, t. I., p. 45.

3 Ord. June 14, 1691. Lebeau, t. I., p. 139. The exception was on account of the little corsaires of Biscay.
ABOLITION OF PRIVATEERING

an age to participate therein";¹ and not only were private adventurers once more compelled to share their prizes with this carpet sailor, but also to give up a percentage of one denier per livre on what remained to them, to the marine hospital at St. Malo.² An additional three deniers per livre was required in the ports of Bretagne and Granville for the ransom of sailors captured in Barbary or the Levant,³ and at Calais, by custom, one-half of one per cent. went to the poor.⁴

In spite of these burdensome regulations, this was the beginning of the Golden Age of the French corsaires. The vigorous Colbert, by his encouragement of commerce, his protection of naval industries, and his enormous increase of the matériel of the royal navy, which grew in his hands from seventy vessels in 1666 to 196 in 1671, 276 in 1683, and nearly 300 at his death,⁵ succeeded in raising in the coast towns a mighty wave of enthusiasm. So many private adventurers appeared that corsaires began to travel in squadrons, the idea of uniting them being popularly attributed to Jean Bart.⁶ The highest personages in the realm, according to Maurice Loir,⁷ did not disdain to make fortunes out of privateers.

Saint-Malo became such a "nest of corsaires" that the English conceived the plan of exploding an infernal machine in that port; the project, however, was a failure, and covered its inventors with ridicule. The profitableness of privateering at this time may be inferred from the fact that on one day alone—Monday, Sept. 25, 1690—Jean Bart took four

⁴ Ibid., p. 136.
⁵ Doneaud, ch. ii. See generally Beckford's History of France, Vol. IV., p. 69
⁶ Larousse, Grand Dict. du XIXme Siècle, tit. Jean Bart.
⁷ La Marine Française, Paris, 1893, p. 74.
Hanseatic vessels, which he ransomed then and there for 39,000 livres;\(^1\) and on the 19th and 20th of the same month he had taken four others, the aggregate ransoms of which amounted to 40,500 livres.\(^2\) The war from 1681 to 1688 was remarkable for the outrages committed by French privateers upon Dutch fishermen. These outrages were encouraged by the government, on the very satisfactory ground that the fisheries “afforded almost the subsistence” of the Dutch.\(^3\) Acts of piracy of course became very frequent; and, in 1689, an example was made of the crews of some privateers which had, “as a last exploit, pillaged a neutral ship.”\(^4\) “Such scandals,” says Loir, “were common; they announced the decadence of our marine.”

The French privateers in Europe, however, appear on the whole to have been comparatively temperate and law-abiding sailors, fearing God and the king, and respecting neutrals. But in America there had developed what may be called a school of privateering, in which no fear of any kind was known and no respect entertained. The flibustiers, or Others of the Coast, had begun to be heard of in the war of the Devolution (1667), in which the services that they rendered to France were so great that their excesses were overlooked. Frequently starting out in fishing boats, which they forcibly exchanged for merchant vessels or small privateers, these men often ended their cruises on a public ship of war; and their ambition increased in proportion to their successes. The prizes which they took were rarely heard of by the admiral. Captured crews were graciously dismissed if their vessels were richly laden; if not, they were mercilessly

---

\(^1\) Eugène Sue, *Hist. de la Marine Française*, t. IV., p. 289.
\(^2\) Ibid.
\(^3\) Mémorial d’Hubert à Colbert sur les Armements en Course à Dunkerque, Sue, t. III., p. 316. This, says Hubert, is to the Dutch “d’autant plus sensible qu’elle fournit presque la subsistance de leur pays.”
\(^4\) Loir, *La Marine Française*, p. 76.
obliged to walk the plank. During the Devolutionary war some flibustiers landed in Venezuela and ransomed the town of Maracaibo, which the inhabitants had prudently abandoned at their approach. Pillage, of course, preceded the ransom, the ransom money being paid merely to prevent the unpillaged residue from being set on fire. The spoils of Maracaibo, and of the Yucatan peninsula, which was ravaged about the same time, were piously sent to enrich various West Indian chapels.

At first these depredations were confined to the enemy and to time of war; but after the Peace of Nimègue, in 1678, the flibustiers had become so numerous, and were so unfit for any other occupation, that their ravages continued unabated. Twelve hundred of them pillaged Vera Cruz and put it to the enormous ransom of 10,000,000 livres, half of which was paid in slaves. Another band descended on Guyara, in Venezuela, and carried off the governor and garrison. An English vessel, cruising harmlessly around La Tortue, was visited and searched, and on the captain's saying that the sea was free and that he was merely taking the air (qu'il se promenait, que la mer était libre, et qu'il n'avait sur cela aucun compte à rendre), his crew were put to the sword and his vessel treated as prize. Grammont, the hero of this exploit, when told before one of his expeditions that Louis XIV. disapproved of them, is said to have replied: "How can Louis XIV. disapprove of a design of which he is igno-

1 "Ils obtenaient la vie," says Guérin, t. III., p. 185, "si les galions qu'ils ramenaient du Nouveau-Monde étaient bien chargés d'or, d'argent, de pierres et d'autres richesses; mais si l'espérance du vainqueur était déçue, alors malheur à eux! on les jetait impitoyablement à la mer!"

2 Larousse, tit. Flibustiers. The flibustiers he says, never commenced their repasts without saying their prayers; which would be more edifying if he did not add, "in order that heaven might send them victory and a rich prize (pour que Dieu leur accordât la victoire et une riche capture)."

3 Guérin, t. III., p. 413.
rant, and which is only a few days old?" Three of Grammont's colleagues, De Graff, Jonqué and Michel Basque, had the effrontery, after hovering around Carthagena and capturing two vessels of war which the governor despatched against them, to send him a letter announcing that they would wait fifteen days for more; which, however, never came.

In 1691 war broke out between England and France, and Bayonne, St. Malo and Dunkirk sent out swarms of corsaires. Duguay-Trouin, then seventeen years old, led his first expedition to Ireland, where he landed, ravaged a "château" and burned two vessels which he could not take home. At the same time Jean Bart and Forbin made a descent on Scotland, and burned four villages and one castle, from which they carried all the valuables, besides destroying several vessels.

In 1692 occurred the naval disaster of La Hogue, the effect of which was to disperse the French fleet collected under Tourville for the invasion of England, so as hopelessly to prevent its reunion. Louis XIV., who for some time had been lending vessels of state to private individuals, was now reduced altogether to this expedient, and the restrictions formerly placed upon the obtaining of public vessels were removed. The Ordonnance of Oct. 5, 1674, providing that only fifth-rate vessels should be devoted to such uses, and then only with the express consent of the king; and that of the 8th Nov., 1685, allowing the individual adventurers in such cases only one-third of the booty, gave way to the Ordonnance of Oct. 6, 1694, providing that after the admiral's tenth and an amount equal to one-fifth of the remain-

1 Guérin, t. IV., p. 10. Guérin adds, with pardonable air of pride, "Voilà quelles étaient les prouesses de Duguay-Trouin, à peine entré dans sa dix-huitième année."
2 Id., p. 11.
3 Lebeau, t. I., p. 64.
5 Id., p. 193.
ing nine-tenths for the king, the adventurers should be entitled to all the residue. The king's share was given up during the war of the Spanish succession (Ord. July 1, 1709).¹

From the battle of La Hogue till the Peace of Ryswick in 1697, the European privateers were accordingly very active and numerous. Morel of St. Malo took, in a fortnight, twenty-two considerable prizes; and if we may believe the accounts of Frenchmen, Duguay-Trouin with one companion took, in one engagement, two English men-of-war and twelve merchant vessels.² Jean Bart created for himself such a reputation that in 1692 the Prince of Orange, sailing from Holland and observing the French corsaire pursuing him with an inferior force, is said to have lowered the pennant of his vessel in order that Bart might not know which was his.³ The great Dunkirkian received his letters of nobility in 1694; in 1696, single-handed, he broke up the enemy's herring fishery, and thus destroyed the means of livelihood of the crews of about 500 boats. In America, the flibustiers surpassed all previous records. Ducasse, the governor of St. Domingo, placed himself at their head, and organized two expeditions against Jamaica, ravaging everything, destroying the fortifications and carrying off about 3,000 slaves. In 1697, in conjunction with the royal officer De Pointis, Ducasse and the flibustiers took Carthagena in the Indies by assault, and De Pointis having appropriated an unfair share of the booty, they revenged themselves upon the unfortunate town, which, altogether, was made to yield about twenty million livres.⁴ The Marquis of Nesmond is said to have made 10,000,000 by one venture against the Dutch.⁵ Lemoyne D'Iberville drove the English out of Hudson's Bay;

¹ Lebeau, t. I., p. 339. ² Guérin, t. IV., p. 29.
³ Abbé Margon, Mémoires de Tourville (Guérin).
⁴ Doneaud, ch. iii. ⁵ Ibid.
and all this with the regular navy weaker than it had been at any time since Colbert.

The close of the reign of Louis XIV. is marked by further centralizing legislation, more or less burdensome to private adventurers. An arrêt of 1695 put a stop to the issue of privateer-commissions by the governors of the West India islands—a measure which was most oppressive to the flibustiers, with whom the governors had usually been in league. On the other hand, the necessity of a commission was rigorously insisted on; and in 1706 a prize taken by an uncommissioned cruiser was adjudged to the King. A clerk (écrivain) of the admiralty was assigned to every privateer, with power to receive the papers of all captured ships and seal up their cargoes to await trial. Further, the percentage for the marine hospital was raised to six deniers per livre instead of one; three deniers per livre were required for the use of sailors wounded on board privateers; and in Dunkirk there was an additional tax for the benefit of widows.

Nevertheless, the activity of the French corsaires continued during the war of the Spanish succession. The flibustiers, in spite of the "amnesty" granted them by the crown, never fully revived after the Peace of Ryswick; but the European


2 The Success, Arrêt du Conseil du 23me Jan., 1706 (Id., p. 307). Similar decisions had been rendered in 1661 by the Conseil des Prises. Later, in 1761, four English vessels captured by uncommissioned adventurers were adjudged to the Admiral—(jugement du Conseil des Prises, Jan. 31, 1761. Lebeau, I., p. 639). In 1694 the Charles Pink was adjudged to the captors, but by the consent of the Admiral. Id., p. 191.

adventurers were very numerous and active. The death of Jean Bart was almost compensated for by the rise of St. Pol, who became the scourge of the Dutch fishermen. Forbin in the Adriatic distinguished himself by the partial burning of Triest, and by his conduct in regard to the Venetians, whose neutrality he doubted, and the suspected cargoes on whose ships he made a practice of throwing overboard. In 1708 the two captains D'Aire spent three days in pillaging the little Portuguese town of Porto-Santo in the Canaries. Duguay-Trouin, like Jean Bart, was given letters of nobility, and indeed he merited them, having destroyed or taken in his short career no less than sixteen vessels of the line and over three hundred merchantmen. A colossal private expedition of Duguay-Trouin's, in 1711, defeated an entire Portuguese fleet and captured Rio de Janeiro. In the last two years of the war the vigorous Cassard succeeded in temporarily reviving the flibustiers; one of the Cape de Verde islands was taken and its capital pillaged; Montserrat and Antigua were reduced, a Dutch colony ransomed, and St. Eustatius and Curacao compelled to capitulate. This is the close of the most successful period of French privateering; yet so little is the Peace of Utrecht a brilliant victory for France, that Chateaubriand calls this war, of all the wars of Louis XIV., "the most just in its principle and the most unhappy in its results." The treaty with England contained the humiliating provision that France should demolish the fortifications of Dunkirk.

The same treaty also regulated the issue of letters of mark. It provided that "all letters of reprisals, of mark or of countermark, heretofore issued, are revoked; and none shall hereafter be issued except in the sole case of a denial of justice (si ce n'est seulement en cas de déni de justice) and then

1 Doneaud, ch. iii.
2 Chateaubriand, Études Historiques, p. 544.
Under the vacillating administration of Louis XV., the French marine underwent a steady decline. A bungling colonial policy succeeded the far-reaching designs of Louis the Great. In spite of the Peace of Aix-la-Chapelle in 1748, the English and French went on fighting in India; and the recall of Dupleix, at the critical moment, by the cabinet of Versailles, shows indeed that Louis XV. was guided by men who "sought more for dividends than empires." Privateers appeared in the war of the Austrian succession, and the two Bacheliers and De Cock, of Dunkirk, acquired some reputation; but as a whole, the corsaires were affected by the spirit of decadence which possessed the royal marine, and enterprise of all kinds languished.

The weakness of France was apparent to her enemies, and, unwillingly enough, she was again compelled to encounter England as an adversary in the Seven Years' War.

The English depredations upon French commerce anterior to the declaration of war led to a curious revival of one of the spectacles of times long past. A merchant of Marseilles, one Georges de Roux, having had eight of his vessels taken by the English, and unable to persuade the cabinet of Versailles to take any decisive action, himself issued a manifesto against England, and sent forth, at his own expense, seventeen vessels to make reprisals. When Louis XV. at last determined upon war, he had recourse to the same heroic measures for encouraging privateers that the English had adopted at the opening of the century. The burdensome share of the Admiral, which had been suspended in 1748,

1 Art. 16.

2 "... qui ne demandaient que des dividendes, et non des royaumes."—Doneaud, ch. iv.

3 Roux, Histoire du bailly de Suffren, referred to by Doneaud, ch. iv.

4 Déclaration du 5me Mars, 1748, Lebeau, t. I., p. 523.
was again suspended in 1756, and finally and forever abolished in September, 1758. Practically the whole property in the prizes was given to the captors, with the usual result of immediately bringing out a great many little and very active privateers, which made the sea intolerable for neutrals, and indirectly enriched the state, but exercised no influence whatever on the ultimate result of the war. While Thuot was landing in Ireland and ransoming Carrickfergus, the British were driving the French out of India and Canada; and the exploits of Dumont de Lisle, Morel and De Cock did not rescue Louis XV. from the necessity of concluding in 1763 a peace which all Frenchmen agree in terming “deplorable.”

The death, in 1764, of Mme. de Pompadour, to whom a great deal of the decadence of the navy was due, was followed by some tardy attempts on the part of the Choiseul ministry to revive the marine. The continuation of these attempts by Louis XVI. had placed the royal navy once more on an excellent footing, when the American Revolution began; and the burning desire of the whole nation to wipe out the disgrace of the Peace of Paris led inevitably to the American alliance of 1778. This war, culminating in the triumphant Peace of Versailles, is perhaps the most respectable period in the history of French privateering. Louis XVI., having observed the successes of the privateers of the United States, immediately determined to encourage them in France as they had never been encouraged before. Heavy “gratifications” or bounties based on the number of guns and prisoners taken were promised by the Déclaration Concernant la Course, June 24, 1778; the whole property

1 May 15. Lebeau, t. I., p. 541.  
2 Id., p. 512.  
3 Id., t. II., p. 23. “Savoir—100 livres pour chaque canon du calibre de 4 et au-dessus jusqu’à 12 livres; 150 livres pour chaque canon de 12 livres et au-dessus; et 30 livres pour chaque prisonnier fait; sur les navires chargés en marchandises,” etc. The figures were 150, 225, and 40 livres respectively on the enemy’s privateers captured; and 200, 300, and 50 on his men-of-war.
was given to the captors, and there were provisions for the dispensing of arms from the royal arsenals, in order to reduce the cost of equipping private expeditions. For the first time corsaires were to be allowed to carry the white flag "fleurdelysé." By the treaty of amity and commerce between France and the United States, the privateers of either nation were permitted to carry their prizes into the ports of the other, so that French privateers cruising off Canada were not obliged to carry prizes to the West Indies. Notwithstanding the swarm of corsaires which instantly appeared under these favorable conditions, the wise and temperate regulations of Louis XVI. kept them fairly within bounds. For the first time, they were forbidden to interfere with the coast fisheries (la pêche côtière). They were commanded to observe the "utmost circumspection" with regard to the vessels of Russia, Sweden, Denmark and Holland, who were being gently led by the crafty Vergennes into the Armed Neutrality which, as has been seen in another chapter, proved so embarrassing to the enemy. In 1782 the Swedish ship Argos, unlawfully captured by a British cruiser and recaptured by the French privateer La Josiphine, was restored with damages, interest and costs, and in the same year the admiralty at Dunkirk was instructed to punish the Éclipse for her pillage of a Danish vessel. As a further illustration of the moderation of Louis XVI.'s privateering, we may refer to the strenuous orders given in 1779 that corsaires

1 Guérin, t. V., p. 70.
3 Lettre du roi à l'amiral, June 5, 1779, Lebeau, t. II., p. 102: "... pourvu toutefois qu'ils ne soient armés... et qu'ils ne soient pas convaincus d'avoir donnés quelques signaux qui annonceroient une intelligence suspecte avec les bâtiments de guerre ennemis."
4 Lettre du roi à l'amiral, Aug. 7, 1880, Lebeau, t. II., p. 256.
5 Arrêt du Conseil, Apr. 8, 1782, Lebeau, t. II., p. 398.  
6 Id., p. 455.
should respect Captain Cook, and treat him as neutral so long as he remained engaged in discovery only. The period of war from 1778 to 1783 was for the corsaires a period of effectiveness, and effectiveness with honor. It closed with the Peace of Versailles, and nothing like it was ever seen again in France.

3

The Era of Revolution

The formidable navy developed by Louis XVI. was, of course, completely disintegrated in the early stages of the revolution. The banishment of its chiefs, the abolition of the office of Grand Admiral, the transfer of the administrative power formerly possessed by naval officers to civil officers of the ports, the merciless bigotry towards everything aristocratic which brought the able and honorable D’Estaing to the guillotine, the substitution everywhere of incompetence for experience, reduced the French marine from the position of a navy to that of a mere collection of armed vessels with crews. When the execution of Louis XVI. (Jan. 21, 1793) converted the wavering neutrality of England into open hostility, and the French ambassador was told to leave England within eight days, there was a great cry for privateers; and on Jan. 31 the National Convention enacted as follows:

“Art. 1. French citizens may fit out privateers (pourront armer en course).

“Art. 2. The Minister of Marine, to accelerate private armaments if there shall be any, shall deliver letters of mark, or permissions in blank to arm for war and cruise against the enemies of the Republic.”

1 Arrêt du Conseil, Apr. 8, 1782, Lebeau, t. I., p. 83.
2 See Guérin’s comments on the decrees of Sept. 21, 1791: t. V., p. 295.
3 Lebeau, t. III., p. 44.
The fourth article of the same "law" provided that only one-sixth of the total number of registered sailors should be allowed to engage, at a time, in privateering. Had it not been for this provision, there would have been none left for the regular navy. As it was, the Convention was compelled to lay an embargo on all privateers until the vessels of the line had made up their armaments.\(^1\)

On February 1 war was formally declared against England; on the 2nd the Convention adopted the first of what may be called its starvation measures, by offering a premium to corsaires bringing in enemy vessels laden with grain.\(^2\) It had become apparent that the Allies were endeavoring to starve France into submission, and heroic measures had to be taken to obtain food, which was already beginning to be regarded as "contraband" by English cruisers, and pre-empted as such by the doubtful admiralty courts. On the 9th of May the Convention issued a very famous decree,\(^3\) reciting the conduct of the English with regard to provisions, and the capture, by an English privateer, of a Danish ship carrying provisions from Dunkirk to Bordeaux; and ordering the seizure and pre-emption of all provisions bound for ports in the possession of Great Britain. This decree marks the beginning of a long series of disputes between France and the United States. Mr. Morris, the American minister at Paris, instantly objected to the decree of the 9th of May as a violation of Art. 23 of the treaty of amity and commerce of 1778. On May 23 the Convention, therefore, excepted American vessels from the operation of the decree; and M. Le Brun, Minister for Foreign Affairs, communicated the new decree to Mr. Morris, with the remark that it was a "confirmation of the

---

\(^1\) *Loi du 22ème Juin, 1793, Lebeau, t. III., p. 80.*

\(^2\) *Loi du 2ème Fevr., 1793, Lebeau, t. III., p. 51.*

\(^3\) *Am. St. P., For. Rel., I., p. 748.*
principles from which the French people will never depart with regard to their good friends and allies, the United States of America." On May 28, however, the decree of the 23rd was repealed; the repeal being due to the influence of the captors of a very rich American ship (the Laurens) who wished it condemned. On July 1 the convention again excepted American vessels—"a new proof," according to M. Le Brun, "of the fraternal sentiments of the French people for their allies." The fraternal sentiments lasted till July 27, when the excepting decree was again repealed, and the decree of the 9th of May left in force.

By this time the regular navy of France had become the laughing stock of Europe. Under the laws made for it by the civil officers appointed by the Convention, and particularly by the notorious Jean-Bon-St.-André, a French vessel was forbidden to surrender, unless sinking, to vessels of the enemy, *whatever their number*, under pain of treason. The ferocious *Reprisentant* of the Convention also forbade the taking of prisoners, and commanded that merchant vessels captured be sunk "*jusqu' aux équipages.*" Yet, as has almost invariably happened in French history, the more demoralized the regular marine became, the more bold and successful became the private adventurers. From Feb. 1, 1793, to the close of the year 1795, the French corsaires took 2,099 prizes; and the loss of the French merchant marine was only about 319. Robert Surcouf had begun his work; Moulton in 1795 captured a large part of the Jamaica fleet; and Richéry's expedition to Labrador broke up the fisheries and sank 80 vessels engaged in that trade. The discomfort in England was great. The funds fell, the

---

4 Guérin, t. VI., p. 20.
5 *Id.*, p. 110.
Bank of England suspended specie payments, the British flag was swept out of the Mediterranean; yet the ancient enemy of France could not be brought to terms, but kept up the struggle long after her allies had abandoned it.

In the mean time the complications between France and the United States had become alarming. The first minister of the revolutionary government received by the United States, Genêt, had at the outset entertained the hope of dragging the United States into the war. In accordance with this idea, he had, without seeking permission, fitted out in American ports a number of privateers, to which he distributed commissions or letters of mark which he had brought already signed in blank from France. The proclamation of neutrality issued by Washington on April 22, 1793, was not believed by Genêt to be regarded with favor by the Republican party; and upon its enforcement by the administration he appealed to the people, found the Federalists too strong for him, and, on the demand of Washington, was recalled. Meanwhile, the privateers fitted out under his commissions had made several prizes (some of them within the territorial waters of the United States), which the French consuls in our ports had assumed authority to condemn; and the resulting claims of Great Britain, which the administration recognized as just, were charged on our growing account with France.

The conduct of the French cruisers had at the same time been becoming more and more insupportable. Mr. Fulwar Skipwith, in his report of October, 1794, to Mr. Monroe, in Paris, 1 complained that many American vessels were rendered unseaworthy by being stripped "of their officers and crews, which are generally replaced by boys and inexperienced hands, in order to be conducted to ports." The Alexander laden with flour on account of the French government, was

1 Am. St. P., For. Rel., I., 750.
captured August 5, 1794, and carried to Rochefort, "being stripped of all her crew except the cabin boy," and so rendered unseaworthy. The ship Mary, London to Boston, was captured by a French cruiser, and her passengers plundered of their hats and watches; the cabin was entirely ransacked; "the passengers, though late at night, and the sea running extremely high, were hurried into a small boat and sent at some distance on board the sloop of war." Among the passengers were several women. The executive directory, by the decree of July 2, 1796, commanded French cruisers to treat neutrals as the latter "allowed" themselves to be treated by the English; which amounted to a license to deal with neutrals at discretion. The agents of the executive directory in the Leeward Islands, of whom the infamous Victor Hugues was one, decreed, on November 27, 1796, the capture of all American vessels bound to or from British ports, thus anticipating the Berlin decree by ten years. The stuff of which this Hugues was made may be gathered from his conduct in the case of the Patty, captured September 5, 1796. According to the affidavit of the master, Josiah Hempstead, he was immediately taken before Hugues, "whose first words addressed to me were, 'I have confiscated your vessel and cargo, you damned rascal,' doubling his fist and running it close to my face." Later, September 8, Hempstead asked when his vessel and cargo were to be tried, and "he answered that they had been already tried and I might go about my business." An old and obsolete marine ordinance requiring neutral vessels to carry a rôle d'équipage, or certified list of passengers and crew, was revived by a decree of March 2, 1797 (17me Ventôse an V.), and the

1 Am. St. P., For. Rel., I., 750.  
2 Id., p. 751.  
3 Id., p. 759. See also generally, John Adams' Works, VIII., 551.  
4 Règlement du 23me Juillet, 1704.  
want of such a list was frequently "deemed sufficient to warrant the condemnation of American property, although the proofs of the property were indubitable." Many American vessels, like the Patty, were condemned in the West Indies without even allowing a defence or looking at the papers. As for the privateers, all discipline seemed lost. The brig Resolution was captured in 1796 by a privateer, and the skipper stripped of everything, "even his clothes." The Delight was condemned in St. Domingo before her captor arrived, for having no sea-letter, the sea-letter having been forcibly detained by the privateer herself. Another French cruiser forcibly placed twenty prisoners upon the Mermaid; another plundered at sea the schooner Hank, Jamaica to Philadelphia, and then dismissed her; another plundered the brig Sally, and "also flogged the captain;" another fell upon the Nancy, and stripped the crew of their clothes, even the shirts from their backs, drove them below, beat them with cutlasses, and placed them on a diet of bread and water; two others fired thirty shots into the brig Almy, "although she was, and had been some time previous, lying to for them;" another pillaged the mate's chest of the schooner Two Friends; another broke open and plundered the cargo of the Success on the high seas; another stole provisions from the ship Pattern. The Commerce was raked fore and aft by the French privateer La Trompeuse, "not

1 Report of Sec'y of State, 1797, Am. St. P., For. Rel., II., p. 29.  2 Ibid.
3 Sam'l and Ed. Cutts to Sec. of State, Apr. 3, 1797.
4 Registry of the Sec'y of the Provisional Tribunal of Prizes established in St. Domingo, 13me Ventôse, an V.
5 Affidavit of Mark and John Hatch, 10th May, 1797.
6 Am. St. P., For. Rel., II., p. 59.  7 Id., p. 60.  8 Ibid.
9 Affidavit of J. Smith, May 13, 1797.
11 Affidavits of Van Renssalaer and O'Quin.  12 Am. St. P., For. Rel., II., 60.
being the length of a ship away, after having hove to and distinctly answered twice." The sloop *Kitty* was summoned to lie to with the formula, "Damn your eyes, hoist your boat out." Said the Secretary of State in his report of June 21, 1797: "The persons also of our citizens have been beaten, insulted and cruelly imprisoned; and in the forms used towards prisoners of war, they have been exchanged with the British for Frenchmen." The prize courts were debauched utterly; the sloop *Fox* was condemned without the shadow of a cause, "the owners of the privateers having given the commissioners 100 half joes to pronounce that sentence."

The following, among other remarkable cases, are mentioned in the Philadelphia *Gazette*:

(1) A French privateer boarded Captain Pierce, of Philadelphia, and besides stealing about $300, beat his supercargo with a sword so that he died. On complaint to the French authorities, the privateer was imprisoned three days.

(2) The *Zephyr* was plundered of all her provisions by the French privateer *Hirondale*; her captain, who had begged to be allowed to remain on board the privateer, was ordered on shore, and finally thrown overboard.

(3) The *Two Sisters*, Norfolk to Leogane, was boarded by a French privateer, and two sailors compelled, at the point of the cutlass, to sign a declaration, written in French, that the destination of the vessel was Jamaica; on the strength of which declaration she was sent in and sold, and the purchaser put in possession; after which the papers were sent to Cape François for trial.

Perhaps the most outrageous case of all, however, was that of William Martin, who was thumbscrewed for three hours in the cabin of a French armed brig, sailing under English

1 Affidavit of Andrew Frothingham and William Watson, Jan. 1, 1797.  
3 Id., p. 60.  
4 *Phil. Gaz.*, 28th Nov., 1796.  
5 Id., 5th Apr., 1797.  
6 Id., 6th Apr., 1797.
colors, because he would not acknowledge that his cargo, belonging to a Baltimore firm, was English property.¹

The depredations of the Fortitude, a privateer which took and burned an English merchant vessel, the Oracabissa, within the territorial waters of the United States,² at last forced the issue between the United States and France. On July 10, 1798, the President, in pursuance of acts of Congress passed May 28, June 20 and July 9, instructed the commanders of armed vessels of the United States "to subdue, seize and take any armed French vessel or vessels sailing under authority or pretence of authority from the French republic, which shall be found within the jurisdictional limits of the United States or elsewhere upon the high seas."³ Privateers were also sent out by the United States; several naval engagements occurred, and several French vessels were taken and condemned as good prize. Hostilities were terminated by the convention of 1800,⁴ which provided for a "firm and inviolable" peace, the restoration of public vessels captured, the repression of piracies and the requirement of security before issuing privateer commissions, to the amount of $7,000, or 36,820 f., for a vessel carrying fewer than 150 men, and double that sum for a vessel carrying more than 150 men. The convention also contained a most-favored-nation clause, and re-established the rule Free Ships, Free Goods. About the same time the Second Armed Neutrality checked the French corsaires in Europe, and

¹ Letter from Rufus King, Apr. 19, 1797, enclosing the protest of William Martin, dated Apr. 3, 1797, Am. St. P., For. Rel., II., p. 64.
⁴ Concluded Sept. 30, 1800; ratifications exchanged at Paris, July 31, 1801; proclaimed Dec. 21, 1801.
caused the First Consul to do his utmost to regulate those in America, in order to obtain the good-will of the northern powers, already prejudiced against England.

The Peace of Amiens was violently broken by the British embargo of May 15, 1803, which Napoleon answered by ordering the arrest of all the English in France (May 22). The convention, already (April 30) concluded, for the cession of Louisiana to the United States, was quickly ratified, and the First Consul, no longer obliged to defend this burdensome possession, found himself free to develop at leisure his scheme of Continental Blockade. The French privateers in America, again allowed to run wild, resumed their career of piracy. In consequence of their depredations, American merchant vessels began to travel armed, and to resist visit, which furnished a pretext for the French to treat them, in turn, as pirates. "Nothing saved our lives," write three of the crew of such a vessel, "when they boarded us, but their thinking we were English, and asked us how dare we engage under American colors." A "black general" is said to have committed suicide rather than fall into the hands of the French.²

Meanwhile the blows to neutral commerce in Europe were beginning to fall in quick succession. The exclusion of British vessels from certain German and nominally neutral ports was followed by the British declaration of blockade of May, 1806, from the river Elbe to the port of Brest. On November 21 of the same year, Napoleon, having defeated the Prussians at Jena and triumphantly occupied Berlin, felt himself strong enough to retaliate upon Great Britain for this absurd and illegal blockade, and accordingly issued the Berlin decree, declaring the whole British Isles blockaded, ordering the arrest of all Englishmen and the

¹ P. Sisson, etc., to G. Barnewall, Esq., July 26, 1804, Am. State Papers, For. Rel., II., 608.
² Ibid.
confiscation of their property, half the proceeds of which was to be applied to the indemnification of Continental merchants who had been damaged by unlawful seizures on the part of British cruisers; and forbidding the entry into French ports of any vessel direct from England or her colonies. Notwithstanding the broad language of the decree, the French minister of marine succeeded, on December 24, 1806, in satisfying the American minister that nothing new was intended. Indeed, the Berlin decree was not known to have been enforced against American commerce until October 10, 1807, when the Horizon was condemned.\(^1\) The British Order in Council of January 7, 1807, cannot, therefore, be justified as a counter-retaliation for the Berlin decree,\(^2\) though perhaps the more vexatious Orders of November 11 may justly be referred to that ground. On December 17 the Emperor issued the Milan decree, continuing the paper blockade of the British Isles and forbidding neutrals to "submit" to the Orders in Council of November 11th, under pain of becoming "denationalized" and liable to capture as British; which provisions were said to be merely a juste reciprocité for the conduct of Great Britain. The embargo ordered by the Congress of the United States in December, 1807, furnished Napoleon with a shallow pretext for another sweeping decree, aimed directly at the United States. On April 17, 1808, orders were given "to seize all American vessels now in the ports of France, or which may come into them hereafter,"\(^3\) on the ostensible ground that since the embargo no American vessel could legally leave home, and, therefore, any found in the ports of France were presumptively navigating on British account; whereas, it was matter of common knowledge that a great many American vessels had


\(^2\) Ibid.

\(^3\) Bayonne Decree, \textit{Br. & For. State Papers}, VIII., 484.
deliberately remained abroad in order to avoid the embargo, without ceasing in any respect to be neutral. The embargo in the United States having become worse than war, it was dissolved in March, 1809, and war determined upon; but, unwilling to inaugurate a "three-cornered" struggle, the American government pursued the policy of "auction sale," offering, practically, if either side should repeal its decrees, to go to war with the other. An ambiguous announcement, on August 5, 1810, that the Berlin and Milan decrees should cease to have any effect after the first of the succeeding November, was hailed with joy by the American public, or rather by the Republican part of that public, and treated as an actual repeal; and the matter was believed to be settled by the decree of April 28, 1811. Subsequent investigation disclosed the discomforting fact that the Republican party had been tricked by Napoleon, who never had any real intention of repealing his decrees at all, and who, by a secret decree, since known as that of Trianon, had kept alive the mischief which his official decree of April, 1811, had purported to abolish. However, it has been seen that the repeal of the British Orders in Council, which was delayed till June 23, 1812, was not influenced in the slightest degree by the supposed repeal of the decrees of Berlin and Milan, and, therefore, with our national chagrin for having been so easily trapped by Napoleon, need be blended no regret for having unjustly attacked Great Britain.

As to the fall of Napoleon, it is necessary to remark only upon the well-known fact, that his Continental System, his own creature, was his ruin. It was the attempt to extend that system which led to the disastrous breach with Russia; and from Moscow to Elba was at most but a question of time.

2 Report of Sec'y of State, July 12, 1813; Am. State Papers, For. Rel., III., p. 609.
Yet the exultation of Great Britain was tempered somewhat by the results of the American war. The treaties of 1814 and 1815 were not so much triumphs for Great Britain as they were triumphs for neutrals. If, as Doneaud says, they "gave the earth to Russia," they emphatically did not give England the sea.¹

¹ "En résumé, ces traités donnaient la mer à l’Angleterre; la terre, à la Russie." Doneaud, ch. vi.
CHAPTER III

PRIVATEERING IN THE UNITED STATES

During the Revolution

From 1756 to 1763 the privateers fitted out in the North American colonies of Great Britain, and particularly in the ports of Massachusetts and Rhode Island, had inflicted enormous injuries upon the commerce of France. The New England sailors had taken to privateering naturally, and as naturally had laid it aside upon the conclusion of the Peace of Paris. It might have been expected, therefore, that upon the outbreak of hostilities with the motherland in 1775, the colonists would be prompt to effect a second transition, and resume the marauding rôle in which they had already become distinguished; but for various reasons this did not happen immediately.

The conflict which began in April, 1775, was a domestic dissension between Great Britain and her colonies. The American nation, though struggling for birth as it had been struggling for the previous decade, was not yet born; and properly speaking, therefore, the hostilities at Lexington were not the beginning of a war. The situation of the colonies was peculiar. Congress vacillated. One day full of fire and threats, the next, conciliating and hopeful that the ministry were at last coming to their senses, it was impossible to force it into any definite course; and the resulting handicap upon the colonists was severe. It was on account of this
state of things that no privateers were commissioned by the central government in 1775.

The first naval victory of the colonists, nevertheless, was the result of private enterprise. On May 5, 1775, some people of New Bedford and Dartmouth fitted out a vessel with which they entered a harbor of Martha’s Vineyard and cut out another American vessel, of which the Falcon, a British cruiser, had made prize. On June 11 the king’s cutter Margareta convoyed two sloops to the harbor of Machias, there to be freighted with lumber for the use of the army in Boston. The sloops were promptly seized by the townspeople, and a certain Captain O’Brien, with forty companions, was despatched in one of them against the cutter, which, after some resistance, struck her colors. These trifling successes aroused the most intense enthusiasm, particularly in New England; and the desirability of extending hostilities to the sea in a systematic manner began to be felt immediately. On June 12, Rhode Island commissioned two vessels, and the other maritime colonies, as if they had merely been waiting for the signal, followed suit. In November, Massachusetts authorized private-armed vessels to cruise, and established a court for condemning their prizes. In the meantime the inertia of Congress was beginning to give way before the sturdy attacks of the delegates from Rhode Island, who, on Oct. 3, had laid before the body of their peers their instructions of the preceding August, to use their whole influence for equipping a continental fleet. Washington was in favor of the project; for it was a source of great annoyance to him to see British transports and store

1 Winsor, Narrative and Critical History of America (Cambridge, 1888), VI., p. 564.
2 Bancroft’s Hist. of the U. S., IV., 184.
3 Winsor, VI., 565 n.
4 Gent. Mag., Jan., 1776; referred to by Winsor, VI., p. 591.
5 Bancroft, IV., 263.
ships passing him *unarmed*, and to be obliged to refuse his men "leave to put a few guns on board a vessel to cruise for them" until he had communicated with the Congress. The successes of the few impromptu cruisers which he did send out in this way, in intercepting stores, made him the more anxious that their number should be multiplied; indeed, Mr. Cooper considers that, if it had not been for the supplies thus brought in, "the Revolution must have been checked in the outset." 

John Adams also lent his support to the Rhode Island delegates; and, on the 13th of October, Congress passed a resolution directing the equipment of two national cruisers, the first of which was to carry "ten carriage guns, with a proportionable number of swivels." 

Thirteen frigates were ordered in December, and while they were being constructed merchant vessels were commissioned by Congress as vessels of war, and merchant captains as naval officers. The *personnel* of a navy was as difficult to find as the *matériel*; for nearly all the colonists whose sons had a taste for the sea had sent them into the British navy, from which scarcely any resigned. Under these circumstances Congress at length adopted the inevitable policy of authorizing private individuals to cruise. On March 23, 1776, a resolution was passed "that the inhabitants of these colonies be permitted to fit out armed vessels to cruise on the enemies of these United Colonies." The preamble simply recited that an "unjust war" was being urged against

---

1 Adams to Langdon, Jan. 24, 1813; John Adams' *Works*, X., p. 27.
2 *History of the Navy of the U. S.*, ch. xiii.
4 *Journals of Congress*, I., 292.
the colonies; that their petitions were unheard; that an act of parliament had declared their trading vessels good prize; and that it was "justifiable to make reprisals" upon their "enemies." On April 3 it was resolved that "blank commissions for private ships of war, and Letters of Marque and Reprisal, signed by the President," be sent to the different States; the security to be given by applicants for such commissions or letters was fixed at $5,000 for vessels under 100 tons, and $10,000 for larger vessels, in either case payable to the President of Congress in trust for the use of the United Colonies; and all applications were to contain a description of the vessel and crew, etc., "and the quantity of provisions and war-like stores," and were to be forwarded to the Secretary of Congress and by him registered. Elaborate instructions for the guidance of the privateers thus commissioned were issued on the same day. Articles 1 and 2 of these instructions authorize them to "attack, subdue and take" British vessels (with certain exceptions in favor of immigrants), or vessels carrying contraband to the British, wherever found on the high seas, or between high and low water-mark. The succeeding articles provide for bringing the prizes in "to some convenient port or ports in the United Colonies;" for "severe punishment" of any one killing or maiming a prisoner; and for written accounts of captures to be sent to Congress "by all convenient opportunities." Article 8 contains the singular provision that one-third at least of their whole company shall be "lands- men." Article 9 forbids them to "ransome any prisoners or captains;" and the tenth and last article reserves the right to issue other instructions from time to time, if necessary.


The privateers which rapidly took the sea under these instructions were unlike any which the world had ever seen before. It would be idle, of course, to pretend that they were all inspired by patriotic motives only; but it is certain that the patriotism of most of them was of a purer character than that of their English and French predecessors. For the first time in its history the privateer-system assumed approximately the shape of a marine militia or volunteer navy. Nothing so well illustrates this fact as the generous readiness of our early privateers to place themselves under general naval control for the purpose of helping along any maritime adventure. Continental ships, the vessels of the state navies, and private individuals frequently joined in dangerous and often pecuniarily unprofitable ventures, for the general good of the cause; and the spectacle of three privateers uniting with regular war-vessels in an attack upon the transports sent to Howe in June, 1776, was a unique one. Frequently, also, perhaps too frequently, they actually went out of their way to attack vessels of the British navy, and sixteen of His Majesty’s cruisers figure prominently in the list of their prizes. It was this admirable, yet misdirected zeal that Adams so much deplored when, writing to Calkoen in 1780 he said that had it not been for their imprudence, the American frigates and privateers would “by this time, well-nigh have ruined the British commerce, navy and army.”

Towards the close of 1776 a new and magnificent prospect began to open for private vessels of war. On October 1,

1 Winsor, VI., p. 568. See also Cooper, ch. xii. In January, 1778, an American privateer assailed in the night the British fort of New Providence in the Bahamas, capturing the fort and a sixteen-gun man-of-war. Jameson’s Dict. of U. S. History, tit. Privateers.

2 Maclay, Hist. of the Navy, Part I., ch. viii.

Silas Deane, who was then in Paris, wrote to Congress\(^1\) to send over a number of blank commissions, or preferably "a general power for that purpose;" "for," said he, "it is certainly a very practicable and safe plan to arm a ship here, as if for the coast of Africa or the West Indies, wait until some ship of value is sailing from England or Portugal, slip out at once and carry them on to America." The nations of Europe being at peace, Deane was able to be "acquainted with the time of every vessel's sailing, either from England or Portugal," so that the prospect was a very alluring one indeed. In another letter\(^2\) he counsels the sending of a couple of frigates to the Banks to break up the fisheries, which had already had one "wretched season" on account of our privateers; and he suggests that Congress may buy ships on credit from French merchants at 5 per cent. In December, Congress authorized the fitting out in France of "any number of vessels not exceeding six, at the expense of the United States, to war upon British property.\(^3\)"

The nation was five months old, and Congress was losing its timidity. The sympathy of France was notorious. The jubilant privateers knew, with the rest of the world, that France was in the war in spirit, and might at any moment enter it in form. Great Britain knew it best of all, but put off the evil hour as long as possible. At no other time could Vergennes, in answer to Lord Stormont's complaints that French officers were embarking for America by scores, have risked his witty reply that the French nation "had a turn for adventure."\(^4\) The Treaty of Utrecht provided that it should not be lawful "for any foreign privateers to fit their ships in the ports of one or the other of the aforesaid

---

1 Deane to Committee of Secret Corresp., Sparks' Dip. Cor., I., 43.
2 Same, Nov. 27, 1776, Sparks' Dip. Cor., I., 66.
3 Secret Journals of Congress, II. (For. Aff.), 35, 36.
4 Bancroft, V., 126.
Partys," yet Americans armed ships daily in the harbors of France. In violation of the same treaty they carried their prizes in and sold them; Vergennes extricating himself on the plea that he could not eject foreign vessels in distress. Distress, of course, became a chronic condition of the American privateers in European waters; and if, in consequence, any controversies arose between the French court and our commissioners, they were designed solely for publication in the London Gazette.

Meanwhile the misery inflicted by our privateers on the ubiquitous British commerce was steadily increasing. They came forth from New England in an endless stream, Rhode Island, which was particularly active, sending forth in 1776 no less than fifty-seven. New England, in fact, had begun to live on privateering; in Salem it was the principal business of the town. Even outside of New England, men like Washington and Morris engaged in it. Early in 1778, Mr. Woodbridge reported to the House of Lords that 733 vessels had been captured since May, 1776—a loss to the nation of £1,800,633 18s; but even this enormous total gives but a faint idea of the damage done by our cruisers. The West India trade was almost ruined. With one-fourth of the ships taken, with insurance at 23 per cent., with rum and sugar falling 11 per cent. on account of the colonial demand being shut off, and with the inevitable delays, it is estimated that the losses to that trade amounted to 66 per cent. Nor was the European trade safe. Thanks to the

1 Quoted by Winsor, VI., 570.
3 Sheffield, Privateersmen of Newport, Appendix XI.
6 Lossing, Field-Book of the Rev., II., 638.
8 Niles, Am. Rev., p. 432.
hospitality of France and the indecision of Spain, our privateers swarmed in European waters, and even the channels and the Irish Sea were not free from them. So great was the unrest that linen ships from Dublin to Newry sailed under convoy; and ten per cent. insurance was sometimes paid from Dover to Calais. 2 The result was to drive trade almost entirely into neutral bottoms; and the Thames "presented the unusual and melancholy spectacle of numbers of foreign ships, particularly French, taking in cargoes of English commodities for various parts of Europe." 3 Apropos of the capture in the Channel of a British brig of two hundred tons by a privateer of twenty, Mr. Carmichael gaily wrote: 4 "I had been told by a man high in office in England that resistance was a chimera in us, since their armed vessels would swarm so much in our rivers as even to interrupt the ferry-boats. His assertions are verified vice versa; our ferry-boats ruin their commerce."

The comparative purity of motive of the "ferry-boats," as a body, did not save Congress from the complications with neutrals, which are the common curse of too much privateering. The neutrality of Spain was quite serious at first; and an American captain who put into Bilboa with his prizes in October, 1776, was arrested and tried for piracy, 5 escaping conviction only with considerable difficulty. In 1777, our commissioners at Paris began to be "much troubled with complaints of our armed vessels taking the ships and merchandise of neutral nations," 6 Holland complaining of the

1 Annual Register, 1778, p. 36, quoted by Whart., Dip. Cor., II., 168 n.
2 Winsor, VI., 574.
3 Annual Register, 1778, p. 36, quoted by Whart., Dip. Cor., II., 168 n.
4 Carmichael to Dumas, June 13, 1777, Sparks, Dip. Cor., IX., 323.
5 Deane to Committee of Secret Corresp., Nov. 27, 1776, Sparks, Dip. Cor., I., p. 54.
6 Franklin, Deane and Lee to the Com. of For. Aff., Nov. 30, 1777, Sparks, Dip. Cor., I., p. 340.
capture of the *Chester* of Rotterdam, Spain of the capture of the *Fortune* laden with Spanish goods, and even friendly France indignant over an attack upon her royal vessel, the *Emperor of Germany*, though willing to pass over with a merely formal protest the arrogance of the Portsmouth privateer in seizing an English merchantman in the very mouth of the Garonne.\(^1\) The "irregularities," or more plainly the piracies, of one Captain Conyngham, who persisted in making Dunkirk the base of his operations, and who was shut out of Spain for his impolitic capture of a Swedish ship with Spanish property, from London to Teneriffe, "cost the public more than 100,000 livres,"\(^2\) and produced a considerable anti-American feeling in Madrid. The zeal of our privateers, most of whom seemed to have been born with a prodigious talent for the making of mischief, led them to burn all the prizes that they could not safely send in; and as there frequently happened to be neutral property on board, they soon came to be liked as little as their brethren of England. It was, however, so obviously the policy of Congress to obtain the good-will of neutral nations, and its efforts in this direction were so marked, that these cases were regarded generally as the excesses of individuals, and led to no serious breach with the United States.

The inevitable Franco-American alliance was concluded in February and went into effect July 17, 1778. Article XVII\(^3\) of the Treaty of Amity and Commerce, which went hand in hand with the Treaty of Alliance, gave the fullest liberty to privateers and ships of war of either party to make use of the ports of the other. Under these favorable conditions privateering flourished more and more. The

---

1. Lee to Committee of For. Aff., Nov. 27, 1777, Whart., *Dip. Cor.*, II., p. 429; and see note to p. 840.
seventy odd British vessels engaged in blockading our coasts in 1776 and 1777 were compelled to unite in the summer of 1778 in order to meet the fleet despatched from France under D'Estaing; and with nearly all our ports free it was "impossible to conceive the havoc" made by our privateers. The number of prisoners taken was so great that in 1779 Great Britain was at last obliged to consent to a cartel for their exchange. From 1780 till the end of the war privateering was not quite as profitable as during the two preceding years. D'Estaing had unfortunately removed to the West Indies, Sir Henry Clinton had taken Charleston, De Grasse was delayed, and in Europe the Armed Neutrality, though directed primarily against England, chilled the air for all private adventurers. "Nevertheless," says Mr. Cooper, "it is a proof of the efficacy of this class of cruisers to the last, that small privateers constantly sailed out of the English ports with a view to make money by recapturing their own vessels; the trade of America at that time offering but few inducements to such undertakings."  

To an American, perhaps the most remarkable thing about our privateers is their patriotism. To any one else, that which would appear most remarkable is their success. Our privateersmen started out with the intention of hastening the approach of peace; and there can be no doubt that their influence in that direction was great. The reasons for this influence, which, as has been seen, it is by no means usual for privateers to exercise, are to be found in the peculiar situation of England during the last years of the war. With France, Spain and Holland carrying on a vigorous war, and the Baltic powers united in a sort of morose readiness to join them, the reduction of the colonies by any one brilliant coup was impossible. To the ministry, therefore, it was a

1 Gerry to Adams, May 5, 1780; Adams' Works, VII., 189.
2 Hist. of the Navy, ch. xii.
question of recognizing our independence or else temporizing. And here is precisely where the effect of the privateers was felt; for with that mighty force striking unceasingly at its one vital part, its trade, the English nation simply could not afford to temporize. It was less spirited, but more profitable withal, to conclude the Peace of Versailles.

During the War of 1812

The poverty of the three Federalist administrations and the political principles of the three Republican administrations which succeeded them, prevented the development of any substantial Federal navy. When Madison sent Congress his war message on June 1, 1812, the available naval force consisted of seven frigates and about a dozen smaller vessels, many of which were unfit for sea. The British navy at the time consisted of 1060 sail,¹ and it was believed by the opponents of the war in New England that with this tremendous force our adversary might institute a blockade of our coasts three or four vessels deep and yet have some to spare. With a wisdom born of experience, Congress decided to lose no time in calling for private vessels of war. The declaration of war itself² conferred authority upon the President "to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States." Eight days later an act was passed³ regulating the issue of commissions in detail. It contained the usual provisions for a written description of the vessel to be filed with the Secretary of State, for security of five or ten

³ June 26, 1812, 2 Stat. at L., 759.
thousand dollars according to the number of the crew (150 men and not 100 tons, as in the Revolution, being made the point of distinction), for the transfer of the whole property in the prizes to the captors, subject to their written agreement; for the bringing in of these prizes and their adjudication in the district courts of the United States; for the delivery of prisoners to a United States marshal or other district officer; for a bounty of $20 for each man alive on board hostile ships of equal or superior force at the beginning of the engagement leading to their capture; for journals of cruises to be kept under penalties, and shown on demand to the public vessels of the United States; and for obedience to any instructions issued by the President. Subsequently the President authorized Mr. Monroe, Secretary of State, to issue the customary instructions. As the war was undertaken by the United States in defence of neutral rights, the second paragraph was made particularly explicit upon this point:

"2. You are to pay the strictest regard to the rights of neutral powers and the usages of civilized nations. * * * You are particularly to avoid even the appearance of using force or seduction with a view to deprive such [neutral] vessels of their crews or of their passengers. * * *"

Circumstances were particularly favorable for privateering. For nineteen years American shipping had had to run the gauntlet of vexatious French decrees and British orders, under such conditions that visit meant capture; and the safety of every vessel had depended not upon her papers but upon her sails. Necessity had produced during this period a great number of fast-sailing clippers which were ready at any time to be converted into privateers; and under the act of June 26 the conversion instantly began.

1 See Guernsey, New York City during the War of 1812, vol. II., App. n. 4; and Whart., Dig., § 385.
Notwithstanding the unpopularity of the war in New England, and the abhorrence of privateering which had developed in some parts of it, the parts which were not thus affected responded to the call for private armed vessels with a rich though sulky generosity which astonished the peace party in England. Traders "delirious with disaffection" equipped privateers, and Salem was not far behind Baltimore in the number which she sent out. One month after the declaration of war a little volunteer navy of sixty-five vessels was at sea, and the prizes were beginning to arrive almost daily. "Any craft that could keep the sea in fine weather" set out to watch for British vessels unsuspiciously approaching the coast, and scores of pilot-boats armed with one or perhaps two nine- or twelve-pound guns, reaped rich harvests during the first few weeks of the war. Our shipping, of course, did not suffer proportionately. In the first place there was less of it—less even than usual, for a great deal of it had been converted during the preceding decade into nothing more substantial than French Spoliation Claims; and besides, the provident embargo of April 4, 1812, just before the declaration of war, had kept a great deal of what still remained to us at home. Those who objected to the war as suicidal on the part of the United States saw only one side of the picture. They did not see, and hence derived no comfort from, the exhaustion under which our adversary was laboring. Her trade taken by surprise,

1 See Hildreth's Hist. of the U. S., III., p. 372.
2 All the apothecaries of New Bedford refused to fill the medicine chest of a ship's doctor, who said his ship was a privateer which had come into New Bedford to refit. For its encouragement of privateers Baltimore was branded by the Mercury of the same town as a "sink of corruption" and the "Sodom of our country." Ingersoll, Second War with Great Britain, Second Series, vol. I., p. 31.
4 Coggeshall, ch. ii.
6 2 U. S. Stats. at L., p. 700.
her prestige lost by the surrender of the Guerrière, gold at 30 per cent. premium, wheat nearly five dollars a bushel, Wellington retreating in Spain and Napoleon to all appearances about to crush the Czar;¹ the most sanguine minds in England were profoundly uneasy. In 1813 the outlook became a little brighter. Napoleon was evidently beaten, and the danger of invasion was past; the American coast, moreover, was closely blockaded, and the pilot-boat privateers were abandoned as useless; but the distressed state of the country continued, and the mercantile and shipping classes, whose arrogance had produced the Orders in Council and brought on the war, raised loud cries for peace. The one force that produced these cries for peace was the American privateers. Not the American army, for its successes were interrupted and indecisive; not the regular navy, for its destruction of British prestige maddened while it did not exhaust the enemy; but the five hundred odd clippers which did not fight, but which sailed as only Yankee clippers can sail, and took, and burned, and destroyed—these were the real peace-makers.

Through the negligence of the admiralty, the British cruisers in the Windward Islands had been out so long that their copper was almost off, and in that region, in consequence, our privateers became "so daring as even to cut vessels out of harbors * * * and to land and carry off cattle from plantations"²—a source of great mortification to the London Times. As British vessels were now rarely met except armed or in convoy, the privateers of 1813 were larger and stronger than those of 1812; but their sailing qualities are universally conceded to have been the finest in the world. In a light breeze, or for sailing into the wind, they had no

¹ Henry Adams, Hist. of the U. S., VII., p. 5.
rivals; and it was not unusual for them to sail from a blockaded port fearlessly in broad day-light, if they were able to get the blockading squadron to leeward. How much we depended on these little vessels to bring about a disposition for peace in England before Napoleon was crushed and we were left alone against her, was becoming apparent to Congress, and the year 1813 contains quite a deal of "encouraging" legislation of all kinds. A bounty of $25.00 for each prisoner taken by privateers was offered on Aug. 2, and increased to $100.00 in March of the next year. The history of the privateer pension fund begins with the act of June 26, 1812, which directed 2 per cent. net of every prize to be paid over to the collector of the port for the use of widows, etc.; the distribution was regulated by the acts of Feb. 13 and Aug. 2, 1813. The system of destroying prizes was now in high favor in the Department of the Navy. All the regular war-vessels were practically instructed to destroy their prizes, being assured by the Secretary of the Navy that, unless very valuable, and near a friendly port, "it will be imprudent, and worse than useless, to attempt to send them in." About one-half of the vessels sent in were re-captured, on account of the strictness of the blockade, and it was felt to be a great pity that privateers, as well as regular war vessels, could not be induced to destroy all that they captured. "Encourage them," wrote Jefferson—the same Jefferson, by the way, who had helped negotiate the treaty of 1785 with Prussia—"to burn their prizes, and let the public pay for them. They will cheat us

1 3 U. S. Stats. at L., 81. 2 3 Stats. at L., 105.
3 2 Stats. at L., 799; and 3 Stats. at L., 86. See also the Act of Mar. 4, 1814, 3 Stats. at L., 103.
4 Instructions to commanders of the Constitution, the Siren, the Rattlesnake and Enterprise, the Peacock, the Wasp, etc. Am. State Papers, Nav. Aff., I., pp. 375, 376.
enormously. No matter; they will make the merchants of England feel, and squeal, and cry out for peace.” This was the true principle. By an act of March 3, 1813, Congress offered to pay, to any persons who should “burn, sink or destroy” any British armed vessel of war, one-half the value of such vessel. Jefferson’s idea was, substantially, the extension of this act to all captured vessels whatsoever, and such an extension would, it is conceived, have been excellent economy. One-half the value of the prize at the moment of capture was fair, because the chance of its reaching port safely was only about one-half; and this system would have prevented the weakening of privateers by the constant withdrawal of prize crews, a weakening which always rendered them inefficient and frequently led to their capture. A bounty of this sort, coupled with positive instructions to privateers to burn their prizes, would have been the true policy of our government; and not, as Mr. Henry Adams suggests, the total abolition of privateering and the equipment of fifty sloops-of-war like the Argus. Fifty vessels, however well managed, cannot do the destructive work of five hundred; and moreover, under such an arrangement as the one suggested, privateers would be quite as efficient as sloops-of-war, besides costing the public less. The burning of vessels without trial usually produces ill-feeling and diplomatic difficulties, but it is not illogical to claim it as a belligerent right, as long as capture of enemies’ property at sea is recognized. The vessel burned is either wholly hostile, in which case certainly no one has any right to complain; or hostile with neutral property on board, in which case

1 Jefferson to Monroe, Jan. 1, 1815, Writings of Jefferson, VI., 407 at 410.
2 U. S. Stats. at L., 815.
3 Hist of the U. S., VII., p. 335.
4 Mr. Henry Adams says (VII., p. 335) that the privateers cost the government more than than the sloops would have cost, on account of the pensions and bounties. He forgets that the sloops too would have had to have pensions and bounties, besides being equipped and sailed at the government’s expense.
the neutral takes the risk of the destruction of the vessel by the other belligerent; or wholly neutral (the fourth case of neutral vessel and enemy property being eliminated by the rule Free Ships Free Goods). If wholly neutral, of course, it would unquestionably be an outrage to destroy it, unless, indeed, by reason of some irregularity in its papers, its neutrality should not have been fairly apparent.

As it was, the privateers burnt a good many vessels without instructions. The Governor Thompkins and the Surprise each destroyed 14; the Fox and the famous True-Blooded Yankee 7 each; the Grand Turk 6, and nearly every privateer which took prizes had one or two burnings to its score.¹

Privateering in 1814 was very popular in New York. The total number of cruisers sent out from New York City during the war was 120, and they brought in 275 prizes, and sunk and destroyed many more.² One New York privateer brought in booty to the amount of $300,000, after having narrowly escaped from seventeen successive British pursuers.³ So much was cruising against the British coming to be regarded as a sort of legitimate commercial business, that in October, 1814, the legislature of New York passed an “Act to encourage privateering Associations”⁴ which contained the most elaborate provisions for the formation of stock corporations to carry on privateering. By this time the merchants of England were heartily sick of the war and complained bitterly, sometimes to the Admiralty, sometimes to the Prince Regent himself. The British Isles, for the second time, were really in a state of blockade; not a block-

¹ See the list of captures in Emmons' Statistical History of the Navy of the U. S.
² Guernsey, New York City during the War of 1812, Vol. II., Appendix, note 4.
³ Lamb and Harrison, Hist. of the City of New York, p. 654.
⁴ Laws of N. Y., 38th Sess., chap. xii.
ade of the Napoleonic kind, but of a substantial, dangerous sort which caused insurers to demand the enormous premium of 13 guineas on £100 across the Irish Channel, in spite of the three frigates and fourteen sloops which were constantly on duty protecting it.\(^1\) At Halifax, insurance was practically refused; sometimes 35½% per cent. was paid. The *Morning Chronicle* complained that “that the whole coast of Ireland from Wexford round by Cape Clear to Carrickfergus” was blockaded by “a few petty fly-by-nights.”\(^2\) In spite of the heavy tax paid by merchants as “convoy duty,” the Admiralty was unable to afford them protection; the Governor Thompkins cruised leisurely through the channel, burning fourteen vessels in her passage, and the *True-Blooded Yankee* destroyed twenty-seven in thirty-seven days. The United States sloop-of-war *Argus* made her headquarters in St. George’s Channel and averaged a prize a day; everything taken was burned, under the instructions before quoted. Undoubtedly Great Britain was the principal sufferer by the war; moreover the situation had become somewhat ludicrous, for the Orders in Council had long been repealed, and after the recent naval events it was hardly necessary for Great Britain to bind herself on paper not to maltreat American vessels in the future. And so, for the second time, a peace was hastened, if its very terms were not influenced, by American privateers.

It is common to regard the Treaty of Ghent as a technical if not a substantial humiliation for the United States, because the British government was not forced into a formal relinquishment of its maritime pretensions. Indeed, the casual reader of the treaty could not but gather the impression that the high contracting parties had been engaged in a very

\(^1\) Coggeshall, ch. ix.

\(^2\) *Morning Chronicle*, Aug. 31, 1814; quoted in McMaster's *Hist. of the People of the U. S.*, IV., p. 115.
bitter boundary dispute, being otherwise on excellent terms. As a matter of fact, of course, the United States never undertook to secure from Great Britain a paper acknowledgment that she had been wrong. The war was resolved upon simply because it was better to have war on both sides than war on the British side and peace on our own.¹

During the war of 1812, the United States lost some five hundred vessels.² According to Emmons, who furnishes perhaps the most reliable statistics of our privateers, the latter alone took from the British 317 ships, 538 brigs, 325 schooners and 161 sloops—1,341 prizes in all.³ The total number of prizes at sea was probably even greater than this,⁴ and Emmons does not count those made on the Lakes. The prizes were, of course, very irregularly distributed. Out of 517 privateers in Emmons' list, only 209 are recorded as ever having taken a prize; on the other hand, 13 are recorded as having taken over 20 prizes each. One of these, the Yankee, a brig from Bristol, realized three millions from her captures; they consisted of nine ships, twenty-five brigs, five schooners and one sloop.

Thus we emerged from a naval war which we had entered into without a navy and prosecuted against the strongest naval power in the world. If Mr. Gallatin went too far when he called privateering “our only mode of warfare against European nations at sea,”⁵ at any rate we must agree with President Pierce, that a proposition to abolish privateering, while

¹ Madison's Message, June 1, 1812. ² Coggeshall, p. 395.
³ Statistical History of the U. S. Navy.
⁴ Schouler places the number at 1,750 (Hist. of the U. S., II., 455 n.), and Ingersoll at 2,425 (War of 1812, p. 117). Coggeshall also says it exceeded 2,000 (p. 395). Probably, however, Ingersoll's and Coggeshall's figures are swelled by captures of American vessels sailing under British licenses, of which a great many were taken and condemned.
⁵ Speech of Feb. 10, 1797, Adams' Gallatin, 170; Whart., Dig., § 385.
the right of capture of private property at sea remains at all, is a proposition to which "this government could never listen."

1 Pierce, Second Annual Message, 1854, Whart., Dig., § 385.
PART III

THE ABOLITION OF PRIVATEERING
CHAPTER I

THE DECLARATION OF PARIS

The excesses of the Napoleonic wars had aroused in the habitually neutral states an unconquerable aversion to privateers, which was strikingly evidenced at the opening of the Crimean war. The petty states of Germany, with one accord, shut their ports to all private-armed vessels and their prizes. At the same time, the peculiar and almost unnatural Anglo-French alliance was fraught with happy consequences for neutrals. The British government, in deference to the wishes of its ally, abandoned during the war its ancient objections to the rule that free ships make free goods; and both powers announced their intention not to issue "letters of marque" at all. The sacrifice thus offered up at the shrine of Neutrality was not, it is true, a very great one; for the geographical position of Russia rendered her so susceptible to blockades that the trade in Russian bottoms, never very large, was practically annihilated altogether by a single strong fleet at the entrance to the Baltic; and privateers, if any had been commissioned, would have had to live on neutrals or starve. But the forbearance, on the part of England at least, was so unusual, that when the plenipoten-

1 Cf. the Procl. of the Senate of Hamburg, Apr. 26, 1854 (distress excepted); Procl. of the Senate of Lübeck, Apr. 24, 1854 (distress excepted); Ordinance of the Senate of Bremen, Apr. 28, 1854; Law of Hanover, May 5, 1854; Ord. of Grand Duke of Mecklenburg-Schwerin, Apr. 26, 1854; and, similarly, the Declaration of the Emperor of Hayti, Nov. 18, 1854. British and For. St. Papers, Vol. 45, pp. 1269-1277.

tiaries assembled at Paris to agree on the terms of peace, the smaller states were filled with hopes that something exceedingly liberal, and for the general good of Europe, was about to be accomplished.

The proceedings of the Congress were characterized by more fraternity and good humor than is usual in the discussion of questions relating to the Ottoman Empire. The neutralization of the Black Sea, the regulations about the Danube, and the admission of Turkey into the "European Concert," so increased the spirit of union among the plenipotentiaries that by the time the Treaty of Peace was ready, they were prepared to entertain any liberal idea that their president, Count Walewski, had to propose. The gratifying results of the war, the maritime part of which had been conducted entirely upon French principles, led the latter to propose the permanent incorporation of those principles into International Law. During the séance of April 8, 1856, Walewski, referring to the work of the Congress of Westphalia in establishing freedom of conscience, and that of the Congress of Vienna in abolishing the slave trade and opening the rivers of Europe, remarked that it would be "worthy of the Congress of Paris to end certain disputes of too long standing (mettre fin à de trop longues dissidences) by laying the foundations of a uniform maritime law, in time of war." He then suggested the four principles which were afterwards incorporated in the Declaration, the first being the "abolition of privateering."

Lord Clarendon for England announced the readiness of his government to surrender their ancient rights and unite in a declaration that free ships make free goods, on condition that privateering should be abolished.

Orloff, for Russia, and Buol, for Austria, promised to ob-

1 Brit. and For. St. Papers, Vol. 46, p. 120; Gourdon, Hist. du Congrès de Paris, p. 113.
tain instructions from their governments; and the senior plenipotentiary from Prussia, the Baron Manteuffel, promised the consent of his in advance. At the next conference, April 14, all the plenipotentiaries declared themselves authorized to unite in the following

DECLARATION

* * *

"The Plenipotentiaries,

"Considering,

"That maritime law in time of war has been for a long time the subject of unfortunate controversies,

* * *

"That it is advantageous, in consequence, to establish a uniform doctrine on a point so important,

* * *

have issued the following solemn declaration:

"1st. Privateering is and remains abolished;

"2nd. The neutral flag protects the enemy's goods, except contraband of war;

"3rd. Neutral goods, except contraband of war, are not subject to seizure under the enemy's flag;

"4th. Blockades, to be binding, must be effective; i.e., maintained by a force sufficient to render approach to the enemy's coast really dangerous.

"The governments of the undersigned plenipotentiaries engage themselves to bring this declaration to the attention of those States which have not been invited to participate in the Congress of Paris, and to invite them to accede to it.

"Convinced that the maxims which they have proclaimed cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries have no doubt that the efforts of their Governments to make their adoption general will be crowned with full success.
"The present declaration is not and shall not be binding except among the Powers which have signed or may accede to it."

On the 16th of April the signatures of the plenipotentiaries were formally affixed, and the seven governments of France, Great Britain, Russia, Prussia, Austria, Sardinia and the Porte stood committed to the Declaration. On the proposition of Walewski, "and recognizing that it is to the common interest to maintain the indivisibility of the four principles mentioned in the declaration signed to-day, MM. the plenipotentiaries agree that the Powers which have signed or may accede to it shall not enter for the future, into any arrangement concerning the law of neutrals in time of war, which does not rest on all four of the principles of the said declaration." The Russian plenipotentiaries suggested that this agreement ought not to interfere with any previous conventions; which suggestion was fully approved by the others.

To the casual reader the Declaration, in its completed form, is apt to seem a monumentum aere perennius to the wisdom, as well as the philanthropy, of its authors. It cannot be denied, however, that closer examination discloses much that calls for criticism. The professed object of the plenipotentiaries was to establish a "uniform doctrine" on an "important point" which had long been the subject of "unfortunate controversies." Of the four principles enunciated, only one, the principle that free ships make free goods, came within this description. The third and fourth principles had been perfectly settled before, and the contrary of the first, that is, that all nations have a right to fit out privateers, had never been questioned; so that these three principles must have been introduced into the declaration for some other purpose than to settle "unfortunate contro-

versies.” Then the “indivisibility” of the four principles is, to say the least, unnatural; and if the plenipotentiaries considered its admission necessary for accession to the Declaration, it was at any rate questionable policy to bind themselves not to “enter, for the future, into any arrangement concerning the law of neutrals in time of war, which does not rest on all four of the principles of the said Declaration.” It will readily be seen that this agreement prevents any signatory power from engaging separately with a non-signatory one for the observance of principles (3) and (4), although the latter were simply declaratory of existing International Law; or of principle (2), although the two powers might consistently have practised it, and might have included it in all their former treaties. It was, indeed, rather a defect in the declaration to include principles (3) and (4) at all, especially when there was, as there is yet, a crying need for the definition of contraband, which the Declaration left untouched. The reason for coupling principles (1) and (2) was not a logical, but a diplomatic one. Great Britain, as the strongest naval power, had the greatest interest in abolishing privateering, and without its abolition would never have consented that free ships should make free goods. Of course, if the principles were to be severable, other powers would be enabled to avail themselves of her concession without paying her price; which would indeed be unfair. But that does not excuse the prohibition —suggested by Count Walewski himself—to enter into separate agreements; which strongly savors of discourtesy toward non-signatory powers. Still further, it would have been, it is submitted, in much better taste to word the first article more like a treaty and less like a statute. “La course est et demeure abolie” was a very broad statement; it is not too much to say that, in 1856 at any rate, it was a false statement; since it assumed that a principle absolutely new
and untried was thereby, with the support of only seven powers, definitely incorporated into International Law. It must be remembered that the first article was the only one which contained an innovation; for (3) and (4) were already admitted by all, and (2) by all except two powers (Great Britain and Spain); yet it is precisely this first article which is worded in the most sweeping and uncompromising way. It was, indeed, this first article which was the chef d'œuvre of the Paris Congress.

It is impossible to suppose that the seven great powers who signed the Declaration of 1856 were moved by philanthropy merely. The philanthropic motive was perhaps strongest in France, which has, indeed, always led the way toward a liberal maritime policy, and whose political philosophy was dominated by men who had already come to look with disfavor upon the capture of private property at sea in any way at all. But even France had other motives for her conduct. Her navy was the second in the world, and constantly increasing; and the Declaration, therefore, gave her a tremendous advantage in a maritime war with any of her neighbors except England. Moreover the French privateer, when he existed, was of a more uncontrollable and piratical type than the privateer of England or America; and several decades of spoliation claims had suggested to the French nation that perhaps it was better to save the money which they would have to pay for his depredations, and use it toward carrying on the war. As for the other powers, Russia, Prussia, Austria and Sardinia were no privateering states, and had more to fear from them as neutrals than to gain from them as belligerents; moreover, they received the great concession, Free Ships Free Goods; and Turkey was too young a member of the "Concert" to thwart, by any undue display of individuality, the wishes of all its guardians.

The attitude of England, after the Declaration was signed,
was somewhat peculiar. It is to be remembered that the authority of the British plenipotentiaries was only that of the ministry, who had not, in spite of the great importance of the principles involved, considered it necessary to gain the approbation of the House of Commons, much less that of the House of Lords, before taking the final step. Before very long there began to be an unpleasant feeling that England had been trapped, as the publication of the statistics of the Russian war showed how much more unfavorable to England than had at first been thought was the rule Free Ships Free Goods. One opposition journal declared "Clarendon and his colleagues," for agreeing to the second article, "guilty of a deliberate act of treason against the state, for which they should have been impeached," and Mr. Lindsay said openly in the House of Commons that "he did not wish to throw aside a solemn declaration, but he said the people of this country would not abide by it, and would appeal to the House for its abrogation;" and it yet remains to be seen," he said later in a letter to Lord John Russell, "whether the chief states of the Christian world would, by force of arms, interpose * * *"). The prevailing opinion, however, was that of Lord John Russell, that the Declaration was a fait accompli, and that, without regard to the possibility of coercion, a breach of faith could not mend matters.

With its virtues and its faults, the Declaration was submitted for approbation to all the principal states of the world, even to some non-maritime states. Nearly all returned a favorable answer within a few months. Hanover and the Two Sicilies were the first to accede, both notifying the Cabinet of Paris of their intention on May 31; then followed, in order, the Papal States (June 2), Electoral Hesse (June

2 Quoted by Aegidi & Klauhold, *Frei Schiff unter Feindes Flagge*, p. 34.
4), Tuscany (June 5), Belgium (June 6), the Netherlands (June 7), Oldenburg and Saxe-Altenburg (June 9), Sweden and Norway (June 10), Bremen and the Grand Duchy of Hesse (June 11), Saxony (June 16), Nassau (June 18), Lübeck and Greece (June 28), Saxe-Weimar and Saxe-Coburg-Gotha (June 22), Denmark and Württemberg (June 25), Bavaria (July 4), the German Confederation (July 10), Mecklenburg-Schwerin (July 22), Portugal (July 28), Baden (July 30), Chili (August 13), Parma (August 20), Mecklenburg-Strelitz (August 25), Guatemala (August 30), Hayti (September 17), Argentine Confederation (October 1), Ecuador (December 6), Peru (November 23, 1857), Brunswick (December 7, 1857), Brazil (March 18, 1858), and Switzerland (July 28, 1858). The notifications of accession are rather interesting documents. Many of them state no reason; a great many descant upon the advantages of the Declaration from the point of view of philanthropy; still others, such as those of Chili, Denmark, the Two Sicilies, the Netherlands, and Portugal, call attention, with much pride, to the fact that the principles just adopted have always been proclaimed by their governments; Baden, Bavaria and Württemberg are thankful that there are to be no more conflicts about privateers; Guatemala frankly calls the Declaration a guarantee for weak nations; the Duke of Tuscany goes so far as to say that he will regard the principles as making part of his International Law—though it is doubtful whether by this expression any intention is signified to enforce them against non-acceding powers. The word “his”


2 Denmark says its “justice is so evident” (p. 143); Greece considers it (p. 147) a “véritable conquête de la justice et de la science du droit sur les maximes différemment conçues;” it is rigorous justice according to Guatemala (p. 148); Hanover calls it “un des plus beaux monuments de la civilisation moderne” (p. 149).
(son) would seem to save the remark from the appearance of a threat which it would otherwise possess.

Of all the powers invited to accede to the Declaration, only Spain, Mexico, and the United States returned any answer but an unqualified affirmative. With long coast lines and weak navies, none of these powers could afford unconditionally to abandon privateering; and Spain was not remarkably anxious to establish the rule Free Ships Free Goods, having usually contended for the contrary in her palmiest days. The Spanish nation, moreover, seems to have entertained grave doubts as to the disinterestedness of the greater maritime states in proposing the change. The position of the United States was a difficult one. Always the advocates of a liberal maritime law, it was impossible for us to rest in such bad company as that of Spain and Mexico; on the other hand President Pierce had firmly declared his intention not to agree to the abolition of privateering while capture of private property at sea was allowed at all. On the 28th of July, 1856, Mr. Marcy, Secretary of State, wrote his famous letter to the Comte de Sartiges. After ably criticising the Declaration, pointing out the unfairness of its operation as between powers with weak navies and those with strong ones, and referring to the growing tendency of modern times to separate the government from the individual, of which the Declaration itself was an example, Mr. Marcy abruptly asks why not go the whole way? Why not exempt private property at sea entirely, and thus render the laws of war at sea consistent with the laws of war on land?

"The President, therefore," says Mr. Marcy, "proposes to add to the first proposition in the 'declaration' of the Congress of Paris, the following words: 'And that (sic) the

1 Cf. the Crónica, Oct. 6, 1856.
2 Message of Dec. 4, 1854.
private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.'" And he concludes with the hope that the amendment will be accepted, or that the United States will be allowed to join in principles (2), (3), and (4) while holding aloof from principle (1); and with a casual suggestion that it would be as well, in furthering the great purpose of confining the hardships of war entirely to the belligerents, to abolish the law of contraband.

This letter of Mr. Marcy's, at one stroke, took the United States out of the unpleasant position of appearing to obstruct progress, and enabled it, instead of being left an unwilling straggler, to pose as the leader of the van. The logic of the position, from an international point of view, was irresistible. It was difficult for the supporters of the Declaration as it stood to give any legal reason for abolishing privateering, while they recognized the general liability of private property at sea to capture. The arguments against privateering were open to the criticism that they were arguments from the abuse of a thing against its use, and that what privateering really needed was not abolition, but regulation. On the other hand, the world had been drifting toward the principle of the amendment for years. A numerical majority of the nations of the earth was certainly in favor of it. Sooner or later, if the future of International Law was to be judged by its past, it would have to come: why should it not come from the Paris Congress?

The Declaration of Paris was unquestionably an advance—Mr. Marcy's proposition was an advance still greater—and yet it is a matter of grave doubt whether even the latter presented the true solution of the difficulty for the United States. From the international point of view, the Marcy proposition was most commendable; from
the point of view of American diplomacy, it is doubtful whether it was wise. Pending the replies of foreign nations, the letter was vigorously discussed by the entire American press. Some papers went so far as to declare the proposed declaration unconstitutional. They maintained that no power was given to the President and Senate to declare away a belligerent right that existed at the formation of the Constitution; that it was even doubtful whether the right could be abolished by constitutional amendment, since, they said, it might well be one of the rights which the Declaration of Independence had referred to as inalienable! It was soon seen, however, that this objection was untenable, nearly all our treaties having surrendered some right that “existed at the formation of the Constitution,” in exchange for similar concessions on the part of other nations. A more valid objection was that the amendment as worded annihilated the Declaration, making articles (1), (2) and (3), or articles (2) and (3) at any rate, unnecessary and tautological, so that it would be scarcely proper to adopt it as an “amendment” in the form presented. Even this, however, was an objection only to the form of Marcy’s idea, and not to the idea itself. The genuine and serious objection, from an American point of view, was that Marcy’s idea of exemption extended only to the high seas, and thus left untouched the system of commercial blockade. The consequences would

3 *London Spectator*, Aug. 30; *London Morning Herald*, Sept. 4; *Washington Union*, April 28, 1857; *N. Y. Journal of Commerce*, Dec. 5 (amendment not safe unless blockades [meaning probably commercial blockades] are abolished); *London Times*, July 16, 1857 (would have given England maximum efficiency of navy and minimum risk to commerce). The *Manchester Examiner and Times*, however, Nov. 26, 1856, believed that Marcy’s principle, pushed to its legitimate conclusions, would have entailed the abolition of all blockades.
be disastrous in case of war with Great Britain or France, for although they could not capture our property on the high seas, they could, with their immense navies, keep a great deal of it in our ports, while we, not powerful enough at sea to blockade their coasts, would have no means of retaliation. The amendment as worded by Mr. Marcy, therefore, presented in one respect a false issue, and would have been almost as unequal in its operation as the Declaration itself.

The English Press was almost evenly divided,¹ but most of the continental papers approved the amendment as offered.² Marcy pushed the proposition vigorously, as indeed he did all things. At the same time, it appears that he did his utmost to prevent the smaller states which had not yet acceded to the original Declaration, from doing so. "It does appear to me," wrote Marcy to Dallas, Aug. 4, 1856,³ "that the proceedings of the Congress at Paris were resorted

¹ See for the amendment—

London Morning Chronicle, Aug. 23 and Sept. 2, 1856; Telegraph, Aug. 21; Evening Star, Aug. 28; Shipping and Merc. Gazette, Aug. 20; Daily News, Aug. 27; Times, Sept. 3; Star, Nov. 25; Manchester Examiner, Nov. 26; Leeds Mercury, Nov. 27, etc.

Against the amendment—

London Standard, Aug. 20; same, Nov. 25; Globe, Dec. 22; Morning Herald, Aug. 21; same, Sept. 4; Morning Post, Aug. 21; same, Aug. 22; same, Aug. 23 (Marcy amendment too favorable to the U. S.); same, Nov. 26; (not practical: England would enlarge her definition of contraband and so continue to capture private property), etc.

² See, for the amendment—

Allgemeine Zeitung, May 7, 1856 (Decl. not fair); same, Oct. 21; Cologne Gazette, Sept. 3 (but see same, May 11); L'Assemblée Nationale, Nov. —; La Presse Belge, Sept. 5, 1856 (cannot escape from Marcy's dilemma: allow privateering, or else no capture at all); Le Constitutionnel, Dec. 16 (amendment good, but not new); L'Indépendence Belge, Aug. 27 (cabinet of Washington justified in looking to its interest) Le Nord, June 12, etc.

Against the amendment—

Paris Pays, in Brussels Le Nord, Aug. 23 (U. S. selfish); Paris Siècle, Aug. 27 (threatens U. S. with coercion), etc.

³ MS.
to as a device to defeat our negotiations on the 2nd and 3rd principles of the Declaration. It was not necessary that I should more distinctly indicate that than I have done in the replies. In order to put our Ministers abroad in possession of our views for the purposes of enabling them to prevent as far as possible other Powers from acceding to the Declaration, * * * I shall send copies of the document to them * * *.

These efforts, apparently, bore but little fruit. In Brazil's notification of accession, March 18, 1858, Sr. Da Silva Paranhos does indeed express his approbation of the amendment; but Brazil accedes nevertheless. On Nov. 24, 1856, Marcy wrote to Dallas that he had received a dispatch from Mr. Mason at Paris declaring that the imperial government would accept the amendment, and adding, "Russia has already done so—and several other powers have received it with favor. If there is sturdy resistance in any quarter it will come from England."

Thus matters stood when the Pierce cabinet retired in March, 1857. In mercantile and shipping circles Marcy was hailed as the champion of humanity and progress; a splendid dinner was tendered to him by the prominent merchants of Baltimore,² and the members of the New York Chamber of Commerce, as individuals, united in a petition to President-elect Buchanan to retain him in office.³ Buchanan, however, observed the danger to the United States that lurked in the proposed amendment perhaps more clearly than its philanthropic author, and caused the British Government to be notified that the United States would be pleased to consider the negotiations suspended. The friends of Marcy, comparing the attitude of the President with his utterances

¹ Marcy to Dallas, MS.
² Baltimore Sun, March 29, 1857.
³ Troy Budget, Feb. 7, 1857.
while ambassador at the Court of St. James, declared that he was simply about to propose an amendment to the amendment, abolishing commercial blockades; but unfortunately, he never did, and the United States remained outside the pale of the Declaration at the outbreak of the Civil War.

1 "The time will arrive," Mr. Buchanan had then said, "when war against private property on the ocean will be entirely proscribed by all civilized nations, as it has already been upon land." See W. M. Addison, "Ought Private Vessels to be Exempt from Capture in Time of War? The Negative Maintained" (Baltimore, 1856).

2 Cf. the Boston Traveller, Aug. 5, 1857; and the N. Y. Journal of Commerce, July 31, 1857.
CHAPTER II

THE WORKING OF THE DECLARATION

A PRIORI the Declaration of Paris seems to have, on its practical side, three weak points.

The first is the vagueness of the term "privateering" (la course). Marcy, in his letter to Sartiges, predicted that this would infallibly lead to more "unfortunate controversies" than the Declaration assumed to end. Weak maritime states, he declared, would evade the first article by pretending to clothe with a public character the vessels of their merchant marine, and privateering would simply be carried on in the name of the state, although in fact no more subject to central control than formerly. Marcy could not, or would not, see any remedy for this condition of things. "Every nation," said he, "would have an undoubted right to declare what vessels should constitute its navy, and what should be requisite to give them the character of public ships," and from the nation's own decision he did not see that there could be any appeal.

The second weakness is the impossibility of securing the proper observance of the second article in the absence of an authoritative definition of contraband. Under the present practice, what is or is not contraband depends upon the wishes of the belligerents as announced from time to time during the war. Constant opportunity is thus afforded for a strong maritime power, such as England, to continue the encroachments upon neutral rights which the Declaration was intended to check; and, by increasing the number of
contraband articles indefinitely, practically to destroy the rule that free ships make free goods.

The third weakness is the impossibility of confining the binding effect of the Declaration to "the Powers which have signed or may accede to it." Of course, there is no difficulty in understanding that in case of war between England and Spain, for example, England would be entitled, in spite of the Declaration, to fit out privateers. But suppose war between England on the one hand and allied France and Spain on the other; if the first power issued letters of mark against Spain, the adventurers bearing them would have no right to interfere with French vessels and yet would be subject to capture by every French man-of-war; so that England would be at a disadvantage after all. The inequality with which the Declaration operates is quite as noticeable with regard to article (2). The United States, for example, is not a party to the Declaration; yet in case of war between two signatory powers the United States would be the party really most benefited by article (2), for both belligerents would entrust a large part of their merchandise to American, as neutral, bottoms where, under the Declaration, they would be safe. It is true that neither belligerent owes any duty, under the Declaration, to the United States; but each owes a duty to the other, which the remaining parties to the Declaration would not permit to be violated. Similarly, if war occurred between England and the United States, we might safely entrust our goods to French bottoms, while our adversary could not; except, indeed, for the accidental fact that we

1 Originally the foes of the Declaration denied this; they said that as between the belligerents themselves, the Declaration, like all treaties, was abrogated by the war. This was urged several times quite seriously in the House of Commons. There are, of course, two obvious answers. The Declaration is not, in any correct sense, a treaty (though the first article, at any rate, would have been a much more appropriate subject for a treaty than for a declaration); and if it were, treaties made in contemplation of war always survive.
recognize Free Ships Free Goods aside from any of the doings of the Paris Congress.

In the less than half a century which has elapsed since the Declaration, not a few questions of interpretation have arisen; and what has been, gives us a foretaste of what may be.

When the civil war broke out in the United States, and the government at Richmond announced its intention to issue letters of mark, the greatest consternation was produced in the North. Had the United States acceded to the Declaration of Paris, it was reflected, the Southern States, then certainly part of the Union, would have been bound by it, and we might justly have invoked the assistance of foreign nations to prevent its violation. As it was, the immense commerce of the North was exposed, and there was no way of retaliating on the Southerners by sea. In deference to the popular outcry, Mr. Seward, even at the eleventh hour, offered to accede to the Declaration; with the Marcy amendment, if acceptable; if otherwise, without it. The whole of the correspondence on the subject was conducted in thoroughly diplomatic style, carefully avoiding all direct mention of the question at issue—namely, whether, in case of the accession of the United States, the other signatory powers would lend their assistance to keep the seas clear of Confederate privateers. The interchange of notes convinced Mr. Seward that such assistance would not be given, and the offer was withdrawn. The attitude of England and France was unquestionably a correct one. The President's Proclamation of Blockade (April 19) had practically, though not formally, recognized the existence of a state of war between the North and the South; that is, recognized the belligerency of the Confederates; and as soon as the latter

1 Circular of April 24, 1861; Dip. Cor. (1861), p. 34.

became belligerents, the power of the Washington government to sign away their belligerent rights fell to the ground. It is, perhaps, fortunate that Mr. Seward's offer was not accepted; if it had been, we should have been bound to the Declaration to-day, and very little of the injury inflicted upon our commerce would have been prevented. As it was, the Alabama was not a "privateer," for Captain Semmes held a commission in the "Confederate navy." 1

The next case that occurred involving the Declaration was a still simpler one. In 1865 it was agreed, as a matter of course, that Chili, although a party to the Declaration, might commission privateers against Spain, which was not. 2

In the Franco-German war several interesting questions arose. The King of Prussia, on July 18, 1870, issued a famous decree, announcing that the Prussian navy would not make war upon French merchant vessels. 3 Both Prussia and France had, for a long time, favored the abolition of the capture of private property at sea, and the former, unable to protect her commerce, thought this as good an occasion as any to begin. The attitude of Prussia was warmly commended by the United States, particularly because she had made no condition with regard to reciprocity, 4 but France unfortunately lost her philanthropy at the critical moment, and contented herself with observing the Declaration of Paris; and later the Prussian decree was repealed.

The advantages enjoyed by non-signatory powers like the United States, with large potential carrying trades, became apparent when France announced that although the United States and Spain had not signed the Declaration, they were

not to be excepted from the provisions of Article (2). This, as has been shown, was a necessary consequence of the Declaration itself; any other attitude on the part of the French government would have given just ground for offense to Prussia. Thus, one of the three weaknesses became apparent. The disputes as to the right of the Germans to treat coal as contraband, which fill the British and Foreign State Papers relating to this period, showed, in some slight degree, how serious the second weakness might become, especially if England were to uphold the belligerent right against Germany, instead of Germany against England. From our point of view, however, the most interesting dispute was that which arose upon the meaning of the word "Privateering."

On July 23, 1870, the Prussian government notified that of Great Britain that the Declaration of Paris was considered valid and to be observed "throughout the whole of the States of the North German Confederation." On the very next day (July 24), the King, acting under the advice of the Chancellor, issued a decree purporting to provide for the establishment of a volunteer navy. All German seamen and ship-owners were called upon to place themselves at the service of the fatherland. The vessels were to be hired by the state, and one-tenth of their value paid to the owners as deposit; in case of loss, the other nine-tenths was to be paid; in case of restoration, the one-tenth paid was to be reckoned as hire. The owner was to hire a crew, the crews were to enter the Federal navy for the war, wear its uniform and badge of rank, take oath to the articles of war, receive pensions at the regular standard, and, if desired, obtain per-

---


manent establishment in the navy as a reward for extraordinary service. The hired ships were to sail under the Federal flag, and to be armed and fitted out at public charge. Premiums from 50,000 thalers down were to be paid to such ships as should capture or destroy ships of the enemy; and these premiums were to be paid to the owners of the ships, to whom was to be confided the distribution in proper proportions amongst the crew.¹

But for the provisions italicised, it would seem impossible to regard the proposed navy as an evasion of the Declaration of Paris. Those two provisions were certainly unfortunate. In its essence, and as it was doubtless honestly intended by the Prussian Government, the scheme was simply for the state to obtain ships for hire, and to increase its navy to a war footing by offering bounties to volunteers: The provision that the volunteers were to be procured by, and the bounties to pass through the hands of, the owners of the ships, who were mere contractors, who had nothing to do with the navy, and who ought to have been allowed, after surrendering their ships and receiving their hire, to drop out of the transaction altogether, was a most unwise and dangerous one, and lent an absurd appearance of private enterprise to a scheme which in its essence was nothing of the sort. The French government saw only the appearance, and protested. England was asked to intervene,² and this fact would have shown Mr. Marcy, had he lived to see it, that since the Declaration of Paris every nation has not a right to declare what vessels shall constitute its navy; but the Law Officers of the Crown, to whom the matter was submitted by Lord Granville, were of opinion that there were “substantial distinctions” between vessels of the kind proposed and privateers, and Granville, in a polite note to the

² De Lavelette to Granville, Aug. 20, 1870, ibid.
French government, declined to do anything more than admonish Prussia not to allow the distinction to fade. As a matter of fact, no Prussian volunteer navy was ever formed, but if it had been, no reasonable construction of the Declaration of Paris would have been violated. At most, the Prussian Government was too economical in employing the same persons as purveyors of ships and recruiting agents; but the vessels hired could not have been privateers for quite a number of reasons: (1) they were actually, by virtue of the contract of hiring, public vessels for the time being, fitted and armed and sent forth at the public expense; (2) their crews were actually public servants, having no right to cruise anywhere except under orders, and subject to the same discipline as the regular navy; and (3) they were designed for the work of a regular navy, and forbidden in fact to prey on private property at all. Under these circumstances the abuses which the first article of the Declaration sought to prevent, would have been quite impossible. But the action of Prussia confirms Mr. Marcy's prediction as to the use which weak maritime states, in the wars of the future, will make of their merchant marines, and gives us an idea just how much of privateering is, and remains, abolished.

The Declaration of Paris is truly, as Mr. Marcy said, a half-way measure. It is inchoate, unfinished, and, it cannot be denied, somewhat faulty, as the first steps of all great reforms have been. But to call it an epoch-making event, or a red-letter day in the calendar of the Law of Nations, would be superfluous. Perhaps that which is to come—the abolition of all capture of private property at sea, including the abolition of commercial blockades—is easier than that which has already been accomplished. In International Law, as in other things, it is the first step that costs. But in honoring

Walewski and Bourqueney, Buol and Hübner, Clarendon and Cowley, Orloff and Brunnow, Cavour and Villamarina, Manteuffel and Hatzfeldt, Aali-Pacha and Mehemmed-Djemil-Bey, as men well abreast of their time, it will always be a pleasure for Americans to remember our own Secretary of State, who was—we do not know yet how many—years ahead of it.
BIBLIOGRAPHY.

Addison, W. M. Ought Private Vessels to be Exempt from Capture in Time of War? Baltimore, 1856.
A General Collection of Treatys and Other Publick Papers (London, 1732).
American and English Encyclopedia of Law.
American Instructions for the Government of Armies in the Field.
American Social Science Association Journal.
American State Papers, Foreign Relations.
American State Papers, Naval Affairs.
Annual Register. (Dodsley's.)
Anquetil. Motifs des Guerres. Paris, an VI.
Azuni. Sistema Universale dei Principii del Diritto Maritimo dell 'Europa, Triest, 1797.
Bancroft. History of the U. S. N. Y., 1884.
British & Foreign State Papers.
Case of the U. S. at Geneva.
Century Dictionary.
Code of the Institute for Wars on Land.
Coke. Institutes.
Cooper. History of the Navy of the U. S. N. Y., 1856.
Diplomatic Correspondence of the U. S.
Fauchille. La Diplomatie Française et la Ligue des Neutres de 1780. Paris, 1893.


Foreign Relations of the U. S.


Guernsey. New York City during the War of 1812. N. Y., 1889.


Hildreth's History of the U. S. N. Y., 1849.

Ingersoll. Second War with Great Britain. Phil., 1845.


Johnson's Encyclopædia.

Journals of Congress.


Lamb and Harrison. History of New York City. N. Y., 1877-1896.


Laws of New York.


Loir. La Marine Française. Paris, 1893.


Lossing's War of 1812. N. Y., 1869.


Maclay. History of the Navy. N. Y., 1894.
BIBLIOGRAPHY

McMaster. History of the People of the U. S. N. Y., 1892.
Moniteur.
Napier. History of the Peninsular War. Phil., 1842.
Return of the Names and Number of Russian Vessels Captured, etc., ordered by the House of Commons to be printed, July 29, 1856.
Revue de Droit International.
Secret Journals of Congress.
Select Pleas in the Court of Admiralty (Publications of the Selden Society, Vol. 6 for 1892).
Sheffield. Privateersmen of Newport. Newport, 1883.
Sparks. Diplomatic Correspondence of the American Revolution. Boston, 1829-1830.
U. S. Statutes at Large.
Webster’s Dictionary.
Wharton’s Digest of International Law. Washington, 1886.
Wharton’s Diplomatic Correspondence of the American Revolution. Washington, 1889.
Wheaton. Elements of International Law. (Dana’s ed.) Boston, 1866.
Woolsey. Introduction to the Study of International Law. N. Y., 1864.
IV

PUBLIC ADMINISTRATION

IN

MASSACHUSETTS:

THE RELATION OF CENTRAL TO LOCAL ACTIVITY
PUBLIC ADMINISTRATION IN MASSACHUSETTS

THE RELATION OF CENTRAL TO LOCAL ACTIVITY

BY

ROBERT HARVEY WHITTEN, Ph.D.

University Fellow in Administration

COLUMBIA UNIVERSITY
New York
1898
# TABLE OF CONTENTS

## CHAPTER I
### INTRODUCTION

<table>
<thead>
<tr>
<th>I. <em>Period of Settlement and Decentralization</em></th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decentralization within the town</td>
<td>11</td>
</tr>
<tr>
<td>Decentralization of commonwealth administration</td>
<td>11</td>
</tr>
<tr>
<td>Effect upon the position of the town</td>
<td>13</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. <em>Period of the Elimination of Distance and Centralization</em></th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improvements in transportation and communication</td>
<td>14</td>
</tr>
<tr>
<td>Growth of cities and depopulation of the country</td>
<td>15</td>
</tr>
<tr>
<td>Economic reorganization necessitates political reorganization</td>
<td>16</td>
</tr>
<tr>
<td>Evil of legislative centralization and administrative decentralization now made manifest</td>
<td>17</td>
</tr>
<tr>
<td>Administrative centralization must precede municipal home rule</td>
<td>18</td>
</tr>
</tbody>
</table>

## CHAPTER II
### PUBLIC SCHOOLS

<table>
<thead>
<tr>
<th>I. <em>Period of Decentralisation</em></th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1628-1647, no central regulation</td>
<td>19</td>
</tr>
<tr>
<td>1647-1789, central requirements and control</td>
<td>19</td>
</tr>
<tr>
<td>The development of the school district, 1700-1817</td>
<td>20</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. <em>Period of Centralisation</em></th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increased interest in education</td>
<td>22</td>
</tr>
<tr>
<td>Legislation, 1815-1834</td>
<td>22</td>
</tr>
<tr>
<td>The establishment of the state board of education, 1837</td>
<td>23</td>
</tr>
<tr>
<td>Organization, powers and work of the board</td>
<td>23</td>
</tr>
<tr>
<td>Abolition of the district system</td>
<td>26</td>
</tr>
<tr>
<td>Skilled supervision</td>
<td>28</td>
</tr>
<tr>
<td>Consolidation of weaker schools</td>
<td>29</td>
</tr>
<tr>
<td>Increased legislative control</td>
<td>30</td>
</tr>
<tr>
<td>Independent position of the school committee</td>
<td>30</td>
</tr>
<tr>
<td>The school fund</td>
<td>32</td>
</tr>
<tr>
<td>Distribution of the school fund</td>
<td>33</td>
</tr>
<tr>
<td>Special aid to poor towns</td>
<td>34</td>
</tr>
<tr>
<td>Relation of the commonwealth to the public school</td>
<td>36</td>
</tr>
</tbody>
</table>
CHAPTER III

PUBLIC POOR RELIEF

I. Period of Decentralization

Settlement laws prior to 1789
State paupers prior to 1789
Laws of 1789 and 1794
Rapid increase in the number of state paupers
Evils of unregulated local relief at the expense of the state

II. Period of Centralization

1. The board of alien commissioners, 1851
2. State board of charities, establishment and organization
3. The care of the poor in state institutions
   Establishment of state almshouses, 1854
   Partial return to former system
   Changes in the settlement law
   State care of dependent children and of the insane poor
4. Central administrative supervision of local poor relief
   Reports of the overseers of the poor
   Audit of town accounts
   The placing of paupers in private families
   The care of dependent children
   Inspection of almshouses
5. Need for control over towns without almshouses
6. Relation of the commonwealth to public poor relief

CHAPTER IV

PENAL INSTITUTIONS

I. Period of Decentralization

Development of the county
Establishment of general prisons
General prisons become county prisons

II. Period of Centralization

1. Establishment of state prisons
2. Administrative control over county prisons
   Requirement of reports
   Former inspection by legislative committees
   State board of commissioners of prisons
   The general superintendent of prisons
   Results of administrative control
3. Direct control and management of county prisons by the state

CHAPTER V

PUBLIC HEALTH

I. Public Health

1. Period of decentralization
   1628-1797, quarantine and contagious diseases
   1797-1850, development of local boards of health
2. Period of centralization
   a. Sanitary commission, 1850
CHAPTER VI

POLICE

I. The State Police ........................................ 80
   1. The enforcement of prohibition, 1865-75 .......... 80
      Prohibitory law of 1852, and its failure in the large cities .... 80
      The movement for a metropolitan police system ....... 81
      Establishment, organization and work of the state police .... 82
      Repeal of the prohibitory law, 1875 ............ 84
   2. The state detective force, 1875-79 ............ 86
      Reorganization of the former force as the state detective force ... 86
      Powers and work .................................... 86
      Reorganization as the Massachusetts district police .... 87
   3. The Massachusetts District Police ............... 87
      Organization and powers ................................ 88
      Development of powers and duties .................... 88
      Inspection department, present organization and powers ... 88
      Detective department, present organization and powers .... 90
      The suppression of disorder in time of strikes .... 91

II. The Investigation of Fires ............................ 93
   Reason for governmental interference ............... 93
   Inefficiency of local administration ................. 93
   The state fire marshal .................................. 94

III. Enforcement of Law in the Rural Towns .......... 95
   Prevalence of lawlessness in the declining towns ...... 95
   Movement for state interference ....................... 96

IV. Metropolitan Police ................................. 96
   Establishment in Boston and Fall River ............... 97
   Organization and powers ................................ 97
   A disorganizing factor in city government .......... 98
   Relation of the commonwealth to the municipal police .... 98
CHAPTER VII

TAXATION

I. History of the Apportionment of the General Property Tax

I. Apportionment by the general court prior to 1645
No apportionment, 1645-68
General board of equalization, 1668-1692
Apportionment by the general court, 1692-1780
Constitutional provision of 1780
Apportionment by committees of the general court, 1780-1871
Shortening of the period between apportionments
Apportionment by the tax commissioner
Results of present method

II. Disintegration of the General Property Tax

1. History of the disintegration
State tax on the capital stock of banks, 1812
Taxation of manufacturing corporations, 1832
State tax on savings banks and insurance companies, 1862
General law for the taxation of Massachusetts corporations, 1864
Taxation of national banks, 1868
Taxation of mortgages, 1881
State collateral inheritance tax, 1891

2. Further disintegration probable
Taxation of intangible property and income
Recommendations of the tax commission of 1897

3. Separation of state from local taxation
Tendency has been toward a separation
Reasons for a separation

CHAPTER VIII

STREET RAILWAYS

1. The special incorporation acts of 1853
2. First general law regulating street railways, 1864
3. The special commission of 1865
4. Establishment of the railroad commission, 1869
   Organization
   Control in the interest of publicity
   Power of recommendation
   Control over fares
5. General incorporation law, 1874
6. Examination of books and accounts
7. Substitution of electric for horse power
8. Development of control, 1887-1897
   Capitalization
   Leases, sales, and consolidations
   Accommodations and equipment
   Grade crossings with railroads
   The joint use of tracks
   Railway inspectors
9. The street railway an inter municipal institution
10. The special committee on street railways, 1898
CONTENTS

11. Question of commonwealth or municipal control ........................................ 121
12. The granting and the revocation of locations ............................................. 121
13. Question of conditional grants ................................................................. 122
14. Question of revocable or term franchises ................................................ 123
15. Question of taxation .................................................................................... 124
16. Control over fares ....................................................................................... 125

CHAPTER IX

Gas and Electric Light Works

I. The Development and Control of Gas and Electric Light Works .................. 127
   Incorporation of the Boston Gas Light Company, 1823 ............................ 127
   General incorporation law, 1855 ................................................................. 127
   Inspector of gas meters and illuminating gas, 1861 ................................. 128
   Control over gas companies prior to 1885 ............................................... 128
   Establishment of the gas commission, 1885 .............................................. 128
   Development of electric lighting, 1880–87 ............................................... 129
   Control of the gas commission extended to electric light companies, 1887 . 129
   Development of municipal ownership ......................................................... 129

II. The Gas and Electric Light Commission ....................................................... 131
   Organization ................................................................................................. 131
   Control in the interest of publicity ............................................................. 131
   Control over the granting of franchises .................................................... 132
   Consolidation of gas with electric light companies .................................... 133
   Control over capitalization ........................................................................ 134
   Compulsory service .................................................................................... 135
   Control over the price and quality of the light ......................................... 135
   Enforcement of the law .............................................................................. 136
   Question of municipal or state control ....................................................... 136

CHAPTER X

The Civil Service Commission

Development of the merit system .................................................................... 138
The civil service commission, establishment and organization .................... 140
Authority of the commission ......................................................................... 140
Methods adopted ............................................................................................ 141
Extension of the classified service .................................................................. 142
Relation of the state board to the municipalities .......................................... 145

CHAPTER XI

Central Audit, Local Records, State Highways, and the Metropolitan District

I. The Audit of County Accounts ................................................................... 148
   County not a vigorous institution in Massachusetts .................................... 148
   Investigations of county accounts ............................................................... 148
   Savings’ bank commissioners given supervision ......................................... 149
   Office of controller of county accounts created, 1887 .............................. 149
   Beneficial results of his work ..................................................................... 150
II. The Commissioner of Public Records

Report of the special commission of 1885
Commission continued
Office of commissioner of public records created
Results of the work of the commissioner
Proposed establishment of a central record office

III. The Highway Commission

Turnpike construction previous to the development of railroads
Influence of wheelmen for better roads
Creation of the state highway commission, 1893
Organization, duties and powers
System of highways planned and work accomplished

IV. The Metropolitan District

Period of division
Movement toward consolidation
Early attempts to provide a common system of water supply and sewerage
The metropolitan sewerage commission, 1889
The metropolitan park commission, 1893
The metropolitan water board
State commissions a temporary expedient
Recommendations of the special commission of 1896
Need for consolidation of many of the municipalities

CHAPTER XII

Theory of the Relation of Commonwealth to Municipal Activity

Each has a distinct individuality
Need for a general grant of power to the municipality
Distribution of functions
The municipality as the agent of the state
Aid and regulation of the municipality, as such
CHAPTER I

INTRODUCTION

Public administration in Massachusetts may be divided into two great periods; (1) the period of settlement and decentralization, and (2) the period of the elimination of distance and centralization. The first movement began with the settlement of the colony, was at its height during the eighteenth century, and came to an end during the first half of the present century: the second had its beginnings in the first half of the present century and still continues.

1. Period of Settlement and Decentralization. The first was a period of expansion: population was spreading over the outlying territory. From 1700 to 1770, one hundred and sixty-eight new towns were incorporated.¹ Within the town a process of decentralization and division was going on. When a settlement was made in an outlying portion of a town, it was set off as a district, a precinct or a parish.² After it became fully developed, reproducing in itself the conditions of the parent society, maintaining its own school and meeting house, it was set off as a separate town. In this way many towns have been repeatedly divided; at least eleven towns have been formed either in whole or in part from the original territory of the town of Dedham. At first the homes of the inhabitants were compactly centered about

²Channing, Town and County Government in the English Colonies of North America, pp. 36, 37.
the mill, the school and the meeting house,¹ and each townsmen had, not too distant for oversight, his acres of meadow, upland, tillage, and woodland.² But when concentration for defense was no longer necessary the farming population spread out over a wider area. Many of the new agricultural towns had no center of population, the homes of the inhabitants being widely scattered upon their respective farms. In others population was grouped about a number of isolated hamlets, but there was no main nucleus of population. It now became inconvenient for all the townsmen to send their children to a central school, or for them to attend a central church. Gradually, therefore, the town administration was largely decentralized. School districts, road districts and parishes were formed, and many of the functions formerly performed by the general town meeting were now turned over to the inhabitants of the different districts.

The same movement is seen in the central administration. The functions of the central administration were chiefly military and judicial. At first these matters were centrally administered by the general court, the governor and his assistants. But as the settlements became scattered and communication was very difficult, it was found inconvenient to administer all these matters from a single center. Accordingly the colony was divided, first into court districts, then into military districts, and finally, in 1643, the shire or county was formed.³ Legislation continued to be centralized, but the laws centrally enacted were now administered by local town and county officials. The difficulties of transportation and communication were such that efficient central

¹ For better defense in case of attack by the Indians, the general court forbade the building of dwellings distant more than half a mile from the meeting house. *Colony Records*, v. 1, p. 181.
³ Channing, *op. cit.*, pp. 34, 35.
control was out of the question. Decentralization came because under the conditions local administration was more efficient than central.¹

Nevertheless this was a most unsatisfactory condition. The towns paid but little attention to many statutes of the legislature. In order to bring them under control, the statutes went more and more into detail, prescribing minutely the duties of each officer and affixing penalties for non-compliance. Nevertheless the enforcement of general laws continued practically to be a matter of local choice. But these detailed statutes had indirectly a very serious effect upon the position of the town. The town was originally not an authority of specific and enumerated powers, but of general powers. The towns at first sprang up and attended to the ordering of their own affairs without the authorization of the general court. The law of 1635 merely recognizes existing practices. It gives the towns control over their own organization and power to make “such orders as may concern the well ordering of their own towns, not repugnant to the laws and orders here established by the general court.”² The towns were autonomous.

With the decentralization of the commonwealth administration and the consequent attempt to control local officials in the administration of general laws, all this was gradually changed. The detailed statutes definitely fixed the organization of the town and the duties of many of its officers. As the habit of legislative regulation grew stronger, the legislature no longer distinguished clearly between general interests and those which were purely local, but regulated all matters indiscriminately. The towns once autonomous gradually became so bound up in the meshes of detailed legislation

¹ In 1820 Maine, formerly a part of Massachusetts, became a separate state.

² Colony Records, v. 1, p. 172.
that they could neither make any change in their organization nor undertake any new function without express authorization of the legislature. The town instead of being an authority of general powers became an authority of enumerated powers.¹

2. *The Elimination of Distance and Centralization.* Early in the present century great dynamic forces were set at work, which were destined to bring about a complete reconstruction of the existing social structure. Of these, improvements in transportation and communication were the most vital. The movement began in Massachusetts with the construction of turnpikes between the larger towns; then followed, in quick succession, the steamboat, the railroad and the telegraph. These were soon followed by the horse railway, cheap postage, the telephone, the electric railway and the bicycle. The tendency of the railroad, the telegraph and cheap and quick postal service was to bring about a concentration which was attended by the congestion of population in cities and the depopulation of the rural towns. The electric railway, the telephone and the bicycle came to counteract these evils; while their tendency is strongly toward the centralization of business, it is also toward the diffusion of habitations.

These great socializing forces, going hand in hand with the development of the factory system and improvements in machinery, made possible a vastly higher organization of society than was possible under a stage-coach regime. The existing structure had to be transformed; labor and capital had to be withdrawn from their isolated employments and concentrated in large centers, in order to reap the advantages

¹The rule at present is that every exercise of authority on the part of a city or town must rest either on some express statutory provision, or upon long continued custom and usage. A few municipal powers have never become statutory; they are survivals of a time when the municipality had a general grant of power. See Spaulding v. Lowell, 23 Pickering, 71, 77, 78.
of the greater division of labor and co-operation now made possible. The result was a movement of labor and capital, of population and wealth, from the country to the city. Moreover, in the localization of the agricultural industry, resulting from the opening up of the fertile plains of the West, many farmers were compelled to abandon their farms and move to the West or to the city. Since about 1860 many of the small towns have declined steadily; while the cities have grown as steadily and at a much more rapid rate. In 1890, 143 out of a total of 351 cities and towns, showed a smaller population than in 1865. There were 134 towns in which the annual product derived from agriculture exceeded that derived from manufactures; and these towns contained a population of 156,408 in 1865, and of 147,823 in 1890, a decline of 5.49 per cent. The following table gives the number of towns showing a decline in population during each of the decennial periods, from 1865 to 1895:

<table>
<thead>
<tr>
<th>Decennial Period</th>
<th>Total number of cities and towns</th>
<th>Towns showing a decline in population</th>
<th>Aggregate decline</th>
<th>Percentage decline</th>
</tr>
</thead>
<tbody>
<tr>
<td>1865-75</td>
<td>342</td>
<td>142</td>
<td>106,361</td>
<td>34.38</td>
</tr>
<tr>
<td>1875-85</td>
<td>348</td>
<td>153</td>
<td>34,675</td>
<td>13.10</td>
</tr>
<tr>
<td>1885-95</td>
<td>353</td>
<td>143</td>
<td>29,426</td>
<td>13.08</td>
</tr>
</tbody>
</table>

In 1790 less than five per cent. of the population lived in cities or towns of over twelve thousand; by 1855 the number had increased to forty per cent., and in 1895 it was sixty-five per cent. This is shown by the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of cities and towns of more than 12,000 inhabitants</th>
<th>Proportion of total population</th>
<th>Year</th>
<th>Number of cities and towns of more than 12,000 inhabitants</th>
<th>Proportion of total population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1790</td>
<td>1</td>
<td>.048</td>
<td>1855</td>
<td>14</td>
<td>.360</td>
</tr>
<tr>
<td>1800</td>
<td>1</td>
<td>.058</td>
<td>1865</td>
<td>15</td>
<td>.398</td>
</tr>
<tr>
<td>1810</td>
<td>2</td>
<td>.098</td>
<td>1875</td>
<td>19</td>
<td>.506</td>
</tr>
<tr>
<td>1820</td>
<td>2</td>
<td>.107</td>
<td>1885</td>
<td>27</td>
<td>.592</td>
</tr>
<tr>
<td>1830</td>
<td>2</td>
<td>.123</td>
<td>1895</td>
<td>32</td>
<td>.656</td>
</tr>
<tr>
<td>1840</td>
<td>4</td>
<td>.191</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Economic reorganization necessitates political reorganization.

First. The economic organization has become vastly more complex, and manifestly the complexity of the political organization must keep pace with the complexity of the relations that it is its function to regulate. A countless number of new wants have arisen, most of which have been supplied by private enterprise, but many have required the direct or the indirect intervention of government. Under eighteenth century conditions the degree of technical and scientific knowledge required for both industrial and public administration was comparatively slight; now the highest technical and scientific service is required for the proper administration of both public and industrial affairs.

Second. Progress in the elimination of distance has tended toward centralization in public administration, no less than toward the centralization or organization of industry. The benefits of increased specialization can usually be obtained only by a more comprehensive organization, by a wider market or a larger administrative district.

Third. The circle of common interests has in many cases
been greatly extended. That which was the common interest of the district has become the common interest of the town; the common interest of the town has become that of a number of towns, or of the entire commonwealth; the common interest of the commonwealth has become that of a group of commonwealths or of the entire nation.

These changes demanded a complete political reorganization; a reorganization of the internal affairs of the municipalities and the commonwealth, a redistribution of functions between the municipalities and the commonwealth, and a readjustment of territorial lines. It was now that the movement that has been noted in the preceding period, the decentralization of state administration and the change in the position of the municipality from an authority of general to an authority of enumerated powers, became a factor of tremendous importance. This reorganization, which might have taken place with something of the ease and promptness with which the industrial reconstruction was effected, was effected but partially and tardily. The readjustment of the municipal organization demanded by the rapidly changing conditions, instead of taking place automatically with the changing needs of the municipality, was brought about, if at all, by the tardy and arbitrary methods of special legislation. The proper subjects of commonwealth administration and supervision had greatly increased; but the commonwealth, instead of directly administering or supervising these matters through its own officials, continued for a time its policy of devolving their administration upon local officials. The hands of both the municipalities and the commonwealth were thus effectually tied; neither was autonomous. The municipalities were dependent on the commonwealth legislature for the exercise of all legislative power; the commonwealth was dependent on municipal officials for the administration of its laws. Legislation was centralized and administration decentralized.
It is this condition that is believed to be a prime cause of the general disorganization throughout the United States, in commonwealth and especially in municipal government. This study of Massachusetts administration is presented because it is believed that this state has made the greatest progress towards a rational solution of the problem. As we have seen that the evil condition was brought about by the decentralized administration of matters of general concern and regarding which there was not a complete identity of interest between the municipality and the commonwealth, it is obvious that the first step in its removal must be a centralization in the administration of all such matters. Until this is done it is premature to demand municipal home rule; the legislature must continue to interfere continually in the organization and administration of municipal affairs. Massachusetts has made considerable progress in the direction of a more centralized administration; and with a clearer appreciation of the problem it would soon be ripe for the granting of a large sphere of autonomy to its municipalities.
CHAPTER II

PUBLIC SCHOOLS

The evolution of the public school administration naturally divides itself into the two grand periods that have already been noted. During the first period there was little attempt at central regulation, and local control gradually passed from the towns to the districts. During the second period a considerable degree of central supervision and regulation has been developed and the district system has been abolished.

1. Period of Decentralization.

For nearly twenty years after the settlement of Salem in 1628, no law was passed by the general court relating to the establishment and maintenance of schools. Not until 1647 were the towns required, or even expressly authorized by law, to maintain schools. Yet previous to this time schools had been voluntarily established in all the principal towns. Boston established a school in 1635. The school system thus voluntarily established was soon recognized by the general court as a matter not purely of local but of general concern.

The school law of 1647 is concise but strong. It requires simply that each town of fifty householders shall maintain a school for the teaching of reading and writing, and that each town of one hundred householders shall maintain a school in which students may be fitted for Harvard College. With this general requirement, the demands of central control were satisfied: each town was left free to organize and manage its
school affairs in its own way. The duty to maintain schools was imposed on the town in its corporate capacity and not upon any particular officer or board, and the schools could be supported through fees, taxes or special funds. This simple law, with a few minor amendments, sets forth the relation of the commonwealth to the public school for a period of one hundred and forty-two years.

The enforcement of the law was left to the courts. For failure to maintain a grammar school, a penalty of five pounds was imposed; the amount thus forfeited going to the support of the nearest grammar school of an adjoining town. In 1671 the penalty was doubled. In 1701 the general court, after declaring the observance of the law “to be shamefully neglected by divers towns, and the penalty therefore not required,” again doubled the penalty; and it was made the duty of county justices of the peace “to take effectual care that the laws respecting schools and school-masters be duly observed,” and county grand juries were also specially charged with the enforcement of the law. Many of the smaller towns felt the support of a grammar school to be an unnecessary burden, and persistently refused to maintain it, although repeatedly fined for their neglect. On June 17, 1718, the general court, after affirming that “by sad experience it is found that many towns that not only are obliged by law, but are very able to support a grammar school, yet choose rather to incur and pay the fine or penalty than maintain a grammar school,” ordered that the penalty be greatly increased. This attempt was also unsuccessful, and in 1789 the requirements of the law were considerably reduced.

Development of the School District. As has already been

1 *Colony Records*, v. 4, p. 486.  
2 *Province Laws*, v. 1, p. 470.  
3 The grammar school, so-called, was really a preparatory school for Harvard College.  
noted, until about the beginning of the eighteenth century, the population of the town was compactly centered about the town meeting house.\(^1\) Now a new epoch began. The settlers became widely scattered upon their respective farms. These new conditions made changes necessary in the former system, and the broad powers vested in the towns enabled them at once to meet these new demands without having to await the action of a distant legislature. As the children could no longer gather at a central school it was decided to send the school to them. The schoolmaster, instead of holding the school throughout the year at some central place, was now directed to teach for a certain portion of the year in each of several places. We thus have a moving or itinerant school. Gradually school houses were established in various places, the districts became well defined; and the school tax levied by the town, instead of being expended under the direct supervision of the town meeting and the school committee, was apportioned among the several districts. Each district was allowed to draw its share of the school money and expend it as it saw fit. This latter stage was reached in some of the towns about the middle of the eighteenth century.\(^2\)

In 1789,\(^3\) this custom which had then existed in many of the towns for almost fifty years, was at length recognized and crystalized by legislative enactment. In 1800 school districts were given power to levy taxes for the erection and repair of school houses, but the power to tax for the maintenance of schools has always remained with the town.\(^4\) In 1817 the district was made a corporation, with power to hold property, to sue and be sued.\(^5\)

The development of the district system is usually condemned as an unmitigated evil; the period in which it flourished is usually regarded as one of disintegration and

---

\(^1\) See above, p. 11.

\(^2\) Martin, op. cit., p. 77.

\(^3\) Acts, 1789, c. 19.

\(^4\) Ibid., 1799-1800, c. 66.

\(^5\) Ibid., 1817, c. 14.
degeneracy. Yet it should be borne in mind that the arguments that are now so convincing in favor of a more centralized system of school administration, have very little weight when applied to eighteenth century conditions. A more centralized system is now favored, because with it a better classification, and skilled instruction and supervision can be secured, and the wealth of the richer districts can be drawn upon to help bear the burdens of the poorer. But in the eighteenth century pedagogy was practically an unknown science and skilled supervision an unknown art; while wealth was much more evenly distributed than it is at present. Centralization under such conditions would have been as premature as would have been the organization of laborers into large factories before machinery supplanted hand labor. It would have been centralization merely for the sake of centralization, and would have been gained at the expense of individual vigor and future progress.

2. Period of Centralization.

The law of 17891 was the most detailed school law that had yet been enacted. For the most part, however, it was simply a codification of practices and customs that had been freely developed in the towns and districts. Early in the nineteenth century there was a marked development of interest in education. Industrial progress was attended by an increased interest in social conditions. The school problem began to be more carefully studied, the importance of education to the commonwealth as a whole began to be more generally recognized, and as a result legislative interference became more and more frequent.

In 1826 each town was for the first time required to choose a school committee, which was vested with the general supervision of all the schools of the town.2 Some member of the

1 Acts, 1789, c. 19.  
2 Ibid., 1825–26, c. 170.
committee was required to visit each school at least once a month, and the committee was required to make an annual report of school attendance, expenditure, etc., to the secretary of the commonwealth. In 1834 the school fund was established. The law provided for the accumulation of a fund of not more than one million dollars, the income of which was to be used for educational purposes.¹

State Board of Education. The establishment of a school fund was but a beginning. A few men became convinced that the public school system of the time was deplorably deficient, that a campaign of education and enlightenment should be instituted, and that this work could best be performed by a state board of education. By an act approved April 20, 1837, the board of education was established. It was vested with no compulsory authority and simple duties, yet its advent was an epoch-making event in the history of education.

The board was to consist of the governor, the lieutenant-governor and eight members appointed by the governor with the consent of the council. The members were to receive no compensation but the board had power to appoint a paid secretary, who was to be its executive officer. The organization of the board has since remained unchanged. Its duties, most of which were actually to be performed through its secretary, were (1) to prepare an abstract of the school returns made by the local committees; (2) to “collect information of the actual condition and efficiency of the common schools;” (3) “to diffuse as widely as possible throughout every part of the commonwealth, information of the most approved and successful methods of arranging the studies and conducting the education of the young;” (4) to make an annual report to the legislature upon the condition

¹ Acts, 1834, c. 169.
of the schools and the most practical means of improving them. Soon afterwards the board was given power to prescribe the form of school registers, and of the returns and reports of school committees, and to see that the towns before receiving their portion of the state school fund, fulfilled the requirements of the law with respect to returns, taxation and maintenance of schools. Cities, which have recently been required to provide instruction in manual training, must obtain the board's approval of the course provided.¹

It is seen, therefore, that the control which the board exercises over local school authorities is very small indeed. It is very weak as compared with the extensive powers exercised by state superintendents and boards in many other states. The board has no compulsory authority over the certification of teachers and no legal power to decide appeals and settle disputes between local officials. But diplomas from the state normal schools under the management of the board, and certificates granted by the board, may be accepted by the local school committees in lieu of a local examination. Moreover, "the services of the board as a voluntary arbiter in school questions are often sought. These questions are frequently brought before the secretary or agents of the board; both parties in an educational dispute gladly availing themselves of the advice or decision which they thus receive."²

The chief function of the board has ever been to advise, enlighten and arouse, but not to compel. It was with this conception of the true sphere of the board that Horace Mann, its first secretary, took up the work. With an enthusiasm that has seldom been equaled he began a campaign of education. The means that he employed were pub-

¹ Acts, 1894, c. 471.
lic conventions, meetings, the press, pamphlets and reports. He speaks of his task as follows:

"The education of the whole people, in a republican government, can never be attained without the consent of the whole people. Compulsion, even if it were desirable, is not an available instrument. Enlightenment, not coercion, is our resource. The nature of education must be explained. The whole mass of mind must be instructed in regard to its comprehension and enduring interests. We can not drive our people up a dark avenue, even though it be the right one; but we must hang the starry lights of knowledge about it and show them not only the directness of its course to the goal of prosperity and honor, but the beauty of the way that leads to it."

In 1850 the board was authorized to appoint agents to assist the secretary. Their main duties have been to visit schools, advise teachers, superintendents and school committees, and to deliver educational addresses. They have sometimes been called upon to address town meetings. At present the board has four agents. Mr. George A. Walton, for twenty-five years an agent of the board, says of their work:

"With the present force there exist the most intimate personal relations between the several town school officials and the agents, and hence, indirectly with the secretary of the Board. The most obscure village in the most out-of-the-way district of the state can be reached by a representative of the Board with a day's notice. Probably there is no State in the Union where the actual condition of all the public schools is so open and apparent to the State Superintendent as are ours to the secretary of the State Board. It is doubtful if in any state having a system of county superintendents

---

school interests have been as vitally affected by their supervision as have those of Massachusetts by the counsel and instruction of the agents in the last ten years."

A most important function of the board has been to serve as professional adviser of the legislature. It has repeatedly made investigations at the instance of the legislature. The legislature has seldom taken any important step in school legislation without a special report on the subject from the board. The secretary and members of the board have always stood ready to give legislative committees the benefit of their greater experience and trained judgment, and their advice has usually been sought. As the central control over local school authorities has thus far been almost entirely legislative, the function of the board in this connection has been one of prime importance.

When the board began its work in 1837, there were practically no professionally-trained teachers in the schools. The development of a trained teaching force, supervised by trained superintendents, has been a work that has constantly engaged the best efforts of the board. Through its influence ten state normal schools have been opened: two in 1839, one in 1840, 1854, 1873 and 1874, and four in 1897. In 1896 about one-third of the teachers in the public schools had received a professional training in these schools. They are under the direct control of the board. The teachers' institute is another means used by the board for the education of teachers. Attendance at the institutes is voluntary. The expense is paid by the state, and they are held under the direction of the agents of the board.

*The Downfall of the District System.* But the establishment of normal schools and institutes was the easiest part of

---

1 Report of the Board of Education, 1895–96, p. 239.
2 Acts, 1846, c. 99.
the problem. To secure the employment of trained teachers by the local authorities and their supervision by trained superintendents, was a much more difficult task. A prime requisite in the securing of professionally-trained officials is that their appointment and tenure be based entirely on merit; but instead of this being the case, appointment and tenure were usually based on kinship or friendship to a constantly changing district committeeman. Nor could efficient supervision be obtained under the district system. Each district could not afford to employ a trained superintendent for its single teacher. Moreover, with progress in the art of teaching, just as with progress in every other art or industry, specialization became necessary. In place of one teacher, teaching all grades and all subjects, modern methods require a special teacher for each grade and in some cases for each subject. This, too, is an impossibility under the district system. In any undertaking the benefits of increased specialization can usually be secured only by a more comprehensive organization. The enlargement of the local unit of school administration was, therefore, a problem of fundamental importance.

At the time the board of education began its work in 1837, the district system was almost universal. A few of the more compact and progressive towns, however, had never adopted the district system. As a rule there was but a single school in each district. The appointment and removal of the teacher were in the hands of a prudential committeeman elected by the district. The teachers appointed had first to be approved by the town committee, but this was usually merely a matter of form. Although the town could abolish the district system altogether, or if it saw fit, exercise a very strong control over the districts, in practice the districts were given the greatest possible freedom.
In 1838 a law was passed providing that the town school committee should contract with the teachers of the district schools unless the town, by a special vote in town meeting, decided that this power should be retained by the prudential committee. In the same year any two districts were authorized to unite for the purpose of supporting a school for the more advanced pupils. In 1844 the town school committee was authorized to remove any district teacher. In 1853 the school committee was empowered to discontinue the districts unless the town voted triennially for their continuance; but in 1857 the law was repealed. In 1859 the district system was summarily abolished, but at a special session of the same year the repealing act was itself as summarily repealed.

Ten years later, in 1869, the system was again abolished, only to be partially reestablished the next year by a law authorizing it upon a two-thirds vote of the town. Not until 1882 was its final overthrow accomplished, and at that time it had already been voluntarily abandoned by all but forty-five towns.

Skilled Supervision. The district system abolished, the next step was to place the schools of the town under the supervision of a trained superintendent. The first general law authorizing the employment of superintendents by town and city school committees was that of 1854. But previous to this Springfield had temporarily tried the experiment in 1840. In all, ninety-four cities and towns have taken advantage of this act. This number consists of the cities and the larger towns. To the small rural and urban towns with but:

1 Acts, 1838, c. 105.
2 Ibid., 1838, c. 189.
3 Ibid., 1844, c. 32.
4 Ibid., 1853, c. 153.
5 Ibid., 1857, c. 254.
6 Ibid., 1859, c. 252.
7 Ibid., 1869, c. 110.
8 Ibid., 1870, c. 196.
9 Ibid., 1882, c. 219.
10 Ibid., 1854, c. 314.
few schools, the expense of skilled superintendence appeared too great. To remedy this difficulty a law was passed in 1870 permitting two or more towns to unite for the purpose of employing a superintendent. Only seventeen towns, however, were formed into districts under this provision. Many doubtless would have been inclined to do so had they not been dissuaded by the somewhat difficult task of coming to an agreement with other towns. Moreover many of these small rural towns have been steadily declining in population and wealth. This being the case, progressive action on their part, especially if it involves an increase in the tax rate, can hardly be expected. To overcome this difficulty, a law offering state aid to such districts as should be formed was passed in 1888. This law as amended in 1893 provides that any two or more towns, "the valuation of each of which does not exceed two million five hundred thousand dollars, and the aggregate number of schools in all of which is not more than fifty nor less than twenty-five," uniting into a district for the purpose of employing a superintendent, shall annually receive $1,250 from the state. One hundred and fifty-one towns have taken advantage of this act. Altogether the schools of 262 cities and towns, out of a total of 353, are now under skilled superintendents, and in these schools are 93.8 per cent. of the school children of the state. Ninety-one towns are still without superintendents. The board of education holds that voluntary action has now about reached its limit, and that it is time for the state to use its compulsory authority to form these remaining towns into districts for the employment of superintendents.¹

Consolidation of the Weaker Schools. While this process of centralization in the control and supervision of the schools has been going on, a similar process has been taking place

in the schools themselves. The feeble schools are being consolidated. This consolidation has been made practicable by the towns undertaking to pay for the conveyance of children living at a distance from the school. A law authorizing this was passed in 1869. The development of electric roads has greatly hastened the movement. In recent years the expenditure for conveyance has rapidly increased; in 1889 it was $22,118; in 1897 it was $105,317. Its effects may be seen from the fact that while, in the last two years, the number of school class-rooms shows an increase of 683, the total number of schools shows a decrease of 89. This is perhaps the beginning of the end of the little red school-house.

Legislative Regulation. The commonwealth has almost from the start prescribed a certain minimum of school facilities to be maintained by the localities. During the period at present under consideration, this minimum has been repeatedly increased. Aside from the increased requirements as to studies and the length of the school year, the cities and towns have been required to furnish free text-books, and the larger cities and towns have been required to provide evening schools and manual training schools. It is interesting to note the very gradual way in which this control has developed. It has not been used to introduce new methods into the schools of the state, but to universalize existing methods. All of the improvements and reforms which have finally been made compulsory and universal, have been first adopted voluntarily by the more progressive and enterprising cities.¹

Independent Position of the School Committee. An important fact in the development of central control has been the transference from the town or city in its corporate capacity

¹ See Martin, op. cit., p. 268.
to the school committee, of almost the entire local control and authority in regard to schools. Down to 1826, the town was not required to elect a school committee. The duty of maintaining schools was imposed upon the town in its corporate capacity, and the administration of school affairs might be attended to by the town meeting itself, or delegated to the selectmen, or to a special school committee. As a matter of fact a school committee was usually appointed, but it was entirely under the control of the town meeting.

Nineteenth century legislation has wrought a complete change in the relation of the school committee to the town meeting and the city council. New powers and duties have almost invariably been vested in the school committee instead of in the town or city in its corporate capacity, as was formerly the case. Practically the only control retained by the city council and town meeting is a limited control over the expenditure of money for school purposes. In the words of the supreme court, “The power given to the school committee to contract with teachers necessarily implies and includes the power to determine their salaries. And in so doing they are not restricted to the amount appropriated by the city council.” The city council merely appropriates a gross sum for the maintenance of schools, and the work of apportioning this sum for different purposes is performed by the school committee; but the committee does not hesitate to make expenditures considerably in excess of its appropriations. This divided financial responsibility leads to constant friction between the city council and the school committee, and the placing of the schools in the charge of a superintendent or board appointed by the mayor is being

1 See above, p. 22.
2 Roberts v. Boston, 5 Cushing, 198, 207.
agitated. In some cities the school committee is the only survival of the independent board system of city government.

The School Fund. The dominant idea in the establishment of the school fund in 1834 was neither to relieve the local governments of the support of schools, nor to bring about a more equitable distribution of school burdens by taxing the wealthier localities for the benefit of the poorer. It was established as the most unobjectionable and practicable means of introducing a small amount of central supervision and control. Perhaps the most definite object in view was the securing of reports and returns from the local school committees. In 1826, school committees were required to make annual reports to the secretary of the commonwealth, but, as no penalty was provided, few towns responded. In 1832, ninety-nine towns out of a total of three hundred and five made returns; in 1833, but eighty-five reported. It was largely for the purpose of correcting this evil that the school fund was established in 1834. No town can receive any part of the income of the fund that does not make the returns required by law.

Almost from the start, moreover, the receiving of state aid has been conditioned upon the raising of a certain minimum amount by local taxation. In 1836 this minimum was fixed at one dollar for each child of school age. In 1839 the minimum was raised to $1.25, in 1849 to $1.50, and in 1865 to $3.00. In this year, also, the fulfillment of the provisions of the law in regard to the number of schools and the length of the school year was included among the requirements for

---


2 See the report of the house committee, House Doc. 16, 1833.

3 Acts, 1835, c. 138. 4 Revised Statutes, c. 23, § 66, 1836.

5 Acts, 1839, c. 56. 6 Ibid., 1849, c. 117. 7 Ibid., 1865, c. 142.
the receipt of state aid; and in 1878 the enforcement of the truancy laws by the local authorities was also added.

**Distribution of the School Fund.** At first the idea of making use of the school fund to equalize the burden of school support does not appear to have been considered. At the time of its establishment wealth was comparatively equally distributed; the disparity in the per capita wealth of the various communities, which has now become so enormous, had scarcely begun to develop. Nevertheless, the method of distribution from the start has been one which has tended to counteract existing inequalities. The law of 1835\(^1\) provides for its distribution in proportion to population, and the amount of taxes raised for school purposes. In the following year the number of children of school age was made the basis and so continued until 1866.

But notwithstanding the method of distribution the amount of the school fund was so small that its effect as an equalizer was very slight indeed. In 1836, the total amount distributed among the towns was but $16,230.57, and in 1870 but $70,637.62. In 1866 the first step towards the relief of the small towns was taken. By this act, each city and town first received seventy-five dollars and the remainder was distributed as formerly in proportion to the number of children of school age.\(^4\) This afforded but slight relief, however, and the secretary of the board of education in his report for 1872 dwells at length on the inequality in the school burdens of the various towns.\(^5\) He calls attention to the recent marked development in this inequality; producing statistics to show that during the past six years the richest communities had been growing richer, and the poorest had as a rule been

---

\(^4\) *Ibid.*, 1866, c. 208. In 1869 the law was amended so as to give each town one hundred dollars instead of seventy-five.  
growing poorer. It had become practically impossible for
the poorer towns to provide adequate educational advanta-
ges. He recommended that a state half-mill tax be levied,
and the proceeds distributed to the various towns in propor-
tion to the number of children of school age.¹

Although the secretary's plan for a half-mill tax was not
carried out, its agitation led to a revision of the method of
distributing the school fund in 1874.² By this law all towns
with a valuation exceeding ten million dollars, were deprived
of their share in the school fund. In 1875 the valuation of
eighteen of the largest cities and towns in the state exceeded
this amount. This principle of using the school fund for the
benefit of those towns whose needs are greatest was further
extended in 1891. By this law the entire amount is distrib-
uted among the towns that have a valuation of not to exceed
three million dollars. In 1896 the valuation of ninety-eight
cities and towns, containing 82.2 per cent. of the population
of the state,³ exceeded this amount, and they consequently re-
ceived no part of the income of the school fund. Since they
receive no aid, the state control, which in the case of the
other towns is imposed as a condition of state aid, does not
exist. But this is of no practical importance, as the con-
ditions upon which state aid is granted are so simple that
they are voluntarily complied with by all but the poorest
and most unprogressive towns.

Special Aid to Poor Towns. Aside from the distribution
of half the income of the school fund among the poorer
towns, the state grants them various special aids. We have
already noted the law of 1888 by which unions of two or
more towns of a valuation of not exceeding two million five

¹ A half-mill tax upon the valuation of 1871 would have yielded $748,675.84.
In the same year the amount raised by local taxation for ordinary school expenses
was $3,272,335.33.
² Acts, 1874, c. 348.
³ According to the census of 1895.
hundred thousand dollars are assisted in the employment of a superintendent. By the law of 1896, as amended in 1897, towns of less than $350,000 valuation are assisted in the payment of teachers. By a law of 1895, any town whose valuation does not exceed $500,000 and which does not maintain a high school, is entitled to be reimbursed by the state for the expenses of transportation and tuition of children of the town attending the high school of another town.

A similar policy has been adopted by the state in aiding the poorer towns in the establishment of free public libraries. In 1890 there were 103 towns in which there were no free libraries. They were almost without exception small towns with a slender valuation, and in 67 of them there had been a decline in population during the preceding five years. The law of 1890, as amended in 1892, provides for the appointment of a free public library commission. It is the duty of this commission to give advice to local librarians and trustees, and to expend one hundred dollars in the purchase of books for each town that will establish a library and annually appropriate a certain amount for its support. The commission is also authorized a expend a like amount in aid of any town whose valuation does not exceed six hundred thousand dollars, that already maintained a free library previous to 1890, under similar conditions with respect to an annual town appropriation. As a result of this policy, there are at present but ten towns, containing but three-fifths of one per cent. of the population of the state, without free library privileges.

The state, therefore, evidently recognizes a dependent

1 See above, p. 29. 2 Acts, 1896, 408; Acts, 1897, 498. 3 Acts, 1895, 212.
5 Acts, 1890, 347; Acts, 1892, 255.
6 Report of the Free Public Library Commission, 1897.
class of municipalities. It recognizes that towns that are steadily growing poorer, that each recurring census finds with a decreased population and valuation, stand in need of special aid and control. The cities and the large growing towns can be relied upon to provide for education in an adequate and satisfactory manner. The larger cities have always been the first to adopt new methods; it is here that specialization and organization in educational methods have been most highly perfected. It has been the policy of the state, through the efforts and authority of the board of education, through compulsory laws, and through financial assistance, to bring to the poorer rural towns the methods which have already been voluntarily adopted and tested in the larger and more progressive cities and towns. State control is here primarily a problem of the country and not of the city.

Conclusion. Except in the case of the dependent class of towns there does not appear to be any great demand for increased legislative or administrative control. The main field of the state board, aside from its control over these towns that are the recipients of state aid, would seem to lie (1) in collecting statistics and information for the use of the local authorities and of the state legislature; (2) in undertaking investigations for the legislature and in serving as its professional adviser; (3) in giving advice and counsel to local authorities, (4) in establishing schools and institutes for the professional training of teachers, and (5) in the examination and certification of teachers. Its function is predominantly that of rendering services to the localities rather than the exercise of direct control over them. But this condition may be modified.

We have already followed the enlargement of the local unit of school administration from the district to the town and from the town to a union of towns under a single super-
intendent. We have seen that this centralization has been the result of two forces, (1) the desire to equalize the burden of school support, and (2) the desire to secure the benefits of classification and special training.

1. Whether the demands of increased classification and special training require any further centralization is doubtful. Were higher education a governmental function in Massachusetts it would undoubtedly be a function of the state government. Secondary education is in a more doubtful position. Many small towns do not attempt to maintain high schools, and in others the high schools are weak and inefficient. Here there is a demand for consolidation; for an enlargement of the unit of administration. The state has already done something to obviate the difficulty by paying for the tuition and transportation of children of a town in which there is no high school, attending the high school of a neighboring town. Secondary education may become the field of a considerable amount of central administrative control. As to elementary education, the interests of classification and special training do not at present appear to demand any further centralization in its administration.

2. That the desire to equalize the burden of school support will lead to further centralization is more probable. In the distribution of its school fund the policy of Massachusetts differs materially from that of other states. Instead of distributing a very large amount of money in proportion to wealth or population to all its cities and towns, Massachusetts distributes a very small amount among those towns only that are unable to provide adequate educational facilities. But as the entire fund distributed in 1897 amounted to but $86,968.95, while the total amount raised by local taxation for ordinary school expenses was $7,736,815.48, it will be

1 See above, p. 35.
seen that state aid does very little toward overcoming the great disparity in the ability of the various communities to support schools. The demand that this inequality shall be equalized by a state school tax has therefore become strong and persistent. If this movement is successful it will probably be followed by increased central administrative control. If the state collects a general tax, it cannot relieve itself of the responsibility for its proper application.

What then is the true relation of the commonwealth to the public school? In the first place, it must be recognized that the school system is a matter in which the entire commonwealth is vitally interested. This has been continuously recognized ever since the law of 1647, imposing upon the towns the obligation of maintaining schools. In this capacity, therefore, the municipality acts as the agent of the commonwealth. It performs a service for the commonwealth. Its position is, in this respect, analogous to that of a railroad corporation—a private corporation for the performance of a public function.

This being the case, the question of direct central management or of central supervision will turn largely upon whether there is or is not a substantial identity between the interests of the municipality in the maintenance of schools and the interests of the commonwealth. If their interests are entirely antagonistic, direct central management is the logical solution. The strongest kind of central administrative supervision will not suffice to bring about the most efficient management. If their interests are identical in most and antagonistic in but a few respects, a more or less extensive degree of central control is probably the best solution. In school administration the interests of most of the municipalities are substantially identical with those of the commonwealth. It

1 In 1897 a bill providing for a mill school tax passed the legislature, but was vetoed by the governor.
is only in the decaying, dependent towns that even a slight antagonism can be said to exist. There, a considerable degree of central control is doubtless required. As to the other cities and towns, the function of the state board would seem to lie in aiding them, as at present, with information and advice, in inspecting their work and requiring reports in the interest of publicity, and in directly interfering only in occasional cases of gross neglect of duty. Though it is probably expedient to give the state board very broad powers over the local authorities, in order to avoid the necessity of detailed statutes or special legislation, a very sparing use of such powers is most desirable. Under such a system local interest in the schools is preserved. The system is not reduced to uniformity and rigidity. That inequality exists in school conditions, which is the greatest incentive to improvement and progress. Each municipality profits by the successes and failures of its neighbors. All the benefits of a healthy individualism are secured.
CHAPTER III

PUBLIC POOR RELIEF

In this chapter it is proposed to show the evolution in public charity organization. In the first period of development, effective organization is almost entirely lacking; the central authority is exercised as much in the interest of town independence as of real central control. Here will be noted the laws making it increasingly difficult to gain a "settlement" in any town, and the consequent development of a class of "state paupers." Then the movement toward a better organization will be followed, showing the less stringent settlement laws, central administrative supervision, and the beginnings of a more scientific differentiation between the state and the towns of the work of caring for the poor.

1. Period of Decentralization.

Previous to 1639 the towns appear to have done just as they pleased in the matter of the admission of persons to a settlement. Each town took care that no one who seemed likely to become a public charge was admitted. In 1639 the general court gave to any two magistrates the power to determine all differences concerning the settling of poor persons, and "power to dispose of all unsettled persons into such towns as they shall judge to be most fit for the maintenance of such persons and the most ease of the country." In 1655 there was a return to the former system, each town being authorized to refuse admission to persons coming from other towns, and new comers might be warned to
depart at any time until they were formally admitted as inhabitants. Four years afterwards this law was amended by providing that any person might gain a settlement by residing for three months in a town, without having been warned to depart by the selectmen or constable. The county court was empowered to hear all disputes as to place of settlement, and in case the place of settlement could not be determined, the poor person in question was to be left in the town where found, and the expense of his keeping to be paid for out of the county treasury. In 1701 the term of residence necessary to gain a settlement was lengthened from three months to one year. Finally in 1766 it was made impossible for a person to gain a settlement by any length of residence. A person desiring to become an inhabitant of any town must make known his wish to the selectmen, and his application must be approved by a vote of the inhabitants assembled in town meeting.¹

The towns were required to relieve all the poor persons whom they permitted to acquire settlements. Naturally, therefore, they were very cautious in extending to new comers the right to a settlement. Nevertheless, as there was little immigration, the number of persons without a settlement was very small. These, in case of need, were at first, as we have seen, relieved by the towns at the expense of the county. But soon the class known as "state paupers" began to develop. As early as 1675 the relief of the unsettled poor at the expense of the central government finds a precedent. As a result of King Philip's war many settlements had been broken up and their inhabitants forced to seek refuge in other towns. The general court therefore ordered that these refugees should not thereby gain a settlement in the town, and in case they required relief the ex-

pense to the town should be reimbursed from the public treasury.\textsuperscript{1} The law of 1701 regulating immigration provides that sick immigrants shall be relieved by the towns at the expense of the province.\textsuperscript{2} Relief by the towns at the expense of the province is also provided for by a law of the same year in the case of unsettled poor persons falling sick with contagious diseases.\textsuperscript{3} Again, in 1766, it is provided that poor persons who have a settlement in some other American colony shall be conveyed through the various towns by their respective constables to the border of the province, and that each town shall be reimbursed for its expense by the province.\textsuperscript{4} Finally, in the laws of 1789 and 1794, a state pauper class is definitely recognized. All unsettled paupers are to be relieved by the towns at the expense of the commonwealth.\textsuperscript{5}

The act of 1794 also made important changes in the settlement law. The law of 1766 had provided that no one could gain a settlement except by vote of the town. The act of 1794 shows a slight advance. It provides several other methods by which a settlement may be gained, the most important of which is that of continuous residence for ten years and the payment of all taxes for any five years thereof. The conditions of the time, however, demanded a much more liberal measure. A considerable immigration was setting in and improved roads made a freer movement of population inevitable. Yet this law, though ill-adapted to the comparatively immobile conditions of that time, remained practically unchanged down to 1865; adapted only to a condition of status, it remained unchanged during an age of railways.

\textsuperscript{1}See the Report of the State Board of Charities, 1864, p. 236.  
\textsuperscript{2}Province Laws, v. 1, p. 452.  
\textsuperscript{3}Ibid., v. 1, p. 469.  
\textsuperscript{4}Ibid., v. 4, p. 911.  
\textsuperscript{5}Law of Jan. 10, 1789; Law of Feb. 26, 1794.
With a considerable immigration, developing manufactures and a stringent settlement law, it is not surprising that the number of unsettled or state paupers increased rapidly. Between 1792 and 1820 the expense for state paupers increased five-fold, while the population did not double. Previous to 1820 the commonwealth reimbursed the towns for the actual amount spent by them in the support of state paupers; but in this year the maximum state allowance per week for an adult pauper was fixed at one dollar, and in the following year it was further reduced to ninety cents. During the next five years, owing to these measures and to the separation of the district of Maine from Massachusetts, the expense for state paupers decreased, but during the following five years again began to increase. By 1832 the number of state paupers had become almost as great as the number of town paupers. Accordingly, the state allowance was again cut down. It became seventy cents a week for each adult pauper in 1831, and four years later it was reduced to forty-nine cents.

Though by this means the legislature was successful in keeping down the commonwealth's expenditure for the state poor, their number increased more rapidly than ever. This condition was the result of the settlement law which was framed to meet the wants of a comparatively fixed population, but its evil results were greatly increased by the irresponsible method adopted in relieving the unsettled poor. They were relieved by the towns in which they happened to

---

1 The payments to the towns for the support of state paupers amounted to $14,424.71 in 1793, and $72,662.54 in 1820. See the Report of the Committee on the Pauper Laws, 1821.


3 The number of state poor is given as 5,927, and the number of town poor as 6,063. Ibid., p. 13.

4 Cummings, op. cit., p. 42.
be, and each town sent in its account to be allowed by the legislature.

Many of the towns had no almshouses or poor farms, and were in the habit of disposing of their poor at auction to the lowest bidder. The state poor were therefore farmed out by the state to the towns, and then sub-farmed by the towns to contractors. It was charged, moreover, that this method was largely responsible for the development of a large "wandering poor" or tramp class. There was no central supervision over the town officials, and in fact no thorough investigation and audit of the accounts which they presented to the state for payment. Many towns took advantage of this to profit at the state's expense. In 1836 a legislative committee reports that Cambridge, by employing a large number of able-bodied foreigners at road labor and in "a large establishment," and by drawing from the state an annual sum for their support, secures enough revenue to sustain its own paupers, and in addition yield a net profit of about two thousand dollars a year. As a result of another legislative investigation, "it was found that dead paupers had been charged for as living; that, during the suspension of work, whole manufacturing villages had been enrolled as state paupers; that in some small towns trifling gifts to families were made the basis of charging all their members to the state for the entire winter. Many other similar impositions were discovered."

2. Period of Centralization.

Largely as a result of these disclosures a board of "commissioners of alien passengers and state paupers" was established in 1851. It was vested with the administration of the

3 Report State Board of Health, Lunacy and Charity, 1881, p. cxxviii.
immigration laws and the supervision of the town authorities in the care of state paupers. For the latter purpose it was authorized to appoint agents to visit at least once a year all almshouses and places where state paupers were supported, in order to see that the laws were regarded and to prevent the towns from imposing on the commonwealth in their accounts for the support of state paupers. The commissioners saved $22,330.80 to the commonwealth during the first year by disallowing the illegal claims of the towns, and reduced the number of state paupers from 16,154 to 10,267.

In 1863 the board of alien commissioners was abolished and its duties transferred to the state board of charities then established. This board was given a general supervision over the state charitable and correctional institutions. In 1879 the state boards of charity and health were consolidated under the name of the state board of health, lunacy and charity. In 1886 this board was divided into a board of health and a board of lunacy and charity. A recent commission has recommended the establishment of a separate state board of insanity and of a department for children.

As at present organized the board consists of nine unsalaried members appointed by the governor and council for terms of five years. They cannot be removed by the governor and council, and the system of partial renewal is adopted.

The Care of the Poor in State Institutions. The alien commissioners in their first report recommended the erection of state almshouses for the care of the unsettled or state poor. Their recommendations were adopted by the legislature and

1 Acts, 1851, 342.
2 Sanborn, The Public Charities of Massachusetts, 1776-1876, p. cxcvii.
3 Acts, 1863, 240.
4 Report of the Commission to Investigate the Public Charitable and Reformatory Interests and Institutions of the Commonwealth, 1897.
three state almshouses were opened in 1854. The expectations of the supporters of a system of state almshouses were not fully realized. The number of state paupers continued to increase and the expense to the commonwealth was increased rather than diminished. The poor in the state almshouses were, however, upon the whole better provided for than the town poor, and some attempt at classification was made. Many people, however, were of the opinion that poor relief could best be administered by the town authorities, who were better acquainted with the needs of the poor; and it was argued that removal to a state institution usually meant permanent pauperization. A special joint committee of the legislature reported that the state almshouses ought not to be permanently maintained, and a minority of the committee were in favor either of an immediate return to the old system, or of the adoption of a system requiring "each town and city to support all of the paupers residing within their own respective municipalities."^1

The state almshouses were not abolished, but their importance has been considerably diminished by successive legislative acts, by which the administration of relief to a great number of the unsettled poor has again devolved upon the towns, while the number of unsettled poor has also been greatly reduced by changes in the settlement law.

The abuses that arose from the transportation of sick paupers to a state almshouse, led in 1865 to the enactment of a law providing that the towns be allowed three dollars a week for the support of sick state paupers. The necessity of removing all state poor to the state almshouses often led to the permanent pauperization of a person or family where a little temporary aid locally administered would have

^1Report of the special joint committee on public charitable institutions, Senate Documents, no. 2, 1859.

^2Acts, 1865, 162.
sufficed. Accordingly a law was passed permitting the local authorities to grant temporary aid to state paupers, but only under the strict supervision of the state board of charities.\textsuperscript{1} The number thus temporarily supported by the towns was 30,363 in 1897, while the total number of state poor in state institutions was but 3,199.\textsuperscript{2}

In 1865 it was estimated that half of the people of the state had no settlement in any of its cities or towns. Many, moreover, though having a settlement, had it in some other city or town than the one in which they were living.\textsuperscript{3} Prior to 1865 no material change had been made in the settlement laws since 1794. In that year a "military settlement" law was passed. As subsequently amended, it declares that any person who has enlisted in the service of the United States during the Civil War, as a part of the quota of any city or town, has thereby gained a settlement in that city or town. In 1874 the law was so amended that any person residing in a place five years, and paying all taxes for any three years thereof, gained a settlement. Several other more unimportant amendments have been made at various times. As a result, the proportion of persons in the state having no settlement has been greatly reduced. The average number of state poor in institutions was 2,591 in 1865, and 3,199 in 1897, while during the same period the average number of city and town poor in institutions increased from 3,361 to 8,304.\textsuperscript{4} The recent special commission recommends a

\textsuperscript{1}Acts, 1877, 183; Acts, 1891, 90.

\textsuperscript{2}See the Report of the State Board of Lunacy and Charity, 1897, pp. xlv., xlv.

\textsuperscript{3}A settlement once gained in a Massachusetts town continues, and descends to offspring through succeeding generations, and is only defeated by the gaining of a settlement in another town in the state. Report of the Board of Health, Lunacy and Charity, 1880, p. xix.

\textsuperscript{4}Report of the State Board of Lunacy and Charity, 1897, p. xlv.
further amendment of the law, providing that a settlement may be gained by a continuous residence of three years.1

While the experiment of state almshouses was not entirely successful, and there has since 1865 been a considerable decentralization in the administration of ordinary poor relief, there has also been a movement toward a centralized administration of certain special kinds of relief, particularly the care of dependent children and of the insane poor.

Aside from the juvenile offenders, the state board had under its direct control in 1897 1,822 dependent children. This number consists of all abandoned, neglected or dependent infants under three years of age; and of neglected or dependent children between three and sixteen years of age, growing up without salutary control, who have no legal settlement. 512 children are cared for by the various cities and towns. The state board recommends that all neglected and dependent children under sixteen years of age be maintained at the expense of the state and under its direct control.2

Of the 6,702 pauper insane in 1897, 5,279 were in state asylums or boarded in families under state control; 431 were in city asylums; 939 were in town almshouses and 53 in families under town control. The state bears the expense of caring for the unsettled poor, but the cities and towns pay the state for caring for their settled poor in the state asylums. On account of the expense of keeping their poor insane in state institutions, many towns keep their harmless chronically insane in their almshouses. Often in this way the sane are kept with the insane with no attempt at separation. In order to aid the small towns in maintaining their insane poor in state asylums, an act of 1892 provides that towns having an assessed valuation of less than $500,000 may be partly or

---

1 Report of the Commission on Charitable and Reformatory Interests, 1897, p. 35.
2 See the Report of the Commission on Charitable and Reformatory Interests, 1897, p. 8; Report of the State Board of Lunacy and Charity, 1897, pp. 186–7.
wholly reimbursed for the support of their insane by the state. In 1897, forty-seven towns received aid under this provision. The law leaves it to the governor and council to determine what proportion of the expense shall be reimbursed; and, by their recent ruling, towns having a valuation of less than $200,000 are allowed their expenses in full; towns having a valuation of between $200,000 and $300,000, three-quarters of their expenses; and towns having a valuation of between $300,000 and $500,000, half of their expenses. The recent special commission strongly recommends that all the insane poor be cared for in state institutions at the expense of the commonwealth, and it seems probable that the recommendation will soon be adopted.

There are certain apparent advantages in a centralized administration of poor relief. The maximum efficiency at the lowest per capita cost can thus be secured. It permits the classification of dependents in accordance with their different needs. The young may be separated from the old, the able-bodied from the infirm, the vicious from the worthy, the sane from the insane. Separate institutions may be constructed to suit the varying needs of these different classes. By this division of labor, also, the best administrative talent and the best methods are universalized. But while centralized administration has its advantages, there is a certain kind of poor relief that cannot advantageously be adapted to it. Temporary relief can best be administered locally. A little temporary relief will often suffice, where removal to a distant state institution would result in permanent pauperization. In the centralized administration of the relief of dependent children and the insane poor, we see the

1Report of the State Board of Lunacy and Charity, 1897, p. 181.
beginnings of a differentiation between centralized and decentralized poor relief. It seems probable that this differentiation will continue, and the aged poor, the infirm, and other classes will be cared for in the state institutions, while local relief will be confined more and more exclusively to relief of a temporary nature.

Central Administrative Supervision of Local Poor Relief. Annual reports were first required of local overseers of the poor in 1837. The towns, under certain restrictions, may grant aid to the sick state poor (Public Statutes, chap. 86, sec. 25), to those in need of temporary assistance (Acts, 1891, 90), and in cases where the wife has a legal settlement but the husband has not (Public Statutes, chap. 86, sec. 31). The state also reimburses the towns for the burial of state poor (Public Statutes, chap. 84, sec. 17).

Since 1851 the central board has had charge of auditing the accounts of the towns for the care of the state poor. The towns are required to notify the state board of all cases in which relief is given to state poor. The state board then sends an agent to investigate the case; to see that it is a proper case for relief, to investigate the settlement of the pauper, and to decide whether he shall be relieved by the town or removed to a state almshouse. The bills presented by the cities and towns are also carefully investigated, with the result that the state annually saves a large amount of money. In 1897 the claims of the towns amounted to $173,862.36; this amount was reduced by the investigations

1 Act of April 18, 1837.

2 The towns, under certain restrictions, may grant aid to the sick state poor (Public Statutes, chap. 86, sec. 25), to those in need of temporary assistance (Acts, 1891, 90), and in cases where the wife has a legal settlement but the husband has not (Public Statutes, chap. 86, sec. 31). The state also reimburses the towns for the burial of state poor (Public Statutes, chap. 84, sec. 17).
of the board to $125,107.49, a saving to the state of $48,754.87.²

Many towns have no almshouses, their dependents being placed in private families or boarded in the almshouses of other towns. Previous to 1897, it had been the custom of a few towns to auction off their unfortunate poor to the lowest bidder at town meeting. In a few other towns the selectmen placed the poor in the private families offering to care for them at the lowest price. To do away with this reprehensible practice, a law was enacted providing that the state board may determine in what manner overseers of the poor shall make contracts for the support of town paupers, and may visit and inspect all places in which paupers are so supported.²

It is the duty of the state board, at least once a year, to visit all neglected and dependent children supported by the cities and towns, and to investigate their condition.³ When the overseers of the poor of cities and towns fail to comply with the law forbidding the retention in almshouses of pauper children, the authority vested in the overseers may be exercised by the state board to the exclusion of the overseers.

It is the duty of the state board to inspect all places in which insane paupers are kept. As most cities and towns have some mild cases of insanity in their almshouses, practically, this results in the inspection of all local pauper institutions. Where insane persons are found to be improperly cared for, committal to a state asylum may be required. Further than this the board has no compulsory authority. Abuses noted by the state visitor are, however, called to the attention of the local authorities, and their correction often follows.

³ Report of the State Board of Lunacy and Charity, 1897, p. 48.
² Acts, 1897, 374.
⁴ Public Statutes, chap. 89, sec. 53.
Condensed reports of the state agent on the conditions existing in each city and town pauper institution are published in the annual report of the state board, and the abuses thus brought to the attention of the public and the legislature. Publicity is perhaps the greatest need in regard to local poor relief; and there is at present much room for improvement in that respect. At present there is probably less general knowledge concerning the administration of local poor relief than concerning any other important branch of local administration. Almost every family has its representative in the schools and everyone uses the streets. All are directly interested in good schools and clean streets, and are usually able to detect inefficiency in their administration. They are thus able to hold officials to a strict responsibility. With the almshouse the case is very different. Very few have ever visited it. Only the poor unfortunates who inhabit the almshouse have any personal knowledge concerning its administration. Unless its condition is investigated and reported to the people by some special agency, it is impossible for the people to hold the overseers of the poor and the keeper of the almshouse to a strict account. Publicity is the sine qua non of political responsibility.

It seems probable that in this case the function of investigating and reporting can best be performed by the commonwealth. The agent of the commonwealth, by devoting his entire energy to the work of investigating local almshouses, becomes an expert. By knowing the condition of all the almshouses, the best, as well as the poorest, he is able to judge better the merits and faults of each. His work, moreover, will have the very essential quality of being considered reliable: A local investigation can seldom escape the suspicion of being prejudiced and partial—there is always room for the suspicion that it has been influenced by personal or partisan considerations. The state agent having no personal
interest in the conditions or individuals concerned, can be
trusted to interpret the facts impartially.

The very unsatisfactory condition of poor relief in the
small, declining towns seems also to demand increased cen-
tral interference. One hundred and thirty-six towns main-
tain no almshouse; their dependents being placed in private
families or boarded in the almshouses of other towns. The
number of towns without almshouses is greater than it was
in 1864—the year after the establishment of the state board
of charities. Then 116 towns were without almshouses; the
number has since increased to 136. These are as a rule the
smaller towns. Many of them have been declining steadily
year after year in population and wealth. It is not to be ex-
pected that each will maintain an almshouse for its few de-
pendents, and it is not desirable that it should. The inter-
ests of efficiency and economy demand a consolidation of
existing almshouses, rather than a further increase of their
number. The towns already possess the authority to unite
for the purpose of maintaining a common almshouse, though
but two such districts have as yet been formed. All the
towns now without almshouses might be grouped into dis-
tricts—in the same manner that they are now being grouped
into districts for the purpose of employing school superin-
tendents. If the county in Massachusetts held the same
important position that it holds in all other states outside of
New England, the problem would more naturally be solved
by adopting the plan of county almshouses.

What, then, is the true relation of the commonwealth to
public poor relief? In the first place, as in the case of pub-

1 The number of almshouses was but two less in 1897 than in 1864, but the
number of cities and towns had increased from 334 to 353. See Report of the
State Board of Lunacy and Charity, 1897, pp. 103-4.

2 Public Statutes, c. 33, § 5.

3 See above, p. 28.
lic education, we must recognize that poor relief is a matter not merely of local but of general concern. As we have seen, there are classes of dependents that can best be cared for in state institutions. Here the commonwealth should have a large sphere of activity entirely independent of the local authorities; the necessity for a centralized administration is unquestioned. The relation of the commonwealth to that class of poor relief which from its nature requires to be locally administered, is a much more difficult problem. We cannot say, as in the case of the public school, that the interests of the municipality and the commonwealth are substantially identical. A town that maintained no school would suffer from the fact that its most progressive inhabitants would move to a place where school advantages could be obtained; but if a town maintains no almshouse, or can shift the support of its paupers upon others, it may prevent the coming of undesirable classes and at the same time save itself a considerable expense. The immense floating population of the present time also greatly complicates the problem. Moreover, the tramp evil can be effectively dealt with only by concerted action throughout the state. If the local authorities are to administer poor relief, therefore, they must be subjected to a strong central control; the entire system of poor relief throughout the commonwealth must be organized through a central board.
CHAPTER IV

PENAL INSTITUTIONS

At first the punishment and confinement of criminals in Massachusetts was attended to either by the town or by the central government. The county did not exist. It was only developed after the expansion of population had, owing to the difficulties of transportation and communication, made it inconvenient to administer some of the functions of the general government from a single center. In this way the maintenance of prisons was gradually shifted from the central government to the counties. It was inconvenient to bring all prisoners to Boston for confinement, for the same reason that it was inconvenient to transact all judicial business from that center. But with improved facilities for transportation, better roads, railroads and inter-municipal electric railways, the present century has witnessed a movement in the opposite direction. County prisons are being superseded by state prisons.

1. Period of Decentralization.

The Puritans had comparatively little use for prisons. The stocks, the pillory, and the whipping-post were relied upon for the punishment and correction of minor offenders. These, together with a "cage" for temporary confinement, comprised the penal institutions of the town. More serious offenses were punished by expulsion from the colony, and death was the penalty for a great number of crimes. The prison or house of correction of that time bears a closer resemblance to the town work-house and state farm of the
present than to present county houses of correction and state prisons.

In 1632 the general court ordered the first general prison to be built at Boston. Not until twenty years afterwards did it become necessary to provide for a certain degree of decentralization. In 1652 the general court ordered that,

"Whereas there is only one prison in this jurisdiction, and [it is] very inconvenient to send persons so far remote to the prison at Boston, when there is occasion, it [is] therefore hereby ordered that there shall be another prison erected in this jurisdiction, and that to be at Ipswich; and there shall be allowed by the country forty pounds for the effecting the same; and the work to be carried on and managed by the selectmen of the said town." Nine years afterwards, for the same reasons, it was ordered that Springfield and Northampton "be allowed their country rate, for this year ensuing, for and towards the erecting of a prison or house of correction at Springfield."

With the institution of separate prisons, in the various counties of the colony, their support and management, except in the case of the prison at Boston, at once became the function of the county courts. The prison at Boston remained in part a general prison for the whole colony until the changes under the new charter of 1692. The prison itself and the house for the keeper were originally built by the colony; and the prison keeper was appointed and paid by the general court. Soon, however, the appointment of the keeper was transferred to the county of Suffolk, and the expense of repair and reconstruction was divided between the county and the colony.

---

1 Colony Records, v. 1, p. 100.
2 Ibid., v. 3, p. 260.
3 Ibid., v. 4, pt. 2, p. 21.
4 See Ibid., v. 2, pp. 148, 195; v. 3, pp. 190, 232; v. 4, pt. 2, pp. 120, 137, 575; Province Laws, v. 7, pp. 33, 641.
2. Period of Centralization.

Establishment of State Prisons. There was no general prison from 1692 to 1785. For the employment and secure confinement of hardened criminals sentenced for long periods or for life, the insecurely constructed county jails became notoriously inadequate. Accordingly, in 1785, Castle Island in the harbor of Boston was made a place for the confinement at hard labor of convicts of the worst class.¹ The experiment was not entirely satisfactory, the island proving no more secure as a place of confinement than the county jails.² In 1798 Castle Island was ceded to the national government, and it became necessary to provide some other place for the confinement of convicts.³ In 1803 it was decided to build a state prison at Charlestown. This was opened in 1805.

About 1820 a considerable interest in the improvement of prison conditions was aroused. With the exception of the long term convicts who were sent to the state prison, the convicted and the unconvicted, male and female, young and old, hardened criminals and those in prison for the first time, men of all conditions and of all degrees of crime, were crowded together in ill-constructed unsanitary prisons with no possibility of a proper classification. The evils of this condition of affairs were enormously increased by the fact that no employment was provided for the prisoners.

To be sure, ever since 1655, the law had continuously provided that in addition to a jail, each county should maintain a house of correction for the employment of convicted prisoners, but during all these years this law had remained a dead letter. First passed in 1655,⁴ it was substantially renewed under the province in 1699,⁵ under the commonwealth

¹ Laws of March 14 and 15, 1785.
⁵ Province Laws, v. 1, p. 378.
in 1788,¹ and again in 1834.² The first house of correction, properly so-called, was opened in Boston in 1823,³ and for a long time it was the model institution of the kind in the state.

Boston also led the way in the establishment of a reformatory for juvenile offenders.⁴ Although the promoters of this reform recognized that such a reformatory should properly be established for the benefit of the entire state, they saw no prospect that the state would undertake the project. The need for such an institution was naturally more intense in a city than in the rural districts. Had Boston been compelled to await state initiative for relief in this matter, prison reform would have been delayed many years.

The establishment and successful operation of a reformatory for juvenile offenders in Boston, led to the desire, on the part of the other cities and towns of the state, to secure the benefits of such an institution for themselves. The state as a whole became interested in the matter, and, as a result, a state reform school for boys was established at Westborough in 1846, and a similar institution for girls at Lancaster in 1854.

In 1869 it was provided that vagrants and drunkards might be sentenced to the state farm at Bridgewater instead of to the town workhouse or county house of correction. Since 1819 the state prison had been used exclusively for male convicts, and female convicts were imprisoned in the county jails and houses of correction. The establishment of a reformatory prison for women in 1874 greatly relieved the county prisons, and made a better classification possible; a movement which was also greatly furthered by the establishment of the Massachusetts Reformatory in 1884, for the re-

¹ Law of March 26, 1788.  
² Acts, 1834, 151.  
ception of the younger male prisoners sentenced for a year or more.

Central Administrative Control. But aside from this direct assumption on the part of the state of much of the work formerly left to the counties, a very considerable central administrative control over county prisons has gradually been developed. This control first took the form of requiring annual reports from the local authorities. As early as 1834 a law was passed requiring county commissioners to make annual returns to the secretary of the commonwealth in regard to jails and houses of correction. But as no penalty was provided for failure to make returns, the law, though compulsory in form, as a matter of fact had only the effect of a formal request, which local officials might comply with or ignore, as they saw fit. In 1856 the secretary explains the situation as follows: "Notwithstanding the law is explicit in requiring of the sheriffs and overseers of the houses of correction true answers to the inquiries contained in the blanks aforesaid, in some cases these officers seem to have regarded it as a matter wholly within their own choice whether to answer or not, while in others the answers are so imperfect and confused as to be entitled to little or no credit." Accordingly in the following year a heavy penalty was provided for failure to make returns, and since that time, under the direction successively of the secretary of state, the state board of charities and the prison commission, these returns have been quite satisfactory.

In 1833 a special commission was appointed to make a personal inspection of all jails and houses of correction. Some years afterwards it became customary for the joint standing committee on prisons, on the authorization of the

1 Acts, 1834, 151.

2 See Secretary of State's Abstract of the Returns of Keepers of Jails and Overseers of Houses of Correction, 1856.
legislature, to make an annual investigation of all county prisons. This committee, in 1848, reports as follows:1

"The prisoners are crowded together from the fact that many of the rooms are not trustworthy, and often because they cannot be warmed, and the convicted and the unconvicted, the young and old, are mixed up with an indiscrimination entirely in violation of law." But usually the investigations of these legislative committees were without result. As is usual in the case of such committees, they had a pleasant trip at the state's expense, were received and feasted as the guests of the prison keepers, and naturally came back with nothing in particular to report.

In 1863 the state board of charities was created. Among its duties was that of making an annual investigation of all places in which insane persons were confined. As jails and houses of correction were often used for this purpose, they were now subjected to an annual inspection, but this was the extent of the powers of the board.

In 1870, in spite of the assurance of the committee of the legislature of the preceding year that "they found the correctional institutions of the commonwealth generally in a satisfactory condition,"2 there were a considerable number of individuals who were convinced that the county prisons were not all that they should be, and who succeeded in inducing the legislature to establish a board of prison commissioners.3 The board as at present organized consists of five unsalaried members appointed by the governor and council for terms of five years. Two of the five members must be women. The term of one member expires annually. The board appoints a paid secretary to act as its executive officer.4 The board is given an extensive control over county prisons. Among its powers and duties are the following:

1 House Documents, 1848, no. 208.  
2 Senate Documents, 1869, no. 392.  
3 Acts, 1870, 370.  
4 Acts, 1879, 294.
1. The classification of all prisoners with reference to sex, age, character, condition and offense. In order to accomplish this it may remove prisoners from the jail or house of correction in which they are confined, to any jail or house of correction in the state; and it may remove any female prisoner to the state reformatory for women.

2. The preparation of rules, with the approval of the governor and council, for the direction of prison officials, the government of convicts, and the custody and preservation of prison property.

3. The approval of all plans for the construction or enlargement of county prisons.¹

4. The inspection of all county prisons at least every six months.

5. The preparation of an annual report to the legislature concerning the condition of county prisons, with such recommendations and suggestions as it may deem proper.

In 1887, for the purpose of regulating prison labor, the office of general superintendent of prisons was created.² He is a salaried official, appointed by the governor with the consent of the council, and holding office at the pleasure of the governor. He is not under the control of the state board of commissioners of prisons. He is given an extensive control over the prison industries of jails and houses of correction, as well as of the state prisons. Among his powers over county prisons are the following:

1. He may make rules and regulations for the purchase of tools, machinery, and raw materials, and for the sale of the manufactured products.

2. His approval is necessary in regard to the number, compensation, appointment and removal of trade instructors; to the compensation and appointment of purchasing and

¹ Acts, 1897, 316. ² Ibid., 1887, 447.
selling agents; and he must approve all salary rolls and all accounts contracted in purchase of tools, machinery and materials.

A very extensive control is thus seen to be given to the commissioners of prisons and to the general superintendent of prisons. Its exercise has been very beneficial in improving the condition of the county prisons, and in systematizing the entire prison administration of the state. But it has been found impossible to secure the proper classification and employment of prisoners under the county system. There are fourteen counties in the state, and each, with the exception of Dukes, is required to maintain a separate jail and house of correction. In almost half of these counties, the average number of convicts is so small that their proper classification and employment can be obtained only at so great an expense that it is practically out of the question. The expense per convict of an efficient prison management decreases up to a certain point with the number of convicts. The county system is uneconomical and inefficient. The county is not at all adapted to use as a district for prison administration. In order to secure the best results, the smaller houses of correction should be consolidated, and each should be devoted to a special class of prisoners. In order to accomplish this, it has been proposed that the commonwealth assume entire control and management of the county houses of correction, and that the state be divided into such a number of prison districts as will secure the organization of the entire prison system on the most effective and economical basis.¹

Modern ideas concerning the treatment and reform of criminals can be realized only by a high degree of specialization and centralization. Special institutions, specially con-

¹ Report of the commissioners of prisons on the division of the state into prison districts, Senate Documents, 1877, no. 4.
structured and equipped, with skilled penologists in charge, must be provided for the various grades and conditions of criminals. This can only be secured (except at an expense that renders it practically impossible) by the centralization of the entire penal administration.¹

¹“Old and poorly arranged buildings, the imprisonment of both sexes in the same prison, and in some cases in the same wing of a prison, the congregating together in the same prison of persons from every condition in life and experience in crime, form some of the objections to the present arrangement of county control of the different jails and houses of correction.

“There is at present an average of about 800 women in the county prisons in the State. Under a single management, one or two of the existing houses of correction could be utilized for prisons for women, others for the imprisonment of minor offenders which come under the class known as misdemeanors, while other prisons could be easily arranged for the retention of a class known to have a longer experience in crime.” Prison Commissioners' Report, 1897, p. 270.
CHAPTER V—PUBLIC HEALTH

I. PUBLIC HEALTH

a. Period of Decentralization

For a considerable period of time after the settlement of Massachusetts Bay, each of the several towns took care of its health interests in its own way. No general law was passed on the subject of contagious diseases until 1702, yet each town previous to this time took such measures as it deemed necessary to prevent the spread of disease.

In 1647 a plague in the Barbadoes led to the passage of the first quarantine law. It provides for the quarantine of all vessels from the West Indies, under the direction of the council or a committee of the council.1 This quarantine was in effect about two years. Again, in 1665 a temporary quarantine was established on account of the great plague in London. Vessels from England could land their passengers and cargoes only on receiving permission from the governor or the general court.2

A general act for preventing the spread of contagious diseases was first passed in 1702.3 In regard to infected vessels, the act provides that any justice of the peace may take the necessary temporary measures. He must give notice of his action to the governor, who, with the advice and consent of the council, may issue such further orders as may be deemed necessary. The selectmen of towns are given power to iso-

---

3 Province Laws, v. 1, p. 469.
late all persons within their borders falling sick with contagious diseases. This law was the direct result of a severe outbreak of small-pox in Boston, by which 4.4 per cent. of the population died. Though amended from time to time, it continued in force until 1797.

In 1716 a quarantine station was established by the province on Spectacle Island. The station was placed under the direct supervision of the selectmen of Boston, who were to furnish the necessary accommodations and contract with the keeper at the expense of the province.

Up to 1739 no measures had been taken to prevent infected persons from coming into the province by land from the neighboring colonies. It was now provided that the selectmen of any border town might station persons at the main places of entrance from the other colonies, in order to examine travelers and to prevent infected persons from entering.

The power given to the governor and council by the law of 1702 to issue orders regarding the quarantine of vessels became gradually less and less in successive laws, and finally disappeared in 1797.

Previous to 1797 there was no provision for local boards of health. The abatement of public nuisances as well as the prevention of contagious diseases were in the hands of the justices of the peace and the selectmen of the town. Proceedings for the removal of nuisances were usually made on the complaint of some individual whose interests were being injured by the nuisance complained of. The law of 1797 leaves the powers relating to quarantine and contagious diseases with the selectmen, but permits any town to create a

2 Ibid., v. 2, p. 91. See also Acts Relating to the Establishment of Quarantine, Boston Board of Health, 1881.
board of health or health officer to have charge of the removal of nuisances. Little use, however, was made by the towns of the powers thus granted. The small towns did not see fit to provide a special board for the abatement of public nuisances and the needs of the more populous towns required boards with more extensive powers.

The first board of health was created in Boston in 1799 by a special act of the legislature.¹ The law was the result of a severe epidemic of yellow fever during the previous year. The board was composed of members elected by the people, and in it were consolidated all the powers formerly exercised by the selectmen in relation to the administration of the quarantine laws, the prevention of contagious diseases, and the abatement of public nuisances. Modeled upon this law other special acts were passed for several of the larger towns. When these towns became incorporated as cities the powers vested in the health board were vested in the city council, to be exercised by the council or delegated to a separate board, as it might determine. In Boston the health powers of the council were delegated to the mayor and aldermen. In most of the cities the city marshal was given the supervision of all matters relating to the public health. But few of the towns chose special boards of health; the selectmen acting in that capacity.² In Boston the matter was well supervised and considerable systematic work was done, but in many of the towns no thought was apparently given to the subject, and in others only spasmodic efforts were made.

b. Period of Centralisation.

Such was the condition in 1849, when the Asiatic cholera invaded the state. Seven hundred and seven died from its effects in Boston alone. This led to an awakening. A

¹ Laws of February 13 and June 29, 1799.
² See Report of the Sanitary Commission of Massachusetts, 1850.
state commission was appointed to prepare a plan for a sanitary survey of the state. The commission, in its very able report, recommended, among other things, that each town be required to appoint a board of health, and that a state board be established. This board was "to have the general direction of each census; to superintend the execution of the sanitary laws of the state; to examine and decide upon sanitary questions submitted to it by public authorities; to advise the state as to the sanitary arrangements of public buildings and public institutions; to give instructions to local boards of health as to their powers and duties; to suggest local sanitary rules and regulations; to recommend such measures as they may deem expedient for the prevention of diseases and the promotion of the public health; and to report their proceedings annually to the state." Many of these recommendations have since been carried out, but a beginning even was not made until about twenty years afterwards. In 1861 a memorial to the legislature of the Boston sanitary association respectfully represents "that the interests of human health and life . . . require more of the paternal care, watchfulness and protection of the legislature than they now receive, and these objects may be best attained by the establishment of a state board of health."

The demand for some control over the town health authorities is evidenced in the law of 1866, providing that any person aggrieved by the neglect or refusal of the town board to abate a nuisance may appeal to the county commissioners, who may hear the appeal and may exercise all the powers in the abatement of the nuisance that the board of health is authorized to exercise. At length, in 1869, a
state board of health was established. As then organized, it had no compulsory authority. Its duty was simply to make sanitary investigations and to diffuse the information thus gathered among the people. Its function was one of enlightenment, and although it has since been vested with numerous and important powers, none has proved more potent.

In 1871 the board was given power to prohibit offensive trades; in 1878 it was given general supervision of water supplies. In 1879 the duties of the board were transferred to the board of health, lunacy and charity, and this new board was given co-ordinate powers with the local boards of health in the prevention of the spread of contagious diseases. In 1882 the board was given authority to enforce a law passed to prevent the adulteration of food and drugs. In 1885 a separate board of health was created with increased powers, especially in relation to water supplies and sewerage. In 1894 all vaccine institutions were placed under its supervision, and the boards of health of all cities and towns of over five thousand inhabitants were required to send annual reports of deaths to the board according to the forms prescribed by it. These are but the more important steps in its development; its present organization and powers will now be more fully considered.

The state board of health consists of seven persons appointed by the governor, with the consent of the council. Their term of office is seven years, so arranged that the term of one member expires annually. The board appoints a secretary, who acts as its executive officer.

1. General powers of the board. It is the duty of the board to take cognizance of the general interests of health throughout the commonwealth; to make investigations concerning the causes of disease and epidemics, and the influence

4 Acts, 1869, 420.
of locality, employment and condition upon health, and to diffuse information in regard to these things among the people.¹

2. Clothing made in unhealthy workshops. Upon notification from the chief of the district police, it is the duty of the board to examine workshops in which clothing is made, and issue the necessary orders to protect the public health. It also has power to protect the public from clothing made in unhealthy workshops outside of the state.²

3. Offensive trades. Upon complaint, and after notice and hearing, the board may order the discontinuance of any noxious or offensive trade or occupation in the place where it is at the time established. The location and plans of construction of all crematories,³ and of all swine slaughtering establishments,⁴ are subject to the approval of the board, and it may establish regulations for their government. Cities and towns must first secure its approval for taking or purchasing land for the purification and disposal of sewage.⁵

4. Food and drug inspection. The board appoints inspectors and chemists, and takes the necessary measures to enforce the laws of the state relating to the adulteration of foods and drugs. It may expend eleven thousand dollars annually for this purpose, but not less than three-fifths of this amount must be expended for the enforcement of the laws against the adulteration of milk and milk products.⁶

5. Impure ice. Upon the complaint of twenty-five consumers of ice cut from any pond or stream in the commonwealth, the board, after notice, may give a hearing to determine whether the ice is impure and injurious to health. If found to be injurious, the board may forbid its sale.⁷

¹ Acts, 1888, 101. ² Ibid., 1891, 357; 1892, 296. ³ Ibid., 1885, 265. ⁴ Public Statutes, c. 107, §§ 2, 4, 5. ⁵ Acts, 1890, 124. ⁶ Ibid., 1882, 263; 1884, 289; 1891, 412. ⁷ Ibid., 1886, 287.
6. Water supplies and sewerage. The board has the general oversight and care of all inland waters. It examines them to see whether they are adapted for use as sources of water supply or are in a condition likely to impair the public health. It recommends suitable plans for systems of main sewers and such other measures as it deems necessary for preventing the pollution of water supplies. It may conduct experiments to determine the best methods for the purification and disposal of sewage.¹

The board has authority to make rules, regulations and orders for preventing the pollution of streams or ponds used as a source of water supply by any city or town, or any water or ice company. Upon the complaint of the authorities of any city or town or the president of a water or ice company, that the source of supply is being polluted by individuals, the board, after giving notice and hearing, may order them to desist.²

The board consults with and advises cities, towns, corporations, firms and individuals concerning the best source of water supply and the best practicable method of disposing of their sewage; and all such municipalities, associations and individuals must submit to the board for its advice plans of their proposed schemes in relation to water supply and sewage; and all petitions to the legislature for authority to introduce a system of water supply or sewage must be accompanied by the recommendations of the board thereon. It is the duty of the board to report to the attorney-general all cases of failure to comply with the laws relating to the pollution of inland waters.³

7. Infectious and contagious diseases. Local boards of health are required to notify the state board within twenty-four hours after obtaining knowledge of a case of a con-

¹ Acts, 1888, 375. ² Ibid., 1897, 510. ³ Ibid., 1888, 375.
tagious or infectious disease. Upon receipt of information that such a disease exists or is likely to exist in any locality, the board investigates the matter and consults with the local authorities concerning the best means of preventing the spread of the disease; and it may exercise powers coördinate with those of the local board of health. The board has established a plant for the production of antitoxin, for distribution to local boards, hospitals and physicians. It also examines the products of certain diseases sent to it by local boards and physicians for the purpose of determining the disease, notably diphtheria, tuberculosis and malarial fever.

8. Reports of local boards. Local boards of health in cities and towns of more than five thousand inhabitants are required to make annual reports of deaths to the state board, and according to the forms prescribed by it.

The most important work of the state board has probably been in relation to its control over water supplies and sewerage. Eastern Massachusetts is so thickly dotted with populous cities and towns that central supervision has been absolutely necessary to prevent the streams from being turned into noisome sewers and to protect the water supplies from pollution. When individuals come together in cities a common system of sewerage and water supply becomes necessary; and when cities and villages are themselves so closely crowded together as they are in that territory lying within about thirty miles of the state house at Boston, the problem of water supply and sewerage can no longer be left to each individual municipality. It then becomes necessary to provide common water supplies and common main sewers for a number of cities and towns. In this connection the state board has rendered valuable service. At the re-

\[1 \text{Acts, } 1893, 302. \quad 2 \text{Ibid., } 1894, 218. \quad 3 \text{Ibid.}\]
quest of the legislature it has made careful surveys and prepared elaborate plans for systems of sewers and water supply for extensive districts, and its plans have usually been carried out.

The work of the board in giving advice to local authorities, companies and individuals is extensive and is constantly increasing. Upon request, the experts in the employ of the board examine existing or proposed water supplies, make a careful analysis of the water and report the results. Plans for sewage disposal are also carefully considered. A systematic examination of the water supplies of the state was begun in 1887 and the work has since been continued.¹

We see, therefore, that although the state board possesses

¹The death rate in Massachusetts has remained practically stationary during the past forty years in spite of the fact that the average density of population has doubled. Improved sanitary conditions have very nearly counterbalanced the unfavorable influence of increasing density. "Infectious diseases generally, including consumption, have diminished, while most of the so-called local diseases (those of the nervous, respiratory, circulatory organs, etc.), have increased, and the result has been a balance or a maintenance of uniformity in the general death-rate." See Report of the State Board of Health, 1896, pp. 711–829. The work of the state board, especially in the matter of water supplies and sewerage, has doubtless had a very great influence in bringing about the decline in deaths from infectious diseases.

<table>
<thead>
<tr>
<th>Five-year period</th>
<th>Number of persons per square mile</th>
<th>Death-rate per 1,000 caused by pneumonia, kidney diseases, heart disease, brain diseases, and cancer.</th>
<th>Death-rate per 1,000 caused by small-pox, measles, scarlet fever, diphtheria, croup, typhoid fever, cholera infantum, consumption, whooping cough, dysentery, and child-birth.</th>
<th>Aggregate death-rate per 1,000 persons.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1856–60</td>
<td>144.4</td>
<td>2.77</td>
<td>8.17</td>
<td>17.94</td>
</tr>
<tr>
<td>1861–65</td>
<td>150.6</td>
<td>3.47</td>
<td>9.30</td>
<td>20.71</td>
</tr>
<tr>
<td>1866–70</td>
<td>165.8</td>
<td>3.66</td>
<td>7.48</td>
<td>18.19</td>
</tr>
<tr>
<td>1871–75</td>
<td>189.0</td>
<td>4.49</td>
<td>8.49</td>
<td>20.83</td>
</tr>
<tr>
<td>1876–80</td>
<td>208.0</td>
<td>4.68</td>
<td>7.31</td>
<td>18.84</td>
</tr>
<tr>
<td>1881–85</td>
<td>225.7</td>
<td>5.67</td>
<td>6.51</td>
<td>19.82</td>
</tr>
<tr>
<td>1886–90</td>
<td>254.5</td>
<td>6.22</td>
<td>5.68</td>
<td>19.41</td>
</tr>
<tr>
<td>1891–95</td>
<td>287.8</td>
<td>6.88</td>
<td>5.05</td>
<td>19.83</td>
</tr>
</tbody>
</table>
great powers, it can exercise little direct control over the local authorities. Its chief coercive powers are exercised upon the individual directly. In many cases its powers are simply co-ordinate with those of the local boards; either may act, but in case one acts there is no necessity for action on the part of the other. This is largely the case with reference to food and drug inspection, offensive trades, and contagious diseases. Municipalities, like other corporations and firms, must submit the plans of proposed water supply and sewerage systems to the state board for its advice, but are not compelled to follow the advice given. They must also make reports of deaths and contagious diseases to the state board; the requirement of reports is, however, one of the weakest forms of administrative control.

While the powers of the state board have been enormously increased, it has not been at the expense of the importance of the local boards. The work of the state board has resulted in increased local activity; separate boards of health have been established where none previously existed, and inactive boards have become more efficient. The state board reports that owing to the increased activity of the local boards, its interference in the matter of offensive trades is now seldom called for. A state association of boards of health has been formed for the discussion of matters pertaining to health administration. As the density of population increases, additional powers and duties are being constantly imposed upon the local boards.

There can be no question but that the maintenance of sanitary conditions in any part of the commonwealth is of vital importance to every other part of the commonwealth, but it does not follow from this that the public health administration should be completely centralized. The self-interest of the municipality can in the main be relied upon to lead it to take the necessary sanitary measures. The interests of
the municipality and the commonwealth are substantially identical. There are, however, as we have seen, certain functions which must be exercised by an authority of broader jurisdiction than the municipality, and others that must be centrally administered in the interests of economy and efficiency. Aside from these, one of the most important duties of a state board should be that of educating municipalities as to what are their real interests. In case, however, the municipality neglects to act, the commonwealth must act for its own defense. Such action may take the form either of compelling the local officials to perform their duty, or of its independent performance by central officials. In case, however, it is necessary to exercise coercive authority over the individual, it is much simpler for the state board to exercise that authority directly than to coerce an unwilling local board into coercing the individual. This upon the whole represents the actual relation of the commonwealth to the public health in Massachusetts. There has been a considerable differentiation between the municipalities and the commonwealth in the work of health administration.

II. VITAL STATISTICS.

A little more than a decade after the settlement of Salem, the general court passed its first law for the collection of vital statistics. September 9, 1639, Mr. Steven Winthrope was chosen "to record things," and it was ordered that records of births, deaths and marriages be kept in every town, and that they be brought annually to the colony recorder, to be entered upon his books.\(^1\) Three years later, the annual return was required to be made to the district court instead of to the colony recorder.\(^2\) When the law came to be re-enacted under the province in 1692, the town clerk, though

\(^1\) *Colony Records*, v. 1, p. 276.
still required to keep a record of births, deaths and marriages, was required to make no report either to the county court or to the province recorder. Central control, strong at the start, had been weakened in 1642, and was now practically abolished. Some towns may have kept up their records, but it is not probable that many did so. The law, though a dead letter, was kept in the statute books for one hundred and fifty years. Then in 1842 a return was made to the system with which the state started out in 1639. The clerks of cities and towns were required to make annual returns to the secretary of the commonwealth according to the forms prepared by him. The secretary was also authorized to issue instructions and explanations to aid the clerks in making their returns. For a number of years it was very difficult to get some of the clerks into the habit of making these reports, and most of those made were very imperfect. By increased penalties and patient supervision on the part of the secretary of state, however, their accuracy and value has been greatly increased, and they have become much more detailed.

III. STATE BOARD OF CATTLE COMMISSIONERS.

Previous to 1860 no provision had been made for either state or local action for the prevention of contagious diseases among domestic animals. In 1859 pleuro-pneumonia made its appearance in several cattle herds of the state. The disease spread rapidly, and the knowledge of the disastrous effects attending its spread in other countries, led to decisive action. The mayor and aldermen of cities and the selectmen of towns were given summary powers to take the necessary measures to stamp out the disease, and a state cattle commission was established with even more broad and summary powers.1 The regulations of the state board super-

1 Acts, 1860, 192, 221.
seded those of the local authorities, and the local authorities were required to carry out all orders and directions given them by the central board. As a result of these drastic measures, the commission, though its work had been completely blocked during one year by an insufficient appropriation, was in 1866 able to report the complete extirpation of the disease. In 1868 the commission took effective measures to prevent the introduction of Texas fever. Two years later a new disease known as the "foot and mouth" disease appeared, and through the vigorous measures of the commission it was suppressed in 1872. In 1874 and 1875 there was a slight outbreak of Texas fever. This led to the passage of a law in 1876, forbidding the importation of Texas cattle between May and November of each year, and making it the duty of the cattle commission to enforce the law. In 1878 the commission and the local authorities were given the same power in relation to contagious diseases among all other domestic animals that they previously had in relation to cattle. In 1881, the United States supreme court having decided in a Missouri case that a law forbidding the transportation of Texas cattle through or into a state was unconstitutional, the legislature authorized the cattle commission to quarantine all Texas cattle coming into the state.

Alarmed at the spread of tuberculosis among cattle, and the great danger to human life resulting, the legislature in 1892 took measures to check it. In 1876 an act had been passed permitting any city or town to appoint one or more inspectors of provisions and of animals intended for slaughter or kept for the production of milk. Many cities and a few towns had taken advantage of it. Now, however, the appointment of inspectors was made obligatory, and the inspectors were required to report to the state commission all cases of tuberculosis coming to their notice. No penalty was attached for failure to comply, however, and notwith-
standing the frequent orders of the commission, during the first year four towns failed to appoint inspectors, and the inspectors of 235 of the 351 cities and towns in the state made no report to the commission. This failure, and the belief that concerted, systematic action was absolutely necessary to stamp out the dread disease, led in the next two years to an almost complete subjection of the local authorities to the control and direction of the central commission. The present organization and powers of the commission will now be briefly considered.1

The state board of cattle commissioners consists of five members, appointed by the governor with the consent of the council. Their term of office is three years, unless sooner removed by the appointing power, and the commissions of the entire board may be terminated by the governor and council when in their judgment the public safety permits.

The commission has power to make regulations concerning the prevention and suppression of contagious diseases among domestic animals and the treatment and destruction of animals that have been exposed to or are affected with any contagious disease. Such orders and regulations supersede those of the local boards of health. Local boards of health and inspectors of provisions must carry out and enforce all lawful regulations and directions of the commission, under penalty of not exceeding five hundred dollars. The commission is authorized to appoint agents with equal powers to those conferred by law upon the local inspectors, and each member of the commission has the same power throughout the commonwealth to inspect and quarantine cattle that is conferred upon local boards of health and inspectors.

Each city and town is required to appoint one or more in-

1 Acts, 1885, 378.
spectors of provisions and animals under penalty of not exceeding five hundred dollars. In case of refusal or neglect to appoint, the commission may do so. In case of neglect or refusal to be sworn or properly to perform the duties of the office, any inspector may be removed by the commission and another appointed to serve the remainder of the term. The commission may fix the compensation of inspectors thus appointed by it, at not exceeding five hundred dollars a year, to be paid by the city or town. Local inspectors are required to make inspections at the times and in the manner prescribed by the commission; the forms of their records are prescribed in detail by the commission, and they are required to make numerous reports to it. The local inspectors are also subject to the direction of the local boards of health, but in case of conflicting directions the orders of the state commission are to be followed.

When an animal suspected of being afflicted with a contagious disease is quarantined by a local inspector, the commission is notified; an agent of the commission makes an examination, and the animal is killed if found to be diseased. The commission takes immediate charge of the examination of all cattle coming into the public markets at Brighton, Watertown and Somerville from without the state, that are not certified to have passed the tuberculin test before entering the state. Arrangements have been entered into with the cattle commissioners of adjoining states whereby nearly all the cattle coming into these markets have been tested by approved veterinarians before entering the state. Except on the written permit of the commission, all cattle brought into the state must be taken to one of these public markets. And all cattle entering under permits are examined by special agents of the commission. The work of the United States bureau of animal industry, established in 1884, has materially aided the commission in its efforts to prevent the introduction of contagious diseases.
The commission, through its special agents, also undertakes the examination of stables and dairies, with a view to securing better sanitary conditions, and thus of protecting the milk consumer from the dangers of impure milk. Only a beginning has yet been made, however, as the power of the commission is limited to that of examination simply. The results of its investigations show conclusively that milk inspection in order to be of great sanitary value must begin at the source of the milk supply; this in the case of Boston consists of thousands of small dairies situated chiefly in eastern Massachusetts and southern New Hampshire, but Maine, Vermont and Connecticut are also drawn upon.

It thus becomes an inter-state problem; one with which a New England government might most effectively deal.

The intent of the statute under which the cattle commission was created was the suppression of contagious diseases in the interest of the animal owner, rather than the protection of the consumer against the use of unwholesome animal products. With the fight against tuberculosis the aim has come to be the protection both of the interests of the producer and of the health of the consumer.

The cattle commission presents a most thoroughgoing example of central administrative control over local authorities. The commission may direct, remove, and in certain cases appoint the local inspectors. So far, the power of removal has been exercised but once. It has been the policy of the commission to exercise this power only on rare occasions when there is positive evidence of dishonesty or incompetency. Aside from this, however, the commission has a large sphere in which it acts through its own agents independently of local officials.

1 See Whitaker, Milk Supply of Massachusetts Cities.

2 Chapter 491 of the act of 1894 is a codification of the laws relating to contagious diseases among domestic animals. It has been amended by chapters 476 and 496 of the act of 1895.
CHAPTER VI

POLICE

I. The State Police.

The present state police force owes its origin to an attempt to prohibit the sale of intoxicating liquors. A statute prohibiting the sale of intoxicants throughout the state was passed in 1852. Previous to this, through local option, the liquor traffic was prohibited throughout a large portion of the state. In 1847 the mayor and aldermen of Boston refused to grant licenses for the sale of liquor, and none were again granted until 1852. This attempt at prohibition in Boston failed; the city marshal in 1851 reported that there were then fifteen hundred places in which liquor was sold. But when Boston, after a five years' trial, at length became convinced that it could not enforce a prohibitory law, the legislature intervened to make prohibition obligatory.

The law of 1852 was very generally enforced in the rural communities, and in many of the smaller urban centers where the local sentiment was strong in its favor. But in Boston, and a few other manufacturing cities having a large foreign population, all pretension of enforcement gradually ceased. The execution of the law being left entirely to the local authorities, it naturally followed that the law was enforced in those cities and towns in which there was a strong local sentiment in its favor and ignored in the others; the law, though compulsory in form, was optional in fact. To be-

1 Winsor, Memorial History of Boston, v. 3, p. 253.
lievers in state prohibition, this condition could not be satisfactory; the purpose of the friends of the law had been to make use of the compulsory power of the state to impose prohibition upon unwilling communities. They soon came to a realization of the fact that all that they had secured was the promulgation of the law, and that it was far from being self-executing. It is impossible to exercise coercion by putting the coercive power in the hands of those that are to be coerced.

The demand was, therefore, made for some form of central administration of the law. The most ardent friends of the law favored a system of metropolitan police, by which the police of the large cities, in which the law was being disregarded, would be placed under boards appointed by the governor. A beginning was to be made with Boston and its suburban cities. In 1865 a bill passed the senate constituting Boston, Chelsea, Cambridge, Charlestown and Roxbury a metropolitan police district. It is interesting to note the deep-seated distrust with which the promoters of this measure looked upon large cities. A joint special committee of the legislature reports as follows: * * * Moreover, large classes, having the right of citizens, but not the welfare of government at heart, always run into large cities as the common sewers of the state, and are ready to make use of just such machinery as the present system affords to them, to make the material, moral and legal interests of society and the

1 Senate Documents, 1863, no. 129, p. 4.
state subservient to their passion and their will." The following is taken from the address of the state temperance alliance to the people of Massachusetts in 1864: "It is never safe for any state to entrust the execution of its laws to a great city. The larger the city, the greater the danger. There are frequent and grave issues between great cities and the laws of the state. In such cases the laws can never prevail, unless the state controls the police that executes them."

The city council of Boston on the other hand entered a vigorous remonstrance against this proposed usurpation of the city's ancient rights, arguing as follows:1 "That as general laws administered in local communities by officers of their own selection has been ever an essential principle of our free institutions, in our judgment the police powers should be left as at present to the control of the towns and cities; and, inasmuch as delegation to independent boards without responsibility involves expenditure without check and often the oppressive exercise of power, its charge should be left to the municipal authorities, who assess the taxes, are accountable for their economical application, are open to scrutiny, and liable to be removed by those who have elected them."

As a compromise between those who desired the metropolitan police plan and the less radical supporters of prohibition, an act to establish a state police was passed in 1865.2 As then established the state police consisted of a constable of the commonwealth appointed and removable by the governor and council and at least twenty deputies for Suffolk county and one for every other county. The governor and council could direct the employment of additional deputies. The constable and his deputies had all the powers of local

1 Senate Documents, 1863, no. 163.
2 Acts, 1865, 249.
police and constables, except the service of civil process, and their jurisdiction extended throughout the commonwealth. It was their duty to see that all the laws of the commonwealth were enforced; and they were charged especially with the suppression of houses of prostitution, gambling places and liquor shops. The constable was subject to the direction of the governor in the execution of the laws and the preservation of the peace. The governor, moreover, was given the power in any emergency, of which he was to be the judge, to assume command of the whole or a part of the municipal police force of any place, and to authorize the constable of the commonwealth to command its assistance in the execution of criminal process, the suppression of riots, and the preservation of the peace.

We see, therefore, that in the establishment of a state police, regard was had not only for the immediate object to be attained, but for the general principles involved. The legislature had come to the conclusion that its general police regulations should no longer be subject to the veto of the local administrative authorities. A force was placed under the direction of the chief executive of the state to enable him to uphold the laws and maintain peace, order and security throughout the commonwealth.

For the special task for which it was established, the suppression of the liquor traffic in the large cities, the state police force proved unequal. A system of metropolitan police might perhaps have been more successful. The few state officers assigned to the city of Boston could not accomplish that which would have been an extremely difficult task for the entire police force of the city. During 1866 the average strength of the force was fifty-eight, and in 1867, eighty-seven. In 1867 it secured 5,331 prosecutions for violation of the liquor law, and made 1,979 liquor seizures.¹

In the following year the prohibitory law was repealed, but after a year's trial of license it was again enacted. In 1871 the force was reorganized. Three police commissioners were appointed, with power to appoint and have general supervision and direction of a chief constable and not exceeding seventy deputy constables. In the following year the police commissioners were authorized to increase the force to one hundred men. In 1874 the powers of the police commissioners were vested in the chief constable. The efforts of the state police to enforce the prohibitory law were unabated, and in 1874 it made 5,912 liquor seizures and secured 7,126 prosecutions. But the apparent impossibility of the task led to the repeal of the prohibitory law in the following year, and to a return to the system of license and local option.

Though reorganized in 1875, the state police force was not abolished. The special service which was the occasion of its establishment, was no longer needed, but during the ten years that it had existed, its services under the general powers granted it had proved so beneficial that it had earned the right to a permanent place in the administrative system of the commonwealth. In 1866 three members were assigned specially to detective duty. Their services proved particularly valuable in detecting thieves at camp-meetings, military musters, and agricultural fairs. While the state constable instructed his deputies to give especial attention to offenses against liquor selling, gambling and prostitution, they were also directed to give attention to complaints against parties charged with violating any criminal statute. When in 1867 a new law was enacted regulating the employment of children in factories, the constable was charged with its execution, and he was required to detail one of his deputies specially for this service.

When the prohibitory law was temporarily repealed, in 1868, a bill passed the legislature to abolish the state police, but was vetoed by the governor. In his veto message one of the chief reasons urged by the governor for the retention of the force was that it was necessary in order to check the increasing demoralization in the larger cities. He was convinced that cities could not be trusted to enforce the numerous laws of the state, passed in the interest of public morality. Upon this point he says: "A prosperous commerce, progress in the arts, and the increase of manufactures have condensed our population in large towns and cities, intensified vicious inclinations, and multiplied the actual number of crimes. This is apparently the price of public prosperity and wealth. Official records display to the public gaze an alarming increase of offenses against the person and property, of licentiousness and gambling, as well as of insanity and pauperism, that are directly traceable to lives of vice. . . . To deal with this advancing demoralization, the municipal police, however honest or well-disposed, seem to a great extent inadequate. . . . It is apparent that public decency and order and public justice require the maintenance of an executive body which shall not be controlled by the public sentiment of any locality; which shall be competent in its spirit, its discipline and its numbers to a reasonable and judicious but just and impartial enforcement of the statutes of the commonwealth." Basing his objections on broader and more fundamental principles, he says: "I object to this bill that it detracts from the powers conferred for the common welfare upon the executive department of the commonwealth, taking therefrom practically the means of enforcing general laws, and vesting them in local officers, who are responsible only to their immediate constituents, and not to the whole people."1

1 See Report of the Constable of the Commonwealth, 1869.
This attempt to abolish the state police force, therefore, failed, and as the prohibitory law was re-enacted in the following year, the question of abolishing it was not seriously considered until 1875, when there was a return to local option. In the meantime, however, the detective work of the force had become so important that chiefly for this reason it was now decided to reorganize and decrease the force, but not to abolish it. The experienced detectives of the state force had proved very valuable in working up difficult cases and in assisting local authorities in the detection of criminals. To the inexperienced authorities of the smaller towns this service was peculiarly helpful. While the state police had been established and retained for the special purpose of suppressing vice in the large cities, it was now retained very largely because of the inefficient administration of the towns.

The State Detective Force, 1875–79. The state police force was reorganized as the state detective force. The governor and council were given power to appoint and remove a chief of the force and not more than thirty detectives. These officers were given the right to exercise throughout the commonwealth all the powers of police, and all the powers of constables, except the service of civil process. It was made their duty to aid the attorney-general, district-attorneys and magistrates, in the pursuit of criminals and in procuring evidence for their conviction. The governor was given power at all times to command their assistance in suppressing riots and in preserving the peace. All local police officers were required, within their respective cities and towns, to render aid, when called upon, to the governor and the state detectives.

During the first year the force numbered fifteen. It made 396 arrests and assisted the state board of charities in 273 cases. In the following year it was given charge of the

1 *Acts, 1875, 15.*
enforcement of all laws relating to the hours of labor. The next year an act was passed providing for various safety appliances in all factories and public buildings. It was made the duty of the chief of the detective force to detail one or more of his force to act as inspectors of factories and public buildings, and to see that the law was observed. The state inspectors were also required by this statute to enforce all laws regulating the employment of women and minors in manufacturing establishments. By this provision the work of local truant officers in enforcing the compulsory school law was greatly facilitated.

In 1878, the state having become infested with bands of tramps who were little better than brigands, it was made the special duty of the detective force to enforce the law against vagrancy. In this year the force numbered thirty, the maximum number allowed by the law. Three of this number were specially detailed for the inspection of factories and public buildings. The rest of the force was employed in the detection and prevention of all manner of crimes. They performed special service at military musters, camp-meetings, agricultural fairs and other public gatherings. In this year 1,100 arrests were made for all degrees of crime, and stolen property to the value of $106,204.70 was recovered.

The Massachusetts District Police. A strong antagonism against a state police had however been aroused, and an attempt was made in the following year to abolish it and transfer its duties relative to labor laws and the inspection of

---

1 *Acts*, 1876, 216.
3 As Boston and several other cities had already provided regulations, and inspectors for their enforcement, similar to all but one of the provisions of this law, these cities were exempted from the jurisdiction of the state inspectors.
factories and public buildings to the bureau of labor statistics. This attempt was unsuccessful, but the force was reorganized and greatly reduced in number.\(^1\) It now became known as the Massachusetts district police. The governor was authorized to appoint not more than two officers in each of the eight attorneys' districts, and to designate one of the number as chief of the force. Their powers were, like those of their predecessors, to extend throughout the state, and the governor might command their services in suppressing riots and in preserving the peace. The only material change in their powers was that they were not given authority to require the assistance of the local police officers in the performance of their duties.

On account of an insufficient appropriation the new force was organized with but nine members, but the next year it was increased to sixteen, the maximum number allowed by law. Four of these were detailed as inspectors. The force has been gradually increased until now it numbers forty-four. The increase has been made necessary by the constantly increased duties that have been imposed by law upon the inspectors. In 1888 the force was divided into two departments, an inspection and a detective department.\(^2\) The act provides that no inspector shall be required to perform duties other than those pertaining to the office of inspector of factories and public buildings, unless his services are required by the governor in suppressing riots and in preserving the peace. In 1897 there were thirty-one officers in the inspection department, and thirteen in the detective department.

**Inspection Department.** Among the more important duties of this department are the enforcement of the various laws relative to the employment, payment, and hours of labor of workmen and of women and children; the guarding of machinery; the sanitation and ventilation of factories and

\(^1\) Acts, 1879, 305.  
\(^2\) Ibid., 1888, 113.
public buildings; the supervision of tenement clothing manufacture; the heating of street cars; the inspection of steam boilers; the examination and licensing of engineers and firemen; and the inspection of elevators, except in the city of Boston. Except in the city of Boston, also, the inspectors are required to enforce the provisions of the law relative to the security of the occupants of factories and public buildings in case of fire, and the plans of proposed buildings subject to the law are required to be submitted to the inspector of the district. The mayor and aldermen of all cities except Boston, and the selectmen of towns, have the right to call upon a state inspector to inspect buildings considered dangerous to life or limb. It is the duty of the inspectors of cities and towns to report the condition of fire-escape appliances in hotels and lodging houses to the chief of the district police; and accidents occurring to employees must also be reported to this officer by all manufacturing and mercantile establishments.

In the enforcement of these various provisions the chief of the detective force, subject to the approval of the governor, is given certain ordinance powers, and the inspectors are given a large degree of discretion. Any person may appeal from the order of an inspector to a justice of the superior court. The justice may hear and decide the case himself, or refer it to three disinterested experts; and the order of the inspector may be affirmed, modified, or annulled.1

It is thus seen that in this very broad field of regulation the commonwealth assumes directly the execution of its laws. It does not leave their enforcement to the option of the local-

1 Steam boilers that are under the periodically guaranteed inspection of insurance companies are exempt from inspection by the state inspector. Here business interest and public interest coincide; the company not only inspects, but guarantees its inspection.

ities, nor does it attempt to force unwilling local officials to execute them; it deals directly with the individuals and corporations whose affairs are to be regulated. In this it deals with public corporations (cities and towns) in the same way that it deals with private corporations. It regulates the employment of laborers by cities and towns, and the sanitation and ventilation of their public buildings in substantially the same manner that it regulates employment, sanitation and ventilation in factories. The work of the state inspectors in improving the ventilation of schools has been particularly valuable.

Detective Department. The chief duty of this department is to aid the attorney-general, the local police authorities, and especially the district attorneys in the detection, arrest and conviction of criminals. This work of the force is especially valuable to the towns, whose officers are inexperienced in detective work. Of this the chief of the force speaks as follows:

"The increase in crime, and especially in the number of burglaries during the past year in the towns throughout the commonwealth, is a strong argument in favor of a force large enough to cope with the criminal work. That local town officers often fail to ferret out crime is not surprising, when it is considered that in a majority of cases the cities furnish the class that commit these depredations, and when undetected they return to their haunts. * * * * I am decidedly of the opinion, that, in cities where there is always an established police force, the services of state officers are seldom required; but, for the prevention of crime or detection of criminals in the towns of the state, officers trained for detective work are indispensable."

Every year numerous requests are made by local authorities and associations for the services of state detectives at

---

1 Report of the Chief of the Massachusetts District Police, 1880, p. 4.
large public gatherings, such as public celebrations, military encampments, and agricultural fairs. The state detectives, knowing the professional thieves and pickpockets who are accustomed to frequent such places, are enabled to render efficient service, while the local officers are almost powerless. Besides this strictly detective work, one member of the force is detailed for duty in connection with the coast fisheries.\(^1\)

The Suppression of Disorder. In the district police the governor is furnished with a force that can be instantly summoned by him to act in any part of the state for the suppression of disorder and the preservation of the peace. By the timely use of this force disturbances have been suppressed which might otherwise have developed into dangerous riots, destructive to life and property. With the arrival of the state force the tendency to disorder and violence has been checked. Though the state force has been weak in numbers, no turbulent crowd has yet ventured to test its strength.

In the year that the district police was organized (1879), and when it numbered but nine men, it was ordered to Fall River on account of the labor troubles there and rendered most valuable service. The employers concerned testify to its service, as follows: "A change for the better, and in favor of law and order was noticeable immediately after their arrival, attributable, we believe, to the fact that the disturbing element recognized in the district police a force entirely independent of local political influence, ready to see the law executed without fear or favor." The mayor of the city, in commending the work of the force in a letter to the chief, says: "No matter how good a local force of police a place may have, I am convinced that officers wearing the state authority have a moral influence in any community far

\(^1\) Acts, 1897, 288.

\(^2\) Report of the Chief of the Massachusetts District Police, 1879, p. 4.

\(^3\) Ibid., p. 3.
superior to the best local police whenever any general tendency to violate the law or create a disturbance exists. I have had some opportunity to see the working of the state police in its various forms in this city, and I do not hesitate to say that twice as many men, known to and knowing almost every person in the city, could not be as effective in preserving public order as the force under your direction."

Two years later the force prevented serious trouble from developing during a strike of canal laborers in the town of Sandwich. During the year 1885 it was summoned to three towns on account of anticipated disturbances arising from strikes among factory operatives. In the towns of Randolph and Rockland the state police appeared and made a few arrests, after which the excitement subsided. At Millville disgraceful rows and assaults preceded the call for the services of the state force, but upon its arrival the disturbance was at once suppressed. On two occasions, in 1889, the force was called to Buzzard's Bay to enforce the laws in relation to fisheries. In 1893 it was called to North Abington on account of trouble between the town and a railroad company. In the present year (1898) the force has been called to New Bedford during a strike of cotton mill operatives.

During the past twenty years there have been many long and bitter struggles between labor and capital in Massachusetts; that they have never led to the destruction of life and property is perhaps largely due to the existence of a state police. By its prompt action incipient riots have been suppressed, and the mere knowledge of its existence has exerted a repressive influence that can scarcely be overestimated. A local police, subject as it must be to personal and local

---

1 Ibid., 1881, p. 6.  
2 Ibid., 1885, p. 9.  
3 During all this period the state militia has been called upon for but one day's service on account of labor troubles. February 21, 1887, two companies were called out during a strike at Cambridge.
influences, cannot exert the repressive influence that is more potent than actual physical force in dealing with turbulence; the *posse comitatus* of the sheriff is an unreliable and often dangerous expedient; the militia is unwieldy, expensive and inefficient.\(^1\) In its state police Massachusetts has the most efficient means of suppressing disorder that has yet been developed in any American commonwealth.

II. *The Investigation of Fires*

The establishment of state police supervision for the investigation of fires has been made necessary to prevent the setting of fires for the purpose of defrauding the insurance companies. Were the insurance companies the final losers, they might be relied upon to take care of themselves; but the rate-making association of the companies levies a tax upon the whole community, sufficient in the long run to repair the effects of carelessness and crime. The competition between companies is now so great that they make little attempt to investigate suspicious fires for fear that such action may have the appearance of an attempt to avoid the payment of rightful claims, and thus prejudice them in the public mind. Nor have the local police proved equal to the demands of the occasion. They have usually considered it a matter between the company and the individual, totally unmindful of the public injury involved. Especially in the smaller cities and towns, personal considerations and influences usually prevent any thorough investigation.\(^2\)

The first movement in the direction of state control was made in 1886.\(^3\) The act authorized the governor, with the

---

\(^1\) Had Pennsylvania possessed a state police the recent tragedy near Hazleton could scarcely have occurred.

\(^2\) See *Official Fire Inquests*: an address by Chas. W. Whitcomb, state fire marshal of Massachusetts, before the annual convention of the fire underwriter's association of the northwest, held at Chicago, 1895.

\(^3\) *Acts*, 1886, 354.
consent of the council, to appoint a fire marshal for the city of Boston. The city was reimbursed by the state for the salary that it was required to pay him. It was his duty to investigate the cause of every fire, to cause an inquest to be held in suspicious cases, and to prosecute incendiaries. Though appointed by the governor and council, and removable by the governor, he was placed under the supervision and direction of the city board of fire commissioners.

In 1888 it was made the duty of the board of fire engineers of every city except Boston, and the selectmen of every town to investigate the cause of every fire. But for reasons already given this attempt to secure local action was largely unsuccessful. This failure, together with the beneficial results achieved by the fire marshal of Boston, led to the creation of the office of state fire marshal in 1894.¹ The office of fire marshal of Boston was abolished and its efficient occupant was made state fire marshal. The local boards are still required to make investigations as under the former law of 1888; but the fire marshal may if he deems necessary supervise and direct their investigations, and they are now required to make a report to him within a week after the occurrence of the fire. The state is divided into ten districts, and an assistant of the state marshal is stationed in each district. Upon receiving the report of the local board, the district officer at once proceeds to an investigation of the cause of the fire, and reports to the state marshal. If any evidence of incendiarism is shown an inquest is held, and if the facts warrant an arrest is made and the offender prosecuted.² The state fire marshal and also the local boards have the right to inspect buildings and to order the removal of combustible materials or inflammable conditions. But in

¹ Acts, 1894, 444.
² First Report of the State Fire Marshal, 1894.
case the order is given by a local board the owner may appeal to the state fire marshal and he may revoke the order.

III. Enforcement of Law in the Rural Towns

The prevalence of lawlessness in the declining rural towns of western Massachusetts has recently received a good deal of attention. It is charged that ruffianism is almost unchecked, and that the local constables are little more than figureheads. Mr. W. M. Cook, who has made a careful statistical investigation of murders in Massachusetts, finds that the four counties of western Massachusetts, Franklin, Hampshire, Hampden and Berkshire, have decidedly the worst record. In Franklin, the county that has the blackest record, there are but three towns of more than three thousand inhabitants, and seventeen out of twenty-six towns show a decrease in population during the past twenty years. In the last ten years twenty-six of the thirty-two towns of Berkshire county have declined in population. Mr. Cook says that “the more atrocious and flagrant murders were hidden away in the more remote localities, in general following the line of least resistance.” In explaining the bad record of these western counties he says:

“The best stock of the old families has been leaving the hillside farms for years and going to the west or to the cities. The least desirable of the old native stock has been left at home. Population has dwindled, and the consequent intermarriages between relatives have perhaps caused deterioration in many families. Then, again, very many rural towns have been left isolated by the railroads; the churches have grown weak and of little account as a barrier against social degeneration. The solitude of rural life leaves men more a prey to brooding over real or fancied wrongs or grievances. Finally, the lack of police restraint in small towns allows

ample scope to unbridled passions and to innate ferocity. Perhaps this lack of close police supervision is a very consider- able factor in the bad record of the rural Massachusetts districts as regards homicide. It would be unwarranted to say that the rural population has a stronger innate tendency to commit murder than the population of the metropolis.”

The Springfield Republican has recently published interviews with the sheriffs of these western counties, all of whom acknowledge that hoodlumism exists to an alarming extent.1 The sheriff of one county explains that “the constables have personal interests to look after, and they are almost always anxious to escape the duties of investigating a case or of making an arrest that is unpopular.” Another sheriff says, “I have taken a three days’ trip in the county, and I could not help but notice the careless ways in which matters were conducted. I feel in general that there is too little care in selecting the selectmen of the towns, and in turn the selection of constables or officers. The offices often go begging, no doubt, and in this way men are put in who are not the best for the place. I sometimes think that if in these country towns there was any great emergency, which would call for courage, the officials would be found lacking sadly in backbone.”

As a result of these disclosures, the plan is being agitated of placing one or more state police in each county for the enforcement of the law whenever the town constable neglects or refuses to act.

IV. Metropolitan Police

Although from the facts given above, it would seem that the rural towns were more in need of state interference, it is in certain cities alone that the control of the police has been taken out of the hands of the local authorities and vested in

1 Springfield Republican, August 26, 1897.
state officials. This peculiar condition has doubtless resulted from an exaggeration of the evils of city government, and an enshrinement of New England town government based largely on departed virtues.

The police force of Boston passed under the control of a centrally appointed board in 1885, and that of Fall River in 1894. The provisions of both acts are substantially the same. A board of three members is appointed by the governor and council, and is subject to removal by them. The members must be appointed from the two principal political parties, and must be residents of the city. Their salaries are paid by the city, and they are not allowed to engage in any other business. The board is given power to appoint and organize the police force of the city, and to make all necessary rules and regulations for its government. All necessary expenses incurred by the board in the maintenance of buildings, the payment of the patrolmen and for incidental purposes must be paid by the city upon the requisition of the board; but the number or pay of the patrolmen cannot be increased without the authorization of the city council. In case of riot or violent disturbance, the mayor may assume control of the police; and the board of police is required to execute the orders issued by him for the suppression of the disturbance. The board also has control over the granting of liquor licenses.

The influences which brought about the passage of these acts were substantially the same as those which were behind the attempt to establish the metropolitan system previous to 1865. Aside from a general distrust in the capacity of large cities for self-government, there is a special distrust of their ability to deal with the liquor problem and the suppression of vice. It may be doubted, however, admitting that

1 Acts, 1885, 323.
2 Ibid., 1894, 351.
3 See above, p. 81.
it is expedient for the state to interfere in these matters, whether the central control of the city police is the best means of accomplishing that end. The substitution of a state board for a board or official under immediate control of the mayor and the city council introduces a disorganizing element into city government. It is a return to the irresponsible and now generally discarded "board system." The state board being largely independent in its expenditure of city money, considerable friction is sure to result between it and the city council, that is held responsible for the tax levy and the appropriation of the revenue. This leads to numerous appeals to the legislature to interfere.

But more important still is the fact that the work of the police department is so intimately connected with the work of almost every other city department, that unless they are all under the supervision of a single head the most efficient organization cannot be secured. The suppression of vice and the regulation of the liquor traffic form but a small part of the duty of a city police force. If it is desirable for the state to interfere in these matters, the best plan would seem to be that adopted between 1865 and 1875; the enforcement of such state laws as the local police neglect to enforce through a small force of state police, while leaving the local police under the control of the local authorities. This, moreover, is the plan which is now proposed for the enforcement of law in the rural districts.

To be sure, the local police are very largely employed in the enforcement of state laws, yet from this it by no means follows that they should be state officials. The question of state or local enforcement of a state regulation turns largely upon the cause which brought about its enactment. If the state intervenes in order to compel action which is opposed to the public sentiment existing in certain municipalities, it is unwise to turn over the enforcement of the regulations to
the authorities of the municipality. But laws of this kind are very exceptional; the great bulk of police legislation is enacted by the state, rather than by the municipality, almost wholly in the interest of uniformity. There is no class of criminally disposed municipalities as there is of individuals; were the municipalities left to themselves they could be trusted to enact the necessary legislation to preserve peace, order and security. Their laws, however, would not be uniform, and this, in a mobile society, would cause great inconvenience; to secure uniformity the state intervenes. In the enforcement of these laws, however, there is a complete identity of interest between the municipality and the state. There is no inconsistency, therefore, in turning them over to the municipalities for enforcement.
CHAPTER VII

TAXATION

The purpose of this chapter is to review briefly the history of the apportionment of the state general property tax among the towns, to trace the progress in the disintegration of the general property tax and to note the tendency toward a separation of state from local taxation.

1. Apportionment of the General Property Tax

The general property tax has from the start been the back-bone of the revenue systems of both the central and the local governments. It was soon supplemented by a poll tax and a "faculties" or income tax, and also by customs duties, excises and lotteries.¹ At first the general court determined the amount that each town should raise, and this amount, together with the amounts necessary for local purposes, was re-apportioned by the town officers among the individuals of the town. It is not known upon what the first apportionments made by the general court were based; they were probably based on the valuations of the local officers, corrected in accordance with the best judgment of the members of the court. In 1636, however, a committee of thirteen was named by the general court with authority to require the assessment lists of each town, and with these and all other means at their command to determine upon a true valuation for each town. Upon the valuations thus determined the general court based its apportionments for a num-

ber of years, probably until about 1645. About this time the plan of apportionment by the general court appears to have ceased, and the colony rates were levied by the local officials upon valuations made by them. Some degree of centralization was, however, provided. In 1646 a system of county equalization was established. Each town chose one man who, together with the selectmen, made the assessment. The representatives of the towns thus chosen met in the shire town, and after examining into "the truth and equity" of the assessment of each town, revised and equalized the assessments according to their best judgment.¹

No provision was yet made for equalization between the counties, and complaints of inequality were rife. The difficulties in the way of equitably assessing the property tax over the entire commonwealth were thus early demonstrated. Already, towns were vying with towns, and counties with counties, in the undervaluation of their property; and each was satisfied that the other was escaping its just proportion of the common burdens. To avoid this evil, in 1668 there was established one of the most thorough-going schemes of general equalization that have ever been provided.² A board of equalization was established and given the final and absolute determination of the valuation of the property of each town and of each individual. The law reads as follows:

"Whereas sundry complaints have been made of much inequality in the annual assessments to public charges, the several towns and counties not paying in just proportion to one another, as is the true intent of the law, . . . it is therefore ordered, . . . that henceforth from time to time there shall be some meet, able, faithful and judicious men, chosen and authorized by the court, viz., two in the county of Essex, two in Suffolk, two in Middlesex, and two in Norfolk, who

meeting together with the commissioners of the several towns, they, or the major part of them so met together, shall have the absolute and final determination of the just proportion of each town and of each person and estate therein, so that there may be a just and equal proportion between county and county, town and town, merchants and husbandmen, with all other handicrafts as much as in them lie."

This law continued until the annulment of the colony charter, and probably until the granting of the new charter in 1692. The last application of the principle appears under the temporary law of 1692. As soon as general equalization ceased, the inequalities that at once resulted brought about a return to the system of the apportionment between the towns by the general court of the amount to be raised. The first apportionment act of 1694 recites that the assessors of the towns do not properly perform their duties, and that this "has occasioned an inequality and disproportion betwixt town and town." To obviate this the act definitely fixes the amount to be raised by each town for the support of the general government. The plan then adopted was continued down to 1871. At periods of from one to ten years new apportionments have been made by the general court; the usual period has been between five and ten years. Up to 1707 these apportionments appear to have been based upon the assessments of the local assessors as equalized for each county by the town representatives, as under the law of 1646. For the next two apportionments, made in 1718 and 1727, a more centralized plan was adopted. The general court appointed three commissioners for each county to examine and revise the assessment lists of the towns. After 1727 the general court continued to make new apportion-

1 *Province Laws*, v. 1, p. 91.
ments at irregular intervals, based upon the returns made by the town assessors.

The constitution of the commonwealth, adopted in 1780, provides that for the proper apportionment of the state tax, "there shall be a valuation of estates, within the commonwealth, taken anew once in every ten years at least, and as much oftener as the general court shall order." Under this provision the practice continued much the same as before 1780. At intervals of about ten years, until 1871, the general court has ordered the town assessors to make returns to it of all property liable to taxation. The custom has been for a large committee of the general court, with the aid of these returns, the valuations fixed by local assessors in preceding years, and their own knowledge of local conditions, to determine the valuation of each town, and from that to fix the proportion of the state tax that each town shall pay, until a new apportionment be made. The towns have then levied the amount thus definitely determined, upon valuations made by their own assessors.

The decennial apportionment was a prodigious task for the legislative committees. The report of the committee for 1793 gives a good idea of the nature of the undertaking and the methods employed:

"In forming this estimate your committee were regulated by the income of the property, as deducible from the different kinds and quantity of produce apparent from said returns—making allowance for circumstances of locality and other appendages, as to them appeared reasonable, and having completed this, your committee found that from the errors and deficiencies in the returns from many towns, the relative proportions of such towns to those which had made

1 Constitution, ch. 1., art. 4, sec. 1.
2 County taxes were apportioned on the same basis as state taxes.
3 Resolves of 1792-3, c. 196.
legal and proper returns, would be marked with striking features of injustice—to remedy which your committee proceeded to add such articles and amount of property not included in the returns, as by their best judgment deliberately used, it appeared the inhabitants of the different places must be possessed of."

Down to 1860 the apportionments had ordinarily been made every ten years. About this time, however, a very pronounced readjustment of wealth and population began. Some towns rapidly increased in population and wealth while others steadily declined; population was being concentrated in cities, while the rural hill towns were being depopulated. Under such conditions apportionment but once in ten years could not fail to work great injustice. From 1860 to 1883, therefore, apportionments were made about every five years, and since 1883 they have been made every three years.

Not till 1871 did the system of apportionment by legislative committees give way to the present system of apportionment by the state tax commissioner.\(^1\) Apportionment had constantly been becoming a more and more difficult task. Under the simple, uniform conditions of an eighteenth century agricultural community, it was a comparatively simple matter. Now the great disparity in economic conditions and the great multiplicity and intricacy of industrial and commercial relations, made it an all but impossible task. For this work the large legislative committees were most cumbersome, expensive and inefficient. Their apportionments were certain to be the joint product of guess-work and log-rolling.

Since 1871, therefore, the tax commissioner has taken the place of the legislative committee. Once every three years

\(^1\) Acts, 1871, 125.
the local assessors return to the tax commissioner full copies of their assessment books.\footnote{\textit{Acts}, 1881, 163.} This officer takes these books and analyzes them so as to show the average assessed valuation of the different classes of property in each city and town. In addition to this he has an abstract taken of the registries of all mortgages and of all real estate conveyed that seem to give the consideration for the conveyance.\footnote{The abstracts of the registries made, are for the first five months of the year for which the returns of the local assessors are required.} By comparing the average assessed valuations of the different classes of property in the different towns, and by comparing assessed valuations with the value as shown in actual transfers, the tax commissioner determines by what per cent. to increase or reduce the assessed valuation of each of the 353 cities and towns. Upon this basis he then apportions to each the amount that it shall be required to pay of every one thousand dollars of state and county taxes. He reports this apportionment to the legislature, and it has been the custom for that body to adopt it without alteration.

In this system no attempt is made to equalize the assessments throughout the state on which the tax thus apportioned is actually levied. It being an apportioned tax and not a percentage tax, as in most other states, this is unnecessary. A definite amount is required of each town; the town may raise this amount by the assessment of property at full value or at but half its full value, the result will be the same.

The plan has worked fairly well in Massachusetts. Competitive undervaluation, which is the bane of every state in which it is attempted to use real estate for purposes of both state and local taxation, is not very pronounced. This is due partly to the system of apportionment, partly to the smaller area of the state, and partly to the fact that inde-
ependent sources of state revenue have been developed and the state general property tax has come to bear very lightly on the different communities. In 1896 the state poll and property tax was but one twenty-fifth of the total poll and property taxes collected in the state; and formed less than one-third of the total taxes collected by the state government.

2. **Disintegration of the General Property Tax**

The single general property tax has been broken up into a number of separate taxes. It is slowly undergoing a process of disintegration. The plan of taxing everything according to a simple, uniform rule, broke down when applied to complex nineteenth century conditions. The first important step in the disintegration came in 1812, when a state tax was levied on the paid up capital stock of banking corporations.\(^1\) A law of 1832 provides that the machinery and real estate of manufacturing corporations shall be assessed locally, and that in assessing the shareholders, a proportional amount of the value of the real estate and machinery thus assessed shall be deducted from the value of each share.\(^2\) In 1862 a state tax of one-half of one per cent. was levied on the deposits of savings banks, and the depositors were exempted from both state and local taxation on their deposits. By the same act a state tax was also imposed upon the premiums or assessments of fire and marine insurance companies.

The next year it was attempted to levy a state tax on the dividends of non-resident shareholders in Massachusetts corporations by collecting it from the corporations.\(^3\) This act was contested in the courts, and finally declared unconstitutonal,\(^4\) but in the meantime it had been repealed, and the first general law for the taxation of Massachusetts corpora-

---

\(^1\) *Acts*, 1812, 32.  
\(^2\) *Ibid.*, 1832, 158.  
\(^3\) *Ibid.*, 1863, 236.  
\(^4\) Oliver *v.* Mills, 11 Allen, 268.
tions had been enacted. It provides for the taxation of the real estate and machinery of all Massachusetts corporations by the local assessors, for state and local purposes. The state tax commissioner then determines the total market value of the shares of the corporation, and after deducting therefrom the amount locally assessed for real estate and machinery, assesses the remainder at the average rate at which property is taxed throughout the state. The state retains a portion of the tax collected equal to the proportion of the shares held by non-residents, and distributes the remainder to the towns in proportion to the number of shares held in each. The object was to obtain a revenue for the state from the shares held by non-residents, but not to deprive the towns of the revenue that they had been deriving from the taxation of resident shareholders.

In taxing the shares of national banks, it was necessary to provide a different system in order to comply with congressional regulations. In 1868, in order to secure a revenue to

1 Acts, 1864, 208.

2 In the case of railroad, telegraph and telephone companies allowance is made for that portion of their business carried on outside of the commonwealth.

3 In order to prevent the town assessors from placing too high a valuation on the real estate and machinery, thus securing to the town an unfair portion of the tax, the tax commissioner has supervisory authority. With the exception of machinery, the tangible personal property of corporations is not locally assessed. In the case of railroads, only real estate outside of the right of way is locally assessed. The courts have held it unconstitutional to tax railroads on property within the right of way and devoted to a public purpose, but a tax on the franchise is not a tax on property (Portland Bank v. Apthorp, 12 Mass., 252). The question of the taxation of railroad property first came up in the case of Worcester v. The Western Railroad, 4 Met., 564. The court says: "it is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes therefore, like a canal, turnpike or highway, a public easement. The only principle on which the legislature could have authorized the taking of private property for its construction, without the owner's consent, is, that it was for the public use."
the state from the shares of non-residents, it was provided that a tax upon their shares should be collected from the banks by the local authorities. Shares held by residents continued to be assessed upon the individual holders, as in the case of other personal property. The superiority of the method of collecting the tax through the corporation itself, already demonstrated in the workings of the corporation tax act of 1864, soon led to its application to national banks. The law of 1871 provides for the levying of a tax by the local assessors upon the total market value of the shares less the value of the real estate. The method of distributing the amount collected between the state and the cities and towns is the same as in the case of other corporations.

Another important modification of the general property tax came in 1881. According to the method of the general property tax, the attempt was made to tax both the real estate and the mortgage upon it. The law of 1881 is designed to bring about the taxation of real estate once, and only once, whether it be mortgaged or not. It leaves the question as to who shall pay the tax upon the mortgage to be settled between the mortgagor and mortgagee, the result being that the owner of the property usually contracts to pay the tax.

In 1891 a state collateral inheritance tax was levied. Inventories of all estates liable to the tax are filed with the register of probate and mailed by that officer to the treasurer of the commonwealth. By means of this inventory or of an appraisement made by appraisers appointed by the judge of probate, the treasurer of the commonwealth assesses the tax.

It is thus evident that the general property tax has undergone a considerable disintegration, and its present unsatis-

\(^1\) Acts, 1868, 242.  \(^2\) Ibid., 1871, 390.
factory condition appears to make further disintegration inevitable. The general property tax in Massachusetts has always been in theory a general income tax; and it has actually been a combined property and income tax. In case a person derived his income from property, tangible or intangible, the value of the property was considered the best gauge of his income, but in case his income was derived from a trade or profession, he was taxed on his income just as if it had been so much real estate or personal property. It is in the taxation of intangible property and income that the general property tax has broken down most completely.

The income tax applies to the excess of income over two thousand dollars derived from any trade, profession or employment. Although the statute declares that incomes derived from property subject to taxation shall not be taxed, the court has held that this does not exempt the income of merchants derived from their business. The tax is quite unpopular and from a revenue standpoint is of little importance. In 1895, 242 towns taxed no income whatever. It has been impossible to obtain the figures for Boston and Somerville, but the total income assessed in the other cities and towns amounted to but $5,409,925. This amount taxed at the average rate would bring in an aggregate revenue of about eighty thousand dollars. The tax commission reports that this partial income tax “has proved no less difficult of satisfactory administration than the other parts of the present method of taxing intangible personalty.” Concerning the attempted taxation of intangible personalty the same commission says: “The taxation of this form of property is in high degree uncertain, irregular, and unsatisfactory. It rests mainly on guess work; it is blind, and therefore unequal.

1 Wilcox v. Middlesex Commissioners, 103 Mass., 544.
3 Ibid., p. 109.
Here is its greatest evil, though not its only evil. It is hap-
azard in its practical working, and hence demoralizing alike
to tax payers and tax officials.\textsuperscript{1} The commission therefore
recommends the abolition of the partial income tax and of
the tax on intangible personalty, and the substitution of a
general inheritance tax and of a habitation tax.

With the disintegration of the general property tax, the
tendency has been more and more toward a separation of
state from local taxation; the state has obtained a constantly
increasing portion of its revenue from corporation and inheri-
tance taxes, while the taxation of real estate has been left
more and more exclusively to the municipalities. At pres-
ent the cities and towns levy and collect the general prop-
erty tax, the poll tax and the tax on national banks, and pay
part of the proceeds to the state; the state levies and collects
the corporation tax and distributes part of the proceeds to
the cities and towns, while it taxes savings banks, insurance
companies, and collateral inheritances, and retains the entire
proceeds. With the more complete disintegration of the
general property tax which is impending, it seems very
probable that certain of the resulting taxes will be reserved
to the municipalities, while others will be used exclusively
by the central government.

Some segregation of the sources of revenue seems to fol-
low naturally from their varying natures. Among a number
of different taxes it is to be expected that some will prove
peculiarly appropriate for local and others for state purposes.
This is unquestionably a fact. There are certain taxes that
are peculiarly adapted to municipal administration and there
are others that are peculiarly adapted to commonwealth ad-
ministration. A real estate tax cannot be uniformly ad-
ministered over an extensive area; it is best adapted to

\textsuperscript{1} Report of the Tax Commission, 1897, p. 59.
TAXATION

local administration. On the other hand, it is evident that taxes upon inheritance and upon inter-municipal corporations can not be successfully administered by a government whose jurisdiction extends over but a small area. Such a separation is reinforced by the fact that each of these two governments in the exercise of its peculiar functions stands in a special relation to certain economic interests. Certain economic interests are more vitally and immediately affected by the activities of the municipality, and certain others by the activities of the commonwealth. The value of real estate is to a considerable extent created and maintained by the activities of the municipality; while on the other hand corporations receive their charters from the state, and the right of inheritance is secured by the state.
CHAPTER VIII

STREET RAILWAYS

The development of street railways in Massachusetts began in 1853 with the incorporation of two companies by special acts of the legislature. One of these began operations between Boston and Cambridge in the spring of 1856 and the other between Boston and Roxbury a few months later. The relation of the street railway to the municipality, set forth in these special acts, was followed, in most respects, by subsequent special and general acts for many years and in certain important respects has continued down to the present time.

It was provided that the acts should be void unless accepted by the city councils of the cities affected. After a public hearing the mayor and aldermen might grant locations or franchises for the laying of tracks; and, at any time after the expiration of one year from the completion of the road, the mayor and aldermen might revoke any franchise thus granted. Street railways were felt to be a very doubtful experiment, and this provision was intended as a safeguard to compel the removal of the tracks from the street in case they became a public nuisance. Although the street railway soon came to be recognized as necessary and permanent, the certain measure of utility in this provision has secured its continuance down to the present time. The cities were authorized after the expiration of ten years to purchase the roads by paying a sum sufficient to reimburse the stockholders

1 Acts, 1853, 353, 383.  
2 Ibid., 1854, 94.
for the par value of their shares and to secure to them, together with their dividends, an annual return of ten per cent. for the period during which they had held the shares. The aldermen had power to make regulations concerning the speed of cars, the use of tracks and similar matters. The companies were required to make annual returns to the secretary of the commonwealth in the manner required of steam railroads.

In 1864 the first general law regulating street railways was passed. In most respects it simply follows the principles previously adopted in the special acts. No provision is made for municipal purchase of the roads, however, and it is provided that no company shall sell or lease its road except with the permission of the legislature. Furthermore, the first attempt at regulation by a state commission is here made. Upon complaint of the aldermen or selectmen, or of fifty voters of a city or town, the supreme judicial court is authorized to appoint three commissioners, who, after a public hearing, may revise and regulate street railway fares, but in so doing the profits of the road cannot be reduced to less than ten per cent. of its actual cost of construction. A similar commission may also be provided in case one company desires to use the tracks of another, and they are unable to agree upon terms.¹

By this time the street railway had come to be recognized as necessary and permanent, and it was urged that investments should be made more secure than they could be while the franchise was revocable at the pleasure of the aldermen or selectmen. Accordingly a special commission was appointed to consider the relation of the street railways to the cities and towns. The commission reported that they did not deem the laws of the business sufficiently settled to

¹ Acts, 1864, 229.
define strictly the proper relation of the municipality to the street railway. They considered, however, that although the municipality should have considerable freedom of action, it would be best to provide a permanent railroad commission, to which appeals might be carried in certain cases, and which should exercise broad powers over both steam and street railroads.¹

A railroad commission was established in 1869, and though its powers were few and weak, their judicious exercise has proved most beneficial.² It consists of three salaried members, appointed and removable by the governor and council. Their term of office is three years; and the method of partial renewal is adopted, the term of one member expiring annually.

By the law of 1869 and the amendments to it during the two following years, the commission was given a general supervision over all railroads and street-railways. Its most important power was that in the interest of publicity. Railway companies were required to furnish the commission all information requested, and to make annual returns to the commission according to the forms prescribed by it.³ The companies were required to report all railway accidents, and it was made the duty of the commission to investigate their cause. Whenever in the opinion of the commission improved facilities or reduced fares were demanded on any railway, it was made its duty to call the fact to the attention of the company; and upon the petition of the aldermen or selectmen, or of twenty voters, it was made the duty of the commission to investigate any complaint against a company, and if the complaint was well founded to recommend to the company the correction of the abuse, and also to report the facts to the legislature. The power, with important limitations, to

¹ *House Documents, 1865, no. 15.*  
² *Acts, 1869, 408.*  
³ *Ibid., 1870, 382.*
order a reduction of fares and to determine the terms upon which one company might use the tracks of another, which had hitherto rested with special commissions appointed by the supreme judicial court, was now transferred to the railroad commission. It was made the duty of the commission to notify the attorney-general in case it believed any company to be violating the law.

Up to 1874 every street railway had been incorporated by a special act of the legislature. Previous to this the struggles of contending companies for privileges in the streets of Boston and other cities had necessarily taken place before the committees of the legislature. The legislature determined who should and who should not be permitted to receive locations for their tracks from the board of aldermen. The aldermen could then grant a location or refuse it as they saw fit. The general incorporation law of this year provides that a certain number of individuals, after receiving the grant of a location by the aldermen or selectmen of a municipality, and fulfilling the usual conditions, shall receive a certificate of incorporation from the secretary of the commonwealth. This act also authorizes the commission to permit a railway corporation to increase its capital stock beyond the amount prescribed in its charter. This general law did not prevent street railway companies from incorporating under special acts if for any reason they chose to do so, and could prevail upon the legislature to comply with their desires. At present almost as many companies are incorporated by special acts as under the general law.

Two years later the commission was authorized to examine the books and accounts of railways from time to time in order to see that they were being kept in the manner that it had prescribed. It was also authorized to require railways

---

1 Acts, 1871, 381.  
2 Ibid., 1870, 382.  
3 Ibid., 1874, 29.  
4 Ibid., 1876, 185.
to publish statements of their financial condition at such times as it deemed proper; and on application of a director or of persons owning one-fiftieth part of the stock, the commission was required to examine the books and financial condition of the railway and to publish the results of its investigation.

No very important changes were made in the position of the street railway from 1876 down to within the past ten years. The total street railway mileage increased from 88.8 miles in 1860, to 222.5 miles in 1880, and to 470.2 miles in 1887. Then came the enormous development in street railway building, due to the substitution of electric for horse power, which is still in progress. Electricity was first used as a motive power on the Lynn and Boston road in 1888, and in 1889 the Boston and Revere electric railway was the first to be operated wholly by electric power. Since 1887 the street railway mileage has been more than trebled, and there are now but 11.9 miles operated exclusively by horse power.¹

The impetus given to railway building by the introduction of electric power, and the changed conditions that have resulted, have led to the enactment of a great deal of important legislation and to a considerable increase in the powers and duties of the state commission. The subject that has received more attention than any other is that of capitalization. Here the constant effort has been to prevent stock watering, or the capitalization of the franchise or earning capacity of the road. In order to accomplish this the commission has been given almost complete control over all issues of stocks and bonds. No company can increase its capital stock beyond the amount authorized in its charter without the approval of the commission. The commission deter-

¹ Report of the Board of Railroad Commissioners, 1897, p. 88.
mines whether the proposed increase is consistent with the public interest. If it finds the capitalization to be already greater than the value of the property, it may annex such conditions and requirements to its approval as it may deem proper. The commission is also authorized to determine the amount of each separate issue of stock and bonds. When new shares are issued they must first be offered to the stockholders at their market value, as estimated by the commission. The commission may approve the issue of mortgage bonds and decide upon their amount and the rate of interest to be paid, but "no issue shall be authorized unless, in the opinion of such board, the value of the constructed tracks, the equipments, and the other real and personal property of the company, taken at a fair value for railroad purposes, and excluding the value of the franchise, equals or exceeds the amount of capital stock and the debt."  

Previous to 1897, no lease, sale or consolidation could be made except by special permission of the legislature. The commission in its report of that year recommended that something be done to facilitate the merging of the many small companies that had sprung up, holding that this "might often result in securing greater economy and efficiency of management, and in thereby giving to the public a more convenient and, in some cases, a cheaper service." In accordance with this suggestion, acts were passed permitting connecting street railways to consolidate and to enter into leases and operating contracts with one another. The terms of all such consolidations and contracts must first be approved by the commission, and in the consolidation of two companies, their aggregate capitalization can in no case be

1 Acts, 1887, 543; Acts, 1896, 409.  
2 Ibid., 1894, 462.  
3 Ibid., 1894, 472.  
4 Ibid., 1889, 316.  
5 Twenty-eighth Report of the Railroad Commissioners, p. 106.
increased. By far the most important and substantial reductions in the price of street railway transportation that have come since its introduction in 1856, have been brought about by increasing the distance that may be traveled for a minimum fare, rather than in reducing the minimum. Five cents has always been the prevailing price, but its purchasing power has been greatly increased. This has usually come either through consolidations or extensions.

The commission can require any company to provide additional accommodations whenever it considers just and proper. It may also regulate the heating of the cars, and such fenders must be provided as it may require. The consent either of the state commission or of a special commission to be appointed by the superior court of the county, must be obtained for the crossing at grade of railroads by street railways, or of street railways by railroads. Until 1888, the joint use of tracks by different companies was regulated by the aldermen or selectmen. The law of this year gives the commission a veto over the order of a local board authorizing one company to use the tracks of another. When the lines were operated by horse power, the joint use of tracks was a comparatively simple matter, but with the use of electric power this has become increasingly difficult. The joint use of street railway tracks by different companies has become almost as impractical as in the case of steam railroads.

In 1894 three inspectors of steam railroads were appointed, and in 1897 their duties were extended to street railways. It is their duty to investigate accidents and to see whether the railways are complying with the laws relating to the safety of their equipment.

The change from horse to electric power has materially

1 Acts, 1897, 213, 269.  2 Ibid., 1891, 216.  3 Ibid., 1895, 136.  4 Ibid., 1895, 378.  5 Ibid., 1895, 426.  6 Ibid., 1888, 278.  7 Ibid., 1897, 376.
altered the relation of the street railway to the municipality. The old horse lines were usually included within the limits of a single city or town. Now the electric lines in eastern Massachusetts already form a continuous network between most of the cities and towns. Electric power has changed the street railway from a municipal to an inter-municipal institution. The lines operated by the Lowell, Lawrence and Haverhill Company extend through ten cities and towns, those of the West End through twelve, and those of the Lynn and Boston through eighteen. Extensions and consolidations are continually being made.\(^1\)

The electric roads have proved dangerous competitors to the railroads, and in some respects have already practically supplanted them. During the past four years there has been an average decrease of 4,766,000 per year in the number of passengers carried by the railroads; the greater part of which has been due to a falling off in short distance traffic. The railroad commission estimates that during the past four years the suburban travel to and from Boston on the steam roads has decreased ten per cent., while that on the electric roads has increased twenty-five per cent.\(^2\) The development of electric lines has brought railroad construction to a standstill. The commission in its report for 1896 says: \(^3\) "From 1832, when the building of railroads in Massachusetts began, up to 1880, there were constructed in this state on an average about forty miles of railroad a year—the largest annual increment, 131 miles, occurring in 1873. In the

\(^1\) Of the seventy-three companies operating lines in 1896, nineteen operated in but one municipality, seventeen in two, fifteen in three, twelve in four, three in five, two in six, two in seven, one in ten, one in twelve, and one in eighteen. Report of the Board of Railroad Commissioners, 1896.

\(^2\) Ibid., 1897, pp. 10-13. As competing systems of transportation have almost invariably led to combination and consolidation, this may be expected in the case of competing steam and electric lines.

\(^3\) Ibid., 1896, p. 9.
decade from 1880 to 1890, the rate was a little less than twenty miles a year. In the three years following 1890, the average fell to some eight miles; and in the last three years, less than two miles in all have been built. It appears, therefore, that for the present, so far as new lines are concerned, railroad construction in this state has practically come to an end. Additional trunk roads are no longer seriously thought of. The building of supplementary branch and cross lines seems to have been given over to the street railway companies. If the electric street railway had been discovered thirty or forty years earlier, doubtless some of the auxiliary railroad lines now in existence would never have been projected."

The street railway mileage is now 1,206 miles, or 57.4 per cent. of the railroad mileage, and is increasing at a more rapid rate than the railroad mileage has ever done. This development seems destined to continue until each center of population is connected with its neighbors, and a complete network of lines is thus formed throughout nearly the entire state.

With the recognition of the fact that the electric road had become an inter-municipal road, came a demand for a revision of its relations with the municipality. The power of one municipality to stand in the way of an inter-municipal road that the public convenience demanded, was considered anomalous. Moreover there was a popular feeling that the street railway companies should pay a special tax for the special privileges they enjoyed. To investigate the whole subject a special committee was appointed by the governor in July, 1897; the committee reported in February, 1898.

1 In 1897 there was a decrease of 11.4 miles in the total length of railroad lines. *Ibid.*, 1897, p. 4.

2 Length of line and not length of main track is here taken to compute railway mileage.
The committee however does not fully sympathize with the view that the street railway has become an inter-municipal institution. It holds the matter to be one "of distinctly municipal or local concernment, the community as a whole having only a broad interest in the principles involved . . . That the street railway, like the thoroughfare it partially occupies, has in many instances outgrown municipal limits, and so become an instrument of inter-urban travel and communication, is apparent, and this fact also has to be recognized as introducing new elements into the problem; but the fundamental principle of local control is thereby no more destroyed in the case of the railway than in the case of the street itself."

The analogy between the highway and the railway is plausible, but deceptive. The establishment and control of highways can usually be left to the separate local divisions; unity of control is not always essential; yet even here it has been found expedient to turn over the establishment and control of distinctly inter-municipal highways to the county commissioners, and the commonwealth has recently undertaken the establishment of an extensive system of state highways. But the electric road bears a closer resemblance to the railroad than to the highway. Control can best be exercised by an authority whose jurisdiction is as extensive as the institution to be controlled. Unless this is the case the general good may be sacrificed to the selfish interests of particular localities.

At present a municipality may refuse to grant a location to a railway that would be of great public benefit. A line between neighboring cities may be blocked by the action of an intervening town. If the local authorities refuse to grant a location to a steam railroad, an appeal can be taken to the

---

1 Report of the Special Committee on the Relations between Cities and Towns and Street Railway Companies, 1898, pp. 14, 15.
state commission.\textsuperscript{1} It seems that a similar rule should apply in the case of inter-municipal electric roads. The same objections exist to the present power of municipalities to revoke the location of a railway. This, too, should be exercised under the supervision of the state commission. Though the special committee recognizes the justice of this latter position, it denies that of the former.\textsuperscript{2}

Opinion differs as to the present legal power of municipalities to make the granting of a location or franchise conditional on the fulfilment of prescribed terms and stipulations. It may impose "restrictions," but whether this would be legally interpreted to mean "terms and conditions" is doubtful.\textsuperscript{3} Nevertheless, various conditions are often imposed by the municipalities as the price for obtaining a desired grant, extension, or alteration of a location. The railroad commission reports that it does not know that a municipality has ever received direct compensation for such a purpose, and holds that it would be improper for it to do so; and it is the opinion of the commission that legally enforceable conditions cannot be imposed relative to widening or paving the street,\textsuperscript{4} or to the amount of fare to be charged.\textsuperscript{5}

The special committee takes a different view, holding that

\textsuperscript{1} \textit{Acts}, 1872, 53.

\textsuperscript{2} By a special act in 1887, the railroad commission was given appellate jurisdiction over the granting and revocation of locations in Boston, Brookline, and Cambridge. This was just previous to the introduction of electric power, and the commission was opposed to having its authority extended over what it considered was a purely municipal matter. Now, however, under the enlarged sphere of activity of the electric road, the commission considers it eminently fitting that the authority which it has in Boston, Brookline, and Cambridge should be made general.

\textsuperscript{3} See Cambridge \textit{v. Cambridge Railroad Co.}, 10 Allen, 50.

\textsuperscript{4} But by general law the companies are required to pave and keep in repair the portion of the roadway between their tracks.

\textsuperscript{5} \textit{Report of the Board of Railroad Commissioners}, 1888, pp. 19, 174.
under the system in use in Massachusetts it was, and it now is, in the power, as it was and is the duty, of those representing both municipalities and companies to insist on more specific and better considered grants, covering, if thought best, a given term of years, and binding in law during that term." While the committee recommends that companies which have been granted a location in a municipality should be protected "from new and perhaps unreasonable conditions sought to be imposed in grants of alterations and extensions, which may be called for not less for public convenience than by corporate interest," yet it holds that municipalities should be given explicit power to impose terms and conditions on original grants of locations. It is just as true that the public convenience may be thwarted in the latter case as in the former; a single town may prevent the proper development of an extensive system of transportation, or if its demands for compensation are acceded to, may impose a permanent burden upon the entire system, and indirectly on all the people that use it.

Ever since the introduction of street railways, franchises, instead of being perpetual or for a definite term of years, have been legally revocable at the pleasure of the municipality. Practically, this has led to no serious results. Promoters and investors have not been discouraged, and the railways have been able to float their bonds at a rate probably as low as if the franchises were in terms perpetual. As the special committee has said, the Massachusetts franchise may be termed "a tenure during good behavior." As long as the road continues to perform a public service its franchise is

1 Report of the Special Committee on Street Railways, 1898, pp. 22, 23.

2 Ibid., p. 23.

3 The average rate of interest on Massachusetts railroad bonds in 1896 was 4.77 per cent.; on street railway bonds 4.98 per cent. Report of the Board of Railroad Commissioners, 1896, p. 10.
secure; revocation would work such great public injury that it could not be seriously considered. The railway interests prefer this system to the uncertainties of a term franchise, and its continuance is of great public importance as recognizing the complete responsibility of the railway to the public in the performance of its public function.

While the sale of street railway franchises has been a source of considerable revenue to cities in other states, and especially in European countries, this has never been the case in Massachusetts. The companies are not subjected to special burdens, but are taxed in the manner that other corporations are taxed. The theory has been that the street railways should neither be subjected to peculiar burdens nor permitted to earn exceptionally large profits. If exorbitant profits exist, the remedy has been held to lie in improved facilities or cheaper service. Transportation is one of the most vital forces in social organization; there is no public service that is more organically connected with the whole of social activity. There seems to be a growing feeling therefore that the railway, no less than the highway and the post-office, should be free from exploitation in the interest either of corporations or of governments. The railroad commission in arguing against a proposed special tax on street railways says: "A tax on the carrier is a tax on the passenger. . . . Nothing has hitherto been more free than the use of the highways, for all persons, and for all purposes of travel or transportation. There is no good reason why the person who travels in a street car should pay directly or indirectly for the privilege of traveling on the highway, any more than the person who travels in a public coach or in his private carriage."  

1 Report of the Special Committee on Street Railways, p. 18.
2 Report of the Board of Railroad Commissioners, 1895, p. 112. An illustration of the way in which a special tax on the company may become a tax upon the
Although the railroad commission, as has already been noted, has full control over street railway accommodations, its control over fares is very limited. It may order reductions provided the profits of the company will not thereby be reduced below ten per cent. on the actual cost of construction. In 1897 but one company paid as much as a ten per cent. dividend; thirty paid from 6 to 10 per cent.; nineteen paid from 2 to 5 per cent., and forty-three companies paid no dividends. The total dividends paid amounted to 6.02 per cent. of the total capital stock. The capital stock was $32,670,273, and the funded debt $28,007,600. This capitalization is probably considerably in excess of the actual cost of construction, but wise legislation and supervision have prevented the excesses that are prevalent in other states. Using round numbers only, the capitalization per mile in stock and bonds ($46,600) is less in Massachusetts than the average ($49,500) in the New England states, not a third of what it is in New York ($177,800) or half what it is in Pennsylvania ($128,200), less than half what it is ($94,100) in the United States as a whole; and it is less than it is in Great Britain ($47,000), where both construction and appliances are far less costly and elaborate, and over-capitalization has been guarded against with the utmost care.\footnote{Providing the road is not over-capitalized this means ten per cent. on the amount of its bonds as well as of its stock.}

passenger is furnished in the case of the petition of the town of Danvers for a reduction of fares on the Lynn and Boston Railway. The commission says, "We should perhaps be indisposed to recommend more than this at the present time, even if the case were stronger. The question of the financial relations of street railway companies to the cities and towns in which they are located, is under consideration, and may result in legislative action. If new requirements should be laid on the companies, this might have a necessary bearing on the question of fares. An addition of burdens and a reduction of fares at the same time, would be like 'burning a candle at both ends.'" \footnote{Ibid., 1897, p. 159.}

\footnote{Ibid., 1897, pp. 93-97.}

\footnote{Report of the Special Committee on Street Railways, 1898, p. 37. It should
The control over fares that the commission has been able to exercise under this provision has therefore never been very strong. The commission has from time to time received applications for the reduction of street railway fares. Some of them were manifestly unreasonable and would have undoubtedly reduced the profits of the company below ten per cent. Other proposed reductions have been considered without regard to their effect on the profits of the company, and under peculiar conditions the commission has ordered a reduction of fares; in such cases the company has complied without any complaint that the reduction would reduce its profits below ten per cent. on the cost of construction. The special committee on street railways advises that in place of the present limitation on the power of the board to reduce fares, it be provided that fares shall not be reduced by the commission below the average rate of fare charged for similar service by other street railways, which, in the judgment of the commission, are operated under substantially similar conditions. Such a method of control appears to be based on the theory that the interests of the public and of the street railway companies are ordinarily identical, that therefore the average rate will be approximately the just rate, and that governmental interference is necessary only in certain exceptional cases.

be borne in mind however that probably a larger proportion of the street railways of Massachusetts are built along country highways, where the cost of construction is relatively light, than is the case in any other state.

1 Report of the Special Committee on Street Railways, 1898, p. 53.
CHAPTER IX

GAS AND ELECTRIC LIGHT WORKS

1. History of Development and Control

ILLUMINATING gas was introduced in Massachusetts in 1823, with the incorporation of the Boston Gas Light Company by a special act of legislature. The act provides that the company must obtain the written consent of the mayor and aldermen in order to dig up the streets for the laying and repairing of gas pipes, and to them is reserved the power to regulate the acts of the company that affect in any manner the health, safety, or convenience of the inhabitants of the city. The relation of gas companies to municipalities has continued practically on the basis here formulated down to within recent years.

It was not until about a quarter of a century after the incorporation of the Boston company that a general movement for the establishment of gas works in the other cities and towns of the state began. In 1855 the first general law for the incorporation of gas companies was passed. It contains provisions almost identical with those already noted in the special act of 1823; and also the very important additional provision that in any city or town in which a gas company exists no similar company shall be incorporated unless the existing company has realized an annual dividend of seven per cent. on its capital stock for five years. By this provision any company that contented itself with a moderate

1 Law of Jan. 22, 1823. 2 Acts, 1855, 146.
return on its investment was guaranteed against competition. In 1870, however, this provision was repealed.\(^1\) Notwithstanding the existence of a general incorporation law, several companies have been incorporated by special act since 1855. But these special acts, as well as the special acts previous to 1855, contain provisions almost identical with those that have been noted in the first act of 1823, and which were afterwards included in the general law.

By an act of 1861 the governor and council were authorized to appoint an inspector of gas meters and illuminating gas. It was made his duty to examine each meter intended for use, and to stamp and seal it if found to be correct. Upon request of the mayor and aldermen of a city or the selectmen of a town, it was his duty to test the gas supplied to the city or town to see that it was of the required legal standard.\(^2\) In 1880\(^3\) the inspector was required to test the gas of every company supplying gas to fifty or more consumers at least twice a year.\(^4\)

The marked success with which the railroad commission had dealt with the problem of railway regulation suggested the formation of a commission with similar powers for the regulation of gas companies. Accordingly, a gas commission was established in 1885,\(^5\) with most comprehensive powers of supervision, for the protection both of the companies and of the public.\(^6\) Previous to the establishment of the commission,

\(^{1}\) Acts, 1870, 353.  \(^{2}\) Ibid., 1861, 168.  \(^{3}\) Ibid., 1880, 230.

\(^{4}\) In 1866 the city of Boston made an extensive investigation concerning the manufacture and inspection of gas, and in the following year the mayor petitioned the legislature to grant the city a more extensive control over the gas companies, and also the right to appoint a city inspector of gas and gas-meters. But the legislature refused to grant the request. See Report on the Manufacture and Inspection of Gas, Boston Documents, 1866, no. 116; also House Documents, 1867, no. 469.

\(^{5}\) Acts, 1855, 314.

\(^{6}\) This was sixty-two years after the first company was incorporated, and about
aside from the very limited field of the state inspector, no attempt at administrative supervision had been made; no attempt had been made to secure publicity of accounts or to regulate rates; and no effective plan had been adopted to prevent over-capitalization. The municipality had no control over these matters, and the commonwealth had not seen fit to exercise the power that it possessed. The municipality, after permitting a company to lay mains in its streets, had a limited power to regulate its acts in the interest of the health, safety and convenience of its inhabitants, but this gave it no control over the rates, capitalization or accounts of the company. Nor were municipalities authorized to own and operate gas works.

The first electric light company was organized in 1880. In six years the number had increased to forty. The companies were incorporated under a general law, and the cities and towns were required to grant the companies locations for their wires and poles, and had a limited power to regulate them. As a result of this policy, within three years three cities had two companies each, and Boston had five. When the gas commission was established in 1885, electric light was just being introduced, and it was not deemed best to put it under the control of the commission at the time. But the development of electric light companies was so rapid and the connection between gas and electric light so intimate that two years later the commission was given the same power over electric light companies that it had in the case of gas companies.

Previous to 1891 municipalities had no authority to own thirty-five years after the general movement had begun. Of the sixty-four gas companies existing in 1886, thirty-five were incorporated between 1850 and 1860, and all but thirteen were incorporated previous to 1870.—Report of the Gas Commission, 1886, p. 6.

1 Ibid.  
2 Acts, 1883, 221.  
3 Ibid., 1887, 382.
or operate gas or electric light works. In 1888, nevertheless, Danvers had erected an electric light plant for the purpose of lighting its streets. The next year it petitioned the legislature for permission to sell light and power, but its petition was denied. Peabody attempted to establish a plant but was restrained by the courts. At length in 1891, on the petition of a number of cities and towns, the legislature passed a general law permitting municipalities to purchase or erect gas and electric light plants for both private and public lighting. Municipalities were required first to purchase existing plants, and the municipal plants were subjected to substantially the same supervision of the gas and electric light commission as the private plants.

Thirteen towns and two cities now have their own gas or electric light works. Two towns have plants for the supply of both gas and electric light; the others supply only electric light. In the short time that it has been permitted, municipal ownership has developed quite rapidly. One of the chief difficulties in the way of municipal ownership is the fact that the lighting business has to a considerable extent become inter-municipal. In many cases it has been found most economical to have but one plant for several municipalities.

In 1897 eighteen of the sixty-seven gas companies and twenty-six of the eighty-three electric light companies were supplying more than one city or town. The tendency has been toward greater centralization. While this tendency continues, the greater flexibility of private management is a strong argument in its favor. We may rely upon private corporations to consolidate whenever economy of operation can be secured thereby, but we know that it is only very ex-

1 Spaulding v. Peabody, 153 Mass., 129.
2 Acts, 1891, 370. In the same year a special act was passed to legalize the action of Danvers in establishing its plant.
extraordinary conditions that will bring about the union of municipalities for the performance of a common function.

2. The Gas and Electric Light Commission

Since the establishment of the commission in 1885, its powers have been frequently amended, but always to increase and perfect them; the object being to place the commission in position to secure to the companies every opportunity for serving the public efficiently and economically, and to see that they make full use of their opportunities. As at present organized, the commission consists of three members appointed by the governor and council for terms of three years. The principle of partial renewal is adopted, the term of one member expiring annually. The members receive a salary and are not permitted to engage in any other business. They can be removed only for cause, after notice and hearing.

A most important power of the commission and the one on which the intelligent exercise of all others depends, is that of securing publicity. The commission prescribes the form and method of keeping accounts for both public and private works, and may inspect their accounts at any time. Since 1896, also, each company or municipality has been required to keep such records concerning the manufacture and distribution of gas or electric light as the commission may prescribe. Annual reports must be made to the commission in the form and manner prescribed by it, and the manager of every municipal plant must in addition render a detailed report to the mayor or selectmen of the city or

1 Acts, 1894, 503.

2 The gas inspector still performs his duties independently of the commission, though required to furnish it information and assistance upon request.—Acts 1885, 315.

town, according to the form prescribed by the commission. Gas and electric light companies are required to report to the commission within twenty-four hours, all accidents caused by gas or electricity,¹ and chiefs of police and medical examiners are required to report such accidents, whether occurring in connection with municipal or private management.² The facilities of the commission for getting at the facts necessary to hold the companies and the municipalities to a responsible performance of their public function, are therefore almost complete; all that is lacking is a periodical audit of their accounts.

The commission has power on appeal to prevent municipalities from granting franchises to more than one gas or electric light company. In case a new company applies for a franchise in a town already supplied by an existing company, the mayor and aldermen or the selectmen may, after a public hearing, grant the request; an appeal may then be taken to the commission, and its decision, made after giving notice and hearing, is final. In dealing with this problem, the policy of the commission has been consistent. It does not consider competition possible or desirable in the lighting business, and only in very exceptional cases will it permit a duplication of plants. This policy is well set forth in its decision upon the appeal of the Worcester Electric Light Company:³ "The history of corporations doing an electric lighting and similar business in competition in various parts of the country affords strong ground for believing that a new company, if allowed to engage in business, would not long remain by itself, as competition for a period would probably be followed, as elsewhere, by consolidation or absorption. Whether or not such union would be for the public good, the com-

panies would see a gain thereby, and no power rests in this Board or elsewhere, under existing laws, which could effectually prevent some form of consolidation. If the advantages incident to the growth of population, and the development of business, are to be secured and retained for the benefit of consumers, every reasonable effort must be made to prevent unnecessary development of the capital chargeable upon the business.” In conformity with this same policy, municipalities before undertaking municipal ownership, are required to purchase existing plants. As long as the companies properly perform their service to the community, they are free from competition; they have a practical monopoly that is abrogated only for cause. By this plan the risk to the investor is greatly reduced, and he may very properly be called upon to accept smaller dividends than would otherwise be equitable.¹

The commission has control over the consolidation of gas companies with electric light companies; and it may after notice and hearing authorize a gas company to furnish electric light. But unless the gas company purchase the franchise of an existing electric light company it must obtain a franchise from the municipality in order to erect poles and string wires.² The policy of the commission has been to favor consolidation in the smaller cities and towns, where by that means economies in operation can usually be secured. It argues that, “If a consolidation shall bring increased strength and a larger measure of prosperity to the corporations, some share in these advantages will be received by the

¹ The question whether locations or franchises once granted may be revoked by the municipality is not fully settled. There is no statute specifically authorizing either revocation or the exaction of compensation for the granting of locations; either would be of very doubtful validity. Legislation authorizing the exaction of compensation has been frequently sought, but as yet has not been granted.

² Acts, 1887, 385.
community." But in the case of the gas and electric light companies of the city of Worcester the commission refused to grant their petition to consolidate; holding that it would bring weakness rather than strength, and that consolidation would make it for their immediate interest to develop the sale of gas to the prejudice of electric light.

In order to prevent overcapitalization, gas and electric light companies must secure the approval of the commission for each new issue of stock or bonds. New shares cannot be offered to stockholders at less than their market value, as determined by the commission. Each year the commission is required to pass on numerous petitions of companies desiring to increase their capital stock, and each must be decided after a careful investigation of the peculiar conditions of the case. In deciding each case the two main points considered by the commission are (1) the purpose for which the new securities are to be issued, and (2) the relation of the present capitalization to a fair structural valuation of the plant. On the one hand an energetic development of the business must not be checked; and on the other, repairs that should be paid from income ought not to be made by an increase of capital, nor should earnings be capitalized that ought either to be spent in extending the business or in lowering the price to the consumer. If the commission finds the fair structural value of the plant to be less than the capitalization of the company, before allowing an issue of new stock or bonds it may prescribe such conditions and requirements as it deems best adapted to repair the capital stock within a reasonable time, or it may require the capital stock to be reduced by a prescribed amount.

---

1 Worcester then had a population of 84,655.
3 Acts, 1894, 450, 472.
4 Ibid., 1896, 473.
A gas or electric light company having a virtual monopoly of supplying a public service cannot be permitted to deny that service to any one who may be reasonably entitled to it. The commission may, therefore, after a public hearing, compel a company to furnish gas or electric light to any individual. In this matter also, it has the same power over municipalities that it has over companies.

Upon complaint of the mayor or selectmen, or of twenty customers of any company, concerning the price or quality of the gas or electric light furnished, the commission after a public hearing may order the price reduced or the quality improved. Municipalities cannot charge more for gas or electric light than will allow eight per cent. on the net investment, and they cannot charge less than actual cost except by written consent of the commission. Each year the commission is compelled to pass on numerous petitions for cheaper or better light. Many complaints are satisfactorily settled without any formal action on the part on the commission. Since the formation of the commission, upon an average sixteen companies have annually reduced the price of gas. Most of these reductions have come through the voluntary action of the companies. They have been due largely to the competition caused by the increased activity and energy manifested in everything connected with lighting, and especially to the competition of electric lights. They have been due also to the fact that the business, formerly largely speculative, has been placed on a substantial commercial basis; and with this the natural tendency has been to prefer a moderate rate of profit on a large investment rather than a large rate of profit on a small investment. To bring about this condition has been one of the chief functions of the commission. The average price of coal gas to the con-

1 Acts, 1886, 346.  
2 Ibid., 1891, 370.
sumer in 1886, the year after the creation of the commission, was $1.72 per thousand feet, in 1896 it was $1.17.\(^1\)

It is the duty of the commission to see that all the provisions of law relative to companies or municipalities engaged in the sale of gas or electric light are observed; and it may apply to the attorney-general and the courts to enforce all such provisions and all lawful orders that it makes.\(^2\)

State control over gas and electric light companies has certainly proved very efficient; whether municipal control might not be even better is, however, a very proper question. One difficulty in the way of municipal control, as in the case of municipal ownership, is that many of the plants supply several cities or towns. Here the lighting business has become an inter-municipal institution. It is possible, of course, to unite the towns served by a single company into a district for the purpose of exercising control over the company. Similar districts already exist for various purposes of administration. It is doubtful, however, whether the multiplication of local divisions is conducive to the highest political responsibility and efficiency.

There are, moreover, certain manifest advantages of control through a state commission. Efficient control must be of a quasi-judicial character, and must be exercised by men having an extensive technical knowledge of the subject. It does not seem probable that either of these essentials can be best secured through a local board. The state commission-

\(^1\) *Report of the Gas and Electric Light Commission, 1897*, p. 108. The continuous decline in the price of gas is shown in the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Average price of coal gas per m.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1886</td>
<td>$1.72</td>
</tr>
<tr>
<td>1887</td>
<td>$1.66</td>
</tr>
<tr>
<td>1888</td>
<td>$1.56</td>
</tr>
<tr>
<td>1889</td>
<td>$1.50</td>
</tr>
<tr>
<td>1890</td>
<td>$1.46</td>
</tr>
<tr>
<td>1891</td>
<td>$1.43</td>
</tr>
<tr>
<td>1892</td>
<td>$1.32</td>
</tr>
<tr>
<td>1893</td>
<td>$1.45</td>
</tr>
<tr>
<td>1894</td>
<td>$1.26</td>
</tr>
<tr>
<td>1895</td>
<td>$1.21</td>
</tr>
<tr>
<td>1896</td>
<td>$1.17</td>
</tr>
</tbody>
</table>

\(^2\) *Acts*, 1896, 426.
ers are paid good salaries, and devote all their time to the work. They thus gain greater experience and a better insight into the intricacies of the problem, than can possibly be gained by poorly paid, occasionally employed local boards. The public interest is best subserved by making the investment as secure as possible. If this is done the company can dispose of its bonds at a lower rate of interest, investors in its stock will be satisfied with smaller dividends, the business will be placed on a sure commercial basis, and the public will secure cheaper or better service. Investors can hardly fail to feel greater security if their interests are to be placed under the control of a state commission whose policy is well known, than under that of a local board whose policy can only be conjectured and is likely to be capricious. This being the case, municipalities, if permitted to choose in the matter, would probably find it to their interest to have the state commission perform this service for them. Municipalities might, with certain limitations, be permitted themselves to exercise control over the companies or to delegate that power to the state commission. There would then be a competition between the two methods of control, and with free competition the fittest may be trusted to survive.
CHAPTER X

THE CIVIL SERVICE COMMISSION

DOWN at least to the beginning of the present century the minister was the only professionally trained official in the service of the town. It is only recently that school teachers even have possessed special training. Popular administration has always been the rule. The plan adopted has in general been one of a great multiplicity of offices, simple duties, short terms, and compulsory, unpaid service. The theory is that each voter shall aid in administering the affairs of the town in accordance with his ability; and in order that he may do so without interfering seriously with his private affairs, the work is divided among a great number of persons. There is the least possible distinction between the governors and the governed. The policy decided upon in town meeting is popularly administered without the intervention of an official class.

But popular administration, in this sense of the term, is only possible under simple, primitive conditions. When the simple village community becomes a complex city, the complexity of the governmental organization must increase with the complexity of the conditions that it is its function to regulate. There must then be a division of labor. A comparatively small number of people must devote their entire time to the management of city business, while the great majority must devote themselves almost exclusively to private pursuits. The welfare of the community requires that both city and private business be conducted in the most
economical and efficient manner, and both of these ends are furthered by a division of labor. Moreover the complexity of city business requires the services of specially trained men. The large city of the present requires the best skill of the lawyer, the teacher, the physician, the chemist, of the civil, the electrical and the mechanical engineer, and of men of almost every pursuit.

Under the former system each officer received his authority from the people of the town and was responsible to them. This system was followed by one of party administration and party responsibility. Under this system each officer is responsible to his party and the party is responsible to the people. The theory underlying this system has recently received its most vigorous expression from the mayor-elect of a great city. He is reported to have said:

"The man for office under me must be honest, worthy, fit, yes; but he must be a Democrat, and the record of that man's Democracy must be pure and must be straight. That is my notion of city government, and by that idea I will guide. I do not do this on any 'To the victor belongs the spoils of the enemy' sentiment. It is not a question of victory or of spoils. The sole proposal is good government according to the expressed will of the people. These latter have declared for the Democracy, they have elected its candidates and accepted its platform of principles. With those as the conditions, what fashion of political man should be named to carry out those principles and keep the promises of that platform? Should he be a Republican? Or should he be a Democrat, who aided to make the platform; who believes in the principles set forth; who has fought for their success, and who has a heart to carry them into expression? There can be only one answer to all this. My appointees will be Democrats; none but Democrats."

This plan however has produced inefficiency in national,
commonwealth and municipal administration. Rotation in office, which is its natural result, is fatal to efficiency in most branches of the public service. The trouble arises from a failure to distinguish between the machine and the directing intelligence behind it. The administrative machine, if properly constituted, is as well adapted to the carrying out of a Republican as of a Democratic policy. Providing only the hand that directs it is in sympathy with the policy to be pursued, the administrative machine is as efficient in the administration of a high tariff as of a low tariff, of high license as of low license. This fact would doubtless be very generally recognized were it not for the supposed necessity of using the patronage to build up the party organization; of making the administrative machine serve also as the party machine. The strong temptation, therefore, to use the power of appointment and removal for partisan purposes has led to the necessity of placing that power under certain restrictions. The merit system has been the result.

The state civil service commission was established in 1884, by "an act to improve the civil service of the commonwealth and the cities thereof." The commission is made up of three members, appointed and removable by the governor with the consent of the council. Not more than two of the commissioners can be of the same political party, and one commissioner retires every year. It appoints a chief examiner, a secretary, a registrar of labor, and the necessary clerks. For the local administration of the law, the commission appoints a board of examiners for each city. Appeals from the action of these local boards are heard by the state commission; and the members are removable at its pleasure.

At present, with certain express exceptions, the authority

---

1 "Acts, 1884, 320."
of the commission extends to all officers and employees of the commonwealth and of the cities, and of all towns of over twelve thousand inhabitants adopting the act. The following officers and employees are exempt by law from the civil service rules: (1) judicial officers; (2) officers elected by the people, a city council, or either branch of the legislature; (3) officers whose appointment is subject to confirmation by the executive council of the commonwealth or by a city council; (4) the heads of the principal departments; (5) teachers in the public schools; (6) the employees of the commissioners of savings banks and of the treasurer and collector of taxes of cities and towns; (7) two employees of each city clerk, and the secretaries and confidential stenographers of the governor and of the mayors; (8) laborers in cities of less than one hundred thousand inhabitants, unless with the approval of the city council and mayor of the city.1

All other officers and employees may be brought under the rules of the commission. These rules may be general or special in their application. Among other things they must provide: (1) for a classification of the positions to be filled; (2) for the filling of vacancies in offices in accordance with the results of competitive or non-competitive examinations; (3) for the appointment of laborers in accordance with the results of examinations or otherwise; (4) for promotions in office on the basis of ascertained merit, seniority of service, or examination; (5) for a period of probation before an appointment is made permanent; and (6) for the preference of veterans in the certification of appointments, and for their certification without examination at the request of the appointing officer.2

The discretionary power thus vested in the commission is very great indeed. The law itself gives but little indication

1 Acts, 1896, 502. 2 Ibid., 1896, 449. 3 Ibid., 1884, 320; Ibid., 1896, 517.
of the actual extent to which the merit system has been applied or the actual methods adopted. For this one must look to the rules that have been adopted by the commission from time to time, with the approval of the governor and council.

The examinations held by the commission are both competitive and non-competitive. Non-competitive examinations may be provided in case of promotions, of temporary appointments, of positions for which there are no suitable candidates on the eligible list, and of positions requiring special information or skill. The eligible list is made up of those who have passed a competitive examination. Upon the requisition of the appointing officer the commission certifies the three names standing highest on the list; unless there are veterans on the list, in which case the law requires that they must be first certified without regard to rank.1 Upon the request of the appointing officer, moreover, any veteran who has gone through the form of registering with the commission will be certified for appointment without examination. Any one of the three names certified may be selected. If no one of these persons is satisfactory, the commission, stating its reason therefor, may issue additional names. Within these limitations the responsibility for the appointment remains with the appointing officer, and, except in the case of veterans, the power to remove or reduce is not impaired. The veterans' preference law provides that no veteran in the service of any city or town shall be removed, suspended or transferred without a hearing before the mayor or selectmen.2

From the start the commission has adopted a conservative

1 But if the appointing officer states in his requisition that he desires women, the veterans' preference does not apply.

2 Acts, 1896, 517. See also the Civil Service Rules in the report of the commission for 1897.
policy; not attempting to make full use of the broad powers granted it. In its first report, the commission states that it has not attempted at once to apply the rules to all the positions included within the law, and that "only those branches of the service in which a considerable number of persons are employed, requiring qualifications which can be ascertained by simple and uniform tests, have been included in the present classification." This first classification included only the clerical, prison and police service of the commonwealth and the cities, and the fire and labor service of Boston—about 4,200 positions in all. In the following year the rules were extended to include draw-tenders of bridges and foremen of laborers in Boston. In 1887 this provision was made to apply to all cities, and the inspection service of all cities was also included. In its second report, the commission states that it has received applications from several cities, "requesting that the rules be extended to cover more of the subordinate officers and employees, especially the members of the fire departments and the laborers." The commission not having sufficient funds to make the extension requested, and the cities having no authority to make appropriations for such a purpose, the commission recommended that cities be given this power, arguing that "it would not only afford the several cities a local option of how far the system should be extended in their municipal affairs, but it would invite and encourage local interest and activity in the determination of this question, and would enable these communities to test more thoroughly the value of the system by its operation on a larger scale."

Accordingly in 1887 cities were granted authority to make appropriations to defray the expense of administering civil service rules.¹ In the following year the city of Cambridge

¹ Acts, 1887, 345.
requested that the rules be extended to its labor service, and made the necessary appropriation for that purpose. In the same voluntary manner New Bedford secured the application of the rules to its labor service in 1891, Newton in 1894, Everett in 1896, and Worcester in 1897. The policy of the commission has therefore been to make the application and continuance of the labor service rules optional except in the case of the city of Boston. This policy was to a certain extent fixed by law in 1896, by the adoption of an amendment to the law of 1888, providing that its provision in regard to the labor service shall not take effect in any city of less than one hundred thousand inhabitants except on its acceptance by the mayor and city council.¹

In 1892, Cambridge again took the lead by officially requesting that the rules be extended to its fire service. The commission accordingly adopted a rule providing that the fire service of any city would be included in the classified service on the application of its mayor and aldermen. In the following year Somerville took advantage of this provision; New Bedford and Lowell followed in 1897. Owing to several accidents in the handling of steam by some of the school janitors of Boston, the school committee of that city petitioned the legislature for an act compelling the commission to include all the school engineers and janitors of the city in the classified service. This was done by the law of 1889.² Upon the request of Cambridge that its school janitors should also be included in the classified service, the commission adopted the rule that the school engineers and janitors of any city would be included at the request of the school committee of the city. Again on the petition of

¹ Acts, 1896, 449. In 1895, Boston was the only city of more than one hundred thousand inhabitants. Worcester had 98,767, and Fall River, 89,203.

the school committee of Boston, all the truant officers appointed by it were by law included in the classified service.

In 1894 an act was passed providing that any town of more than twelve thousand inhabitants might by vote bring itself under the provisions of the civil service law. Brookline, the only town of more than twelve thousand, took advantage of the provisions of the law during the same year. A law of the same year provides for the appointment of inspectors of plumbing in every city and town having five thousand inhabitants or having a system of water supply or sewerage; and all inspectors before appointment are to be subjected to an examination by the commission. In 1896 the commission made a further extension of its rules so as to include in the classified service the aids of the state fire marshal, and, of the city service, all messengers, all superintendents not exempted by statute, and all civil engineers, draughtsmen and other of the employees of the city engineer.

In the gradual extension of the merit system through the voluntary action of the cities, the growing popularity of the system is clearly shown. We have noted how time after time the classified service has been extended by the civil service commission at the request of the cities concerned; this, in fact, has been the prevailing method by which extensions have been made. The question, therefore, naturally arises as to whether the adoption of the merit system might not better be left entirely to the option of the cities and towns. Although the development would have at first been slower, it seems probable that under a local option system most of the cities would have voluntarily placed their civil service under the rules of the state civil service commission.

Yet it is also probable that were each city, desiring to adopt the merit system, required itself to administer the system, instead of leaving its administration as at present to a state civil service commission, very few cities would undertake the reform. It can hardly be expected that a small city with but a small number of persons in its service, will go to the trouble and expense of establishing the machinery necessary for the independent administration of the merit system.

Centralized administration seems in this case to be the most economical, efficient and reliable. It is more economical because a separate commission for each city would lead to the needless repetition of work now performed but once for all by the central commission. It is more efficient because ordinarily the state commission would be composed of members of a higher grade than those of the local commissions. It is more reliable because entirely independent of the local administration and therefore not open to the suspicion of being influenced by it. The function of the commonwealth seems here to be properly, not regulation or compulsion, but the tender of its services through the civil service commission to those cities that desire to secure the benefits of the merit system. We would then have central administration for the purpose of serving the localities rather than for the exercise of control over them.

The merit system was instituted for the purpose of doing away with the spoils system, but in its actual application it does more than this: it has enormously increased the competition for office both in quantity and quality. Without the merit system, the appointing power is practically limited in selecting his subordinates to his personal acquaintances or persons recommended by them. Having no means of testing the actual ability of the applicant, the appointing officer, if possible, selects a person concerning whom he has some personal knowledge—preferably a relative or friend. With
the adoption of the merit system, all may enter the competition on equal terms. It secures equality of opportunity, and this results in the placing of the round pegs in the round holes.
CHAPTER XI

CENTRAL AUDIT, LOCAL RECORDS, STATE HIGHWAYS AND THE METROPOLITAN DISTRICT

1. The Audit of County Accounts

The county has never been a vigorous institution in Massachusetts. It is little more than an administrative district for purposes of state administration. Its chief function is the maintenance of courts and prisons. Until 1855 county officers were appointed by the governor and council, and judges, justices and medical examiners are still so appointed. When the counties were first established their boundaries were doubtless determined with reference to convenience as administrative districts; but population has moved and the boundaries have remained fixed until now they are not at all adapted to the purposes for which they exist. Norfolk county is composed of three separate parts: two of its towns are inside of neighboring counties. It is not to be expected, therefore, that any vigorous local interest will be taken in county administration; its efficiency must largely depend upon state supervision.

In 1874 the house committee on finance, after investigating the accounts of county officers, reported that it was impossible to conceive "of a more loose, irresponsible and grossly defective method of transacting public business." A special committee was charged with the further investigation of the matter, and its report of the following year shows that the evils had not been exaggerated. It reports "that more than

---

1 House Documents, no. 493, 1874.
half the justices appear to have performed their administrative duties as suited their own notions and convenience, without the slightest regard for the requirements of law." In Barnstable county the treasurers were accustomed to retain their books and accounts upon leaving the office. In Franklin county the treasurer never balanced his accounts. "Some treasurers balance their accounts monthly; others yearly. We think a private corporation would hardly allow a bookkeeper to run his cash account a week without making a balance."  

No action was taken until four years later. In 1879 the commissioners of savings banks were given supervision over the accounts of a large number of county officers. They were required to inspect personally, at least once a year, the books and accounts of county treasurers, commissioners, sheriffs, jailers, masters of houses of correction, district attorneys, clerks of courts, bail commissioners, registers of probate and insolvency, and registers of deeds. They were authorized to require uniformity in methods of keeping accounts. Each of these officers was required to make an annual report of receipts and expenditures to the bank commissioners in the manner prescribed by them.

The bank commissioners continued to audit county accounts until 1887. Though they accomplished much, their work was not as thorough or satisfactory as it might have been, or as they themselves desired. A multiplicity of other duties prevented them from devoting sufficient time to the work. Furthermore, police courts and trial justices were omitted from their supervision, and as these officers turned over large sums of money to the county treasurer, the commissioners could not ascertain accurately the correctness

1 House Documents, no. 18, 1875.
of the accounts of that officer. At the suggestion of the commissioners they were relieved of their control over county accounts, and the office of controller of county accounts was created.  

The controller of county accounts is appointed and removable by the governor and council. His powers differ from those of the bank commissioners chiefly in that Suffolk county is exempt from his supervision, and the inferior courts and trial justices have been brought under his control.  

The county treasurer and all the officers that are required to pay money to him are under the supervision of the controller. He is also required to examine the official bonds of county officers, and to audit and certify the monthly traveling expenses of county commissioners.  

It has long been the custom of the legislature annually to vote the appropriations and the tax levy for each county except Suffolk. This is largely a mere matter of form; its chief merit lies in the publicity that it involves rather than in the exercise of a wise discretion on the part of the legislature. County commissioners are required to submit annual estimates of receipts and expenditures to the state controller in the form prescribed by him. It is then the duty of the controller to analyze and classify these estimates, as nearly as possible on a uniform basis, and report them to the legislature; and he is required to send a copy of this report to the mayor or selectmen of each city and town.  

The work of the controller in examining and supervising county accounts has proved most valuable. The irresponsible methods shown in the investigations of 1874 and 1875 have

1 Acts, 1887, 438.
2 The affairs of Suffolk county are attended to by the city of Boston. The city auditor exercises the supervision that in the other counties is exercised by the state controller.
3 Acts, 1890, 380. 4 Ibid., 1893, 273. 5 Ibid., 1895, 143; Ibid., 1897, 153.
been corrected. The light which the controller has thrown upon the hitherto obscure and devious methods of county administration has led to several important reforms. The publicity which his work has secured has enabled the people to exercise a more effective control over the officers elected by them than was formerly possible. It is perhaps needless to argue that this work could not be as efficiently performed by a local officer. From the greater experience gained by devoting all his time to the auditing of county accounts the state officer is able to render better service; he is an expert. The work of a local auditor is always open to the suspicion of being affected by personal or local influences. State audit has the essential element of reliability.

In the future we may expect a demand to arise for the extension of this service to the cities and towns. It is a service which, under even the most favorable local conditions, can best be rendered by the central government.

2. The Commissioner of Public Records

The very unsatisfactory condition of the public records in the towns and counties led to the appointment of a special commissioner to investigate the subject in 1884.\(^1\) The commissioner made his report in 1889.\(^2\) He found the records to be very incomplete, and in many cases existing records were in the hands of private individuals instead of the officials designated by law. Few towns had any safe place for keeping their records. The commissioner thought that there was ample legislation on the subject if it could only be enforced, and recommended that the existing commission be continued for a sufficient length of time to enable it to bring all the records available into the custody of the officers designated by law. He says: "I would not recommend

---

\(^1\) *Resolves, 1884, c. 65.*

\(^2\) *Report on the Public Records of Parishes, Towns and Counties.*
the creation of a record commission, to be erected on the model of the English Record Commission, for it seems to me wise to preserve and stimulate local interest in records. If they were to be brought to a central office, this interest would decline."

The special commission was continued for three years, and then in 1892 the office of commissioner of public records was established. It is the duty of this officer "to take such action as may be necessary to put the public records of the counties, cities, towns, churches, parishes or religious societies of the commonwealth in the custody and condition contemplated by the various laws relating to such records, and to secure their preservation." \(^1\)

Through the influence of the record commissioner vaults and safes have been provided until almost every city and town has its most important records fairly secure. Many important records have been printed and copies of others have been made. Nevertheless the records of many of the towns are far from being in the condition contemplated by the statutes and are very inconvenient for purposes of consultation. The record commissioner and many historical workers are therefore of the opinion that the English system should be adopted, that all parish and town records prior to a date to be fixed upon should be brought to a central office of fireproof construction, and there classified and indexed and put in a proper condition for preservation.

3. *The Highway Commission*

During the last decade of the eighteenth and the first few decades of the nineteenth century, there was considerable activity in road building. Numerous turnpike corporations were formed and extensive turnpikes were constructed. With the building of railroads, however, the care of the high-

\(^1\) *Acts*, 1892, 333.
way was lost sight of. It is only with the practical comple-
tion of the railway system that attention has again been
turned to the improvement of the highway. Formerly the
highway was the medium not only of local, but also of
through transportation. Although now reduced to a sub-
ordinate position, it is as indispensable as ever. Good roads
are necessary in order to secure the maximum of advantage
from the railway; they form an indispensable part of any
complete system of transportation.

In the present movement for good roads the bicycle has
been the important factor. The farmer was satisfied to use
the roads that he had always used. It was the wheelmen
who first appreciated the value of a level track. Chiefly as
the result of an agitation carried on by them, a special com-
mission was appointed in 1892 to report upon a plan for the
construction of state highways. In accordance with the
plans recommended by it, a permanent state highway com-
mission was established in the following year.¹ The com-
mission consists of three members appointed by the governor
and council for terms of three years. They may be removed
by the governor with the consent of the council for such
stated cause as he may deem sufficient.

It is the duty of the commission to compile statistics and
carry on investigations concerning the roads of the state, and
to collect information concerning the best materials for road
building. The commission may be consulted without charge
by all local authorities concerning the construction and
maintenance of roads; and it is required to hold annually at
least one meeting in each county for the discussion of road
improvement.

Upon petition of the mayor and aldermen of a city, the
selectmen of a town, or the county commissioners of a

¹ Acts, 1893, 476.
county, the highway commission may accept a road as a state highway, to be constructed and maintained by the commission at the expense of the commonwealth. The commission may contract for the construction of the road either with the city or town in which the road is situated or with private parties. One-quarter of the cost of construction must be repaid to the commonwealth by the county within six years. The commission may also contract with the city or town, or with private parties, for the maintenance of the highway, and it cannot be dug up or altered in any way without a permit from the commission. The construction of state roads must be apportioned fairly between the different counties, and not more than ten miles can be constructed in any county during any one year without the approval of the governor and council.\(^1\)

During the four years 1894–97, 1,094.4 miles of road were petitioned for and 179.2 miles laid out. The road laid out is situated in 121 different cities and towns.\(^2\) While at present these little strips of road are widely scattered and disconnected, it is the purpose of the commission that they shall eventually form parts of an extensive and well-planned system. The commission has in view the connection of centers of business with each other. In case there is a large traffic between two cities or towns by way of a road passing through other towns which profit little by the traffic, the road is to be taken as a state road. The commission also has in view the connection of the large centers of population with the surrounding agricultural areas. Each large city is to have roads radiating from it in all directions. Moreover the now declining towns remote from the railroads and waterways, are to be taken from their isolation and con-

\(^1\) *Acts, 1894, 497.*

nected with the business centers. Finally there are to be a number of continuous highways throughout the commonwealth.¹

4. The Metropolitan District

The area known as the metropolitan district consists of the territory lying within about ten miles of the city hall of Boston; it includes Boston and its suburbs. The history of this area shows first a period of division and then one of consolidation. In 1640 there were ten towns wholly or partly within this area. By 1860, through the process of settlement and division already described, the number had been more than trebled.

Now, however, forces tending toward consolidation and centralization came into play. The immense population which the centralization of industry had massed in Boston began to overflow into the adjoining towns. This movement was greatly accelerated by the development of the horse railway. Gradually in this way Boston and a number of its adjoining towns were merged in everything but name and government into a single community. As a result some of these towns were at length annexed to Boston; Roxbury in 1867, Dorchester in 1869, and Charlestown, Brighton and West Roxbury in 1873.² Brookline, which until 1705 was a part of Boston, was by these annexations almost surrounded by the territory of that city, but in spite of this fact it has retained an independent municipal existence down to the present time.

Though there have been no further annexations to Boston, the forces which led to them have continued unabated. The spreading out of population has been given an enormous

² During this period also two new towns were formed from the division of existing towns; Hyde Park in 1868 and Everett in 1870.
impetus by the development of electric lines since 1889. They have made land formerly of use only for agriculture available for residence purposes. They have organized the entire district consisting of twenty-nine cities and towns into a single community with a common center.

As early as 1872 the common needs of the district led to an attempt to have a special commission appointed to report a plan for a system of sewerage and water supply. The state board of health says in regard to this, “It seems to us of great importance in the interest of public health that some comprehensive system be adopted.” A special metropolitan drainage commission was authorized by the legislature in 1881. In its report it recommended the establishment of a drainage district to consist of Boston and twenty other cities and towns. Another special commission reported on the same subject in 1885, but its labors, too, were without immediate results. Finally, in 1889, the state board of health reported plans for a sewerage system for the Mystic and Charles river valleys, and a board of metropolitan sewerage commissioners was established to carry out these plans. The board consists of three salaried members appointed by the governor, with the consent of the council, for terms of three years. The method of partial renewal is adopted: the term of one member expiring annually. It is its duty to build, maintain and operate a system of main sewers for Boston and seventeen other cities and towns, situated in the Mystic and Charles river valleys. In 1895 it was authorized to provide a similar system for the cities and towns of the Neponset river valley, consisting of Boston, Dedham, Hyde Park and Milton.

In 1892 a special commission was appointed to “consider the advisability of laying out ample open spaces for the use

---

2 Acts, 1889, 439.
3 Ibid., 1895, 406.
of the public, in the towns and cities in the vicinity of Boston." In accordance with its recommendations a board of metropolitan park commissioners was established with broad powers to establish and maintain an extensive system of parks and boulevards for a district including twelve cities and twenty-five towns. The commission consists of five unsalaried members appointed by the governor and council for terms of five years. The term of one member expires annually, and they are subject to removal by the governor.

Upon the recommendation of the state board of health a metropolitan water board was created in 1895. It consists of three salaried members appointed and removable by the governor and council. Their term of office is three years, one member retiring annually. At least one of the three must be a resident of Boston and one a resident of the district outside of Boston. It is the duty of the board to construct, maintain and operate substantially in accordance with the plans prepared by the state board of health, a system of water supply for a metropolitan district, including seven cities and six towns, and all other cities and towns within ten miles of the state house requesting to be admitted to the district.

The work of these metropolitan commissions has been very satisfactory. Nevertheless it is felt that they are merely a temporary expedient; that sooner or later some plan will be adopted to provide for the common needs of the district through officers directly responsible to it. If at the time these commissions were formed this district had been included within the bounds of a single county, the task of providing for these common needs would doubtless have de-

---

1 Acts, 1892, 342.  
2 Ibid., 1893, 407; Ibid., 1894, 288; Ibid., 1895, 450.  
3 Ibid., 1895, 488.
volved upon the county authorities; but the county, as at present constituted, has become a well-nigh useless institution in Massachusetts. County lines as originally established were determined with reference to the common needs to be served; but conditions have changed and the lines have remained fixed, and now the metropolitan district includes one entire county and parts of three others. Territorial lines should neither divide people with like interests nor unite people with unlike interests; the problem is so to adjust the territorial boundary as to include a maximum of like with a minimum of unlike interests. In order that this may be brought about frequent readjustment is necessary. But it is here that the rigidity of governmental organization is most pronounced. Failure to make these readjustments is usually excused in the interest of the preservation of historical associations, but historical associations of the highest value center about the common life of the community rather than about any definite territorial area; they demand that boundary lines shall express the common life rather than cramp or divide it.

The demand for some form of local government for the metropolitan district led to the appointment of a special commission to consider the subject in 1894. This commission made its report in 1896. It does not favor the formation of a consolidated city by the annexation of all the suburban cities and towns to Boston. It recommends that, while preserving local initiative and local autonomy in all matters where the service can be undertaken and carried on by the respective cities and towns working within their own borders, a county with a county council at its head should be established for the execution of larger and more general undertakings. The district which it proposes to include in

1 Acts, 1894, 446.
this county contains twenty-nine cities and towns; it has an area of 273.07 square miles, and in 1895 contained a population of 982,037, of whom 494,205 were residents of Boston.\(^1\)

While the county system of organization is for the present at least doubtless the best, there is need for the consolidation of many of the petty municipalities into which the district is divided. The average area of these cities and towns, excluding Boston, is 8.2 square miles, and they vary in population from 864 to 81,519. As long as a municipality has a distinct common life, consolidation is premature; but when, as is in many cases a fact, the boundary line between two municipalities is no more distinct than the boundaries of an election district in an ordinary city, continued separation is a disorganizing element. The tendency of a wider social and industrial organization is more and more to merge these once distinct communities into a common whole. But while social and industrial relations have become organized on a wider basis, it is still attempted to organize government on a neighborhood basis. Under modern city conditions a man's real neighbors are not the people who happen to live in the same district or building that he does, but those whom he meets in the work-shop, the store, the labor union, the social club and the church. With the progress of civilization, association depends less and less on mere physical contiguity and more and more upon an identity of economic, social and intellectual interests.

\(^1\)See Report of the Metropolitan District Commission, 1896.
CHAPTER XII

THEORY OF THE RELATION OF COMMONWEALTH TO MUNICIPAL ACTIVITY.

The relation of the municipality to the commonwealth is not simply that of a subordinate to a superior. It is a relation of a much higher and more complex character. Each has a distinct sphere of activity and a distinct individuality. Each has rights to be respected by the other, and duties in the interest of the other; each is an organ of the state.

This follows from a consideration of the position of the municipality and the commonwealth in the economic organization of society. Upon the economic organization of society depend the territorial distribution and grouping of population. These groups or communities are of all sizes; the smaller being included within the larger, and these within still more extensive groups. The grouping of population about a common center leads to the development of common needs that can best be met by collective effort. Each such community will naturally provide institutions for the satisfaction of these common needs. It is thus that the town governments in Massachusetts were first formed. These communities are not the creation of a central government, they are the product of the existing economic organization; and territorial divisions, in so far as they are what they should be, will conform to them. Territorial boundaries should not be arbitrary, but should express the common life of the community.

Commonwealth lines in New England express past rather
than present conditions; they express the community of interest incident to a stage-coach regime rather than to one of the railroad and the telegraph. Had New England been settled under modern conditions as have the western commonwealths, it would have formed a single commonwealth instead of six. It would form a commonwealth of a little less than the average area and would rank third in population. New England has a marked individuality. The community of interest that really exists is evidenced by the very large number of New England organizations. Industry, and almost everything but government, is organized along New England rather than commonwealth lines.

The individuality of the cities and towns of Massachusetts is in most cases very marked. The political boundaries correspond in large measure to the natural boundaries. In the rural towns there is little demand for collective activity. In the cities, however, a vigorous community life is very evident. The city itself is clearly not the creature of the legislature, though under present conditions its government is. It is not an arbitrary territorial division, but a natural economic development. It is primarily a mobilization of labor and capital for greater division of labor and cooperation: it is also in itself a division of labor, being a product of the localization of industry. This implies a certain degree of individuality; but it is not individual in the sense of being self-sufficient or independent, but in the true sense of being a specialized organ for the performance of a special function. As such, like the individual, it should have all rights and immunities necessary for the full performance of its function, and all duties and limitations necessary to secure the rights and immunities of other organs.

The true relation of the municipality to the commonwealth is in many respects analogous to the relation of the individual to the commonwealth. In all civilized states the
individual has a sphere of liberty or self-government, upon which government either does not or cannot encroach. The tendency in all states is to widen the sphere of individual immunity; the delimitation of a broad sphere of individual self-government has during the past century been one of the chief concerns of constitution-makers. The totality of the activities of the state have been more or less definitely divided between the individual and the government; both are organs through which the ends of the state are attained.¹

One of the most important rights of the individual is his general right of independent initiative. His individuality is not repressed by his being limited to certain specific and enumerated activities. He has a general grant of power; he may undertake any activity which has not been expressly denied him or granted to some other authority. This is one reason why the individual is so versatile, so quick to undertake new enterprises; he does not have to wait for an act of the legislature.

The individual has been a brilliant success in America, while municipal government has been a comparative failure. This failure is probably largely due to the lack of a general grant of power on the part of the municipality. The city is naturally the pioneer in a broad field of undertakings. The greater centralization of wealth and population in the city creates new necessities and makes possible the provision of many new conveniences. The city is a leader in social organization. The improved methods which centralization permits it to originate are but slowly diffused through the rest of the community. Most of these new necessities and conveniences are supplied by private enterprise, but many require the direct or the indirect interference of the city government. In order that a continuous progress may not be

¹ See Burgess, *Political Science and Comparative Constitutional Law*, pp. 87–89.
prevented, it is, therefore, of the utmost importance that the city should be in position to respond at once to the new demands that are made upon it; it is essential that it should possess the power of initiation. This is far from being the case, however. The entire municipal organization is prescribed by statute in the greatest detail, and nothing can be done that is not specifically authorized. The needs of the municipality are constantly changing, but it cannot make any change in its organization or undertake any new activity without first receiving the express authorization of the legislature. The changes which should come about automatically with the changing needs of the community, are brought about, if at all, by the tardy and arbitrary methods of special legislation. This is at present the most demoralizing element in municipal government. In Germany and France the municipalities have a general grant of power; and as we have already seen, this was the system under which the institutions of the Massachusetts town were first developed. It is to this system that the remarkable strength and vigor of those institutions can be largely attributed. A return to this system would introduce new life and vigor into municipal government.

Assuming then a municipality with a general grant of power, what is its natural sphere of activity? In the first place there is a division of functions between the individual and the government as a whole; then there is division of governmental functions between the national and the commonwealth governments. Assuming that these divisions have taken place, upon what principles does the further distribution of commonwealth functions between the central and the local governments depend?

First. Where government undertakes to exercise control

over a given institution, the question of whether this control shall be administered centrally or locally will naturally turn upon the extent of the institution in question. For the exercise of efficient control, the jurisdiction of the controlling authority must be as extensive as the institution controlled. An officer whose jurisdiction covers but a single town cannot exercise efficient control over a railroad, telegraph or express company.¹

Second. Whether certain functions shall be administered centrally or locally depends upon substantially the same factors that determine whether a given industry shall be centralized or decentralized. The economies of production on a large scale cause the large producer to crowd out the smaller. The benefits of increased specialization can be obtained only by a more comprehensive organization. This is as true in certain branches of public administration as it is in industry. Each town might maintain a separate prison, insane asylum, and university, but equal efficiency could be obtained under this system only at an expense that would render it practically out of the question. The needs of classification and specialization require organization on a more comprehensive basis.²

Third. It being determined that a certain function shall be administered in the localities, the question that then arises is whether it shall be administered independently by the local authorities, by the local authorities under a central supervision, or by centrally-appointed and responsible officials. The answer to this question depends, in the first place, upon whether the efficient performance of the function is a matter of local or general concern. If exclusively of local concern, there is of course no demand for central interference. If, on the other hand, it be a matter of general concern, there may

¹ See above pp. 71, 74, 79, 120.  
² See above pp. 27, 37, 49, 62.
or may not be cause for central interference; this will depend upon whether there exists in the performance of the function an identity of interest between the municipality and the commonwealth.

If there is an identity of interest between the municipality and the commonwealth, there is no occasion for central interference; the general welfare will be cared for by the self interest of the municipality. Street cleaning and the maintenance of sewers and water supplies are, upon the whole, examples of this class of functions. If, however, the interests of the two are not in all respects identical, a certain degree of central supervision and control will be necessary. Poor relief is perhaps the best illustration of this.¹

But, when in the performance of a given function, the interests of the municipality and the commonwealth are directly antagonistic, it is usually better for the commonwealth to perform the function through its own officers than to compel the municipality to act as its agent. Compulsory service, once the rule on the part of the individual, has been very generally discarded as inefficient. As applied to municipalities it is even more unsatisfactory. When the local sentiment is opposed to the enforcement of a law restraining the individual, it will usually take as great an expenditure of energy on the part of the central officials to secure even a tardy enforcement of the law by the local officials, as would be required should they take its enforcement into their own hands. This is usually true in the case of prohibitory liquor laws, and often in the case of compulsory school attendance laws. The recognition of the principle brought about the establishment and maintenance of a state police force in Massachusetts.²

Governmental functions having been distributed between

¹ See above pp. 38, 54, 73, 98. ² See above pp. 73, 79, 80, 85, 89, 93.
the municipality and the commonwealth according to the principles above indicated, what is the proper relation of the commonwealth to the municipality as such? The municipality, acting as the agent of the commonwealth in the administration of functions in which there is not a complete identity of interest between the municipality and the commonwealth, should, as we have seen, be subjected to supervision and control; but it is also necessary that the commonwealth should, to a certain extent, aid and regulate the municipality when acting in furtherance of purely local needs. Here the analogy of the relation of the individual to the commonwealth is very apparent. The commonwealth regulates the individual in his relations with other individuals, and assists him by performing for him certain services that he cannot, or cannot efficiently and economically, perform for himself. The commonwealth stands in a similar relation to the municipality. It must regulate, to a considerable extent, the relations of the municipality to the individual and to other municipalities. Control over municipal taxation and boundaries is illustrative of this field of regulation. In the regulation of the municipality, however, there is no occasion for the close supervision that is maintained over the individual. There are municipalities that are occasional wrong-doers, but there is no class of criminally disposed municipalities, as there is of individuals. There may, however, be defective and dependent classes of municipalities that stand in need of special aid and supervision. Some of the small declining rural towns of Massachusetts may be

\[1\] At present the commonwealth exercises control over these matters, but the control exercised is legislative and not administrative. Legislative control is as inferior to administrative in these matters as it is in the case of quasi-public corporations. Similar benefits may be expected to accrue from the establishment of a board to exercise control over municipal taxation, loans, boundaries and other matters pertaining to the municipality as such, to those that have admittedly resulted from the establishment of a state board of railroad commissioners.
classed as dependents, and a few of its summer resort towns might possibly be classed as defectives. It is the province of the commonwealth moreover to assist the municipality as such, by performing for it certain services that it cannot, or cannot efficiently and economically, perform for itself. Of this nature are such services as the administration of the merit system, the technical regulation of municipal monopolies, the audit of municipal accounts, and generally the entire field of municipal inspection and the securing of the greatest possible publicity concerning municipal conditions.

The relation between the municipality and the commonwealth is organic and not mechanical. The problem is to recognize the individuality and responsibility of each. There must be centralization without consolidation and fusion, decentralization without divorce and isolation. There must be sufficient centralization to secure the autonomy of the commonwealth, sufficient decentralization to secure the autonomy of the municipality, sufficient control to secure the responsibility of each.

1 See above pp. 35, 48, 53.  
2 See above, pp. 136, 145, 151, 152.
STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW
EDITED BY THE
FACULTY OF POLITICAL SCIENCE OF COLUMBIA UNIVERSITY.

Price, $3.00; bound, $3.50.
1. The Divorce Problem—A Study in Statistics.
   By Walter F. Willcox, Ph. D. Price, 75c.
2. The History of Tariff Administration in the United States, from Colonial Times to the McKinley Administrative Bill.
   By John Dean Goss, Ph. D. Price, $1.00.
3. History of Municipal Land Ownership on Manhattan Island.
   By George Ashton Black, Ph. D. Price, $1.00.
   By Charles H. J. Douglas, Ph. D. (Not sold separately.)

VOLUME II, 1892-93. 503 pp.
Price, $3.00; bound, $3.50.
1. The Economics of the Russian Village.
   By Isaac A. Hourwich, Ph. D. Price, $1.00.
   By Samuel W. Dunscomb, Jr., Ph. D. Price, $1.00.

Price, $3.00; bound, $3.50.
   By Cortlandt F. Bishop, Ph. D. Price, $1.50.
   Vol. III, no. 1, may also be obtained bound. Price, $2.00.
2. The Commercial Policy of England toward the American Colonies.
   By George L. Beer, A. M. Price, $1.50.

Price, $3.00; bound, $3.50.
2. The Inheritance Tax.
   By Max West, Ph. D.—Price, $1.00.
3. History of Taxation in Vermont.
   By Frederick A. Wood, Ph. D.—Price, $1.00.
VOLUME V, 1895-96. 498 pp.
Price, $3.00; bound, $3.50.

1. Double Taxation in the United States.
   By Francis Walker, Ph. D.—Price, $1.00.

2. The Separation of Governmental Powers.
   By William Bondy, LL. B., Ph. D.—Price, $1.00.

   By Delos F. Wilcox, Ph. D.—Price, $1.00.

Price, $4.00; bound, $4.50.
By William Robert Shepherd, Ph. D.—Price, $4.00; bound, $4.50.

Price, $3.00; bound, $3.50.

1. History of the Transition from Provincial to Commonwealth Government in Massachusetts.
   By Harry A. Cushing, Ph. D. Price, $2.00.

2. Speculation on the Stock and Produce Exchanges of the United States.
   By Henry Crosby Emery, Ph. D. Price, $1.50.

Price, $3.50; bound, $4.00.

1. The Struggle between President Johnson and Congress over Reconstruction.
   By Charles Ernest Chadsey, Ph. D.—Price, $1.00.

2. Recent Centralizing Tendencies in State Educational Administration.
   By William Clarence Webster, Ph. D. Price, 75c.

   By Francis R. Stark, LL. B., Ph. D. Price, $1.00.

4. Public Administration in Massachusetts. The Relation of Central to Local Activity.
   By Robert Harvey Whitten, Ph. D. Price, $1.00.

VOLUME IX, 1897-98. 617 pp.
Price, $3.50; bound, $4.00.

1. English Local Government of To-day. A Study of the Relations of Central and Local Government.
   By Milo Roy Maltbie, Ph. D. Price, $2.00.

Vol. IX., no. 1, may be also obtained bound. Price, $2.50.

2. German Wage Theories. A History of their Development.
   By James W. Crook, Ph. D. Price, $1.00.

3. The Centralization of Administration in New York State.
   By John Archihald Fairlie, Ph. D. Price, $1.00.

The set of nine volumes is offered for $25; bound, $30.
For further information apply to

Prof. EDWIN R. A. SELIGMAN, Columbia University,
or to THE MACMILLAN COMPANY, New York,
London Agents, P. S. KING AND SON, Bridge Street, Westminster.
COLUMBIA UNIVERSITY

Faculty of Political Science.


COURSES OF LECTURES.


The course of study covers three years, at the end of which the degree of Ph. D. may be taken. Any person not a candidate for a degree may attend any of the courses at any time by payment of a proportional fee. Twenty-four fellowships of $500 each, and thirty-four scholarships of $150 each are awarded to advanced students. Several prizes of from $50 to $150 are awarded annually. Three prize lecturehips of $500 each for three years are open to competition of graduates. The library contains over 260,000 volumes. For further information address REGISTRAR.
Systematic Political Science

BY THE

FACULTY OF POLITICAL SCIENCE OF
COLUMBIA UNIVERSITY.

The Faculty of Political Science of Columbia University have in course of publication a series of systematic works covering the entire field of political science proper and of the allied sciences of public law and economics. The method of treatment is historical, comparative and statistical; and it is the aim of the writers to present the latest results of institutional development and of scientific thought in Europe and America.

The series includes the following ten works:

Political Science and Comparative Constitutional Law

Comparative Administrative Law.


Historical and Comparative Jurisprudence.
In preparation. . . . . . By Munroe Smith.


Historical and Comparative Science of Finance.

The Principles of Sociology. Published by the Columbia University Press (Macmillan), 1896. . . . . By Franklin H. Giddings.

