A TEUTONIC INSTITUTION REVIVED

The referendum and its concomitant devices have furnished a theme for much discourse of late, and much has been written for and against them. We have not observed, however, that any one has pointed out how this supposedly modern method of governmental action may seem to be merely a re-establishment of the most ancient organ of government and of legislation known to the Germanic race. This we shall endeavor to do, without offering any comments on the good or ill effects of the institution in question, or with the purpose of furnishing any arguments for or against it.

We are well aware that to many, especially Americans and Englishmen, it may seem far-fetched if not utterly vain to attempt a comparison of the institutions of our forefathers of fifteen hundred years ago and our own, or to point out how the latter have been developed out of the former. The usual view of the average American and English lawyer, so far as he has any views on the subject, is that the common law came into existence say in the reign of Henry II, or of John, or of Edward III, and that all that goes before is a confused and indefinite "antiquity", and such a view appears to be entertained even by some professors of the law. The scholars of the Continent who have labored upon the history of the law entertain no such idea, but recognize the continuity of its development from the earliest times of which we have knowledge. It is also recognized by them that England and the English law furnish an example of such development more uniform and less interrupted by foreign influences than is to be found elsewhere.

When our first knowledge of the institutions of the Germanic peoples begins, and for a considerable time thereafter, we find them formed into numerous tribes independent of each other, recognizing their relationship in blood, in language, and in the worship of the gods, but owing to each other no duty of obedience or of coöperation and claiming no control over other tribes except to endeavor to keep them aloof. These independent tribes were never of such a size that any of their members were compelled to live apart from the rest of the tribesmen at such a distance from the meeting place that they could not be reached by the summons to attend the host in arms, or the moot in time of peace, and could

not effectually attend them. In fact it may be inferred that this distance to some extent determined the size of the Germanic tribe, and that when a tribe became too numerous in this respect it was divided by the emigration of some of its members or the creation of new centers of tribal life which must finally result in the formation of new tribes.

From the accounts of Tacitus and other Roman writers, and from the inferences which may be drawn from the institutions of the Franks and the English and other Germanic tribes, we have a fair knowledge of the general nature of their government in what we may call their natural state, before they were modified by their conquest of the Western Empire. Without citing authorities, and without any attempt at more than a generalized statement, it may be said that the organ of government of these tribes or states was the host, the body of the warriors in solemn assembly. There were among them kings and chiefs, but as Tacitus tells us, these had influence rather than authority, and had no control over the body of the freemen except through their reputation for valor and wisdom, and the effect of their eloquence. There was as yet no differentiation of civil and criminal affairs, or of civil and military, or of secular and religious. The same meeting was the host in arms, the parliament, the court of justice, and the assembly for the worship of the gods. It is obvious that the action of such a body can only take place by its hearing proposals from some of its members and approving or rejecting them by some common action. That some regulation of the making of such proposals should grow up by custom was inevitable, and by the time our ancestors appear in history they had developed a presiding officer and a regulation by him of the right to make proposals to the assembly and to support them by reasons. The assent of the assembly was given by clash of arms, and its dissent was expressed by murmurs. Whatever was agreed on in this way was deemed to be solemnly decided and it determined the action of the tribe. Of course we must remember in this connection that the doctrine of the rule of the majority, or that what the greater part did was to be deemed to be done by all, was not yet evolved, so far as appears was not even thought of, and unanimity was required, a rule which lasted down to recent times in the Polish Diet and endures among us yet in the verdict of a jury. This assembly being the host in arms it was of course the duty of every freeman to be

present, and a failure to do so was one of the highest offenses of which he could be guilty. This duty of attending the meeting of the host afterwards appears as suit to the County Court, as it is commonly called, and the suit of court owing to a feudal lord by those who hold lands of him, and are bound to help form the assembly presided over by him, by which justice is dispensed among his tenants. This form of government was not peculiar to the Germanic race, but was shared by many primitive tribes.

The contact of our Germanic ancestors with the Roman power brought about a great change in their government, which was not occasioned by imitation of Roman institutions, but by the necessity of meeting Roman unity and discipline on equal terms. While the struggle between them was confined to the German frontier and to German soil, the advance made by the Germanic tribes consisted in the formation of more or less permanent unions of tribes theretofore wholly independent of each other, and an increase of the disciplinary power of the leader elected for the war, who was usually the King of some principal tribe. Their progress in this respect was contemporaneous with a decline in the Roman power, the reasons of which do not here concern us, and in time the scale was turned and the Germanic tribes were able to force their way into the Empire. Leaving out of view the earlier invasions whose effects have been relatively unimportant we may take the Frankish Conquest of Gaul as exhibiting all the principal effects of the Germanic invasion of the Empire as well as being that which had the most permanent results. The effect of the Conquest on the Franks was to greatly consolidate their union by scattering and commingling the various tribes of which it was composed; of increasing and making permanent the power of the King which is thus consolidated with that of the dux or war chief; of introducing the duty of obedience to orders temporary or permanent; and what is more to our purpose, decreasing and in the end destroying the power of the popular assembly altogether. Up to this time right was declared by the assembly whenever occasion arose, and while there was no conscious purpose of changing the law and they did not deem themselves to do so, or even to have the power to do so, yet when new circumstances called forth new judgments, the rule so evolved or applied became a part of the custom of the tribe whose assembly declared it. What was so determined by the general assembly of the people thus became the rule for the whole people,

not because it was deemed to be in the power of that assembly to make new laws, but that what that assembly determined to be the law was to be so recognized. While this is not yet legislation, it is the immediate forerunner of legislation and passed insensibly into it. When the Franks had occupied a large part of Gaul it is plain that a meeting of all the Franks was no longer possible. While their numbers were not so great that they might not all have come together on one field or hill so as to join in theory at least in some common resolution, the distances at which many of them dwelt from any possible meeting place, together with their changed mode of life, made it impracticable and all but impossible that they should so meet. This change of circumstances left a great gap in their constitution which was very long in being filled. The result was that the only method of making new rules for the conduct of affairs was by the King's orders. From the nature of the case the King as the commander of the host must be allowed to have power to direct many things, and as civil and military was an unknown distinction, the King's orders were made without observing that distinction, and without pretending to be law or to change the law they became in fact, under the name of capitularies, a source of law. The necessity of changing the law or of giving to the directions of a capitulary the full force of law, gave rise to a practice which prevailed for some time by which certain capitularies were presented to the host at its great assembly or review in each year in March or in May, and having them assented to by clash of arms in due and ancient form. This must, however, soon have become purely formal and perfunctory. The capitularies so approved were deemed to be law as distinguished from administrative orders the force of which would die with the King who made them, and were called *capitula legibus addenda*. The number summoned to the host was but a small proportion of all the Franks, and in each year was only from a portion of their whole territory. The practice fell into disuse, although the idea that the people should take part in the making of the laws lingered on and may be said never to have completely died out even in France, although the course of events in that country led to the doctrine that the King's will had the force of law, and later that it was law. Thus in the Frankish Empire the difficulty of having the freemen meet to deliberate was too great to be solved, and they thus lost all participation in the making of laws.

If we turn now to the invasion of Britain by our Germanic forefathers we shall see a state of affairs somewhat different, and with a difference which was destined to cause, or perhaps it would be better to say to occasion, a different result from that which came about in France. The Germanic Conquest of Britain, unlike that of Gaul, was brought about by numerous invasions of comparatively small bodies, and extended over a long time. Unlike that of Gaul it resulted in a practically complete removal of the former inhabitants in the early stages of the invasion. At least the former inhabitants do not appear to have influenced either the language, the law or the institution of the earlier invaders. The Angles and Saxons formed many small states instead of one great one, and remained so divided until a long time after the invasion. When they were united under one King the boundaries of the older kingdoms were by no means effaced, and the shires preserved the ancient kingdoms in many respects, and especially in the matter of judicial proceedings and in the making or rather the determination and expression of laws. The ancient assembly of the tribe or kingdom continued as that of the County, called in later times the County Court. A general assembly of all the people of England was not attempted even in theory. The Danish invasions compelled the development of a stronger kingdom in England than that which was known to the ancient Germans or to the Saxon invaders, but the power of the English King before the Norman Conquest never equalled that of the Frankish King, either in intensity or in extent. The English King had no court to which his subjects might have ordinary recourse for justice according to the law of the land. The highest court was the Shiremoot, or assembly of the County, in each County, and it applied the customs of the County, which might be quite different from those of other counties; and this variety of the law in different places continued until long after the Norman Conquest. The local character of such a tribunal must have been very apparent even from early times, and immediately after the Conquest, when the King was bent on governing according to the English law substantially as he found it, there were frequent meetings of several counties summoned to one place to give force to the judgments which should be there rendered. In one case we hear that as many as nine shires met in this way. In the Frankish kingdom, on the contrary, the assembly of the district corresponding in size and rank to the

shire was completely obsolete. The only assembly that remained was that which corresponded to the hundred, the purely local assembly. If now we consider the complete desuetude which befell the counterpart of the Shiremoot in France and its continued existence in England for many centuries, we are led to inquire the reasons for this difference, or perhaps rather the means by which it was brought about. The difficulty in either case is the hardship of requiring the ordinary freeman to quit his business and his home twice or more a year and travel one or two days, or even more, over a country scarcely provided with roads, at his own expense, and to maintain himself at his own expense during the sitting of the moot even if it was, as usual, for only one day. In doing so he would of course only be doing his ancient traditional duty of joining the host when it is called together. In the old days when the tribe was small, when wars were frequent, if not constant, when life was more simple and almost barbarous, such attendance was not a burden, or if it was, it was an unavoidable one. The life or death of the tribe might depend on the determinations of every such assembly, and the assembly might at once take to the field against an enemy. But in a time of comparative peace, when the Shiremoot could have before it nothing more important than the settling of the amount of a gift to the King, or the judging of causes between the King and private men, or between private men themselves, it was obvious the great hardship of attendance would appear to be incommensurate with any good that could be accomplished by it, and the maintenance of the old assembly in the old form would be impracticable. For this reason the assembly in the Frankish kingdom ceased altogether. It was enabled to continue in England by a means which has often produced real changes in the law and adapted it to changed circumstances without any formal change in the law itself; that is by pretending that the law has not been changed, but so applying it in practice that a change is really effected. This was not unknown to the Romans, but is a method which is a specialty of English law. As in the ancient assembly, there was no question of a majority, so also there was no question of a quorum; those who attended were the assembly. In later feudal times we hear of certain minimum numbers which should be required to constitute a court, even as low as two, though it is not probable that the assembly of the county would be deemed full if it were reduced nearly so low. Advantage was

taken of this principle of its constitution and the assembly was kept up by excusing, not formally, but in fact, the larger part of the freemen from attendance on each particular meeting, it having become the rule at a time and a way not well determined that if the priest and the reeve and some definite number of men from each vill or township, four or six for example, should come to the Shiremoot, that would be enough. The remaining men of the township or vill would be excused. The priest was eliminated by the separation of the Church Courts from the secular by the Conqueror. The presence of the reeve was necessary by reason of his office. The two, four or six men were chosen for each occasion by the people of the township, or as became not uncommon in later times, the duty of attending the Shiremoot was annexed to the ownership of certain lands as a recompense for their use, the lord in this way relieving his other tenants from the burden. We have here in this simple and obvious arrangement for the comfort and relief of the suitors, as those were called who were bound to attend, the origin of what is sometimes called "the principle of representative government". Much has been written on the subject of representative government with the object of presenting it as a wise and statesmanlike provision designed to bring together the best men of the country to consult about its affairs, and charged with the duty of forwarding the interests of their constituents and of the state. As we have seen, its beginnings are like very many other institutions of English law, mere fiction and makeshift.

With a Shiremoot thus constituted it is easy to see how several shires could well enough meet together. When the time came for the attempt to bring all England together it was made on the theory that all men as the King's tenants mediately or immediately should attend the King's Court, and as that was obviously impossible to be literally done, each shire was called on to do suit by a knight of the shire, just as the reeve and four men did suit for the men of the vill, and the boroughs in like manner were called on to come by one or more of the burgesses. The great men who could afford to attend were summoned to come in person. In this way the Great Council of the King, afterward called by the French name of Parliament, was manned. The separation of the Council into two houses and the predominance of the Commons as the representative assembly followed, and from this original have sprung all the representative governing bodies in the

world. The right of representing a constituence in such a legislative body is now looked on as a privilege. It is one eagerly sought and highly prized. In the early days of the English Parliament, however, such was not the case. It was still an onerous duty, it was attending the host, doing suit of Court, and he who attended was paid by the county or the borough for his trouble, although the law made no provision for his pay, at least until recent years. Proceedings against the inhabitants of counties for not sending a member to Parliament were not infrequent. Another and consequent result of this status of the member was the fact that being elected a member and undertaking the duty he could not resign it. As well might a man who is drafted for military service attempt to resign. His only means of avoiding it was and is (unless some recent statute has changed it) by way of the Chiltern Hundreds. Whatever may be said about representation as a device or instrument for the well government of the State, we thus see that it is in fact, in its origin and its history, only a makeshift. The ideal and traditional government is still that of the people. The people do not all participate; they live too far away, they are too numerous and too busy, and some of them too poor. It would be a burden too grievous to be borne.

Such a government by all the people was that of our ancestors when they first come into the light of history. Judging from what we know of the institutions of peoples in a lower stage of civilization than they, as the North American Indians, for instance, we may be sure that the government of our ancestors was substantially the same for very many centuries before. The vast increase of territory and the change of conditions made that form of government impracticable for twelve or thirteen hundred years. During that time the roads were somewhat improved, but the pace of men and horses was not increased, and the conveyance of news and of discussion and opinion was still slow and difficult. The invention of printing had made a beginning of a change, but the lack of means of transmission prevented it from having full effect. So long as these conditions lasted nothing better than representative government could be thought of. It was the nearest approach then practicable to the ancient national and we may say natural government of the people. Certain men were to go to the meeting place from each district and deliberate and act, and what they did should be deemed the act of all, because these men were deemed to be the very body of the people. That their action

should not always in reality be what the body of the people wished to have done is obvious. It is obvious *a priori,* and *a posteriori* it is the ground of much present discontent. Indeed we may hear it on every hand and from men of every station.

Those who are thus dissatisfied with the present mode of legislation are casting about for a remedy. Many of them are advocating the introduction of an institution or method of legislation which has been given or acquired the unhappy name of *referendum,* a name which might have been invented by one of the classical gentlemen who furnish names to the venders of tooth-powders, but from which it is not to be inferred that it is a nostrum, to be passed by without notice or examination. By the referendum it is proposed to present propositions to the whole people for their assent or dissent, not by clash of arms or by murmurs, but by ballots to be gathered and counted. The propositions to be so presented may be for changes of the laws, or for the determination of financial or administrative questions; in fact any and every sort of question which has to do with the welfare of the people. All such matters came before the ancient Germanic assembly and were determined by it. Such a body is necessarily confined to assent and dissent in disposing of what is presented to it. It has no organ for formulating propositions. It can, however, hear debate on the propositions advanced, and from the earliest times must have done so. We find the Homeric Greeks and the North American Indians both familiar with the eloquence of leaders in the assembly, and while we do not hear much of it among the ancient Germanic peoples we cannot doubt that it was a chief element in their deliberations.

Until the invention of the railroad, the telegraph and the newspaper, and what is more, the bringing of them into universal use, there was no substitute for the voice of the leader in the council uttered in the hearing of all. The nearest approach to it was to cut down the number of those who attended the council so that all present might hear. One who should take this large view of the course of the development of free government might say, whether with good reason or not we shall not undertake to decide, that now in these last days, by reason of the social and economic changes we have mentioned, the difficulty of common action by the people which gave rise to representative government has been removed. Such a one might argue to this effect: the voices of the leaders, or rather their words, come to the people more fully

and more easily than ever; every proposition is discussed more fully and by more advisers than could possibly be heard in any meeting; every change of sentiment, every wave of feeling is communicated more quickly and more truly than in a crowded assembly. The people are now in fact at all times assembled and ready and able on any reasonable notice to say whether they agree to any proposed action or not, and that so we should apply the maxim *cessante ratione, cessat et ipsa lex.* As the reason for what is called representative government has ceased, let it, too, cease, or at least, let it take a subordinate place where it may still be useful. Let the people resume the privilege of determining directly and in their own persons what they will do or have done, as their ancestors did long ago. The referendum is therefore not a transitory invention of doctrinaires, but a practical, long tried institution, about to be brought back to us on the tide of time. The direct government of the people by themselves made impracticable by circumstances has now by change of circumstances become practicable once more.

As we have said, we have no intention of making an argument for or against the referendum, nor is it apparent that any valid argument can be made from the view we have suggested, although on one hand it might be contended that the adoption of the referendum would be a reversion to a barbaric custom, outworn and long disused, and on the other that it is a return to the enjoyment of ancient liberties long lost but never quite forgotten. Those who prefer to suspend their judgment on this matter, but who recognize in the proposed changes a return to ancient conditions whether for good or ill, may at least find in it an example and a proof of the declaration of the preacher that there is nothing of which it can be said that it is new; "it hath been of old time which was before us."

John D. Shafer.

Court of Common Pleas, Pittsburgh, Pa.