

12-1-1960

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Recommended Citation

R. H. Maudsley, *The House of Lords*, 15 U. Miami L. Rev. 174 (1960)
Available at: <http://repository.law.miami.edu/umlr/vol15/iss2/5>

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THE HOUSE OF LORDS*

R. H. MAUDSLEY*

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I. INTRODUCTORY

It is not surprising that the House of Lords should be the subject of much misunderstanding in the United States. Its composition assumes the existence of a hereditary aristocracy, and its position in the Constitution requires that membership of the aristocracy implies not only social standing but also political power. Both these assumptions are contrary to American social and political principles; in England they are the result of continuous historical development from the feudal State of the Middle Ages, and their existence in modern Britain produces a problem of extreme complexity for those who wish both to preserve constitutional forms, and at the same time to ensure that the Constitution is appropriate to the needs of a modern democratic state.

The confusion is made all the more difficult to American observers by the fact that the name "House of Lords" applies both to the Second Chamber of the Legislature and also to the highest Appellate Court. It is as though the Senate and the Supreme Court were called by the same name.¹ The

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**This article was based upon an address given in December 1958 at the Founders' Day banquet of the University of Miami Chapter of Kappa Beta Pi International Legal Sorority.

1. An American law student, (not from Miami) on hearing that, by virtue of the Life Peerages Act 1958, provision was made for women to take their seats as members of the House of Lords, asked me the following question: "Now that women can sit in the House of Lords, will Lady Astor be giving judgment in these appeal cases"? It is hoped that the various incorrect assumptions which prompted this question will be exposed as this paper proceeds.

reason for this situation is, like so many other British peculiarities, entirely historical. As will be seen, there was no division of function between legislative and judicial matters in feudal times; the King's Council, from which the House of Lords developed, performed both, and in name the House of Lords continues to do so. But the only members who attend judicial hearings at the present day are the leading judges of the state—men who would have been appointed to a Supreme Court, if one existed under that name, and who are given peerages for the purpose of doing this work. Indeed, a statute was passed in the latter half of the nineteenth century, taking away the judicial powers of the House of Lords and vesting them in such a court; but, before the act carrying out this scheme came into force, provision was made for the creation of certain life peers as Lords of Appeal in Ordinary, who now carry out these judicial functions, and the jurisdiction was retained in name in the House of Lords.²

It is generally agreed that political stability is a factor of value to a society, and that an established constitution is one of the factors which contribute to this stability. Britain and North America have been particularly fortunate in this respect; this easily can be appreciated by observing the convulsions suffered by many European, Asiatic and South American countries where the Constitution has been subjected to continual and often violent change. But there must be development and reform in order to bring the functioning of the Constitution into line with the changing character of society. This is done in the United States largely by interpretation of the Constitution, and in the last hundred years the powers of the federal authority have increased gently without any alteration to the Constitution.³ The matter does not arise in this form in Britain, for there is no written Constitution to interpret. But changes are made by statutory provision, by convention and by practice. The House of Lords made a great mistake in refusing to accept voluntarily the reduced status which was inevitable as a democratic state developed, and in trying to prevent such reduction by blocking legislation in this direction.

In this respect, the history of the House of Lords shows a marked contrast from that of the Crown. The Crown has survived because it has been prepared to adjust itself to changing situations. It now retains in theory nearly all its ancient power; but in practice, these powers are either exercised by Ministers on behalf of the Crown or they are not exercised at all. The Crown in modern times has kept apart from party politics and has won such a reputation for impartiality in political affairs that decisions taken under prerogative powers, whether by the Sovereign herself⁴ or by a Minister acting

2. Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59.

3. See SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW* ch. VI (1955).

4. The only decision which the Sovereign now makes personally in political affairs is that of the choice of the Prime Minister. Even in this case, however, there is usually no scope for choice, and the convention is that the person selected is the Leader of the party which has a majority in the House of Commons; this is usually

on behalf of the Crown, are usually accepted by the public as being impartial decisions made in the national and not party interests. In this way the Crown has continued to perform a useful political function, and to maintain the confidence of the people at large.

The great question, as will be seen, in the dispute over the political powers of the House of Lords has been the question of the requirement of the assent of the House of Lords to legislation. Until 1911, a bill became law after passage according to the appropriate procedure by each House and by receiving the Crown's assent. The House of Lords has now merely a power to delay legislation, but the Crown's veto still remains. It remains, however, merely because it is never exercised, and has not been exercised since the reign of Queen Anne⁵ (1702-1714). In this respect the royal veto differs from that of the President of the United States and of State Governors. The House of Lords would have done better to observe the rule, as the Crown did, that it should not exercise its powers in defiance of popular will. Of course the Crown, in many cases, learned to do this the hard way. It had been necessary, in order to recover from the turmoil and chaos of the Middle Ages (culminating in the Wars of the Roses which ended in 1487) to establish a strong central authority. This only could be done in those days

known before the election. But there are cases in which difficulty can arise, and in such circumstances the Sovereign takes the advice of any persons whom it is thought proper to consult. The most important examples of such a situation in modern times are the following:

(1) when the Conservative Party was successful in the election of 1924, the Leader of the Party was Lord Curzon. This was the first occasion since 1911 — when the powers of the House of Lords were drastically reduced by the Parliament Act of that year — that a peer had been the leader of the party in power. King George V was faced with the problem of deciding whether to have as Prime Minister a member of the House which was inferior in power and influence, or to depart from the usual practice of appointing the party leader. The principle of ministerial responsibility plays a large part in the working of the British Constitution, and, largely because it was thought that the Head of the Government should be available to face his critics in the House of Commons, the King chose Mr. Stanley Baldwin, who was the leader of the Conservative Party in the House of Commons, and invited him to form a Government.

(2) on Sir Winston Churchill's retirement as Prime Minister in 1955, Sir Anthony Eden was the logical successor as the accepted leader of the Party. But when his health broke down after the Suez crisis in 1956, the leadership of the Party was not clear. Mr. R. A. Butler had acted as Deputy Prime Minister in Sir Anthony Eden's absence, and was one possibility; the other, and the one finally selected, was the present Prime Minister, Mr. Harold MacMillan. It was known that Queen Elizabeth II took advice from Sir Anthony Eden, Sir Winston Churchill and Lord Salisbury; these consultations were private, and it is not publicly known what advice each individual gave, or whether the advice was unanimous. The Queen is assumed to have followed the weight of opinion expressed by these and possibly other advisers. The Labour Party protested at the time that the party leader should be elected by the Party; the Conservatives were content to follow the traditional procedure. The difference of opinion between the parties does not however, involve the Crown in political controversy. If a similar situation arose when the Labour Party was in power, the Queen would undoubtedly be prepared to wait for the Party to elect their leader and then send for him.

5. The Scottish Militia Bill, 1707.

by royal dictatorship, and this, speaking in the most general terms, was achieved by the Tudors (1487-1603). Having set up this strong central royal government, the danger was that it would become progressively stronger, as indeed it did in most European countries of which France and Russia are the best examples. Fortunately for England, the Tudor line was replaced by that of the Stuarts who made greater claims to personal power, but they failed to use the ability and tact which had been displayed by the Tudors. The Civil War (1642-1649) and the Revolution of 1689 disposed of the Stuart line and their belief in the Divine Right of Kings. By the time the Hanoverian dynasty accepted the Crown in 1714 England had set up a strong central authority and had then destroyed it. The pattern which would develop was not clear, and was made more complicated by the fact that the first of the Hanoverian Kings (George I) spoke no English. The eighteenth century saw the beginnings of the development of Cabinet Government and of the acceptance by the Crown of its position as a constitutional Monarch. George III was the last English King to try to dominate politics, and such success as he had in this direction was only temporary. Queen Victoria exercised, of course, some personal influence, but it was all within constitutional forms. In the present century the Crown has strictly observed the conventions relating to the limitations upon its powers, and it is regarded as a factor supporting the development of modern democracy. It is remarkable indeed that despite the increasing power of left wing parties in British history—the opposition to the Conservative Party having changed in the last century from the Whigs to the Liberals and now to the Labour Party—there has been no serious movement to abolish the Monarchy. The House of Lords, however, was less fortunate and less wise. The Labour Party always has been opposed, of course, to any form of hereditary political power; the fact that they have taken no serious action with regard to the House of Lords is due to various reasons, and not the least of these is the fact that the House of Lords was so unco-operative in the Gladstonian and Asquith Liberal era that it was ham-strung by the Liberals, and it failed to survive in its ancient power and glory to the era of socialist government.

The pages that follow will discuss the political history of the House of Lords, its origins, composition, present status, and its conflicts with the House of Commons, the judicial powers of the House of Lords, and the part it does play, and should play, in the modern British Constitution. It will be seen that there is a very real problem in trying to make a feudal relic fit, somewhat reluctantly, in a modern state. There is a desire in many quarters to avoid the necessity of doing real violence to the Constitution, and to continue to make use, if possible, of the seven centuries of service already performed by the House of Lords, and of the services of the many distinguished men who are usually members of the House. It is thought that there may be real danger in creating a unicameral Legislature in England; for the Legislature is all-powerful; the Sovereign's veto is, in practice, obsolete, and the absence

of a Second Chamber means that the fate of the society may depend upon the chances of a single election, resulting perhaps in the smallest of majorities. But, even if the necessity of a Second Chamber is accepted, there is the grave problem of deciding how the Second Chamber should be composed, and what power it should have. We shall see that these problems have now been discussed actively for a hundred years, but no satisfactory solution has been found. The Parliament Act of 1911 was itself a temporary solution; the preamble of that Act declared that "It is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on the popular instead of the hereditary basis." But the Act itself dealt only with the powers of the House of Lords and not with its composition. Many who were not in favour of "ending" the House, were in favour of "mending" it; but it has not been possible to reach agreement either between the Parties or even within the Parties themselves, as to the proper permanent solution. In the days before 1911, the diehard Tories were against all reform⁶, and the left wing parties were in favour of "ending." The temporary solution of the Parliament Act of 1911 reduced the powers of the Lords and led the Conservatives to take seriously the question of reforming the constitution of the House with a view to restoration of some of its powers. The Labour Party, however, being able now to put through legislation without the Lords' consent, is less insistent on "ending" the House, and somewhat fearful of "mending" it on democratic lines on the ground that the Second House tends to become Conservative, and that the abolition of the hereditary qualification may carry with it an increase in the powers of the Second House. The powers of the House were further reduced by a Labour Government in 1949. The composition of the House was changed in 1958 by a Conservative Government, by making provision for non-hereditary peerages to be granted by the Crown both to men and to women. There is then a situation with which neither Party is satisfied; the Conservatives wish to reform the House so that it is fit to play a real part in the making of legislation. The Labour Party hesitates to take the drastic step of abolition, and are content to let the Lords continue so long as they are powerless to interfere substantially with socialist legislation.

II. HISTORICAL ORIGINS

The origins of the House of Lords are to be found in the *Curia Regis*, the King's feudal court. In the feudal system, a landowner had a right to

6. Even in the debate on the Parliament Bill in 1911, Lord Halsbury, an aged ex-Lord Chancellor, could still describe the Bill as

a bad Bill in every sense. It possesses every vice that a Bill could possess. It is unjust and oppressive. It is tainted with Party spirit — I had almost said Party spite . . . if an attempt is made to force this Bill through without the safeguards that my noble friend behind me had provided against injustice and tyranny — I should regard myself as a coward and unfit for the position I hold if I submitted to it without challenging a Division. I should certainly vote against the Bill — as a duty, and a solemn duty, to God and to my country.

demand attendance at his feudal court from his tenants and his officials. The King was the greatest landowner, and all the land in England was held of him by persons known as tenants-in-chief, many of whom "subinfeudated" some or all of their land to other feudal tenants, who thus held their land of those tenants-in-chief of the King. The *Curia Regis* was the greatest feudal court. As Holdsworth says, it was:

in theory composed of the king's tenants in chief, the royal officials and any one else whom the king chose to summon The principal officials of the king's court and household who took the chief part in the government of the country were the justiciar, the chancellor, the treasurer, the chamberlain, the constable, the marshal and the king's justices.⁷

And such an assembly would meet from time to time upon great occasions. For more routine matters, however, a smaller body would meet, composed largely of royal officials. Both the larger and the smaller body were theoretically the *Curia Regis*. But the two are identifiable separately in the twelfth century, and this separation became more marked. The larger body, from which the royal officials later withdrew, is the origin of the House of Lords; the smaller is the origin of the common law courts of King's Bench, Exchequer, Common Pleas, and of the Privy Council of later times.

At first, the powers of the *Curia Regis* were unlimited and undefined, and this was so whether the meeting was of the larger or of the smaller body. And there is no question, of course, of any separation into executive, legislative and judicial powers. The King's personal power received its first check in the early thirteenth century with the granting of Magna Carta (1215) and in the provision therein⁸ that certain feudal dues should be imposed only with the consent of, in effect, the larger meeting of the *Curia Regis*, and the principle became established that such a body is entitled to be consulted on major matters of policy. One of the great questions of the thirteenth century was the establishment and form of this body. At Runnymede in 1215, the only persons entitled to be present in addition to the royal officers were those whose claims were based on the holding of land of the King—the tenants-in-chief. But gradually the right to attend was expanded, and by the end of the thirteenth century elected representatives of the counties and the boroughs were entitled also to attend. A full meeting of such a body was called a Parliament⁹ in the thirteenth century; it consisted of the royal

7. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 35 (7th ed. 1955) (hereinafter referred to as 1 HOLDSWORTH).

8. Chs. 12, 14.

9. 1 HOLDSWORTH 352: "What does the term Parliament mean? A Parliament is rather a discussion or a colloquy than a body of persons. 'It is but slowly,' says Maitland, 'that this word is appropriate to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned. As yet any meeting of the King's Council that has been solemnly summoned for general business seems to be a parliament.' It is, in fact, a large meeting of the King's Council afforded by elected representatives from the counties and boroughs."

officers as before, the tenants-in-chief and certain representatives of the counties and boroughs.

Fleta described the position in this well known phrase: "The King has his court in his council in his Parliament, held in the presence of the prelates, earls, barons, and other learned men, where doubtful points in law are determined, new remedies are devised for new wrongs, and justice is distributed according to every man's desserts."¹⁰ There were no limits then on the power of the Parliament. The royal officers would soon cease to attend the Parliament, and the smaller Council would operate within its own limited sphere and would itself split up to form the common law courts and the Privy Council. The Parliament, then consisting of the prelates, tenants-in-chief and the representatives of the counties and the boroughs, would itself split up into two Houses, the Lords and the Commons.

It was about the turn of the fourteenth century that those members of the Council who were not peers ceased to sit in the Parliament.¹¹ The King could summon such persons if he wished but in the fourteenth century they would be summoned, not as members of the Parliament, but in order to give assistance to it. The right to be summoned to Parliament was limited to those who could show their membership of the privileged class of peers, and to those commoners who were elected from the counties and boroughs. The notion that peerage and the right to be summoned to Parliament was a privilege shows a change from the eleventh and twelfth century idea that attendance at the King's feudal court was a burden to be avoided. The earliest peerage cases were those where the claimant insisted that he was not a member of the peerage.¹² The success which the magnates achieved in imposing charters on the thirteenth century Kings no doubt gave them a feeling of unity and co-operation. Magna Carta itself provided for "trial by peers," and "whatever may have been the original meaning of this clause, it was used in the fourteenth century to give to the peers who sat in the House of Lords the right, if accused of treason or felony, to be tried by their peers in that House."¹³

Thus, the peers became a separate class. The oldest title is that of Earl, which had its origin in Saxon times¹⁴ when it was applied to certain royal officials stationed throughout the country; Earls have always been entitled to a summons to the full meeting of the *Curia Regis*, to Parliament. The titles of Duke, Marquess and Viscount are later creations;¹⁵ they

10. FLETA, book ii, ch. 2 (13th century).

11. 1 HOLDSWORTH 356.

12. PIKE, CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS 103 (1894) (hereinafter referred to as PIKE).

13. 1 HOLDSWORTH 357.

14. PIKE ch. 5.

15. The first Duke was Edward, the Black Prince, son and heir of Edward III who was created Duke of Cornwall in 1337. PIKE 76-77.

signify the imposition of a status and a dignity given by the King to the recipient. The Barony was originally not a dignity but a form of Land-holding. Certain lands were held per baroniam, and until the fourteenth century there was little consistency in the summoning to Parliament of such tenants-in-chief.

It was not till about that time that a barony began to be regarded as a dignity, and for a long period it is not quite clear how far a barony represented property, how far it represented dignity. . . . But with the abolition of tenure by military service barony by tenure lost its meaning. The barony became a dignity simply; and the Baron took rank as a peer.¹⁶

Such were the laymen who were members of this privileged class. Among themselves they ranked, from those days to the present: Duke, Marquess, Earl, Viscount, Baron.

But in addition to the laymen, spiritual lords also had claims to be members of the peerage. Many in mediaeval times would qualify by virtue of land-holding, and Abbots and Bishops were held in those days to be Barons,¹⁷ and at that time they outnumbered the lay peers in the Parliament.¹⁸ But there were certain difficulties. The Church forbade its members to take part in a judgment involving the life or limb of the accused; secondly, the Church for centuries disputed the King's claim to exercise criminal jurisdiction over churchmen, and this required Abbots and Bishops to deny their liability to be tried by laymen, including the magnates of Parliament.¹⁹ Since the right of trial by peers and the right to try other peers had become the test of membership of the peerage, the spiritual lords failed to qualify. They retained their seats in Parliament, however, but they became a less important factor after the dissolution of the Monasteries under Henry VIII in the sixteenth century and the consequent disappearance of the Abbots. A number of Bishops still sit in the House of Lords under arrangements now controlled by Act of Parliament, details of which will be given in the next section.

III. COMPOSITION OF THE HOUSE OF LORDS AT THE PRESENT DAY

We have seen that the origins of the Parliament that we know today emerged from the *Curia Regis* in the thirteenth century, and that it consisted of temporal and spiritual lords and a number of commoners elected from the counties and boroughs. It was not long before the

16. 1 HOLDSWORTH 357. The first creation of a barony by letters patent was John de Beauchamp who was created Baron of Kidderminster in 1387. Since 1446 all new peers, of all rank, have been created in this way; and in 1669, by Order in Council, (nine years after the abolition of all military tenures in 1660) barony by tenure was declared obsolete. PIKE 129-131; 1 HOLDSWORTH 357; BROMHEAD, *THE HOUSE OF LORDS AND CONTEMPORARY POLITICS* 8 (1958) (hereinafter referred to as BROMHEAD).

17. 1 HOLDSWORTH 357-58; PIKE 157.

18. PIKE 165.

19. PIKE 179.

Commons held their meetings separately from the Lords, and the two Houses of Parliament were established. More will be said of this later. It may be advantageous to anticipate some later parts of the story of the House of Lords as a legislative body and as a judicial body, in order to give some description of its composition at the present day. The struggles through the centuries which have created this composition and have established or restricted its powers will then be discussed. We are concerned here only with the Upper House. We have seen that, after the officials ceased to sit in Parliament at the turn of the fourteenth century, and the later separation of Parliament into two Houses, the Upper House consisted of Dukes, Marquesses, Earls, Viscounts and Barons as the temporal peers holding their dignities by hereditary right, and of Abbots and Bishops, who since the Middle Ages had ceased to be peers; they held their seats in the House as lords of Parliament.

The large majority of the members of the House of Lords are hereditary peers in the United Kingdom. Prior to 1707, English creations of peerages conferred a peerage of England; after the Act of Union with Scotland in 1707, such creations were in the peerage of Great Britain, and after the Act of Union with Ireland in 1801 they were peerages in the United Kingdom. There were, and still are, separate peerages of Scotland and of Ireland and such peers were given the right to elect a certain number of their members to seats in the House of Lords. The Act of Union of 1707 provided for representatives from the peerage of Scotland to be so elected. Similarly the Act of Union with Ireland in 1801 provided for the election of twenty-eight representative peers from Ireland. But with the abolition of the Union with Ireland and the creation of the Irish Free State (Eire) in 1922, this procedure came to an end. Those elected at the time were to hold their seats for the remainder of their lives.²⁰

The hereditary nature of a peerage was something of gradual growth. We saw that in mediaeval times the King summoned to Parliament the persons whom he wished to consult. But it became usual for the King to summon to successive Parliaments those he had previously summoned, and to summon their heirs after them; "that which had been merely usual came to be expected, and it became rarer for the King to withhold a summons from a man once summoned or his heirs, and finally so rare that a denial of a writ appeared to be 'illegal,' or a denial of a right."²¹ This hereditary entitlement to a writ has carried with it the corollary that a peer cannot surrender his peerage, nor can the heir of a peer

20. WADE & PHILLIPS, *CONSTITUTIONAL LAW* 75 (5th ed. 1955) (hereinafter referred to as WADE & PHILLIPS). The only survivor of the Irish peers who is entitled to a seat in the House of Lords is the Earl of Kilmorey. WHITTAKER'S ALMANACK 308 (1960 ed.).

21. BROMHEAD 7. The right of a peer, once summoned to receive a writ, was established in 1625 in the case of the Earl of Bristol, whom King Charles I refused to summon because he was out of favor with the King.

refuse to inherit. This question will be discussed later, along with suggestions for the reform of various aspects of the House of Lords.²²

The creation of new peerages is a prerogative right of the Crown, and it has never been challenged seriously. Like many other such rights, it has however become customary in modern times to exercise it, not for the Crown's own advantage, but on the advice of the Government of the day. It was a weapon of great political significance; for, in the days prior to 1911 when the consent of the House of Lords to legislation was necessary, it was possible for the Government to ask the Crown to create sufficient new peers who could be relied on to support the Government in order to force through the Lords legislation which had been rejected there after being passed in the Commons. This was done in 1712 and threatened in the case of the Great Reform Bill of 1832, and the Parliament Act of 1911.²³ The Crown's right at common law was limited, however, to the creation of hereditary peerages. This was established in the *Wensleydale Peerage* case of 1856,²⁴ when the life peerage granted to Sir James Parke, one of the Barons (judges) of the Court of Exchequer was declared inadequate to permit him to take his seat in the Lords. More will be said of this later; it was clearly a decision of momentous importance in the development of the House of Lords. The acceptance of life peers at that date might have ended the creation of new hereditary peerages, and have left us, a century later, with an Upper House consisting of a collection of the most distinguished men of their era holding their office for life. Such a solution would not have been satisfactory to left-wing parties as such a body would inevitably have leaned to the right; but such a body might have been sufficiently adaptable in the last century to have avoided the collisions which occurred between the hereditary House of Lords and the Commons. It might have supplied that element of stability which is required in a Constitution which is non-federal and whose Legislature is "sovereign" and not in any way restricted by overriding constitutional limitations. The non-federal nature of the Constitution is relevant, for, in a unitary constitution, there is no obvious alternative method of election which would prevent the

22. *Infra* p. 204; BROMHEAD 251-54.

23. This procedure is the equivalent, in many ways, to the "court-packing" plan of the Roosevelt era. No question of "packing" a court arises in England, for the Legislature is supreme and the duty of the court is to interpret and apply acts of Parliament. Opposition, in Britain, to the clearly stated wishes of the elected representatives of the people arises in the House of Lords and not in court; in the Roosevelt era in the United States, this opposition appeared in the Supreme Court, whose non-elected members were alleged to be opposing the declared wishes of the elected legislature. To this extent, the "packing" of the Lords in England is similar to the "packing" of the Supreme Court in the United States. It is, however, less insidious for a Government to "pack" one part of a political legislative body for political purposes, than it is for a Government to "pack" a judicial body, which should be, and is assumed to be, impartial in political matters. There has never been any suggestion in England of the judicial members of the House of Lords — the Lords of Appeal in Ordinary — being appointed for political purposes.

24. [1856] 5 H.L. 958, 10 Eng. Rep. 1181.

Second House from being merely a reflection of the first and therefore pointless. And the sovereignty of the Legislature is relevant, for, if there is no Second Chamber, and if the Crown's assent to legislation is a formality, there is no constitutional means of preventing the most drastic changes in the way of life and method of government which may be desired by a Government elected at a single election which might not even have the support of a numerical majority of the electors. The House of Lords could have changed during the century into one dominated by the life peers created during that time and might have acquired great prestige. If that had happened we could well say that such a result was an example of the alleged British genius for the development of constitutional forms. But it was prevented by the Lords themselves, and it now stands as a further example of, and warning against, the short-sighted retention of out-dated privileges. More will be said later of attempts to create life peerages.²⁵ Let us note here that a very limited power was given by statute in 1876, and a general power in 1958.

Provision was made in the Appellate Jurisdiction Act of 1876 for the creation of Lords of Appeal in Ordinary who are charged with the performance, in company with other peers who hold or who have held high judicial office, of the judicial duties of the House of Lords. There can now be up to nine Lords of Appeal in Ordinary. They, in effect, constitute the final Court of Appeal in the United Kingdom. More will be said later of the jurisdiction and judicial functions of the House of Lords, and of the way in which this function has been separated in all but name from the political or legislative function of the House of Lords. We noted earlier that the retention of the same name for the bodies dealing with these separate and independent functions was a common source of confusion.

A general power of creation of peers for life together with the right to a seat in the House of Lords was conferred upon the Crown by the Life Peerages Act of 1958. This Act gave the Crown the power which was denied to it by the decision in the *Wensleydale Peerage* case of 1856, and it also gave power to confer such peerages upon women. Women had previously been able to hold peerages in their own right if they were the proper claimants by descent of a hereditary peerage according to the mode of descent laid down in the letters patent creating the peerage. But, hereditary peeresses have never been entitled to a seat in the Lords,²⁶ and until the Act of 1958 provided for the creation of life peeresses, no woman had ever been entitled to a seat. More will be said later of women's claims to sit in the House.²⁷

25. *Infra* p. 199; Bailey, *Life Peerages in THE FUTURE OF THE HOUSE OF LORDS* 109 (Bailey ed. 1954).

26. *Viscountess Rhondda's Claim* [1922] 2 A.C. 339.

27. *Infra* p. 208.

The remaining members are the Bishops. It will be remembered that, before the dissolution of the monasteries by Henry VIII, the Lords spiritual outnumbered the Lords temporal in the House of Lords. Today there are only twenty-six Lords spiritual, and this number is composed of the two Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and twenty-one of the other Bishops according to seniority by date of appointment.

A word might profitably be said here concerning the acceptance of peerages by socialists. The Labour Party has always been strongly opposed to the House of Lords and to all forms of hereditary privilege; yet socialist politicians are willing to accept peerages and have often been criticized for doing so on the ground that they are accepting for themselves privileges of which they disapprove in principle. Such criticism is almost invariably unfair. It is essential for the continuance of the system that each party should be represented in the Lords; this is true when Labour is in opposition, and all the more so when they are in office. The general practice has been for socialist politicians to accept a peerage when they can be of most useful service to the Party in the Upper House. This usually arises when a politician's career is drawing to a close and the person in question no longer feels able to withstand the rigors of campaigning and of service in the Commons. It is often a way of remaining in active politics after defeat at the polls, and in many cases peerages have been given to back bench members of the Party in the Commons in order to vacate a safe seat for another member whom the Prime Minister wishes to have in the House of Commons and who was a casualty in an election in a different constituency.²⁸ The provision in the Act of 1958 for the granting of life peerages presumably will make these problems less serious for Labour Party politicians. It is probable that Labour members will make it a point of principle to accept life peerages only,²⁹ but the question has not yet generally arisen as the Labour Party has not been in office since the Act of 1958 came into operation.³⁰

IV. THE HOUSE OF LORDS AS A LEGISLATIVE BODY

We have seen that in the twelfth century great decisions of state were taken by the King and his Council; that the Council might be a large body, consisting of all the prelates, Earls and tenants-in-chief, or a small body of selected personal advisers; that Magna Carta (1215) provided that certain decisions should be taken only by the larger body;

28. There is no residential qualification for candidates in a Parliamentary election.

29. In recent times (but prior to 1958) childless persons have been noticeably more willing than parents of children to accept peerages.

30. For an analysis of new peerages created during the period 1832-1928, see Greaves, *Personal Origins and Interrelations of the Houses of Parliament*, in 9 *ECONOMICA* 173-184 (1929); and for the period 1916-1956, see BROMHEAD 26.

and that this larger body was the origin of the House of Lords.³¹ There is no doubt that the power to enact laws rested in the King and the larger Council. Laws enacted in the thirteenth century were sometimes made by the King and his Council, large or small, and sometimes they were said to be made with the assent of the "community" of the realm. There was no consistent rule concerning the requirement of the consent of the Commons,³² nor was it clear, in the early statutes to which they were alleged to consent, exactly who it was who was present. The formula of "two knights from each shire and two burgesses from each borough" was established in the Model Parliament at the end of the thirteenth century. It is clear however that, even when the Commons were said to have assented, they had no power of initiation of legislation;³³ this came in Edward III's reign (1327-1377).³⁴ At that time the Commons could initiate legislation by petition to the King and Council, and sometimes they would be said to assent to the statute based on their petition — which may or may not be in the exact terms of their petition. Later, in Henry VI's reign (1422-1461) the practice was changed and the Commons could introduce a Bill into Parliament in the final form in which it would be enacted; this is basically the modern practice whereby bills passed in the Commons are sent to the Lords for their assent.

The separation of the King's smaller Council from Parliament involved the loss, by the smaller Council, of its legislative power. Legislative power was then vested in the King and the large Council with, usually, the assent of the Commons. The necessity of the Commons' assent to legislation was not established until the fifteenth century; the Commons had complained that Acts based on their petitions were not in accordance with the petitions and claimed to be entitled to express their assent to legislation.

King Henry V thereupon granted that nothing should be enacted on their petitions contrary to that which was asked, so as to bind them without their assent . . . the Commons had been asserting and had established the principle that they should not be bound by any legislative enactment without their own consent. Both the Commons and the Lords could now initiate legislation, and assent of both was required to an Act of Parliament.³⁵

In the next reign, as stated above, the Commons began to initiate legislation in the form of formally drafted bills instead of by petition. Such is the position regarding the enactment of legislation by the British Parliament from that day, with the exception of the Cromwellian era, to 1911.

31. 1 HOLDSWORTH 351.

32. PIKE 313-19.

33. PIKE 318.

34. Confirmation of Magna Carta and of the Charter of the Forest in 1327 was at the request of the Commons. PIKE 319.

35. PIKE 325.

While it is true to say that the consent of both Lords and Commons was necessary for legislation, a constitutional practice developed to the effect that the Lords should not interfere with Money Bills. This custom is thought to be of ancient origin, but it only became one of prime importance in the seventeenth century. Special grants of money, in addition to the ordinary feudal dues, were periodically made; and in the days before the Commons were represented in Parliament, burgesses of cities to be affected were consulted. It was not unreasonable that those who were most immediately affected should be entitled to discuss the question, and the burgesses could make the best terms they could, sometimes in return for concessions from the King.³⁶ The general financial structure of the state was based upon accepted feudal rules, and these required that payments were to be made in connection with certain incidents of landholding. This provided the lords with their personal income, and provided the King, as ultimate landowner, with the finance that was necessary to administer the mediaeval state. The question of special levies was a matter for discussion between the King and the people who were to pay them; so the Lords were content to leave the burgesses to argue with the Exchequer as best they could over such levies. When the Commons appeared in Parliament, they took over this role. After the disappearance of the feudal structure of the state in Stuart times, and the abolition of military tenancies in 1660, the Crown's feudal revenues almost disappeared and the Exchequer became entirely dependent upon the votes of supplies by Parliament. The Commons had historical grounds for their claim to control votes of supplies; and as they represented the people who were to pay the taxes, there was a powerful rational argument on their side also. Disputes between the Lords and Commons arose soon after the Restoration (1660), and in 1671 and 1678 the Commons passed resolutions denying the Lords' right to initiate, alter or amend a bill for the granting of aids and supplies.³⁷ The resolutions did not expressly claim to deprive the Lords of the power of rejecting a Money Bill, and of course they had no statutory effect. The Lords claimed to have the power to reject, though they accepted the practice that they should not alter or amend. They rejected financial legislation in 1860 and again in 1909. In 1860 the particular issue, the repeal of Acts imposing duties on paper,³⁸ was met by including a provision to

36. PIKE 337.

37. 1671: "that in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords." 9 H.C. JOUR. 234 (1671). 1678: "that all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, limitations and qualifications of such grants, which ought not to be changed or altered by House of Lords." 9 H.C. JOUR. 509 (1678), quoted in PIKE 343. See 159 PARL. DEB. (3d ser.) 1383-1606 (1860) for a further resolution of the Commons in 1860.

38. PIKE 344-45; ALLYN, LORDS VERSUS COMMONS. A CENTURY OF CONFLICT AND COMPROMISE, 1830-1930, pp. 49-59 (1931) (hereinafter referred to as ALLYN).

this effect in the general Finance Bill for 1861 which the Lords would not, according to accepted rules, alter or amend, nor were they willing to disrupt the whole financial scheme for the year by rejecting it. This is a form of "tacking" familiar to American lawyers in connection with attempts to overcome the President's, or a State Governor's veto.³⁹ In 1909, as is well known, the Liberal Party's annual Finance Bill (budget) was rejected,⁴⁰ and this led directly to the passing of the Parliament Act of 1911 which deprived the Lords of all powers in connection with Money Bills. More of this will appear later. The outstanding problem in connection with them, is that of deciding what is and what is not a Money Bill. Taxation at the present day is a matter, not merely of finance, but of general political policy, and the line between Money Bills and others is very difficult to ascertain.⁴¹ The decision is taken, under the Parliament Act, by the Speaker of the House of Commons; a certificate by the Speaker that a bill is a Money Bill means that the Bill, after passing through the Commons, can go straight to the Sovereign for assent.⁴² This procedure has been opposed in many quarters on the grounds that it gives enormous arbitrary power to one man, who is indeed a member of the House of Commons. Other procedures have been suggested but not adopted. The usual suggestion is that a joint committee of both Houses should determine the question whether a bill is a Money Bill or not; but the whole question is tied up with that of the reform and composition of the House of Lords, and no satisfactory alternative to the Speaker's certificate has yet been found.⁴³

Until 1911, the powers of the House of Lords in legislative matters were not restricted by law. In matters other than Money Bills, the Lords had dominated Parliament until less than a century previously, when the Great Reform Bill of 1832 first broadened the franchise in such a way as to make the Commons genuinely representative of the people. Throughout the nineteenth and early twentieth centuries the franchise was further broadened until the modern system of universal adult suffrage was established in 1929. The Commons had had their day of triumph in the middle of the seventeenth century when they led the Parliamentary cause against King Charles I; and, after the King's execution, the Parliamentary party resolved "that the House of Lords was useless and dangerous and that whatever was enacted by the Commons had the force of law without the consent of the King or of the House of Lords."⁴⁴ The Lords came back with the Restoration of 1660, and they were able to exert

39. SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW* 100 (1955).

40. ALLYN, ch. VI.

41. A Money Bill is defined in detail in the Parliament Act, 1911, 1 & 2 Geo. 5, c. 13, § 1(2).

42. *Id.* § 1(3).

43. In practice the system works well. In giving the certificate, the speaker follows very closely the precedents created by earlier situations.

44. PIKE 327; 6 H.C. JOUR. 111, 132 (1648).

a leading influence on legislative and political matters by their formal legislative powers and also by their influence over the elections to the House of Commons.⁴⁵ The tide turned against the House of Lords with the Reform Bill of 1832, and subsequently the Gladstonian Liberal policies — and particularly the issue of Home Rule for Ireland — greatly alienated opinion in the House of Lords and left it almost entirely Conservative in sympathy. This tendency was aggravated by the rise of the Labour Party and of socialism at the turn of the present century. The result was that, instead of being the controlling factor in the political sphere, the House of Lords found itself being merely support in depth to the Conservative Party. It thus appeared to be a mere obstruction to the people's will during a period of Liberal rule; and its position became the more anomalous when it appeared that the House of Lords would accept measures of reform proposed by the Conservative Party although it would reject them if proposed by the Liberal Party. It became not merely obstructive, but partisan;⁴⁶ and, in the end, a combination of Labour Party members and of Irish Nationalists was the decisive factor in forcing the Parliament Bill of 1911 through the Commons, backed up by the King's undertaking to create sufficient new peers if necessary to force it through the Lords. The strangle-hold of the Lords was broken.

No limitation has ever been set upon the power of the Crown to create new hereditary peerages. The Tory Government of 1711 was able to obtain a majority, in order to ratify the Treaty of Utrecht, by persuading the Queen (Anne) to create twelve new Tory peers. Since that date, peers have never been created for the purpose of carrying a particular piece of legislation; but from the last two decades of the eighteenth century creations have been made for the purpose of strengthening the Government's position in the Lords. The Union with Ireland of 1801 was facilitated by the offer of English peerages as a method of obtaining support from influential personalities in the Irish Parliament. Wholesale creations for the purpose of forcing the Lords to accept the policy of the Commons over a particular piece of legislation has twice been threatened — in connection with the Reform Bill of 1832 and the Parliament Act of 1911. The fact that such a power existed was always a weakness in the

45. BROMHEAD 11.

46. In 1909, Lord Lucas, Under-Secretary of State for War in the Liberal Government said:

During the three Liberal Parliaments which preceded the present one, eleven Liberal Bills were killed by your Lordships' House. During the four years of this Parliament, seven Liberal Bills have been killed — When you realize that during the period covered by the last four Liberal Parliaments (*i.e.* from 1880 to 1909, which period included four Conservative Governments) not one single Conservative measure of any kind has been rejected by this House; you are brought face to face with the fact that there has been a frank abandonment by the House of Lords of its ancient position as a revising Chamber and that it now stands in the political arena as a competing body with the House of Commons on Party lines. ALLYN 185-86.

position of the House of Lords, although it did not, of course, theoretically affect the powers of the House. The first legal diminution of the powers of the House of Lords came with the Parliament Act of 1911, and the political situation surrounding this enactment is worthy of further attention.

It has been suggested that the fatal mistake which the Lords made was to become, not merely obstructive, but also partisan. Trouble was brewing during the 1880's when many Liberal measures were rejected; and it came to the boil with the rejection by the Lords of the Liberal Party's Home Rule Bill of 1893 by a vote of 41-419; the majority showing how low the fortunes of the Liberal Party in the House of Lords had then become. It was clear from that time that Irish Home Rule could only come with the abolition of the Lords' veto, and the Irish Nationalists and the members of the newly emerging Labour Party could be relied on for support. After other rejections, the Liberal Party was turned out of office in the election of 1895; and the next ten years of Conservative rule gave the Conservatives their last chance to deal with the problem of the House of Lords. Of course, they did nothing. And during this time the problem appeared less urgent, for the Lords offered no opposition to the Conservative Party's measures. The election of 1906 was a rout for the Government. The Liberals had a majority over all parties and also had the support of the Irish Nationalists, and, on certain matters involving reform of the House of Lords, that of the twenty-nine Independent Labour members, the first substantial representation of the Labour Party. Arthur Balfour, the Conservative leader, quickly showed that he intended to use the Conservative majority in the House of Lords to embarrass the government.⁴⁷ The Education Bill of 1906 was rejected, as was the Plural Voting Bill, a Bill to terminate plural voting by owners of property constituting a voting qualification in several constituencies, and there were other cases prior to the Finance Bill of 1909, over which the conflict between the Houses was eventually joined. But the Lords had already overstepped their previous limits of obstruction and the rules which they had applied previously to justify themselves. The Lords previously had justified rejection on the ground that the measures in question were not consistent with the wishes of the electorate — for example when a measure reached them in a late session of a Parliament or when the issue was one that was not put before the voters. But in 1906, the Lords "rejected in the first session of a newly elected Parliament two bills which had been before the people at the polls, and which had passed the House of Commons by large majorities."⁴⁸ And bitterness was aggravated by Mr. Arthur Balfour's close alliance with the Tories in the House of Lords and his confident reliance in their support in rejecting

47. ALLYN 171.

48. ALLYN 174.

these measures.⁴⁹ The last straw was the rejection of Mr. Lloyd George's budget of 1909.⁵⁰ This was followed by a dissolution and by an election in December 1909 which produced a House of Commons in which the Liberals and the Tories were approximately equal but which contained seventy-one Irish Nationalists and forty Labour members. The battle was lost, and the terms of settlement would now be dependent upon the votes of the Lords' implacable enemies.

This Parliament made a slow start to decide the issues which faced it. It passed resolutions in the House of Commons abolishing the Lords' veto on Money Bills, and restricting their powers with regard to other bills, so as to permit them merely to impose delay, and a Bill to this effect was read once. The fateful budget was re-introduced and passed by the Commons. But the death of King Edward VII introduced a calmer atmosphere and led to an attempt to reach a settlement between the Parties by agreement. Negotiations broke down on the ground, it is believed, that the Conservatives would agree to nothing which would enable the Liberals to pass a Home Rule Bill.⁵¹ The Prime Minister decided to dissolve Parliament; but this was delayed in order to allow the Government's Bill to be introduced into the House of Lords, and also Conservative resolutions giving their solution to the impasse. The main difference between the two was that the Conservative proposals provided for basic reforms in the qualification for membership of the House, and for the settlement of differences over non-money Bills by a joint sitting of the two Houses, or in cases of great gravity by a referendum to the electors,

49. The Prime Minister, Sir H. Campbell-Bannerman, spoke of Mr. Balfour's position as follows:

The situation, as the House knows, has been aggravated by the part taken by the right hon. Gentleman opposite. He speaks for a comparatively small minority here, and he has affected to dispose of the other House for the purpose of dominating us in a manner which I venture to say is without precedent. . . .

I cannot conceive of Sir Robert Peel or Mr. Disraeli treating the House of Commons as the right hon. Gentleman has treated it. Nor do I think there is any instance in which, as leaders of the opposition, they committed what I can only call the treachery of openly calling in the other House or override this House . . . I venture to say that if Bills were mutilated or rejected elsewhere when Sir Robert Peel sat upon that Bench, it was not done at his instance. The right hon. Gentleman's course has, however, had one indisputable effect. It has left no room for doubt, if it had even existed before, that the second Chamber was being utilized as a mere annex of Unionist Party.

176 *PARL. DEB.* (4th ser.) 915-16, quoted in *ALLYN* 175.

50. For an excellent summary of the views expressed in the debates in the House of Lords, see *ALLYN* 179-187.

51. A Conservative peer expressed his dissatisfaction with his party's leadership: "Concessions, of course, we were bound to make, victors and vanquished do not negotiate on equal terms. The government was in a position to require something from us, and that something was Home Rule. We lost our power to resist self-government for Ireland when we allowed the Radicals to go to the country with a down-with-the-Lords cry; and, regrettable as the mistake may have been, we should have been wise to recognize it and make the best of it. We sacrificed the Union for the luxury of flinging back the Socialistic Budget." *ALLYN* 195, quoting from 96 *Fortnightly Review* 203 (1911).

and for determination whether a Bill was a Money Bill or not to be decided by a joint committee of both Houses; this was a more extreme solution than the Government's. This showed how far the Conservatives were prepared to go in the last hour in order to save their vital points of policy. It was thought that reform of the House of Lords would increase its prestige and entitle it to keep its veto to the extent of demanding a referendum in cases of great gravity and this, in the particular context, meant Irish Home Rule. The result of the election in December, 1910 was similar to that of the previous year, Liberals and Conservatives were evenly balanced, and decisive powers left with eighty-four Irish members and forty-two Labour members.

When the new Parliament met, the Government's Bill was read and passed in the Commons. It was greeted in the Lords with a series of amendments and sent back to the Commons. The amendments were unacceptable and the Bill was returned to the Lords. It was known at this time that the new King George V had expressed his readiness to create sufficient new peers to ensure the passage of the Bill. Official opposition by the Conservative leaders now ended, and three hundred peers abstained from voting. As Allyn summarized the vote:⁵²

one hundred and fourteen die-hards, led by Lords Halsbury and Milner, voted against the government while one hundred and thirty-one voted in the government lobby. The majority was composed of eighty-one Liberals, thirteen prelates, including both Archbishops, and thirty seven Unionist peers. At least twenty of this last group had voted in favour of Lord Lansdowne's amendment of July 5th [providing for the submission of certain issues, including of course Home Rule, to the electorate]. As Wyndham put it: 'We were beaten by the Bishops and the Rats.'

The Parliament Act of 1911 was a much more moderate measure than might have been expected from all the fuss that was made. It dealt only with the powers of the House of Lords in relation to the Commons. The preamble stated the Government's intention to constitute the Second Chamber on a popular instead of a hereditary basis, but nothing was done to implement this until the introduction of life peers in 1958. The Act provided, in short, that (1) a Money Bill, which was not passed by the House of Lords within a month of receiving it, could be sent to the Sovereign, and would become law on receiving the Royal Assent. A detailed definition was given of a Money Bill and the certificate of the Speaker of the House of Lords to the effect that it was a Money Bill was to accompany the Bill on presentation to the Sovereign. (2) other Bills [excluding the Bill to extend the duration of Parliament] could be sent to the Sovereign for the Royal Assent without the concurrence of the Lords if they were rejected in three successive

52. ALLYN 214.

Parliamentary sessions and if two years had elapsed between the date of its second reading in the Commons in the first of those sessions, and the date when it was read a third time in the Commons in the last of those sessions.

The House of Lords have thus no right to alter or reject Money Bills; they have merely a suspensory veto of other Bills. This position accords roughly with the constitutional practice existing prior to 1892, when the Lords' attitude hardened over Irish Home Rule. Previously, the Lords had not interfered with financial matters; and they had striven to avoid conflict with the express wishes of the electorate by confining their opposition to Bills dealing with matters which had not been discussed at the previous election and particularly to those Bills presented to them by a Parliament in its later years, when it could very reasonably be said that the Commons might no longer be reflective of public opinion. The Irish and Labour leaders would have liked something much more extreme, and would have liked to see the end of the House of Lords forever. The Lords were lucky to survive; the fact that the crisis arose and that they had to suffer is a further lesson in the importance of submitting voluntarily to workable compromise systems instead of standing firm on out-dated rights.

Further trouble developed between the two Houses in connection with the Labour Party's nationalization programme after the Second World War. The House of Lords, even with its powers limited by the Parliament Act of 1911, could not be expected to be popular with the Labour Party; nor could the Labour Party's policy be expected to be popular with the Lords. Nationalization offended their principles and affected their private interests. Nevertheless, the early measures were not rejected by the Lords.⁵³ Whatever one's political views, there was much to be said for parts of this programme. The coal and railway industries were in financial difficulties; profits were receding, and there was insufficient private capital available for adequate modernisation. These industries were gradually running down to a standstill, but they were both vital to national economic recovery after the War. But the Labour Party intended to apply its remedy of nationalization, not only to those which were outdated but essential, but also to those which were developing and efficient. Many critics saw in this the application of the remedy not only to those which needed it but also to those which were making too much money. The nationalization of iron and steel came into this category; it was known that the Labour Party proposed to implement their election pledge to nationalize it, and it was thought that this measure

53. The most important of these measures were: Coal Industry Nationalization Act, 1946, 9 & 10 Geo. 6, c. 59; National Health Service Act, 1946, 9 & 10 Geo. 6, c. 81; Transport Act, 1947, 10 & 11 Geo. 6, c. 49; Electricity Act, 1947, 10 & 11 Geo. 6, c. 54; Gas Act, 1948, 11 & 12 Geo. 6, c. 67.

might be rejected by the Lords.⁵⁴ The legislative programme was behind schedule; the Government began its five year term of office in July 1945, and it was clear in the fall of 1947, that measures of nationalization, not then enacted, might fail to be enacted by 1950 if the Lords opposed them and relied on their two years suspensory veto. Prior to the introduction of the Iron and Steel Nationalization Bill, the Government sought their quarrel with the Lords by introducing into Parliament a Bill which provided for the reduction of the Lords' veto from a two year delay if the measure were rejected in three successive sessions, to a one year delay if it were rejected in two successive sessions. This Bill was rejected by the Lords, and after the usual series of inter-party conferences in times of House of Lords crisis, which, as usual, produced no agreement, it passed into law, under the procedure of the 1911 Act, in December 1949. This gave the Government time to pass the Iron and Steel Nationalization Bill during the existing Parliament even if the Lords rejected it. Time, however, was running short; and an arrangement was reached by which the Lords passed the Bill on the understanding that the Government postponed the date for its coming into operation until after the next election.⁵⁵ It thus appeared as a vital issue in the election; the Labour Party won again and the Act was put into effect, but they held office for less than two years. And the Conservative Government, which was formed after the election of 1959, repealed the Act and returned the steel industry to private ownership. The leading political parties were both committed to drastically different policies on steel, and this had a most unsettling effect on the industry. Since the decisive success of the Conservative Party in the 1959 election, the Labour Party's attitude to nationalization has been much less extreme.

Subsequent disagreements between the Houses have been concerned with minor and non-political issues. The Homicide Act of 1957 was the result of the rejection by the House of Lords of a private Bill passed by the Commons in 1956 providing for the abolition of the death penalty. Its author, Mr. Sidney Silverman, was a Labour member, and the Conservative Government allowed their supporters a "free vote"—that is, they were not required to support any particular policy. Owing largely to the intervention in the House of Lords by Lord Goddard,⁵⁶ the Lord Chief Justice, the Lords rejected the Bill. In order to prevent a serious clash which would have occurred if the Bill had been rejected at a subsequent session by the Lords, the Government introduced the Homicide Bill into the Commons, and it passed that House and the Lords. The Act was a compromise and provided for the retention of the death penalty in limited cases only.⁵⁷ And recently

54. Annual Register 85-86 (1947); CHORLEY, CRICK & CHAPMAN, REFORM OF THE HOUSE OF LORDS 21 (Fabian Research Series No. 169, 1954) (hereinafter referred to as CHORLEY)†

55. Annual Register 59 (1949).

56. See The Times (London), July 7, 1956, p. 6.

57. Maudsley, *Developments in the English Law of Homicide*, 14 U. MIAMI L. REV. 355 (1960).

the House of Lords rejected the Legitimation Act of 1959 at its first reading, and then changed its mind and passed it. The Legitimation Act of 1926 had provided for legitimation by subsequent marriage, but excluded the case of a child conceived while either of the parents was married to someone else. The 1959 Act has now abolished this exemption. The House of Lords drew courage to reject it at first on grounds of righteousness and the sanctity of marriage, but fortunately a constitutional issue was avoided by the Lords' change of plan.

The House of Lords is thus reduced to a situation in which it can do no more than delay legislation for a Parliamentary session and for a year from the second reading in the House of Commons; its legislative function has largely disappeared. We will postpone to a later stage a discussion of what its legislative function ought to be; for this is closely tied-up with a matter which has been explained historically and to which we will return—the question of what its composition ought to be. Before we discuss these matters, we should complete another aspect of the historical development of the House—this time in its judicial capacity.

V. THE HOUSE OF LORDS AS A JUDICIAL BODY

A. Jurisdiction

We have seen that the origin of Parliament is to be found in the *Curia Regis*; that the *Curia Regis* power consisted of a small body of personal advisors—later to become the Council, or of a larger body of personal advisors, prelates, magnates and tenants-in-chief—later to become Parliament. And that the Council separated from the Parliament in the fourteenth century. Many questions arose as to the respective powers of Council and Parliament. Without going into details, it can be said that one issue in controversy was that of law-making, and this included both the enactment of statutes, and also changes by other ways in the common law.⁵⁸ In this controversy the Parliament prevailed, and the Council retained only certain powers of issuing ordinances in times of crisis and of exercising jurisdiction in matters not covered by the common law.⁵⁹ Thus the Lords, Commons, common lawyers and judges were united in their opposition to the Council; and then succeeded in retaining for Parliament the right to exercise the judicial functions which had existed in earlier times in the *Curia Regis*. Parliament could not, of course, deal with every minor dispute, and the common law courts were already established for this purpose. "Thus, although it is nowhere explicitly stated that the jurisdiction of the House of Lords was only a jurisdiction in error, it was in fact generally a jurisdiction of this kind."⁶⁰ This jurisdiction

58. 1 HOLDSWORTH 360.

59. Chancery jurisdiction, and the jurisdiction of the prerogative courts arose from this power.

60. 1 HOLDSWORTH 362; Beven, *The Appellate Jurisdiction of the House of Lords*, 17 L.Q. REV. 155, 357 (1901).

fluctuated during the centuries and became finally limited and established in the seventeenth century. Before we examine the jurisdiction, we should consider why it was that Parliament's jurisdiction was exercised, not by King, Lords and Commons, but by the Lords alone.⁶¹

After their acceptance as a House of the Parliament, the Commons might well have claimed a right to take part in the exercise of this jurisdiction. But this would not have been a strictly logical development. The mediaeval jurisdiction had been in the *Curia Regis*; Parliament developed by the addition of the Commons and the exclusion of the Council, the Commons being added for consultation on special matters, particularly legislation and taxation. The part of the original *Curia Regis* that was still left in Parliament was therefore the Lords alone. The Commons fought to maintain their entitlement to approve legislation and to grant supplies by taxation, but they never wished to become involved in the judicial and non-legislative powers which remained with the Lords. The distinction between judicial and non-legislative matters was not, of course, clear-cut in those days, and there was much confusion in relation to the jurisdiction of the House of Lords until it became established in the seventeenth century.

Little need be said in explaining this jurisdiction, some parts of which are now obsolete. There are a few early instances of the exercise of original jurisdiction by the House of Lords in civil matters, but that jurisdiction was abandoned after the decision in 1666 of *Skinner v. East India Company*;⁶² the civil jurisdiction of the House of Lords is now exclusively appellate.

There were various forms in which original criminal jurisdiction could be exercised, and two of these should be mentioned. (1) Impeachment. This is a criminal proceeding initiated by the House of Commons against any person, who is then tried before the House of Lords. A corresponding procedure is available under the United States Constitution.⁶³ The procedure was last used in England in the case of Lord Melville in 1805 and, while it is still legally possible to revive it, it is unlikely ever to be used again.⁶⁴ (2) Trial by peers.⁶⁵ It was a mediaeval principle that a man accused of crime should be tried by a feudal court, in which all the suitors were judges, and that the accused's inferiors in rank could not sit. Magna Carta expressly provided for trial by one's peers, and in that sense meant trial by one's equals. In the case of Commoners, this became confused with trial by jury—which was a rough equivalent to the old feudal principle in a more developed state of the criminal courts. In the case of peers,⁶⁶ the old principle was applied in

61. PIKE 290; 1 HOLDSWORTH 362.

62. 6 St. Tr. 710.

63. U.S. CONST. art. II, § 4.

64. 1 HOLDSWORTH 379; RADCLIFFE & CROSS, *THE ENGLISH LEGAL SYSTEM* 223 (3d ed. 1954) (hereinafter referred to as RADCLIFFE & CROSS).

65. 1 HOLDSWORTH 385.

66. The dual meaning of the word is obvious.

its exact feudal meaning until 1948.⁶⁷ Prior to that time, a peer who was accused of treason or felony was tried at first instance by the House of Lords under the Presidency of the Lord High Steward; if Parliament were in session, all the peers were judges, and the verdict was given by a majority vote. If Parliament were not in session, a jury of peers was empanelled and the case was tried like any other criminal case before a jury.

The jurisdiction exercised at the present day may be explained under three headings:

(1) Civil. The ancient appellate jurisdiction still exists, and an appeal in civil matters lies from the Court of Appeal (established in the reorganization of the Judicature in 1873) by leave of that court or of the House of Lords, to the House of Lords.⁶⁸ The House of Lords is the ultimate appellate court.⁶⁹

(2) Criminal. In most criminal matters, the final appellate court is the Court of Criminal Appeal which was established by the Criminal Appeal Act of 1907. But section 1(6) of the Act provides for a further appeal in a criminal matter to the House of Lords, if the Attorney-General certifies that the case both "involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought."⁷⁰ Such certificates have been issued reluctantly, and this practice has attracted criticism.⁷¹

(3) Privilege. The House of Lords has the right to determine questions relating to its own privileges. This includes the right to decide the validity of a grant of peerage, and cases of disputed claims to peerages are usually referred to the House.⁷² There has been much dispute between each House of Parliament and the courts on the question of the extent of the right of each House to be the judge of its privileges. It is for the courts to determine, according to law, whether a particular privilege exists; if it does, the House

67. It was abolished by the Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 30. The last trial of this type was of Lord de Clifford, who was charged with manslaughter. The evidence was flimsy, and the pomp and formality of the ceremony made it appear all the more absurd. In a footnote on p. 256, Bromhead says:

There had been some argument in the House, a few days before the trial, over the question whether it should or should not be compulsory for peers attending the trial to have cocked hats. The memories of some venerable peers who have been present at the trial of a peer, in 1903, were searched, and so were the relevant newspaper files, and it was decided that cocked hats were required. All this business took place in the midst of a grievous international crisis and many people found it all rather embarrassing.

The system was not merely anachronistic; it was inefficient and unfair in that it provided for no appeal.

68. Administration of Justice (Appeals) Act, 1934, 24 & 25 Geo. 5, c. 40.

69. 1 HOLDSWORTH 368-376; RADCLIFFE & CROSS 221; WADE & PHILLIPS 239.

70. 1 HOLDSWORTH 218, 390-91.

71. The present Government has expressed its intention of giving an appeal as of right to the House of Lords in criminal cases, and legislation is expected shortly.

72. 1 HOLDSWORTH 391-92.

can judge whether the privilege has been infringed, and the power of each House to commit for contempt will not be questioned by the courts.⁷³

B. *The Personnel of the Court*

Until the last hundred years, the personnel of the House of Lords exercising its judicial function did not differ from that of the House exercising its legislative function. All the members of the House might sit in judgment in a civil case, as we have seen they might do in a criminal. It was obvious that such a body was entirely unequipped to exercise the function of a supreme court, and the practice arose of inviting the judges to appear before the House to tender their advice. In most cases the view of the majority of the judges was followed, and the placing of appellate powers in the Lords was in such circumstances merely a cumbrous way of obtaining the views of all the judges. But their advice was not always followed, and such a case presented the improper and ridiculous spectacle of legal questions being decided by non-lawyers for political or other reasons, contrary to the best legal opinion. An outrageous case was the *Bishop of London v. Ffytche*⁷⁴ in 1783, in which the courts of Common Pleas and of King's Bench, and seven of the eight judges consulted by the House, were in favour of the defendant. The House decided for the Bishop (the plaintiff) by nineteen votes to eighteen, and in the nineteen votes were included the votes of thirteen Bishops. The situation could not be tolerated, but things moved slowly. They came to a head in 1844 with the prosecution of Daniel O'Connell,⁷⁵ an outstanding Irish patriot. He had been convicted of various offences of conspiracy and sedition. An appeal came to the Lords on purely technical legal grounds; and of the five leading lawyers of the day who were peers, three wished to quash the conviction and two to affirm it. A number of non-lawyer Tory peers wished to vote with the minority, but they were dissuaded from doing so by the Lord President of the Council, who said, in a masterpiece of cautious understatement: "if noble Lords unlearned in the law should interfere to decide such questions by their vote instead of leaving them to the decision of the law Lords . . . the authority of the House as a court of justice would be greatly impaired."⁷⁶ From that time, no one except peers who hold or who have held high judicial office has taken an active part in any appellate judicial work. And when in *Bradlaugh v. Clarke* in 1883, Lord Denham "a barrister of determined views" attempted to vote, his vote was ignored.

73. 1 HOLDSWORTH 392-94; WADE & PHILLIPS 126-28, *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1704); *Stockdale v. Hansard*, 9 A. & E. 1, 112 Eng. Rep. 1112 (Q.B. 1839); the Case of the Sheriff of Middlesex, 11 A. & E. 273, 113 Eng. Rep. 419 (Q.B. 1840); *Bradlaugh v. Gossett*, [1884] 12 Q.B. 271.

74. Beven, *The Appellate Jurisdiction of the House of Lords*, 17 L.Q. REV. 357, 367 (1901).

75. 11 Cl. & F. (1844).

76. Beven, *The Appellate Jurisdiction of the House of Lords*, 17 L.Q. REV. 357 (1901).

This left the lawyers in control of judicial work, but provided no guarantee that the lawyers who happened to be peers were the persons best qualified to constitute the final Court of Appeal. In the 1850's, a ridiculous situation arose; it usually happened that the House consisted in its judicial sittings of Lords Cranworth, St. Leonards and Brougham.⁷⁷ The first two were eminent men, but often disagreed on legal points, as eminent lawyers can do; this left the casting vote with Lord Brougham, in whom the profession had little confidence. To remedy the position, Queen Victoria purported to strengthen the legal representation of the House by conferring a life peerage on Baron Parke, one of the leading Common lawyers of the day. The validity of this creation was challenged and referred to the Committee of Privileges, which decided that the Crown had no right to confer a non-hereditary peerage entitling the holder to a seat in the House.⁷⁸ The consequence of this decision upon the composition and future development of the House has previously been mentioned. The immediate result was that a hereditary peerage was conferred on Baron Parke and he took his seat as Lord Wensleydale. He died shortly after. The problem hung on for a few more years until the Judicature Act of 1873 contained a clause abolishing the appellate jurisdiction of the House. This provision was however repealed before it came into operation; the jurisdiction survived by the creation, under the Appellate Jurisdiction Act of 1876, of Lords of Appeal in Ordinary⁷⁹ who, together with the Lord Chancellor, ex-Lord Chancellors and other peers who hold or have held high judicial office, now exercise the judicial functions of the House of Lords. This system has worked well; in all but name such personages constitute a Supreme Court. The decision to retain the old form was no doubt due to the desire, of which we have seen other examples, to adapt and develop old forms rather than to create new ones. It also has the advantage of giving the leading lawyers of the day an opportunity to express their views on suggestions for legal reform when they come for discussion in the House of Lords in the form of Bills.⁸⁰

C. *The Authority of the Court*

The increase in the authority which the court has won during the last century is truly amazing. From a position in the 1850's in which it was

77. RADCLIFFE & CROSS 220.

78. Wensleydale Peerage Case [1856] 5 H.L. 958, 10 Eng. Rep. 1181. It is said that the whole trouble was caused by an attack of gout which prevented Sir James Parke from taking his seat at the appointed time. "The original issue of a patent of nobility without any remainder attracted little public attention at first, and if the new Lord Wensleydale had taken his seat on the first day of the session, as he was expected to do, it is possible that nothing further would have happened. But when the day came, an attack of gout prevented him from taking his place, and Lord Lyndhurst had time to move that the House should resolve itself into a Committee of Privileges." BROMHEAD 247.

79. There may now be up to nine, Appellate Jurisdiction Act, 1947, 10 & 11 Geo. 6, c. 11.

80. As was done, for example, in the case of the Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11.

thought unfit to be an Appellate Court, its decisions now carry such weight that all other courts are bound by the decisions of the House of Lords—as is the House itself.⁸¹ A similar strictness applies also at the lower level; courts of first instance are bound by the decisions of the Court of Appeal, and the Court of Appeal is bound by its own decisions and by those of the House of Lords.⁸² Decisions of courts of first instance are only of persuasive authority. The readiness to be bound by previous decisions reached an almost comic stage in *Jacobs v. L.C.C.*⁸³ wherein the question was whether the House of Lords was bound by its own rule laid down in *Fairman v. Perpetual Building Society*.⁸⁴ In *Fairman's* case, the House found for the defendant on two theories; the question in *Jacobs* was whether the House must come to the same conclusion if only one of the theories was relevant. In other words, if two reasons are given for a decision and it is not clear which reason is dominant, are they both part of the *ratio decidendi*? If both of them are not part of the *ratio*, then presumably neither is, for it could not be determined which of the two is critical. The thought that there might have been a House of Lords decision which did not add something to the existing mountains of precedent was too much for their Lordships in the *Jacobs* case, and they held themselves to be bound by both theories. All this means that what the House of Lords decides is the Law, and it is useless for Counsel in future cases to argue that the decisions were contrary to justice or social policy. The Court has no choice but to follow a decision which is binding upon it. If counsel wishes to avoid the effect of the decision he must show that the present case is distinguishable and the principle of law applied in the previous case is not relevant to the present one. To operate in this mechanical way requires very clear and precise understanding of the meaning of *ratio decidendi* and of the method of reaching it.

Such clear comprehension does not however exist. In the nature of things it could not. This is no place to enter into a discussion of this problem, but a reference to the views of leading writers may be given.⁸⁵ Perhaps it is well that this method cannot become entirely scientific. At present there is always the opportunity for a judge to hold himself bound by a previous case if he approves it and to find a means of distinguishing it if he does not. There is no doubt however that the system has made impossible many developments which would have been beneficial to the law. Judges prefer to avoid any new departure, and principle is subservient to precedent.

81. *London Street Tramways v. L.C.C.* [1898] A.C. 375.

82. *Young v. Bristol Aeroplane Co.* [1944] 1 K.B. 718.

83. [1950] A.C. 361.

84. [1923] A.C. 74.

85. *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 1 (1931); Montrose, *Ratio Decidendi and the House of Lords*, 20 *MODERN L. REV.* 124, 587 (1957) and comment thereon at p. 413; 21 *MODERN L. REV.* 155 (1959); see also Goodhart, *The Ratio Decidendi of a Case*, 22 *MODERN L. REV.* 117 (1959); Stone, *The Ratio of the Ratio Decidendi*, 22 *MODERN L. REV.* 597 (1959).

It is easy to make fun of the occasions when the system of stare decisis works badly, and inevitably it imposes conservatism on the law. It does, however, operate in England in circumstances more favourable to it than would be the case in America. English lawyers, in the first place, are only concerned with a single jurisdiction; it is much easier in such circumstances to obtain certainty of decision, and there is a greater tendency of judges to rely on previous decisions. In the second place, the fact that the British Parliament is "sovereign," and not limited in its powers by constitutional provisions, means that the courts can leave to Parliament final responsibility in the matter of determining what the law should be. Judges will often say: "I reach this conclusion on the authorities. If the law is not consistent with the requirements of society, it is for Parliament to change it." This was for many years an artificial expression of hope, but in recent years the Law Reform Committee has been very active and has done excellent work in making suggestions to Parliament for the reform of private law, and Parliament has often acted on their suggestions. The system does increase the certainty of the law, at the expense of freedom of judicial development. Whether or not one approves of the system depends to a large extent upon the importance attached to these factors. However that may be, the fact remains that the system does operate in England; and one result is—and this is the relevant point for our purposes—to give tremendous power and authority to the House of Lords as the final Appellate Court. What the House of Lords decides is binding upon all the courts including itself for all time—subject always to the intervention of the Legislature.

VI. REFORM OF THE HOUSE OF LORDS

A. *The Purpose of a Second Chamber*⁸⁶

1. WHAT THE HOUSE OF LORDS DOES

Two main factors have combined to raise the House of Lords in influence and general estimation in recent years. First, their very loss of power has made their critics less hostile to them, and the Labour Party made no attempt to abolish the House during its tenure of power from 1945 to 1952. The Lords, on the other hand, have accepted their reduced status and have made an effort to make the present situation function successfully. Much useful work has been done by the House of Lords in recent years. By far the most important part of their work is that of giving Bills more detailed consideration than they have received in the Commons, and in suggesting amendments after discussion in a more co-operative and less tense atmosphere than exists in the Commons.⁸⁷ The House of Lords also does useful work in initiating

86. Report of the Conference under the chairmanship of Lord Bryce (the Bryce Report) CMD. No. 9038 (1918); Chorley, *The House of Lords Controversy*, PUBLIC LAW 216, 219 (1958); BROMHEAD, ch. 18.

87. Bryce Report, para. 6; CHORLEY 11; Chorley, *The House of Lords Controversy*, PUBLIC LAW 216, 219 (1958).

in that House Bills of a "non-political" nature, for which time might not be able to be found in the Commons,⁸⁸ and also in providing opportunities for general debate on matters by public interest.⁸⁹ The views of the Lords are always considered by the Government, and their suggested amendments to Bills often accepted. Much of this work would have to be done by somebody; the possession of a peerage is not a necessary qualification of fitness to do it, but the House of Lords does contain members with specialised and expert knowledge of almost any subject.⁹⁰ They accept this duty, they do the job well,⁹¹ and, while their amendments cannot be pressed to the point of disturbing Government policy, their efforts are appreciated.⁹² Second, this work is facilitated by the Lords' freedom from reliance upon a political party. Party discipline in the Commons is such that Government matters can be sure of support from their official supporters in the Commons. And a member who speaks against his party's policy in the Commons is running the risk of losing the official support of the party at the next election, or perhaps even of being excluded from the party. Peers run no such risk; their membership of their House is personal to them and it cannot be taken away. The Government (Cabinet) can thus dominate the Commons, and the Commons dominates the Legislature which is "sovereign" and unrestricted by constitutional provision. There is a real danger of Governments of extreme views forcing through the Commons policies which are inconsistent with democratic principles, and of these measures becoming law because there is no one else who can stop them. There is therefore a useful function which a Second Chamber can perform. And it is a curious paradox that the House of Lords is now appearing as the guardian of the peoples' liberties against the excesses of the peoples' elected representatives.

88. CHORLEY 17.

89. CHORLEY 11-21 and Appendix I where an account is given of the work of the Lords in the 1948-49 session. See *THE FUTURE OF THE HOUSE OF LORDS* (Bailey ed. 1954) for a list referable to 1953.

90. Indeed, in the debates on the Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, Lord Pethwick-Lawrence was able to speak with special authority, having been "a guest of His Majesty" in prison in connection with a militant demonstration of women suffragettes in 1912.

91. Of the Transport Act, 1947, 10 & 11 Geo. 6, c. 81, a statute whose drafting was admitted to be unsatisfactory owing to pressure of other legislation, the *Times* of May 6 said: "Seldom if ever have the revising functions of the Upper House been more important. The most casual glance at the Bill as it leaves the Commons suggests that if a revising Chamber did not exist it would have to be invented. The Bills will no doubt pass into law. There is no question of the Lords frustrating the will of the Commons. But it is vitally important that, before it is passed, those sections and clauses which have so far been discussed inadequately or not at all should be subjected to the impartial, practical and expert examination of which the Upper House is capable." Quoted in CHORLEY 13.

92. In *PUBLIC LAW 223* (1958), Lord Chorley makes the point that amendments made by the Lords are often more likely to be accepted by the Government than amendments suggested in the Commons; for, in the Commons, amendments will usually be made by the Opposition, and the Government may suspect that a "lurking political motive" underlies the amendment.

2. THE PROBLEM OF THE POWERS OF THE HOUSE OF LORDS

There is much to be said for retaining a Second Chamber in a Constitution where the Legislature is sovereign. The powers which should be given to the Second Chamber must depend on its composition. The more democratic the composition of the Second Chamber, the greater the powers that can be given to it. But to have a body elected on the same lines as the First Chamber makes it merely a reflection of the first which will add nothing to the Legislature, but will merely draw away from the First Chamber some of the men who should serve there. The more unreasonable the qualification for membership, the fewer the powers that can be given to the Second Chamber. And heredity is the most unreasonable of all. But, paradoxically, it is because of the unreasonableness of the qualification that the House of Lords has survived the period of office of the Labour Party. The Labour Party's argument has been: (1) that an elected Second Chamber achieves nothing that a single Chamber cannot achieve; (2) that a second which is based on any method of selection of men of distinction will be sure to be conservative in general character; (3) that there will be effective dual Chamber government when Labour is in power, but not when the Conservatives are in power; (4) that a conservatively minded Second Chamber does no harm so long as it is powerless; and (5) that the Labour Party must oppose reforms which make a more sensible qualification for membership because they would be followed by demands for greater power for the Lords.⁹³ On the other side, it is argued that a Second Chamber is needed to protect the people against extreme changes in the people's basic rights without their consultation. As Lord Salisbury said:⁹⁴

We on this side of the House ask no more than that issues affecting the welfare of the electorate, where their judgment is unknown and doubtful, should be referred for their consideration or at least deferred for a short time to enable their views to be found out. This is the whole reason for our stand for an effective second chamber. If the present House of Lords is not the right body to exercise this power, let it be amended; but do not remove the essential safeguard against extreme action by the Right or by the Left.

The danger from extremists of either side is here stressed, but no one has any doubt as to the side which Lord Salisbury had in mind. His general thesis however is correct; the people should be specially consulted on matters affecting their basic rights and interests. But the proper conclusion is not clear. A question which was at issue at the election which produced the existing Parliament will have been submitted to the people, and the Government will claim that the people gave it a mandate to carry out such a policy. But elections are determined by a multiplicity

93. It was the question of the powers of the House of Lords that caused the all-party conference of 1947 to break down. See White Paper, CMD. No. 7380 (1948).

94. 153 H.L. DEB. (5th ser.) 653 (1948).

of factors, and it may be that the issues in question were only some of many election pledges, and the electors may have agreed with the other pledges which the Government gave but not with the particular ones now in issue. The doctrine of the mandate is a dangerous one, but it is difficult to see how it can be avoided unless there is to be a referendum in respect of every matter which the House of Lords decides was not adequately before the electorate at the last election. As Viscount Addison (Labour) said in the debate on the Parliament Bill in 1948:

The claim to decide whether a subject is or is not in accordance with the mandate of the people contains the implication that, if this House is of opinion that it is not in the mandate, this House is at liberty to reject it . . . We challenge that implication from the very start. We claim that it is for the elected representatives of the people to decide whether an issue is or is not to be the subject of Parliamentary activity.⁹⁵

Our conclusion must be that some delaying power in a Second Chamber is desirable, but that a non-representative House is not a suitable body to determine the wishes and opinions of the people.

B. *Attempts at Reform*

There is a considerable history of attempts to reform the composition of the House of Lords. Most of it has come from the Conservatives, and from the House of Lords itself. Admittedly, it usually has come when strife between the Houses has existed or has been foreseen, and the House of Lords has been trying to strengthen its position by plans to reform its composition. This accords with the radical and Socialist criticism that Conservative reforms only come when the old regime has become untenable. Conferences on reform of the House have been held at each major crisis in the relations between the Houses, but nothing has come of them. The Bryce Committee examined the question in great detail in 1918 and published a most informative paper,⁹⁶ but the Conservative Governments of the inter-war years were unable to secure sufficient agreement among themselves to effect legislation. It was hoped in 1948, and subsequently, that all-party conferences could produce an agreed scheme for the reform of the House. But the divergent aims of the political parties have made this impossible, the Labour Party refusing to agree to anything which would increase the power of the Lords. The only practical result is the Life Peerages Act of 1958 referred to above.

We have seen that the question of life peerages arose in 1856 and that the House then declared that it was not competent for the Crown

95. Lord Addison, Lord Privy Seal in the Labour Government 1945-1950, 153 H.L. DEB. (5th ser.) 631 (1948), quoted in CHORLEY 23.

96. Conference on the Reform of the Second Chamber, CMD. No. 9038 (1918).

to create a peer for life with a seat in the House.⁹⁷ A bill to give the Crown power to confer life peerages on two judges followed immediately, but it failed to pass the Commons.⁹⁸ A bill in 1869 was introduced to give wider powers of creation, but this was rejected in the Lords.⁹⁹ Provision was made, as previously recorded, for the appointment of Lords of Appeal in Ordinary as life peers in 1876. Further attempts were made in the 1880's to reform the composition of the House.¹⁰⁰ Details of these schemes do not concern us, but it is important to note that this was the last favourable opportunity for reform by general agreement. The determination of the Liberal Party under Mr. Gladstone to grant Home Rule to Ireland caused large scale "aristocratic secession" from the Liberal Party. From that time there was an overwhelming Conservative majority in the House of Lords. This was clearly demonstrated when the Home Rule Bill of 1893, which, having passed the Commons, was rejected by the Lords by a vote of 419 to 41. From that time the Lords were a dominant weapon in party politics, passing Conservative Bills and rejecting many important Liberal ones. The matter came to a head, as we have seen, with the budget of 1909. The Liberals, the newly formed Labour Party and the Irish Nationalists were interested, not in reforming the House of Lords, but in abolishing it—or at least in rendering it powerless. As we have seen, all-party discussions were held in the lull in the battle in 1910 caused by the death of King Edward VII, but they came to nothing. The Parliament Act of 1911 was intended to be a temporary solution and to be replaced by a reorganization of the whole system. Basic reforms were recommended by Lord Bryce in his report following his Conference in 1918 with the leaders of political thought inside and outside Parliament. The Conference recommended that the Upper House should consist of 326 members—246 elected by members of the House of Commons arranged by geographical areas and 80 peers elected by a joint committee of both Houses of Parliament on which all parties should be represented. Disputes between the two Houses were to be settled by a system of joint consultation by representatives of both Houses, and intractable disputes would be settled by referendum. The proposals did not find acceptance. The matter dragged on; the King's speech in February 1922 promised that proposals would be submitted for "the Reform of the House of Lords and for adjustment of differences between the two Houses."¹⁰¹ Attempts during the 1920's met with no success, largely because no specific proposals were acceptable to the Conservatives as a whole, and Conservative Governments did not wish to risk defeat by gratuitously pressing such a thorny

97. *Supra* p. 199; Wensleydale Peerage Case [1856] 5 H.L. 958, 10 Eng. Rep. 1181.

98. PIKE 379.

99. PIKE 380-82.

100. PIKE 383; ALLYN 145; BROMHEAD 245; THE FUTURE OF THE HOUSE OF LORDS (Bailey ed. 1954); 11 National Review 115 (1888).

101. 49 H.L. DEB. (5th ser.) 3 (1922).

issue. Many of them wished for reform in order to strengthen the Lords. The Liberal and Labour opposition was certain to combine against any such effort, and their interest was to ensure that the powers were not increased. So nothing was done in the inter-war years. Further attempts to reach agreement during the crisis of the Iron and Steel Nationalization Bill of 1948-49 failed to overcome the inevitable problem of the danger of a reformed House being given more power.¹⁰² When the Conservatives finally brought forward the proposals in 1957, they provided merely for the awarding of life peerages to men and women. The problem of powers was not tackled at all. The truth is that any attempt to increase the powers of the House will give rise to fanatical opposition, and that the "temporary" solution of the Parliament Acts has worked much better than anyone expected. And while it was working well enough to discourage energetic opposition from the Left, it was thought best to leave things as they were.

Even smaller success has attended other projects for reform. Suggestions for reform of particular anomalies are commonly turned down on the ground that they must be considered in the framework of wholesale reform of the House; but, as we have seen, it seems to be impossible to reach agreement on plans for large scale reform. Many suggestions have been made. While we are not concerned with the details of these plans, it may be useful to explain that, apart from life peerages, (which have appeared in many schemes), the following reforms have been suggested:

(1) For the abolition of the hereditary right to a seat; or the reduction of the right of a hereditary peer to a seat to one of representation by peers elected by all the peers or by some other method.

(2) For the separation of the Second Chamber from the peerage, and for the Second Chamber to be constituted by persons, not peers, who would be elected by some different method of election from that used for election to the Commons—by election on a regional basis or by the House of Commons themselves. A number of peers might or might not also be included in such a body. The Bryce report of 1918 proceeded on these lines. Some such scheme would have the advantage at the present day of reducing to some extent the social or snobbish aspects of membership of the Second Chamber, and would help to remove the anomaly of socialist participation in an aristocratic House.

(3) For the Second Chamber to consist of Privy Councillors who are not members of the House of Commons. There is much to be said for such a suggestion. It would immediately dispose of the hereditary element, and separate membership from peerage. It would provide a

102. *Supra* p. 194; White Paper, CMD. No. 7380 (1948).

smaller body of distinguished men, and — this is an important factor in the mind of its author¹⁰³ — would not disqualify peers from service in the Commons. It is doubtful, however, whether Privy Councillors, with their many other duties, would have time to perform the duties of the Second Chamber. And it may be that they would need to be reinforced by other persons, perhaps the Peers, perhaps officials, who could do much of the work of revision without having the right to vote on it.

(4) For all peers to be entitled to attend, but only certain ones entitled to vote; or for peers who continually failed to attend to be deprived of the right to vote or to be absolutely excluded. These suggestions have reference to the problems of the power exercised by large numbers of peers, who normally ignore the House, to turn up and vote in support of the Conservative Party on some great controversial issue. These are the "backwoodsmen." The routine work of the Lords is done by some 60-80 peers, with another 100 or so who make periodical visits. Such a group would be overwhelmed by the remainder of the 800 odd members who might turn up at any time. This is serious enough, but it would be even more serious if they all attended regularly, for the body would be quite unwieldy. As Viscount Samuel said: "If all the 800 members were to attend on all occasions, the institution would instantly collapse. In fact, I think that this is undoubtedly the only institution in the world which is kept efficient by the persistent absenteeism of the great majority of its members."¹⁰⁴ The problem then is to keep away large numbers of peers whose duty it is to attend. A committee was appointed to consider this problem and submitted a report.¹⁰⁵ Action has been taken by providing by Standing Order in June 1958, that "peers should be asked to say whether or not they propose to attend Parliament," the suggestion is that leaves of absence should be given to those who say they do not and also to those who do not reply, and that those who receive such leave "could hardly with decency ask to have their leave of absence cancelled when some subject . . . on which they felt strongly came up for discussion."¹⁰⁶

(5) For Peers to be allowed to resign from the Lords, and/or to be allowed to sit in the Commons.¹⁰⁷

All the schemes of major reform of the House of Lords would permit men who had inherited peerages to sit in the Commons. Exclusion from the Commons denies to such persons the hope of ever holding the

103. Mr. Anthony Wedgwood Benn, son and heir to Lord Stansgate. *Infra* p. 208.

104. 153 H.L. DEB. (5th ser.) 656 (1948).

105. Report of the Select Committee on the powers of the House in relation to the Attendance of its members, January 24, 1956.

106. CHORLEY, PUBLIC LAW 230-31 (1958); BROMHEAD 251.

107. BROMHEAD 251-54; 11 National Review 431 (1888).

office of Prime Minister or Chancellor of the Exchequer, and prevents him from taking part in political life in the place which is now the real center of activity. In 1895 the heir of the Earl of Selborne attempted, on his father's death, to remain in the Commons by failing to apply for a writ of summons to the Lords, but he was excluded. The present Leader of the House of Lords, Lord Hailsham, was a member of the Commons before his father's death and had a promising political career ahead of him. He has often regretted his misfortune in succeeding to a peerage and has received much public sympathy. The most determined attempt to evade the present rule was made by Mr. Wedgwood Benn, heir to a Labour peer, Lord Stansgate. In 1955 he arranged to have a personal Bill introduced into the House of Lords to provide for the renunciation of his peerage, but the Bill failed. The Lord Chancellor opposed it on the ground that reform must come to the Lords not by a "side wind," but by reform of a general character.¹⁰⁸ This argument scarcely justified the rejection of a reasonable request in this individual case. And, as we have seen, the proposals which the Government brought forward in 1957 were of a very limited character and failed to deal with this question. The argument for postponing piecemeal reform until a general scheme is agreed has no validity where there is no prospect of agreement upon such a general scheme. The only valid argument against permitting persons in Mr. Benn's position to remain in the Commons is that the Lords have a useful job to do, and would be deprived of the services of able and experienced young men. But men of sufficient ability could no doubt be found outside the ranks of peers' eldest sons now sitting in the Commons.

(6) For women who are holders of hereditary peerages to sit in the House of Lords.

Until 1958 no woman had ever sat in the House of Lords; until 1919 women had been unable to sit in the Commons. But the Sex Disqualification (Removal) Act of that year provided that "A person shall not be disqualified by sex or marriage from the exercise of any public function."¹⁰⁹ The Act was passed with the membership of the House of Commons particularly in mind, but it was thought that its term was wide enough to include membership of the House of Lords. In 1922 Lady Rhondda¹¹⁰ claimed a seat, but the Committee of Privileges decided against her. Women were excluded from the Lords, they said, not because of the disqualification, but by ancient rule, and that the removal of disqualification on the ground of sex did not apply. Attempts have been made to provide seats for hereditary peeresses; and now that women like peers can sit, it seems unreasonable to deny a writ to

108. BROMHEAD 254.

109. Sex Disqualification (Removal) Act, 1919, 9 & 10 Geo. 5, c. 71, § 1.

110. [1922] 2 A.C. 339.

hereditary peeresses. But the Labour Party opposes this on the ground that it increases the hereditary element in the Lords, and it is a step in the wrong direction. Understandably, the Government in 1957 did not wish to get involved in issues of principle with regard to a matter of such small practical importance and omitted this question from the bill of that year. Whether the *Rhondda* case was a correct decision on the statute or not, it seems better to let the matter rest where it is.

(7) For the payment of peers.¹¹¹

Payment of peers is a question which has only arisen in recent years. In the days of the old regime, hereditary peers were sufficiently wealthy to ignore the question of payment for services or payment of expenses. In recent years, the discontinuance of a connection between peerages and wealth, which is emphasized by the elevation to the peerage of socialist politicians of humble background and limited means, has raised the question as a political issue. And the voluntary nature of service in the Lords causes much greater difficulty to the Labour Party than to the Conservatives. Clearly the provision of salaries for all peers would be impossible, for this would amount to the payment from public funds of permanent salaries to persons who claimed them by inheritance. And a requirement of attendance would be impossible to administer because it would be impossible to distinguish between those who worked seriously and those who put in appearance for the sake of receiving the money. Labour members have put forward suggestions for the payment of full Parliamentary salary to a limited number of peers from each party, but no such far reaching scheme has yet been agreed. Travelling expenses are however paid to peers who attend at least one third of the sittings of the House. In addition, a payment of not more than three guineas a day may be claimed for attendance at sittings of the House or of its committees, on proof that expenses of that amount have been incurred. There is thus provision for a very limited payment for travelling and other expenses, but no form of salaries for service.

VII. CONCLUSION

We have seen something of the House of Lords as a political and a judicial institution, something of its problems, something of the suggestions that have been made for its reform. We are now in a position to consider what its future is likely to be, and what it ought to be.

It is apparent that no one who was framing a new Constitution and was considering the composition of a Second Chamber and Supreme Court would try to copy the House of Lords. It is important, however,

111. BROMHEAD 257-58.

as was said at the beginning of this paper,¹¹² to proceed with great caution before deciding to overthrow an institution which has been a basic part of the Constitution for over 800 years. It is important also to appreciate the difficulty of replacing satisfactorily an institution which has continued to survive in spite of a number of extraordinary anomalies. These factors alone would make the invention of a reformed institution difficult enough. But it is rendered all the more difficult by contemporary political factors, by the inter-relation between the composition of a reformed House and its powers, and by the Labour Party's unwillingness to agree to many reasonable reforms on the ground that a Second Chamber rationally constituted will attract to itself more power. There seems no reason to believe that agreement on general reform, which has eluded reformers for a century, is any nearer at the present day. It is submitted, therefore, that future development will not come from broad schemes of general reform.

It has been made clear that there are many purposes for which a Second Chamber is needed, and that the House of Lords, largely because of its independent and non-representative character, and certainly because of its wholesale absenteeism, performs very well the tasks that need to be done. It is contrary to the basic rule enjoining a search for stability in constitutional matters, to destroy one and raise another for reasons of theoretical disagreement with the composition of the first. Unless the House of Lords commits suicide by placing itself deliberately in opposition to the clear decision of the House of Commons, it is the author's view that it will survive, with certain modifications, for a number of years.

Opposition to the Commons, by standing upon such rights as it still has, might lead a Labour Government to proceed against it and to destroy it on grounds of political principle. The Labour Party is theoretically opposed, not only to the hereditary principle, but to the existence of a Second Chamber of any sort. They do however accept that much useful work has been done by the House of Lords, and they are unlikely to destroy it unless led to do so on doctrinaire grounds. It is quite clear, however, that the legislative powers of the House of Lords cannot be increased. There is no hope for those Conservatives who wish to add to their party's strength by resurrecting the political power of the Upper House and relying on it to support them. Any alteration to the composition of the House of Lords must be within the framework of the Parliament Acts. It may be that their present suspensory veto of one year from the second reading in the Commons will be further reduced, and that the Lords' consent will be declared unnecessary in the case of all Bills. The Lords will be well advised to avoid conflicts on these matters, for any change in their powers will be by way of reduction.

112. *Supra* p. 175.

Reform must, therefore, come to the House of Lords by piecemeal methods, and the Lords must accept that the political powers of the House of Lords are those reserved for them in the Parliament Act of 1949. Of the various suggestions for reform which have been mentioned, the most important is that provided for in 1958—the creation of life peers. It is to be hoped, though it is yet too early to tell, that a practice will be established that all future creations will be of life, and not hereditary, peerages. In this way the hereditary element will gradually disappear. And if steps were taken to eliminate the rights of “backwoodsmen” to turn up at critical times, the Lords would in effect consist of life peers and of a few hereditary peers whose interest and regular attendance showed their qualifications for their position. The elimination, in one way or another, of backwoodsmen is a reform which is overdue. So also is the inability of peers to resign from the House of Lords in order to be available to election to the Commons. The other two reforms that have been discussed are less clear; little is gained by admitting hereditary peeresses, and such a rule would increase the hereditary element. And the question of payment is one which raises problems which appear insoluble, while the hereditary entitlement to membership of the House still exists. The amount of daily expenses which peers can claim for attendance will no doubt be increased.

These are matters which often have been discussed and on which particular reforms could be effected. The introduction of life peers does not mean of course that the hereditary peers will disappear for many years. And there is the danger that the existence side by side of two classes of peers may create difficulties. It may be advantageous therefore to bring hereditary peerages to an end. This could best be done by providing that these peerages came to an end on the death of the present holder, or after a period of years whichever is the earlier. Life peerages could fill the gaps created and could, if desired, be given to those hereditary peers who lost their peerages by such a provision. Abolition of hereditary peerages would simplify the whole problem for the Labour Party's point of view. Because of their dislike of social rank and class distinctions generally, some socialists have thought it improper to accept a peerage and go to the House of Lords. It is made easier for such a person to go with a life peerage, but, unless there is a clear division between life and hereditary peers, membership of the House of Lords would still signify a superior social position. The elimination of hereditary peers would avoid that and would place all peers in a House of appointed legislators with no social or snobbish association. In order to avoid such associations by reason of historical connection, it might be well to discontinue the existing titles and let the life peers be known by other titles—and Senator would probably be the most appropriate.

We have seen that, whatever happens to the House of Lords, it cannot increase its legislative powers. In practice, it cannot reduce them much if it is to be used at all as a revising Chamber. For the greater part of the year's delay, now allowed between the second reading in the Commons in one session and the third reading in the next session, will be taken up, in the case of a large Bill, in discussion in the Lords and discussion in the Commons of the Lords' amendments. We have seen that this revision work has to be done somewhere; and if the Lords were deprived of all legislative responsibility, some other body would have to be created for the work. There is, however, an argument in favour of a really effective Second Chamber in a sovereign Legislature, and this is the argument that it is improper for a Single Chamber to have the power, as the result of a single election, to take away the peoples' basic rights. We have seen, in the Parliamentary crisis at the turn of the century, that the Lords claimed to be acting as the defenders of the people's rights. The weakness of their position was that they were not qualified to judge the people's interests and views, and that the Lords were acting more truthfully to protect the established order of property which was their own particular interest. But profitable use could be made of a Second Chamber exercising a veto on legislation until the next general election when the proposed legislation will affect the basic rights of any member of the public. A scheme on these lines would involve the drafting of a Bill of Rights on the American model and of an exception being made to the Parliament Acts so as to renew the requirement of assent by the House of Lords to any measure inconsistent with the Bill of Rights. Disputes between the Houses on the question whether legislation was of that type or not would be settled when the validity of a statute passed without the Lords' consent was challenged in the courts. In this way the most serious dangers involved in the sovereign unicameral Legislature would be avoided. It must be admitted that there is no real chance of such power being given to the House of Lords, whether reformed or not.

It is submitted, therefore, that the best way to deal with the present situation is:

- (1) establish a general practice that all creations of peerages in the future are for life only.
- (2) permit peers to sit in the House of Commons.
- (3) eliminate the threat of the "backwoodsmen."
- (4) provide for the extinction of hereditary peerages within a generation at least.
- (5) (with the exceptions mentioned below) make no attempt to increase the legislative power of the House of Lords.

(6) avoid the threat to individual freedom which continually exists where there is a sovereign unicameral Legislature, by requiring the assent of the House of Lords to legislation which is inconsistent with a Bill of Rights.

It is the author's view that the next few years will see the establishment of 1, 2, 3 and 5, but not of 4 or 6.