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The House of Lords and the Model Parliament

WHEN tracing to its origin in a *dictum* of Coke¹ the famous doctrine of ennobled blood, I pointed out that the creative effect of a writ of summons followed by a sitting—and, therefore, the right to claim a barony as so created—is a doctrine which rests upon that dictum, although decisions of the house of lords have long made it settled law. But I urged that what had not been decided was

the limit to which the doctrine is retrospective, a question which involves determining the date of the first true Parliament. It is easy to say that a summons to, and a sitting in Parliament create an hereditary barony, but what is meant by 'Parliament'? Is it a body which is so styled? Or a body which discharges legislative functions? Or a body in which the three estates are all duly represented? This is a question which the House of Lords has not definitely settled.²

This, however, was precisely the question which was raised, at my suggestion, on behalf of the Crown, on the recent claim (1914) to the barony of St. John, and which had, at last, to be decided. For the only 'sitting' by a St. John which the claimant was able to produce was on the morrow of Trinity Sunday, 1290, in a gathering described on the rolls of parliament both as 'Parliamentum' and as 'plenum Parliamentum'.³ This gathering was a feudal body, assembled for the purpose of a feudal aid, and the estate of the commons does not appear to have

¹ 1st Inst. 16 b.

² *Peerage and Pedigree* (1910), i. 224, 247-8 *et seq.* The point, I find, had not escaped the vigilant eye of Maitland, who wrote, in his lectures on *The Constitutional History of England*, that 'The question still seems open whether to prove the summons and sitting of one's ancestor at any time, however remote, is sufficient' (p. 84 note).

³ *Rot. Parl.* i. 25.

been represented on that occasion. The validity of this 'parliament' (for *peerage purposes*) was the sole question at issue, and the decision by a majority of the committee for privileges (8 July 1914) that, for these purposes, it was not a valid parliament is probably the most important which has been given for many years, alike for the constitutional historian and for the student of peerage law. The only one approaching it in importance was that, in 1906, on the claim to the earldom of Norfolk (created 1312), which brought history and peerage law into violent conflict.

When Stubbs wrote his *Constitutional History*, he cautiously observed, of the writs of summons issued by Edward I, that

It may be not unreasonably held that the practice of the reign owes its legal importance to the fact that it was used by the later lawyers as a period of limitation and not to any conscious finality in Edward's policy. It is convenient to adopt the year 1295 as the era from which the baron, whose ancestor has been once summoned and has sat in parliament, can claim to be so summoned.⁴

The footnote appended to this statement runs thus :

Courthope, *Hist. Peerage*, p. xli, but cf. Hallam, *M. A.* III. 124, 125. . . . The importance of 1264 and 1295 arises from the fact that there are no earlier or intermediate writs of summons to a proper parliament extant ; if, as is by no means impossible, earlier writs addressed to the ancestors of existing families should be discovered, it might become a critical question how far the rule could be regarded as binding.

When this statement was cited in recent peerage cases, efforts were made to trace the authorities on which it rested, but without success. After careful consideration I have arrived at the conclusion that the first reference is wrong, and that what Stubbs had in his mind was not Courthope's *Historic Peerage*, but the earlier work on which it was based, namely, the *Synopsis of the Peerage* (1825) of Sir Harris Nicolas. For that writer deals on p. xli with 'Baronies by Writ', and states in his opening paragraph that 'perhaps the earliest positive Writ of Summons to Parliament after the 49 of Henry the Third is that tested on the 24 June, 23 Edw. I. 1295'. Courthope, on the contrary, is concerned, on the page cited, with a different subject. Moreover, though he deals on p. xxv with 'Baronies by Writ', he does not make a statement similar to that made by Nicolas. It is,

⁴ Ed. 1875, ii. 183-4. Maitland referred to this passage when he wrote, in the above note, 'Dr. Stubbs would go back as far as 1295, or even further, should earlier writs be discovered.' Professor Medley similarly refers to this as Stubbs's own view : 'Dr. Stubbs regards the year 1295—the date of the Model Parliament—as the point of time from which the regularity of the baronial summons is held to involve the creation of an hereditary dignity' (*English Const. Hist.*, 4th ed. revised, 1907, p. 143).

therefore, to Harris Nicolas, a well-known peerage counsel, that this statement must be traced. With regard to the other reference, namely, that to Hallam, it seems to be correct, for in the edition of 1860, which I possess, Hallam there deals with the subject of 'Barons called by Writ'. But, so far from making any statement as to the earliest writs which create a barony, Hallam there disputes the now accepted doctrine that these early writs did create a barony. His statement, therefore, has no bearing on the date of the earliest valid writ as given by Stubbs.

But though, as we have seen, Stubbs, in his text, definitely gave that date as 1295, in his footnote he treated the writs of 1264 (to Simon de Montfort's parliament) as 'writs of summons to a proper parliament'. He asserted, however, quite definitely, that there were no valid 'intermediate writs of summons' between these dates.⁵ I quote from Stubbs thus exactly because in the arguments which, in recent cases, arose on this subject, considerable importance was attached to the views of the great historian. As a matter of fact, however, he was not himself expressing any view upon the subject; nor, as an historian, could he do so. No historian would dream of naming the year in which a writ of summons, if followed by a sitting, first created an hereditary barony, descendible to the heirs general of the person who received the summons. For the lawyer, however a dividing line is an obvious necessity; he cannot deal with a gradual development, but must assume that at a certain date the writ changed, not in form, but in operative effect. Professor Tout, in his recent work on *The Place of the Reign of Edward II in English History* (1914), has expressed himself strongly on this point. He denounces

that unhistorical way of looking at history to which ordinary practical lawyers have at all ages been exceptionally prone. They look at the past as a plane surface which has never been altered. They have imperfect appreciation of the idea of development. . . . Our modern peerage law . . . is full of these legal perversions, notably in its ridiculous doctrine of 'calling out of abeyance' thirteenth-century baronies which were in no wise hereditary dignities in the modern sense. It is almost as absurd to expect formal legislation by the three estates in 1311 as it is to imagine that Edward I created an hereditary house of lords in 1295.

It is, however, a singular fact that although, before the close of the seventeenth century, it had become settled law that a writ followed by a sitting had the above stated effect, it has never yet been formally determined at what date the writ of

⁵ Sir T. D. Hardy had given evidence in the Hastings case (1841) that there were not 'any writs of summons to parliament' between these dates.

summons first assumed this character. Or, to put it another way, it was till recently quite uncertain, if indeed it is not still, what was held by the house of lords to be the first valid parliament, the writs to which, because of its validity, created, if followed by a sitting, an hereditary barony. With the advance in historical learning it has become more and more difficult to determine on what the validity of a parliament did, in fact, depend. The word 'parliament', on which Lord Cottenham relied as decisive in the Hastings case (1841)—where this same 'parliament' of 1290 was in question—might mean, as Maitland has shown, something very different from parliament as we conceive it. As M. Pasquet has recently observed, 'La diversité des assemblées qui sont officiellement désignées sous le nom de Parlement est extraordinaire'.⁶ Again, the test of legislative power, of which much was heard in the Fauconberg case (1903), fails when applied to an age in which, as we now know, legislation was effected by ordinance as well as by statute.⁷ The truth is that what constituted a valid parliament 'for peerage purposes' is a question outside the historian's scope and province; it concerns only the house of lords, and must be decided, in the last resort, by the opinion of the house.

But that opinion, unfortunately, remained in hopeless doubt. The house in 1805 reaffirmed for the barony of (De) Ros the validity of the writs of 1264, on which the high precedence of that barony and of Le Despencer rested.⁸ It also recognized, on that occasion, the extremely doubtful writs of (8 June) 1294.⁹ But when, in 1841, the 'sitting' of John de Hastings in the parliament of 1290 was pronounced to be valid, and to imply the issue of a writ, a new date was introduced. Lord Cottenham

⁶ *Essai sur les Origines de la Chambre des Communes* (1914), p. 149.

⁷ Stubbs, *Const. Hist.* (1875), ii. 239-40, 284, 407; Maitland, *The Constitutional History of England*, pp. 186-7; Medley, *op. cit.*, p. 252.

⁸ Historians are likely to be much puzzled by this passage in the official report of the latest peerage case (1914), namely that of the barony of St. John, which has just been issued as I write:—

(*Sir Robert Finlay*). . . In 1249, there was a parliament with the three estates, and there are two peerages which date from that year, De Ros and Le Despencer, and which are recognized as dating from that year.

(*Lord Parmoor*). And 1249 is also recognized as the earlier date when you have the modern model.

(*Sir Robert Finlay*). Yes, my lord, what I was going to say is this: Taking it as established that peerages may date from 1249, subsequent variations from the model of 1249 would not impair the validity of a sitting in parliament any more than variations from the model of 1295 in subsequent parliaments would impair the effect of a sitting there (p. 131).

The explanation of this passage is that the above mysterious parliament of '1249' was really that of 49 Hen. III, for which the writs were issued in December 1264.

⁹ See, for these, Nicolas, *Synopsis*, p. 141; Courthope, pp. 117-18; *Complete Peerage* (ed. Gibbs), i. xxii-xxiii (where Mr. Watson's criticism is mistaken); *Lords' Reports on the Dignity of a Peer*, i, app. i. 56.

appears to have recognized the writ of 1264, issued to his father, as valid, but did not allow (whatever the reason)¹⁰ that date to the barony's creation, as had been done in the case of (De) Ros. The 'authoritative' Burke dates the barony in one place '1290' and in another '1295', and the latter date, one knows not why, is adopted by Sir Francis Palmer.¹¹ The next and a most important landmark was the Mowbray and Segrave case (1877). The writs of 1264 were on that occasion definitely rejected as having been invalidated by the *Dictum de Kenilworth*. But infinitely more surprising was the acceptance as valid, without any argument and without objection from the Crown, of writs which even the petitioner had not originally vouched, which no writer on the subject had even so much as mentioned, and which Stubbs had, just before, we have shown, explicitly ignored.

The writs which thus supplanted those of 1264 as the earliest recognized as valid in the opinion of the house were issued in 1283 to those tenants in chief whom the king had previously summoned to join him in a punitive expedition against Llewelyn and his brother David and the Welsh 'rebels' generally.¹² It had always been an axiom since the days of Hale that writs of summons to parliament were recorded on the dorse of the Close Rolls, and must be proved thence; but the two summonses above are found, not on the Close Roll, but on what is known as the Welsh Roll. It is true that in the latest instance, that of the barony of St. John, in which the second of these summonses was invoked as a parliamentary writ, it was alleged to be taken from the 'Close Roll' of 11 Edward I in the petitioner's case, signed by Mr. Fox-Davies, but this is only an example of that extraordinary carelessness which those who represent the Crown have occasionally had to check in recent cases. It is laid down by Sir Francis Palmer that the printed case lodged by the claimant 'must fully state the facts as to the creation of the dignity . . . and must be in accord with his petition to the Crown'.¹³ Nevertheless, the petition of the St. John claimant to the Crown, which bore the name of Mr. Farnham Burke, Norroy King of Arms, began by alleging 'that your Petitioner's ancestor . . . was summoned to Parliament as a Peer of the Realm, 5 Edward I'. Those who are fairly conversant with peerage law and history and who are not awed by the name of a king of arms, must

¹⁰ The reason given seems to have been somewhat overlooked. It was that a petitioner 'is bound to show the concurrence of these two circumstances, of a summons and a sitting' in the ancestor from whom 'he derives his title'.

¹¹ *Peerage Law in England*, p. 176.

¹² So far as I know, I am the first to point out the identity of the names in these two lists of writs (*Reports on the Dignity of a Peer*, i, app. i. 47-50).

¹³ *Op. cit.* p. 232.

know at least that no such summons of the year 1276-7 has even been alleged to exist. As a matter of fact, this summons reappears in the claimant's case, not, of course, as a summons to parliament, but as a 'Summons *cum equis et armis*, to Worcester against Llewelyn ap Griffith, Prince of Wales'.

I do not propose to recite afresh the arguments against the validity of the 'parliament' summoned in 1283, and known to historians as that of Shrewsbury or Acton Burnel. For I have already set them forth in *Peerage and Pedigree*, and have there shown how keenly the whole question was discussed, when, as counsel for the claimants in the Fauconberg case (1903), the present prime minister upheld the *status* of this assembly as a valid parliament. In 1892 the late Lord (then Sir Horace) Davey had similarly argued for its validity as counsel for the Wahull claimant. In both these cases, if I may venture to quote from *Peerage and Pedigree*, the committee's difficulty was the same.

The truth is, if one may speak plainly, that their lordships were hampered throughout by the unfortunate but undoubted acceptance of these writs as valid, in 1877, by Lord Cairns, without having had the point argued. Their keen intellects were engaged in desperate attempts to explain away that acceptance, in spite of its emphatic language.

In accordance with a well-known legal tradition, they were hunting for that elusive formula which should reconcile the *dictum* of a great lawyer with the judgement that overthrows it. In the St. John case, Lord Atkinson, who attached special importance to the *personnel* of committees, insisted that, in addition to Lord Cairns, 'Lord Blackburn, Lord Redesdale and Lord Cottenham treated a writ to attend that Parliament as a valid writ',¹⁴ though the weight of Lord Cottenham's authority is somewhat impaired in this case by the fact that his lordship had died a quarter of a century before.

I have dealt thus fully with the *status* of this parliament because the question arose anew in five of the ten recent cases in which baronies were claimed. The first was that of the barony of Furnival (1912), which was claimed as a creation of 1283. Once again was cited that extraordinary writ in which the king begins by exclaiming :

Hardly could the tongue of man tell one by one of all the treacheries and knaveries with which the Welsh race, like foxes, have attacked our ancestors, ourselves, and our kingdom, from the earliest time that the memory of man can recall, what massacres they have committed of magnates, nobles, and others, as well English as others, of young men and old, of women and even children, &c.

¹⁴ *Minutes*, p. 38.

Their lordships, however, by their resolution, definitely dated the barony as having been created only in 1295. This involved a considered rejection of the writ of 1283. Nevertheless, on the joint claim to the baronies of 'Dynaunt', Fitzwaryn, and Martin (1914), it was boldly alleged that 'Lord Dynaunt', 'Lord Fitzwaryn', and 'Lord Martin' 'were all as Peers summoned by Writ in 1283 to attend the King at Shrewsbury'. Counsel intimated that, in the case of 'Dynaunt', the validity of the writ had a vital bearing on the claim, and thereupon it was separately argued and their lordships pronounced against it. They also rejected it in the Martin case, and thus disposed of one at least of the unfortunate decisions in the Mowbray and Segrave case. The writ, indeed, was invoked again in the latest claim, that of St. John, but as this failed on another point the question was not decided anew, nor is it likely to be raised again after the length at which it has been argued on all the occasions I have mentioned.

It was on the latest of these claims, the most important, probably, that has been heard for many years, that the final step was taken. The case of the barony of St. John turned wholly on the alleged proof of sitting. As in the Hastings case, the only sitting alleged was in a 'parliament' of 1290, but Lord Atkinson justly urged that the resolution in the Hastings case 'is a clear distinct and positive decision' that a sitting in this 'parliament' was valid for peerage purposes.¹⁵ Indeed, had it not been, there could be no Lord Hastings now in the house of lords. But it is well recognized that a committee for privileges is not actually bound by the decision of an earlier committee; it is not bound, says Sir Francis Palmer, 'to perpetuate bad law'. The leading case in point is that of the earldom of Wiltes,

¹⁵ Lord Atkinson's acceptance of the parliament as valid and, therefore, of the claim was, he explained (*Minutes*, pp. 157, 187), largely based on the assertion of claimant's counsel that '*plenum parliamentum*' was 'a term of art', which was only applied to a true and valid parliament. Mr. Cozens-Hardy developed an elaborate argument (*ibid.* pp. 181-91) in proof of this proposition. The obvious answer, given for the Crown and by Lord Parmoor, is that there could be no such recognized distinction between *parliamentum* and *plenum parliamentum*, because these expressions, in the St. John case, 'are used in the same document and applied to the same assembly' (*ibid.* p. 218). Lord Atkinson, however, observed in his 'judgement' (*ibid.* p. 209): 'I think Mr. Cozens-Hardy has shown conclusively that from 1275 downwards, while many instances can be found where the expression *Plenum Parliamentum* was used to describe a true parliament, where representatives of the commons attended, in no instance, save possibly in that of the so-called parliament at Shrewsbury of 1283, were these words applied to an assembly other than one purporting to be a legislative representative assembly with full powers.' This is one of the strange passages in the 'judgement' (see below). For Mr. Cozens-Hardy, though invited by his lordship to deal with the case of the 'parliament' of 1283 (p. 157), passed it over in his argument (p. 183), and, as a matter of fact, the words *plenum parliamentum* were not, so far as I can find, anywhere applied to that assembly.

the claim to which was rejected in spite of the previous decision in favour of the claimant to the Devon earldom.¹⁸ Sir Francis adds, as a second precedent, that

the decision of the House in the *Beaumont Case*, 1794–5, as to the destruction of a peerage in abeyance, where one of the co-heirs was attainted, in no way prevented the House of Lords in the subsequent cases of the *Camoy's Peerage*, 1838, and the *Braye Peerage* from overruling the former decision and deciding inconsistently with it.

But this is a strange misconception. There was no such decision as alleged on the claim to the barony of Beaumont (1795), nor was the actual decision of the house in any way overruled by, or inconsistent with, those in the Camoys and Braye cases.

The committee, however, had a clear right to reverse the ruling in the Hastings case on the point that here arose. Still it was, no doubt, a serious step to take, the more so as this 'parliament' had been incidentally accepted by Lord Cairns in the Mowbray and Segrave case and by Lord Selborne in the Wahull case (1892). I had ventured, in *Peerage and Pedigree*, to question Lord Cottenham's ruling, and to point out that his lordship's reliance on the word 'parliament' (or even *plenum parlamentum*) was 'begging the whole question of what the word "parliament" denoted at that date'. I also urged that he missed the point in his 'judgement' on the claim, and that 'the validity of this document as proof of sitting appears to be open to question'. When the St. John case came on for hearing, this was the objection taken for the Crown, and in spite of the powerful advocacy, for the claim, of Sir Robert Finlay and Mr. Cozens-Hardy, the committee, by a majority of four to two, ratified that objection and decided against the claim. Thus the 'parliament' of 1290 underwent in turn the same fate as those of 1264 and 1283, and if that of 1294 has not yet been formally rejected, there is now at least, on the part of their lordships, a decided tendency to accept, as valid 'for peerage purposes', nothing earlier than 'the model parliament' of 1295. This, indeed, is the date they have allowed to the baronies of Furnivall and of Martin.

I pointed out in the work above cited that, even in the Wahull case, the house had shown 'a strong tendency to accept only records relating to properly constituted parliaments'; but there had never been laid down any definite principle by which it could be determined whether they were so constituted. It is this principle that has now been supplied by the notable 'judgements' of Lord Parker and Lord Parmoor on the claim

¹⁸ Maitland refers to this in *The Constitutional History of England* (p. 79) as a 'very instructive' point.

to the barony of St. John. The former laid it down that the sitting must have been in

a Parliament in the modern sense of the word; that is to say, it must have conformed in its more essential characteristics to what is called the Model Parliament of 1295. . . . Assemblies in which the Commons were unrepresented, though called Parliaments, have never been recognized as Parliaments for peerage purposes.¹⁷

Lord Parmoor, who followed, held that

the sitting must be in a Parliament in the later sense of the word, and something more than presence in an assembly or council called together for consultation with the King . . . a sitting at such assembly or council would not . . . establish an hereditary peerage.¹⁸

The question, therefore, was this :

Was the meeting that of an assembly or council called together for consultation with the King, or was it a Parliament in the later sense of the word, constituted in substantial accord with the Model Parliament of 1295 ?¹⁹

As against the view adopted by Lord Parker and Lord Parmoor, who both held the presence of the three estates to be necessary, it was contended 'on behalf of the claimant, that prior to the date of the model parliament of 1295 it is sufficient for the claimant to prove a sitting in a national assembly properly convoked according to the procedure prevailing at the time, and that the assembly of May 29, 1290, was such an assembly'.²⁰ Lord Parmoor's comment on the view which he thus stated was that 'no authority was cited in favour of so wide a proposition, and to sanction it would introduce a new principle highly inconvenient in the consideration of peerage claims'. One thus returns to Stubbs's phrase that 'it is convenient' to adopt the date 1295. Let me again insist that this is not a question of good or bad history or of good or bad law. It rests entirely with the lords to select a date for themselves, but the peerage lawyer may well hope that the point will be at last determined and endless argument and trouble thereby averted for the future.

Moreover, although the validity 'for peerage purposes' of a parliament is no concern of the historian, he would, to judge from the latest learning, agree at least with the view that the assembly of 1295 was the parent of modern parliaments. If M. Pasquet, in his essay on the origin of the house of commons, holds that Stubbs has exaggerated somewhat the

¹⁷ *Minutes*, pp. 214, 215.

¹⁹ *Ibid.*

¹⁸ *Ibid.* p. 217.

²⁰ *Ibid.* p. 219.

importance of 'the model parliament', he makes this admission :

la nouveauté du Parlement de 1295 consiste donc dans la réunion à *un même Parlement* de groupes divers qui représentent tout ce qui compte alors dans la nation et qui, auparavant, n'ont jamais été réunis tous ensemble en même temps. Dorénavant, lorsque le roi voudra convoquer un Parlement semblable, les brefs de 1295 serviront de modèle.²¹

Professor Tait, commenting on this, has observed that nothing can 'alter the fact that in every essential the parliament of 1295 was the model for all subsequent parliaments of the three estates.'²² Even stronger and more apposite is the conclusion of Maitland, who observes that it

gives us the model for all future parliaments. . . . A body constituted in this manner is a parliament; what the king enacts with the consent of such a body is a statute. . . .

Now and again the name is given to meetings of the king's ordinary council, or to meetings which would afterwards have been called *magna concilia* as distinct from *parliamenta*—meetings of the prelates and barons to which representatives of the commons were not called—or again to some anomalous assemblages which were occasionally summoned. But very quickly indeed usage becomes fixed: a *parliamentum* is a body framed on the model of 1295, it is frequently, habitually, summoned, and with its consent the king can make *statuta*. . . . Parliaments formed on the model of 1295 were constantly held during the coming centuries; . . . at last it was distinctly recognised that the sovereign power of the realm was vested in a king and a parliament constituted after this model.²³

Again, looking back from 1509 at 'the permanent results of the eventful two centuries which have elapsed since the death of Edward I', he writes :

Our first duty must be to consider what a parliament is. We find that the great precedent of 1295 has been followed, that assemblies modelled on the assembly of that year have been constantly holden, that these have quite definitely the name of parliaments. Parliament is still, at least in theory, an assembly of the three estates.²⁴

The point of view of the late Downing Professor was not identical with that of Lords Parker and Parmoor, but this makes

²¹ With this may be compared a passage in the summing up, by Mr. Raymond Asquith, of the case for the Crown on the St. John claim: 'My submission is that it is the co-existence in one assembly and at one time and for one purpose of the three estates of the realm which really makes a parliament, and that before they begin to co-exist there is no parliament, and if they ceased to co-exist, equally there is no parliament in the material sense' (*Minutes*, p. 199).

²² *Ante*, xxix. 753.

²³ *Op. cit.* pp. 74-6. Cf. p. 69: 'In the latter year (1295) there is, we may say definitely, a parliament; the great outlines have been drawn once for all.'

²⁴ *Ibid.* pp. 165-6.

the more notable the similarity of the conclusions at which they arrived on the first valid 'parliament'.

It should be observed that the St. John decision will also add to the small number of clear precedents for a committee arriving at a conclusion absolutely at variance with that of a previous committee.²⁵ But more important than all, from the historian's point of view—if not from that of the intelligent student of English or, at least, of peerage law—is the sharpness of the contrast it presented between the old school and the new, the hard-won triumph, in the teeth of legal precedent and prejudice, of the school which draws its inspiration from Maitland's brilliant labours. Even among the sages of the law, those who had been trained to believe blindly in the 'authority' of Coke, he whose eager gaze was ever turned towards the light, has come at last into his own. In the three elaborately reasoned 'judgements' delivered on this occasion we detect the underlying difference in the spirit which informed them. For Lord Atkinson, the able representative of the lawyers of the older school, the case was virtually decided by the acceptance of the parliament of 1290 as valid in the Hastings case (1841) and its subsequent acceptance in Lord Cairns's 'judgement' and, by 'a particularly strong committee', in the Wahull case; his lordship felt 'quite unable to disregard all those precedents and to adopt a conclusion unsupported by a single authority'. That Maitland had proved, as shown by the Crown, the word 'parliament', under Edward I, to have had a far less restricted meaning than Lord Cottenham assumed altered the whole aspect of the case, but was for him of no account. And yet, even while the case was being argued in the house, M. Pasquet was independently confirming, in his book on the origin of the house of commons, the contention of the Crown on the 'parliament' in question in every respect.

The excursions of a lawyer into history are at times perilous things, and although it may not be of much consequence that his lordship should assign the 'model parliament' to 'the twenty-fifth of Edward I' or should cite a public record unknown to mortal man,²⁶ it is more serious to find him stating, as historical fact, that

In the twenty-fifth of Edward I the so-called Model Parliament was constituted, and it was by the statute then passed *de tallagio concedendo* declared that 'no tallage or aid should be taken or levied by the King without the goodwill and assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgesses and Freemen of the land'. This statute,

²⁵ See pp. 391 f. above.

²⁶ 'The Welsh Close Roll', which was carefully distinguished by his lordship from 'the English Close Roll'.

securing to the Commons the right to tax themselves, and the subsequent statute of the thirteenth of Edward II (1322), securing to them the right to take a part in all legislation, would appear to me to be the earliest authorised attempts to shape and fashion our parliamentary constitution as now understood.²⁷

For it is clear that the learned lord has here confounded the well-known 'model parliament' of 1295 (23 Edw. I) with that of 1297 (25 Edw. I), in which the so-called 'statute' *De tallagio non concedendo* (his lordship has omitted the *non*) was formerly supposed to have passed. Moreover, the advance in historical knowledge has long made it certain that this so-called 'statute'—though wrongly declared to be such by the judges in 1637—was not a statute at all, and was not passed in this or any other parliament.²⁸ Worse still, as Mr. McKechnie has observed in his *Magna Carta* (ed. 1914), 'it is now well known that the . . . document is unauthentic' (p. 238). As to the next statute cited by Lord Atkinson—that which repealed the ordinances—historians now doubt if it had the effect which he assigns to it, and in any case it did not and could not pass in 'the thirteenth of Edward II' (1319–20). Although his lordship

cannot assume that . . . the distinguished Judges who sat on these Committees were ignorant of some of the well-known and common facts of the constitutional history of England . . .²⁹

it would seem that, even in these days, a no less distinguished judge may not always be perfectly acquainted with English constitutional history.

Again, it was somewhat disquieting in these days to hear a learned law lord confidently, almost indignantly, appealing to *May's Parliamentary Practice* for the fact that 'William the First, in the fourth year of his reign, summoned, by the advice of his barons, a council of noble and wise men learned in the law of England', and insisting that 'Lord Hale' (1609–76) asserted this to be 'as sufficient and effectual a parliament as ever was held in England'. For we turn, in our time, not to Hale and his *History of the Common Law*, but to Maitland and Pollock and their *History of English Law* (1895, 1898). And, alas, the very existence of this 'council' rests only on that later compilation which even Hallam knew to be 'spurious' and classed with 'pious frauds', and which Dr. Liebermann, with his vast erudition, has dealt with once for all, that '*Leges Eadwardi*'

²⁷ *Minutes*, p. 213.

²⁸ Stubbs, *Const. Hist.* (1875), ii. 142–3, *Select Charters* (1870), p. 487; Medley, *op. cit.*, pp. 512–13; Bémont, *Chartes des Libertés Anglaises*, pp. xliii. 87–8 ('ce prétendu statut').

²⁹ P. 214.

of which Maitland wrote that 'it has gone on doing its bad work down to our own time'. The truth of that assertion is amply confirmed by the appeal, however unconscious, to its witness in Lord Atkinson's 'judgement'.

It is with the proud consciousness that their labours have not been wasted that historians will turn to that masterly address in which Lord Parker urged that 'it must be remembered that our knowledge and appreciation of the history of the thirteenth and fourteenth centuries is, as the result of modern research, very different from what it was in the past'. And they will learn, I believe, with gratitude and with peculiar pleasure that both Lord Parker and Lord Parmoor, in their luminous 'judgements', referred to Maitland's researches and to their direct bearing on the question at issue in the case.

J. H. ROUND.