THE ENGLISH HISTORICAL REVIEW

NO. IX.—JANUARY 1888

Gneist on the English Constitution

IT is strange that Dr. Gneist, who has made the study of English institutions the object of his life, should have had to wait nearly forty years for a translator. He has published a series of works of great interest to Englishmen, beginning with his treatise on trial by jury (1849), but—to our shame it must be spoken—not one of these was translated till a year or two ago. In England he has been almost unknown, and only a few students have been aware that the highest living authority, after the bishop of Chester, on the history of English government, was a foreigner.

Dr. Gneist's interest in English constitutional history is not solely, or even perhaps mainly, that of an historian: it is also that of a public man, a great jurist and a conservative political reformer. 'It was the "Sturm und Drang" period of 1848,' he tells us in his preface to the 'Verfassungsgeschichte,' 'which first drew him from the domain of law into the wider area of politics.' The constitutional conflict in Prussia led him to examine the origin of social relations, and the issue of his investigations was a treatise entitled 'Adel und Ritterschaft in England' (ed. 2, 1853). The confusion produced by rash and ill-informed attempts to assimilate foreign political ideas induced Dr. Gneist to examine in detail the development of administration in this country. The fruit of his labours was the 'Geschichte und heutige Gestalt der Aemter in England' (1857), which was followed ten years later by the 'Englisches Verwaltungsrecht.' The chief object which Dr. Gneist had in view, namely to show the vanity of any attempt to establish representative institutions without those local and provincial bases on which in England the parliamentary system till lately reposed, was meanwhile attained in his work on 'Die englische Communal-Verfassung oder das System des Self-government' (1860), a book

which with some modifications has passed through three editions. Out of a combination of this work and the 'Verwaltungsrecht,' as Dr. Gneist himself tells us, the 'Verfassungsgeschichte' was composed, and 'the third division of the subject,' the constitution of parliament, has now been laid before us. We infer from some words of Dr. Gneist in the preface to 'Das englische Parlament,' that this treatise is only the precursor of a longer and more important work.

In 'Das englische Parlament' there is, indeed, except in the last sixty pages, which are concerned with the present century, not much that is new. It is for the most part a repetition of those portions of the 'Verfassungsgeschichte' which bear on the history of parliament. In some respects the newer work supplements the older, by treating the actual constitution of parliament and of the assemblies which preceded it in greater detail, but generally speaking it is the 'Verfassungsgeschichte' over again in a more or less compressed form. Some objections may doubtless be raised to this method of treating the subject—for the subject, after all, is but one—in three or four distinct works. There cannot but be needless repetitions; the same matters reappear in different order and proportion; and the reader is not always sure where to find the fullest information on any particular point. But the whole series of works, taken together, undoubtedly contains a mass of information which is not to be found elsewhere except in books and documents inaccessible to most readers, as well as original and thoughtful conclusions which, whether we accept them or not, never fail to deserve the respect due to careful research and impartial judgment.

The introduction which Dr. Gneist has prefixed to 'Das englische Parlament' throws an interesting light on the author's general views, and his manner of regarding the institutions of society in the present day. These views are consistent and intelligible; they are those of an evolutionary optimist. As a good Prussian and a lawyer, he exalts the state; as a religious man and a practical politician, he does not underrate the value and power of the church; as a student conversant with the unceasing development of society, he has faith in sober and rational reform. The need of common defence, the necessity of a power to define the duties and maintain the rights of the citizen, created the state and justify a strong executive. The spiritual wants of men, the demand for a power to mediate between class and class, established and will continue to support the church. The eighteenth-century theories of equality and the social compact are mentioned only as examples of a style of speculation which the objective investigation of later times has driven from the field. The institution of private property, the inequality of classes and individuals, are justified by a sober analysis of human nature.

After a few remarks on the development of medieval society, in

its three great aspects, the state, the church, the army, Dr. Gneist goes on to sketch the development of English society in particular.

The peculiar character of the relation between society and the state in this country is due to the fact that the state has always demanded the personal services of its subjects in war, justice, and police. Most of these duties could only be discharged by men of wealth and position—that is, by great landed proprietors. Hence the aristocratic nature of our constitution. The reliance which even the absolute monarchy of the Norman kings placed on the leaders of society, who discharged the duties of local government and defence, seemed at first to establish a sort of servitude of the upper classes, an *aristoduly*. But this regular discharge of public duties, involving a reciprocity of public rights, called into being the strongest and most durable *aristocracy* which the world has seen. The monarchy, however, retained sufficient power to prevent the formation of an exclusive noble caste, as of exclusive trade-guilds, to rescue the peasants from serfdom, and to hinder the growth of class privilege. Under these circumstances, the formation of distinct estates of nobles, burghers, and peasants was impossible. What was lost by class was gained by the local communities. Rural and civic corporations, counties and boroughs, acquired a sense of individuality and a cohesion which forced the House of Commons slowly into power, enabled parliament to outlive the Tudors and to overthrow the Stuarts, and formed the basis of the parliamentary constitution of the eighteenth century. In a similar spirit the author sketches the relations of society and the church, and of church and state. Here, however, there is nothing specially calling for remark, unless it be the prominence given, in a general view of political history, to the church. Dr. Gneist's co-ordination of church and state, as the two great institutions in which society gives expression to its aims and cohesion to its scattered particles, may well be compared with the remark of Dr. Stubbs in one of his recently published lectures, that 'modern history (including mediæval history in the term) is coextensive in its field of view . . . with ecclesiastical history.' For both these great writers, church and state are but two aspects of the same organism.

Dr. Gneist divides his *History of the English Constitution* into six periods: the Anglo-Saxon; the Anglo-Norman or feudal, which he considers as lasting down to 1272; the period of the estates of the realm—that is, the fourteenth and fifteenth centuries; the Tudors; the Stuarts; and the eighteenth century. The *History of the Parliament* is told in nine 'Essays,' giving a series of pictures of that institution at different epochs. 'Looking at these from the outside,' says Dr. Gneist, 'we might imagine them to be the parliaments of different nations; but a closer view brings to light an inner unity or continuity not to be paralleled in the history of the

world.' The first six of these essays cover periods identical with those of the 'Constitutional History.' The last three bring the history of parliament down to the reform bill of 1885.

In his survey of the Anglo-Saxon period, little effort is made by the author to bring out the collective growth of the constitution. It will hardly be denied that there was almost as much difference between the time of Ethelbert of Kent and that of Ethelred the Unready as there was between the time of Ethelred and that of William the Norman. It is no doubt very difficult—it may even be called hazardous—to trace the development of many institutions before the Norman conquest, but it is an attempt worth making. The student is only too apt to forget that six hundred years elapsed between the coming of Hengist and the coming of William, and that to produce a definite set of ideas and customs and to call it the Anglo-Saxon system is pretty nearly the same thing as to group together the absolute monarchy of Henry I and the parliament of Henry VI and to call such a mixture the medieval constitution. Dr. Gneist has perhaps hardly kept this enough in view. The order, too, in which he treats the different departments of his subject is rather likely to confuse the reader. For instance, after discussing the primitive bases of English society, he describes the Anglo-Saxon monarchy at the height of its power, with all the attributes and prerogatives which belong to it in the ninth and tenth centuries. He then harks back to the period of the Heptarchy and the union of the kingdoms, and discusses the origin of shires and other local divisions. What he has to say is in detail always clear and intelligible, but the general arrangement is defective. 'The history of institutions,' says Dr. Stubbs, 'cannot be mastered, can scarcely be approached, without an effort;' but this effort would be infinitely lightened if only historians would adopt a definite and consistent arrangement of their matter.

In his treatment of these early stages of English society, Dr. Gneist displays a wholesome historical scepticism. English writers have, under the influence of strong political feelings, not unfrequently shown a tendency to discover democratic principles in early times or to attribute powers to popular institutions for which there is but little evidence. It would not be fair to say that Dr. Gneist displays bias in any direction, but he is obviously concerned to refute those writers who, 'like heralds making out a pedigree,' are over-anxious to trace back the continuous history of popular government into a remote antiquity. This is very apparent in the second section of his work, which deals with the Norman period, but it is also evident in his account of still earlier times. Very shortly after the English Conquest, according to Dr. Gneist,¹ 'the

¹ *C. H.* i. 3, 4. The references at the foot are to the English translation by Mr. P. Ashworth, but the quotations in the text are generally translated directly from the original.

inequality of property had undermined the old position of the free-man.' The condition of dependence thus introduced produced widely divergent results on the upper and lower classes. On the one hand, the dependence of the thanes on the monarchy raised them into the position of a great territorial nobility; on the other hand, the dependence of the poor or landless man upon the rich tended to deprive the former of his ancestral liberty, or at least of all political influence.

Accordingly the great county courts were, at their first authentic appearance, assemblies of greater landed proprietors. . . . A picture of old Germanic peasant communities, forming a court in full assembly, under the presidency of elective officials, is not to be deduced from Anglo-Saxon records. The inequality of property has, in the larger assemblies, thrust back the small man into the position of a bystander. Even in the small hundred courts the verdict is generally left to the decision of a narrower circle of witan.³

Dr. Gneist repeats elsewhere³ the assertion that in the county court 'the more influential witan' or 'the thanes' were the regular judges. It is difficult to reconcile this with what is known to have been the composition of the county court in the middle ages, and with the often quoted passage from the 'Leges Henrici Primi': '*Regis iudices sunt barones comitatus, qui liberas in eis terras habent: villani vero &c. non sunt inter iudices numerandi.*' The distinction is clearly drawn, not between great men and small men, but between freeholders and non-freeholders. It is impossible to believe that the county courts should have become *less* restricted in course of time: the tendency must have been the other way. One can hardly help supposing that Dr. Gneist has been led to adopt this view by the difficulty of evolving the aristocratic witenagemot from the popular shire-moot. But if, as is quite possible, the witenagemot had another origin, the assumed restriction of the county court becomes a superfluous hypothesis.

As to the composition of the hundred court, Dr. Gneist is less positive. In the passage just quoted he maintains the existence of a restricted franchise. But elsewhere⁴ he recognises the freeholders as habitual attendants at the court of the hundred. That this was the case can hardly be doubted. The origin of the hundred is traced by Dr. Gneist to the military organisation of the early settlements. It is, as he points out, a common Germanic institution. He seems to think⁵ that the boundaries of the hundreds were frequently altered before their thorough revision by Alfred.

Hence it is clear why the hundred is recognised so comparatively late as a territorial division, why the Saxon Chronicle does not mention the

³ C. H. i. 9. Here, by the way, the translation is seriously at fault.

⁴ C. H. i. 69, 166.

⁵ *Ib.* 49, 69, 94, 95 note.

⁶ *Ib.* 48.

hundreds, &c. . . . The silence of the early Anglo-Saxon laws cannot be entitled to any regard [as pointing to the non-existence of the institution in early times], on account of the extreme rarity of their allusions to the military system.

It is well known that the acreage of the hundred and consequently the number of hundreds in a given area vary very much in different parts of England. Dr. Gneist takes note of this,⁶ but in calling attention to the fact he falls into some curious geographical errors. He reckons Dorset as a midland county, while he places Worcester, Rutland, Leicester, and other midland counties among those of the north. These mistakes do not, however, affect the gist of his argument.

Few among the obscurities of the Anglo-Saxon system are more obscure than the history and meaning of the 'tithing.' Dr. Gneist has a good deal to say on the subject, but he cannot be said to have cleared up the difficulty. After a survey of the different enactments on the subject in the laws of Edgar, Cnut, and others, he arrives⁷ at the negative conclusion, 'that the nature of the existing local aggregations absolutely excluded a territorial division into tithings.' And again:⁸ 'The local districts were formed on no regular system, and the tithing was no such local division.' The tithing, however, he says elsewhere, was 'a small community with a responsible head,' and it originated, like the hundred, in the early military organisation.⁹ Now, if this be so, it must have been originally, at all events, a territorial unit; and if it was afterwards utilised, like the hundred again, for police purposes, it can hardly have been anything else but a local division still. Neighbourhood is of the very essence of the early English arrangements for maintaining the peace, and mutual responsibility would have been impossible if the members of the union had not been closely grouped together. Dr. Gneist, it appears to me, has hardly paid sufficient attention to the development of the system of joint surety from the original family bond (*mægth*, *mægburh*), through the voluntary association (*gild*, *gegildan*)—of which he says nothing—to the compulsory personal responsibility enforced by the laws of Edgar and Cnut, which enacted that every man should have a surety who should be responsible for him. But it does not appear that these enactments have anything directly to do with the tithing. The notion that they are directly connected with it seems to have arisen from a failure to observe that the London frith-gild,¹⁰ with its grouping into tens and hundreds under tithing-men and hundredmen, like the tenman-tale of York, is an entirely different thing from the rural tithing. In these great towns a new system of joint responsibility, on a strict numerical basis, seems to have sprung up

⁶ C. H. i. 49.

⁸ *Ib.* 28, 50.

⁷ *Ib.* 51.

¹⁰ *Judicia Civitatis Landonis*, Thorpe, i. 229.

⁹ *Ib.* 55.

about the time of Athelstan. But these frith-gilds did not extend into the rural districts. In the country at large the only substitute was the rule enforced by Edgar and Cnut, mentioned above. The authors of the compilation called the 'Laws of Edward the Confessor,' confused the two systems. Then, finding the enactment of Cnut, that every free man should be 'brought into a hundred and ¹¹ tithing,' they jumped to the conclusion that the rural tithing was a group of ten persons, instead of being, as it is, the tenth part of some larger aggregate. Lastly, on this assumption they founded the theory that the whole population of England was arranged in groups of ten for the purpose of mutual responsibility. This they called the system of frank-pledge, and thus foisted a Norman institution on their predecessors before the Conquest. No joint responsibility of the rural tithing can, it appears to me, be deduced from the Anglo-Saxon laws. All they enact is that the inhabitants of any tithing, like the inhabitants of a hundred, shall be liable for certain duties, such as helping the authorities to catch criminals; and that every freeman shall be a member of a tithing—that is, that there shall be some district in which he may perform those duties. It is certainly rather presumptuous to differ from such an authority as Dr. Gneist, but I cannot help thinking that the rural tithing is a local division, a fraction of the hundred, originating in military necessities, and afterwards utilised for other purposes of state; that it has nothing to do with the system of mutual responsibility; and that it is quite different from the urban tithing, which was strictly numerical, probably local too, and did involve mutual responsibility. Dr. Gneist¹² traces the 'error that the tithing is a local district' to a passage in Ingulfus, in which the law is stated '*ut omnis indigena in aliqua centuria et decima existeret.*' This he calls a corruption of the passage in William of Malmesbury, '*ut omnis Anglus haberet et centuriam et decimam.*' But the author of 'Ingulfus,' whoever he may have been, is simply translating the law of Cnut, and is so far from copying William that he states correctly what William states incorrectly.

On the later history of the thanehood, Dr. Gneist has some clear and excellent remarks; but one could wish that he had more fully explained its origin, and the relation between the thane and the gesith. If, as seems probable, the title thane was at first confined to the fighting gesith, it was natural that the former, as the more honourable denomination, should eventually extinguish the latter. In the earlier laws the title gesith is found, but not that of thane; in the later the reverse is the case. The older title, however, exists into the tenth century in the form gesithcund and gesithcundman. Dr. Gneist¹³ says that the 'twelfhynde man'

¹¹ Not or, as the translation, *C. H.* i. 51, has it.

¹² *C. H.* i. 51, note.

¹³ *Ib.* 90, 91, note.

(i.e. the man whose 'wer' is twelve hundred shillings) is equivalent to the thane who owns five hides of land and is bound accordingly to military service, while the 'sixhynde man' is equivalent to the 'gesithcundman,' and denotes the warrior without such free possessions. He adds that the latter grade 'did not apparently maintain itself long.' This remark seems to be true of the title 'sixhynde,' but not of the grade which it indicates. The title 'gesithcund' originally had a wide signification, meaning simply 'noble,' and is used in this sense in the laws of Wihtraed. But in the general body of the 'gesithcund' there arose certain grades, and that denomination became restricted to the lower nobility, as distinct from the ealdormen and king's thanes, who formed the highest ranks. The title 'sixhynde' may have been the equivalent of 'gesithcund' in this restricted sense, but it nowhere appears that 'gesithcund' was a title specially denoting the 'warrior without free possessions.' The 'gesithcundman,' according to the laws of Ine,¹⁴ may hold land or not, but, according to the table of *wergilds*,¹⁵ probably a century and a half later, a man could not become 'gesithcund' without getting five hides of land. From this and other indications it would appear that the title, which disappears before the end of the tenth century, simply means noble, and was thus the equivalent of thane; but that, like the latter title, it was not applied to nobles of higher rank, who were especially denoted as earls, ealdormen, or king's thanes. The distinction is much the same as that between *maiores* and *minores barones* in the twelfth and thirteenth centuries. But the question is obscure, and, after all, possesses rather an archaeological than an historical or political interest.

One of the best chapters in this section of Dr. Gneist's work is that on the monarchy. But here again, as in the cases of the *mægburh* and the *gesith*, he shows little interest in the origin of the institution. He passes over in complete silence the curious phenomenon of the double kingship, which appears to have been the earliest form in several at least of the tribes which conquered Britain. It may be compared with the double monarchy of which there are traces in Homer and in early Rome, and which existed in Sparta in historic times. In Kent it continued, as the laws of Hlothære and Eadric show, almost as long as that state preserved a separate existence.

Very little is said about the *witenagemot* in the 'Verfassungsgeschichte,' but the deficiency is to a large extent supplied in 'Das englische Parlament.' Dr. Gneist does not enter upon the question of its origin. This is perhaps a wise abstention, but much that is obscure in its later history might be elucidated if we knew from what earlier form of assembly it was developed. For instance,

¹⁴ Thorpe, i. 135.

¹⁵ *Ib.* 189.

did any but a few great men ever appear in the assembly in later times, or was it in theory—if we can speak of theory at all before the Conquest—the right of every freeman to take part in the council of the nation? Dr. Freeman asserts that this was the theory; Dr. Stubbs contents himself with pointing out that no case is known in which the freeman availed himself of the right, if right there was. Obviously, if the witan in its original form were the assembly of the whole folk spoken of in the ‘*Germania*,’ the recollection of the right might have been expected to live long in the mind of the people. It seems to be the received theory that the witan was a sort of extract of folkmoets, formed by the gradual withdrawal of the poor man, who, as the kingdoms became larger by absorption, found it more and more difficult to attend. There are several objections to this theory, which I have not space to set forth here. On the other hand, it is clearly possible that the witan was developed from the assembly of *principes*, which Tacitus tells us existed alongside of the popular assembly. But I cannot help thinking that the theory which most fully accords with the characteristics of the witan in later times is that it originated neither in the assembly of *principes*, nor in an amalgamation of folkmoets, but in the royal *comitatus*, the body of officials and others at court, with any great men from subject or tributary kingdoms whom the king chose to summon. On this question Dr. Gneist has unfortunately nothing to say, though he would perhaps be as much pleased as Dr. Freeman would be annoyed to find the witan turn out to be in its origin merely a royal council. As to the powers of the witan he for the most part follows Kemble, but makes a distinction, which is certainly necessary, between the normal rights, as that of taking part in legislation, and the abnormal exercises of power, as in the deposition of kings, of which there is no really valid case after the time of Egbert. In fact, while allowing the witan a considerable share of power, especially towards the close of the Anglo-Saxon period, he refuses to invest it with the extensive control over almost all matters of government which, according to Kemble, Palgrave, and other writers, it possessed.

It is in his treatment of the Norman and early Angevin periods that Dr. Gneist’s views diverge most widely from those hitherto generally received in this country. While not going to the lengths of Prynne and other historico-political writers of the seventeenth century, English historians of a later date have as a rule refused to recognise an unlimited or absolute monarchy as existing in England at any time. Most of them moreover, if asked at what period English government most nearly approached a despotism, would probably have answered that it was in the time of the Tudors rather than in that of the Norman kings. Dr. Gneist undertakes

to show that William the Conqueror and his immediate successors were as nearly autocratic as it is possible for European sovereigns to be. He points out that the whole of the administrative machinery—justice, police, the army, taxation and expenditure—was in their hands. They established courts of law and departments of state, the *curia regis* and the exchequer, according to their convenience; they alone appointed and dismissed their high officials, and created new offices; they made peace and war, unhindered by the voice of the nation or by considerations of expense; even over the church, for a generation at least after the Conqueror, their will was law. If they wished to make fundamental changes in the law of the land, as by the act separating the civil and ecclesiastical jurisdictions, the utmost concession which they made to the theory or tradition of a legislative witan was to summon their great vassals, and to go through the form of obtaining an assent which no one would have dared to refuse. If they issued charters they did but impose voluntary fetters on themselves, which with equal ease they could throw aside, or they offered them as a bribe in order to silence objections to a defective title. It is true that certain assemblies, the *curia de more*, were for some time held, but these were mere gatherings for show, occasions for feasting and display. They were a substitute for the gatherings of the witan in Anglo-Saxon times, but the powers of the witan were in abeyance. What had been a legislative assembly became a mere consultative council, which owed its existence to the royal will, and even these gatherings fell into desuetude within two generations after the Conquest. Such is the picture which Dr. Gneist draws, and which he supports, it must be allowed, with very strong arguments.

He explains¹⁶ how this absolutism inevitably resulted from the circumstances of the time. There was wanting throughout the country that cohesion of individuals and classes which alone enables a people to make head against a centralised despotism. The Norman lords had no common bond except their suzerain, they could not trust their own vassals, and still less could they combine with the Saxon population. The Norman prelates were equally severed from the mass of the clergy by national differences, as well as by their support of celibacy and other alien principles. The conquered English could not resist the tyranny of the crown without exposing themselves to the nearer tyranny of the barons; the conquering Normans were restrained by the dangers of their own position in the midst of a hostile population, or, if they rebelled, were easily destroyed piecemeal by a king who in his conflicts with them could always rely upon the nation.

In the light of recent investigations, few will deny that in almost

¹⁶ *Gesch. des Parl.* 71 ff.

all branches of government the Norman sovereigns exercised a sway practically unlimited, except by their own shrewd perception of what was politic or expedient. The question resolves itself into this: what measure of influence on the general affairs of state was exercised by those national assemblies which undoubtedly met at short intervals during the greater part of the period? and secondly, to what extent did the crown control the great vassals in the enjoyment of their local authority? Allowing full weight to the arguments which Dr. Gneist deduces from the lack of evidence about these national assemblies, and from the impregnable position of the Norman king as the single head of two hostile nationalities, I cannot help thinking that he underrates the limitations imposed both by the collective forces of the baronage in council and by the right which they enjoyed within the area of their feudal jurisdictions. We have, unfortunately, no reports of proceedings at the *curia de more*, but we know that they were not merely empty show. Important affairs of state were discussed, sometimes at considerable length. On one occasion, for instance, in 1085 the sittings lasted for five days,¹⁷ and 'the king had a great council and very deep speech with his witan about this land.' Legislation of the type of Ine's or Alfred's codes there was none, so that in this respect a comparison between the Anglo-Saxon witan and the Norman *curia* is impossible. But for such legislation as there was, the consent of the great lords was not assumed; it was asked for and obtained. The Conqueror states this himself in the act about ecclesiastical jurisdictions; it is stated for him by Henry I with regard to the amendments which he introduced into the laws of Edward. Henry is not likely to have departed from the truth in order to invent a precedent limiting his own power, and even if the statement were untrue it would represent the theory in existence early in the eleventh century, a theory which asserts itself elsewhere in Henry I's charter. The autocratic character of legislation in the Norman times is inferred by Dr. Gneist¹⁸ from the use of the first person—'volo,' 'prohibeo,' and the like—and from the absence of the signatures which attest the documents of Anglo-Saxon times. Too much stress, however, should not be laid on these indications, which might be paralleled from times when there could be no question as to the necessity of parliamentary assent. It must also be remembered that William I occupied the throne as the rightful heir of Edward. He came not as a conqueror, but as a legitimate king. It was not his cue to reverse the whole system of government, and needlessly to alienate the mass of his English subjects by abolishing their chief political institutions. Nor, on the other hand, had the duke of Normandy possessed unlimited power in his own country, and his chief supporters in England were well enough acquainted

¹⁷ *Engl. Chron.* s. a.¹⁸ *Gesch. des Parl.* 77.

with this fact. It is hardly conceivable that, as soon as he crossed the Channel, he should have been able to emancipate himself entirely from the influence which his vassals had been wont to exercise in Normandy. It is scarcely more easy to understand how the great feudal lords should have been content to meet time after time in order to discuss affairs of state, if their wishes or opinions were of no effect. An assembly of great men, called together frequently to give advice, inevitably becomes something more than a mere advising body. It is true that we have no positive evidence that the projects of law or other measures submitted to these assemblies underwent any modifications at their hands, but this does not justify us in assuming that no such modifications took place. Dr. Gneist remarks that the English might see in this assembly their time-honoured witenagemote, and the Normans their *cour de baronnie*, but that the Conqueror took care that it should be neither the one nor the other.¹⁹ Dr. Stubbs²⁰ says:—

The view which I have maintained is different; I believe that the Conqueror wished to make these councils both witenagemotes and baronial courts, so maintaining form and reality that the one principle should be a check on the other; but it is a mistake to adopt too strict definitions in such matters.

Elsewhere²¹ Dr. Stubbs speaks in stronger terms:—

The royal court . . . entering into all the functions of the witenagemote, was the supreme council of the nation, with the advice and consent of which the king legislated, taxed, and judged.

It would perhaps be difficult to establish the full truth of this statement, but the view maintained by Dr. Gneist seems also to require modification.

As to the control which the crown was able to exert over the great lords individually in the exercise of their local jurisdictions, Dr. Gneist has some instructive remarks. He points out²² how the private jurisdictions were from the first limited and gradually curtailed.

For financial and political reasons the English monarchy, unlike its fellows on the continent, impeded every development of the court baron, and, without attacking it in principle, gradually neutralised the judicial power of the mesne lords.

Various circumstances contributed to this result; the dispersion of baronial properties over the country, the superior character of the royal courts, the growing complexity of the law which necessitated professional judges, and the gradual falling in of great fiefs, the re-grant of which was not necessarily accompanied by the grant of judicial rights. Later on²³ Dr. Gneist explains how, through

¹⁹ C. H. i. 247.

²⁰ Const. Hist. i. 857, note.

²¹ Ib. 276.

²² C. H. i. 172 ff.

²³ Ib. 191, 196, &c.

the interference of the sheriff, and the system of fines or amercia-ments for any transgression or neglect of duty, the crown was able to bring strong pressure to bear upon the feudal lords, and gradually to oust them from their jurisdictions, though this process was not completed till after the reign of Edward I.

His description of the Norman and early Angevin system of justice and police, a description repeated with additional details in his work on 'Self-Government,' throws much fresh light on a very difficult portion of the subject, and may perhaps be regarded as one of the best parts of his book. He considers the sheriff's tourn, though held in the hundred court, as an offshoot of the county court, due to a royal commission, in which the sheriff appears as a sort of justice on eyre in his own county.²⁴ Regarded in this way, the sheriff's tourn anticipates the journeys of the itinerant justices. The development of the private courts leet from the sheriff's tourn is clearly explained by the author,²⁵ who, in this and other connected matters, compresses the more detailed account given in 'Self-Government.'

Of the royal revenue in the eleventh and twelfth centuries, Dr. Gneist gives, on the whole, a full and clear account; but even he leaves unexplained not a few of the difficulties which puzzle a beginner. It is impossible, for instance, to discover from Dr. Gneist's pages whether hidage and carucage are the same tax under different names, and whether the same lands were at one time liable to scutage and at another to carucage, or not. It is a pity, too, that the author has not more clearly marked the development of the financial system under Henry II and his sons. The unwary student might almost fancy that scutage was a Norman tax, and his attention is certainly not sufficiently directed to the importance of the step involved in the taxation of moveables. Dr. Gneist has his own explanation to give of a difficulty which has puzzled other historians, that of the continuation of the Danegeld—in spite of its abolition by Edward the Confessor—during the Norman times and upon certain estates. He says: ²⁶—

The Danegeld as a lawful tax was abolished and remained so; but the old valuation of the productive returns of ordinary lands was often retained on the occasion of the later exaction of *tallagia*, *dona*, and *auxilia*, in order to avoid making a fresh valuation each time. . . . But it is easy to understand that the hated name of Danegeld, with its humiliating memories, was studiously avoided. Moreover every revival of Danegeld as such would have involved the result that the numerous exemptions from the old tax would have revived also.

But though Danegeld was dropped in common parlance, the old phrase was naturally used in the exchequer to denote what was only the old tax in a new form.

²⁴ C. H. i. 177.

²⁵ *Ib.* 191.

²⁶ *Ib.* 213, note.

In his treatment of the central, judicial, and administrative bodies of the twelfth century, the *curia regis* and the exchequer, Dr. Gneist differs somewhat from the notions generally received in this country. With regard to the origin of the exchequer, he accepts Dr. Stubbs's refutation of the statement which Dr. Gneist maintained in the 'Verwaltungsrecht,' that the exchequer was bodily transported into England from Normandy. Though the 'Dialogus' itself states this, 'an actual importation from Normandy cannot be substantiated . . . the material part of the institution certainly belongs to the Anglo-Norman state.'²⁷ But he retaliates by rejecting Dr. Stubbs's suggestion that the Sicilian exchequer was imported into that island by an Englishman, Thomas Brown.²⁸ According to Dr. Gneist,²⁹ the exchequer, 'in contradistinction to the other functions of the central government, which are merely temporary and periodical, forms the only department of state with a definite and permanent organisation' in the Norman period. The importance of this statement lies in its bearing on the *curia regis* regarded as a supreme court of law. As to the exchequer itself, Dr. Gneist has nothing new to say, unless it be in the note on the exchequer of the Jews, which is taken from Madox, and which supplements a deficiency in Dr. Stubbs's work. But his view of the *curia* differs in very important respects from that of Dr. Stubbs, and still more from that of other writers on the subject. He treats the *curia regis* under three aspects, (1) as a court-day, i.e. a levée, or general assembly of great vassals—the so-called *curia de more*; (2) as a high court of law; (3) as a council of state.³⁰ I have already dealt with his view of it under the first aspect. As a high court of law Dr. Gneist considers that it had no definite form, continuous existence, or regular body of judges till the reign of Henry II. He bases his negative arguments partly on the fact that the Norman baronage, being ignorant of English law, could not try cases in which English law was involved, while a *cour de barons* could not be formed out of the crown-vassals, five hundred in number, the greater of whom would not have submitted to be outvoted by the mass of smaller tenants-in-chief. Nor were the great officers of state so permanent or homogeneous a body as to form the regular nucleus of such a court as was required.

For obtaining a proper legal decision there was therefore no course open but to select a body of persons to act as judges. . . . We find the judicial supremacy of the crown exercised only through the medium of commissions, and this only in comparatively few cases, in which the most powerful and most highly favoured tenants-in-chief were concerned. In all cases for which there is documentary evidence these commissions display so fleeting a character in respect of *personnel*, form, and legal prin-

²⁷ C. H. i. 220, note.

²⁸ Here, by the way, the translation is completely at fault, as a reference to Dr. Stubbs would have shown the translator.

²⁹ C. H. i. 219.

³⁰ *Ib.* 246, ff.

ciples, that the idea of a permanent court of justice of Norman peers would never have arisen had not the lack of evidence been supplemented by interpolations from the institutions of the continent and of later centuries. . . . This *curia regis* did not consist of the collective body of all the vassals of the crown, who in their present form constituted no exclusive body, nor of a definite number of great vassals, . . . nor of a definite number of great officers of state.³¹

Dr. Stubbs, on the other hand,³² regards the *curia* as a court which before the end of the Norman period had already assumed a tolerably definite shape. It was 'the court of the king sitting to administer justice with the advice of his counsellors; these counsellors being, in the widest acceptance, the whole body of tenants-in-chief, but in the more limited usage, the great officers of the household and specially appointed judges.' Dr. Gneist's view is, as Dr. Stubbs remarks,³³ 'an extreme view, in harmony with his general idea of the despotism of the Norman sovereigns,' but it is probably nearer the mark than that of most English historians, who 'attribute more solidity and definiteness to the legal institutions of the period than they can be proved to have possessed.' Whether the special commissions which had been entrusted with the decisions of important cases had before the end of Henry I's reign crystallised into a more or less permanent and definite court, it is probably impossible to decide with certainty. But the fact that such a court existed in the very early days of Henry II's reign, together with certain allusions to the *curia* in still earlier times—for instance, in the ordinance of Henry I for the holding of the hundred and shire courts—seem to make it probable that this was the case. Dr. Gneist, indeed, refuses³⁴ to fix an earlier date than 1178 as that of the establishment of a permanent and definite royal court. In that year, as is well known, the court of king's bench—the body of justices acting *coram rege in banco*—was established, but it is surely hypersceptical to refuse to recognise the existence of a regular court before that time. It was not a new court which Henry II created in 1178: all accounts point rather to the modification of one already in existence.

On the other hand, we cannot but agree with Dr. Gneist when he asserts the non-existence of a regular council of state at this period. Although it cannot be doubted that Henry I or Henry II would take counsel with one or more of his high officials as circumstances seemed to require, there is no evidence that the whole body of officers with or without the assistance of other persons, formed in the twelfth century anything like the later council, regularly summoned and consulted, and acting with a collective authority differing essentially from that vested in any individuals. Such a body does not appear till the minority of Henry III.

³¹ C. H. i. 257, 259, 261. ³² Const. Hist. i. 387. ³³ *Ib.* 388, *note*. ³⁴ C. H. i. 279.

The assumption of the existence in the twelfth century of a permanent royal council, under the name of a *concilium ordinarium*, or 'select council,' is an anticipation of the result of circumstances which only developed in later times.³⁵

The origin of what may properly be called parliamentary government Dr. Gneist finds in the national councils summoned by Henry II. These assemblies, called together not for show but primarily to discuss important affairs of state, formed a series of precedents not to be ignored, and established a custom which could be stated as law in the constitutional clauses of Magna Carta. I do not know that any previous writer has so clearly noted the importance of the conflict between Henry and Becket in bringing about this change. As Henry I summoned the national militia to aid him against his rebellious vassals, as Henry VIII used the parliament to help him in banishing the pope, so Henry II called together the temporal lords to support him in his struggle with the spiritual power.

The ecclesiastical disorders [says Dr. Gneist] form the turning-point at which the king found it advisable to proceed only with the express sanction of the crown-vassals . . . The first step in this direction was when, in 1164, the king laid before them the Constitutions of Clarendon. . . . Thus the deeply rooted national idea of the highest legislative power '*consensu meliorum terræ*' woke to new life on this occasion. . . . In place of the informal councils, the collective body of the great prelates, earls, and great barons was summoned . . . and at Becket's condemnation this assembly acts as a court of peers in the form of a great feudal *curia*, no longer as a judicial commission appointed by the supreme power of the crown.³⁶

It is to these occasions, too, that Dr. Gneist traces the beginnings of a separate estate of 'lesser barons,' summoned now and then to take part with the greater baronage in the discussion of public affairs. Not that the distinction between *majores* and *minores barones* now first arose: on the contrary it had existed and had been recognised in various ways from the times immediately succeeding the Conquest. But the distinction was accentuated by the different treatment which the two classes received in connexion with the national council, and was legally established by its recognition in the great charter. The parliamentary side of constitutional history during the latter half of the twelfth century is, however, rather superficially treated by Dr. Gneist. One need not be much surprised at this being the case, in accordance with his plan, in the '*Verfassungsgeschichte*,' but there is some reason for surprise that instead of treating it more fully he has paid even less attention to it in '*Das englische Parlament*.'

The same remark may be made about Dr. Gneist's treatment of

³⁵ C. H. i. 269.

³⁶ *Ib.* 288-8.

Henry III's reign. He devotes a chapter—by no means too much—to a sketch of the causes which rendered possible the national combination of 1215, and to an analysis of the great charter. The whole of the long and important reign of Henry III is disposed of in another chapter. This is perhaps to be justified as being in accordance with Dr. Gneist's general aim, which is rather to give a series of pictures of the institutions actually existing at particular epochs, than to trace their development, or to describe the attempts and failures of revolutionary times. Still, it may perhaps be regretted that neither in the 'Verfassungsgeschichte' nor in 'Das englische Parlament' has the author devoted fuller attention to what he rightly calls 'the attempts at a government by estates of the realm,' which distinguish the reign of Henry III. It is needless to say that in the space of twenty pages it is impossible to deal satisfactorily with the parliamentary history of the reign before 1258 and with the events of the next seven years, so fruitful in constitutional precedent and constructive ideas. A few lines only are given to the Provisions of Oxford; no notice at all is taken of the Ordinance of London (1264); the essential difference between the movement of 1258 and that of 1264 is not remarked, although it is this difference which marks the point when the third estate first comes forward as an independent claimant for political rights. There are some errors, too, in the sketch, short as it is. It was not in 1258, but in 1259, that the '*communitas bachellerie Angliæ*' sent in the protest which resulted in the Provisions of Westminster. The so-called barons' war did not begin in 1264, but in 1268. In a long note at the end of the chapter, Dr. Gneist enumerates the cases during Henry III's reign in which representatives from the counties were summoned to meet the king. But he will not allow that any but tenants-in-chief (*Kronvasallen*) were summoned before 1265, and he maintains that even these were summoned, not for the purpose of taking part in general discussions of affairs of state, but only for certain specified and limited objects. I cannot see sufficient ground for either of these statements. The choice of representatives *may* have been practically limited to tenants-in-chief, but this cannot be proved from the writs, or from the method of election which, as far as we know, was employed; certainly the phrase '*fideles nostri*,' to which Dr. Gneist points²⁷ as proving the limitation, is capable of a wider interpretation. In speaking of the parliament of 1264, Dr. Gneist says,²⁸ 'The question here touches only the restoration of the national peace, and a deliberation concerning it.' But the 'restoration of the national peace' was just then the most important subject that could have been discussed, and the outcome of the discussion was a complete revolution in the system of government. Fuller and higher powers could not have

²⁷ C. H. I. 381.²⁸ *Ibid.*

been exercised by any parliament than were exercised by the parliament of June 1264, and we know, from the Ordinance of London which was passed by that parliament, that the '*communitas*,' that is, the 'commons,' as distinct from the '*prælati et barones*,' were present and consenting. The difference between the parliament of June 1264 and the better-known one of January 1265 is not in the object of the summons or the business discussed, but in the fact that on the latter occasion members from the boroughs as distinct from the counties took their seats for the first time. In '*Das englische Parlament*,' the parliament of June 1264 is altogether omitted.

The third division of Dr. Gneist's two works carries the student from the beginning of Edward I's reign to the end of the middle ages and the accession of Henry VII. In the '*Constitutional History*,' although one long chapter is devoted to the history of parliament, a far larger share of attention is devoted to the other portions of the subject; in the '*History of Parliament*' this proportion is naturally reversed. The chapters in which the author treats of the system of justice and police under Edward I and his immediate successors are admirable specimens of his work, luminous and suggestive throughout. He brings out clearly and forcibly the importance of the period, as that in which the higher and lower portions of the machine of state, the central and the provincial organisation, were finally welded together into one compact and harmonious whole. Here he is in complete harmony with Dr. Stubbs, whose words, 'The peculiar line of Edward's reforms, the ever perceptible intention of placing each member of the body politic in direct and immediate relation with the royal power, in justice, in war, and in taxation,'³⁹ are quoted with full approval.

The greatness and peculiarity of this legislation [from 1267 to 1877] lies in the constant realisation of a single fundamental idea—the combination of all the functions of the civil power with the larger communal unions already in existence; a combination through which the people became penetrated with the consciousness of political duties, inspired with an idea of political unity, and competent to take the preservation of peace and order into their own hands.⁴⁰ . . . On the one hand [Dr. Gneist goes on to say], thanks to the retention of the Anglo-Saxon judicial system, to the complete obliteration of national differences, and to the transformation of the old *judicium parium* into the system of trial by jury, the local unions of county, hundred, and borough were ready to act as foundations for the political edifice, while the Norman autocracy had habituated the wealthy classes to the discharge of public duties. On the other hand, the central authority of the state had been established in sufficient unity and power, through the action of the exchequer, the *curia regis*, and other means. The problem now was to blend together these elements so as to form an organic union of the central government with the government of

³⁹ Stubbs, *Const. Hist.* ii. 292.

⁴⁰ Gneist, *C. H.* i. 348.

the provinces, smaller districts, and towns, such an organic union as still forms the chief problem which the German empire has to solve.⁴¹

Dr. Gneist then proceeds to show how this problem was solved in England in the thirteenth and fourteenth centuries. The military forces of the nation were organised by statute and ordinance, by such acts as the statute of Winchester, and by the commissions of array, which brought the national army directly under control of the crown. The principles underlying the administration of justice in the local courts are stated by Dr. Gneist as follows. (1) A separation is made between sentence and evidence [i.e. the same persons no longer act both as witnesses and judges]; (2) the duty of giving sentence is laid upon professional judges appointed by the crown; (3) the question of fact is determined by *committees* of the community [juries] selected from the hundreds and counties and named by a royal official.⁴² The processes by which the local courts were connected with the benches of judges, the steps by which the justices of the peace and other elements of the police system were evolved, the application of the local unions to the purpose of self-assessment, are clearly and explicitly stated. In another chapter Dr. Gneist treats of the central courts of justice, which, according to him, did not take their final shape, with distinct staffs of judges, till towards the end of the thirteenth century. Gradually the work of itinerant justices came to be absorbed by the justices of the central courts; the work of these courts was largely extended, a class of professional lawyers sprang up, and the law itself was developed and determined by countless legal decisions, which supplemented the deficiencies of statute and ordinance.

On the subject of the permanent or continual council, which at this time became a body of primary importance in the state, Dr. Gneist has not much to add to or correct in the work of his predecessors. But in treating of the history of parliament from Edward I's reign onward, he attaches greater importance to the *magnum concilium*, or meeting of prelates and barons only, along with the members of the permanent council, than has been attached to it by other historians. The 'parliament' of the fourteenth century, in Dr. Gneist's view, is primarily this body. He devotes a chapter to its functions and powers, crediting it with a distinct and independent existence down to the end of the fourteenth century and even later, and with much legislative and other work which is usually attributed to the larger body in which the commons formed a part. According to Dr. Gneist, the *magnum concilium*, intermediate between the continual council and the full parliament of three estates, was generally convoked four times a year during the greater part of this period.

⁴¹ C. H. i. 349.

⁴² Ib. 356.

We have here to do [he says ⁴³], not with a mere estate of the realm, in which a privileged class of landowners claim a right to be heard, but with a constant and regular participation of the magnates in a political system with fully developed powers over military matters, justice, police, and finance.

Like the continual council, the *magnum concilium* shared with the crown the ordinary work of government, first by voluntary royal concession, afterwards by custom which stiffened into law. It enjoyed 'a quadruple sphere of action, as a court of law, a council of state for administrative purposes, a tax-granting and a legislative body.' ⁴⁴ Its functions as a court of law, affording the great lords the *judicium parium* to which they laid claim, and to other persons an appeal from lower courts, were at first most obvious. Its members were recognised as peers, with the right of being tried by the body to which they belonged, by the statute of 1341. The title 'parliament' was attached to the body in question especially when discharging judicial duties of this kind; it was known as the *magnum concilium* when acting as a deliberative and administrative council. As such, it took a leading part in investigating and answering petitions, and it claimed the right of influencing the king's choice of his habitual advisers in the continual council. 'Under the house of Lancaster the greater part of the executive council consists of members who owe their position to the high estimation in which they are held in the *magnum concilium*.' ⁴⁵ In the matter of taxation, though the great council possessed the right of granting scutages and aids, Dr. Gneist allows that 'this right had soon to be shared with the representatives of the commons, which in this respect ⁴⁶ gradually acquired a preponderance.' Lastly, with respect to legislation, 'the great council,' says Dr. Gneist, ⁴⁷ 'is until later in the reign of Edward III the ordinary body for the discussion of laws.'

In a subsequent chapter Dr. Gneist considers the steps by which the commons gradually came to share in the powers of the great council, and to form a separate estate in parliament. He is not clear as to the date at which this fusion may be regarded as fully established, but the general impression left upon the mind after reading these chapters is that the *normal* parliament consisted of the great men only till after the middle of the fourteenth century, and that the right of the third estate to take its full part in the national discussions was not recognised till at least the end of Edward III's reign. In the matter of legislation, Dr. Gneist takes little, if any, notice of the famous declaration of 1322, which recognises the legislative rights of the commons. According to him, ⁴⁸ 'the turning-point is the long and financially embarrassed reign of

⁴³ C. H. i. 414.

⁴⁴ *Ib.* 415.

⁴⁵ *Ib.* 421.

⁴⁶ Not 'from this point,' as the translation has it.

⁴⁷ C. H. ii. 422. ⁴⁸ *Ib.* 19.

Edward III. The commons, who until then had been only occasionally mentioned in connexion with parliamentary statutes, are from this time seldom omitted.' The same view is maintained in 'Das englische Parlament.' In tracing the growth of parliamentary control over the different departments of government, he does not differ essentially from the view of other historians, though he is much less complete in this part of his work than Dr. Stubbs, whose 'chief merit and success' he considers⁴⁹ 'to lie in this period.' But it is clear that, in his view of the importance to be attached to the limited parliament or great council of prelates and barons, he differs widely from the English historian. 'The national council,' says Dr. Stubbs,⁵⁰ 'as it existed at the end of the reign of Edward I, was a parliamentary assembly, consisting of three bodies, the clergy . . . the baronage . . . the commons of the realm.' He recognises, of course, the separate existence of the *magnum concilium*, but the difference between him and Dr. Gneist is clearly brought out in the following passage: ⁵¹—

In conjunction with the rest of the prelates and baronage, the permanent council acted sometimes under the title of *magnum concilium*; and this name was occasionally given to assemblies in which the council and the estates met, which are only distinguishable in small technical points from proper parliaments. Many of the assemblies of the reign of Henry III . . . may be regarded, in the light reflected from the fourteenth century, as examples of the *magnum concilium*; but in point of fact the *magnum concilium* under Edward II and III was only a form of the general national assembly which had survived for certain purposes, when for other practical uses of administration it had been superseded by the parliament of three estates as framed by Edward I.

The question is one which it is difficult to decide. The verdict will partly depend on the value to be attached to precedents such as that set by the model parliament of 1295, and to such declarations of principle as that of 1322, and partly on the idiosyncrasies of the investigator.

In his remarks on the method of election of representatives for counties and boroughs, Dr. Gneist, in the later of his two works, adopts the conclusions of Dr. Riess, as set forth in his 'Geschichte des Wahlrechts zum englischen Parlament' (Berlin, 1885). Dr. Riess's investigations bring out the extreme uncertainty which prevailed in the fourteenth century, with regard both to town and county franchise, and the wide range of influence which the indefiniteness of local custom left to the sheriff. They also explain how it was that so many of the smaller boroughs escaped the burden of representation. Forming only parts of hundreds, they received their writs through the officers of the hundred and thus escaped making any direct return to the sheriff. A very useful excursus on the origin of the

⁴⁹ C. H. i. 846.

⁵⁰ Const. Hist. ii. 194.

⁵¹ Stubbs, *ib.* ii. 260.

hereditary peerage, with an elucidation of the difficulties connected with barony by writ, barony by tenure, and kindred matters, is given at the end of the chapter on the great council; ⁵² while a detailed summary of the steps by which the system of parliamentary taxation was developed forms an appendix to the chapter on the House of Commons.⁵³

The chapters in which Dr. Gneist sketches the condition of the church in the fourteenth and fifteenth centuries, and reviews the changing fortunes of the 'king in parliament' in a rapid survey of the different reigns, are slight and call for no remark. Those on the 'Three Estates' and the 'Prerogative of the Crown' are an able and interesting summary of the condition and mutual relations of classes, and on the monarchy as forming the keystone of the political edifice at the close of the middle ages.

Every collision of the estates with each other and with royalty awakes afresh the consciousness that the source of all the rights of the great lords and the last protection and support of the weaker classes are to be found in the permanent sovereign power—that is, in the monarchy. . . . In spite of all the fluctuations and violence of this period, the parliamentary constitution raised and enhanced the dignity of the crown to a point still higher than that at which it had stood in the Norman times.⁵⁴

The king is still 'in theory the sole landowner,' he is 'the head of society,' the 'hereditary possessor and source of all magisterial authority;' in him is vested the '*imperium*,' the right of the state to command and ordain; 'the king, and not the parliament, makes laws.' This view is in accordance with that which Dr. Gneist throughout maintains, and the pages in which he relates it form a natural stepping-stone from the medieval monarchy to the absolutism of the Tudors.

Up to this point, the close of the middle ages, Dr. Gneist traverses ground already occupied by the exhaustive work of Dr. Stubbs. It is hardly necessary to say that neither work can well be dispensed with by the student. Dr. Gneist is sometimes clearer in arrangement, more easy to follow through the maze of detail; he is positive and incisive where Dr. Stubbs is judicial and balanced; he presents new views with force and originality, and not unfrequently throws fresh light on obscure portions of the subject. But if here and there Dr. Gneist supplements or even perhaps corrects Dr. Stubbs, there are many more departments of constitutional history in which the reader who wishes to find the fullest and most authoritative treatment must have recourse to the latter rather than the former. It would be invidious and unnecessary to institute a detailed comparison between the two authors. I have noted the more important points on which their opinions differ, and it is impossible to

⁵² *C. H.* i. 434.

⁵³ *Ib.* ii. 40.

⁵⁴ *Ib.* ii. 114.

say more for any one who differs from Dr. Stubbs on his own ground than that he is a foeman fully worthy of his steel.

When we pass beyond the middle ages, the relation between Dr. Gneist and the chief English authority is somewhat different. Here, again, he cannot be said to supersede Hallam, for on his own ground, the principles of government, the nature of the great questions at stake, the arguments on either side, the general course and connexion of political events and legislation, Hallam will not easily be superseded. It is on this side that Dr. Gneist is most deficient. But the English writer almost entirely neglects one portion of his task. Generally speaking, we look in vain through his pages for information about the machinery of government, the offices of state, the local and provincial authorities, the nature of the different bodies or institutions by which the country was governed. It is this deficiency which Dr. Gneist supplies, and by so doing he becomes a guide of primary importance, indispensable for certain purposes to any one who wishes to study the history of our constitution during the last four hundred years.

If, however, Dr. Gneist's work supplies certain defects in other authors, there are considerable gaps in his own. In his account of the reformation, for instance, he displays an impartial mind, but his survey of the legal and constitutional revolution brought about by the parliament of 1529 and its successors is sketchy and insufficient. An exhaustive examination of the constitutional results of that series of enactments which introduced and legalised the reformation is still to be made. Nor, again, does Dr. Gneist investigate, except in a cursory manner, the position of parliament under the Tudors, the establishment of some of its most important privileges, the influences to which it was subjected, and the control which it in its turn exercised upon affairs. Of the use made of her ecclesiastical supremacy by Elizabeth in the legislation against papists and puritans we hardly hear anything in this section, though in his review of the ecclesiastical question in the next century the author returns to this subject. It is characteristic of Dr. Gneist's view that he describes the executive as 'surrounded by its more or less intimate councillors, in the three traditional grades'—that is to say, the privy council, the *magnum concilium*, and the House of Commons.⁴⁵ One hardly expects to meet the *magnum concilium* in the sixteenth century, and it is difficult to see what separate existence was enjoyed by the House of Lords apart from the House of Commons. In 'Das englische Parlament' Dr. Gneist drops the title *magnum concilium*, but he enumerates the same three bodies, and treats the upper house of parliament separately from the lower. What Dr. Gneist seems to mean is that the privy council and the parliament were the two bodies into which the councillors of the crown were divided, but

⁴⁵ C. H. ii. 143.

why he treats the two houses of parliament as on a different footing in this respect is not easy to understand. A beginner would certainly infer that Henry VIII and Elizabeth summoned a *magnum concilium* as Edward I and Edward III did, but Dr. Gneist can hardly mean him to believe this. On the other hand, he refrains from drawing a distinction—unless this is what is meant by the separate mention of the *magnum concilium*—between the inner circle of the privy council and the larger body or ordinary council. That such a distinction was recognised, but that confusion also existed as to the limits of the *concilium ordinarium*, is clear, for instance, from the fact that it was sometimes maintained, as Hudson⁵⁶ tells us, that all peers had a right to sit in the Star Chamber.

Dr. Gneist devotes the greater part of a chapter to the privy council, which he describes as practically identical with the old continual council,⁵⁷ and not as an unrecognised committee of it. This chapter contains much that will be new to many readers, especially with regard to the officers of state, the rise of the secretary, the precedence and functions of the different members of what may now be almost called the ministry.

In his account of the Star Chamber, Dr. Gneist differs from Hallam in attaching more importance to the statute of 8 Hen. VII as establishing its powers than does his predecessor. He guards himself, however, by saying :⁵⁸—

This is the extraordinary criminal jurisdiction of the king in council, which had never ceased, and which was in this act acknowledged afresh and embodied in a committee. . . . The Star Chamber is accordingly only a committee of the privy council, on which account also every privy councillor could occasionally take part in the proceedings, as was done at first in important cases, and later was the general rule.

Hallam, on the contrary, maintains⁵⁹ that ‘no part of the jurisdiction exercised by the Star Chamber could be maintained on the authority of the statute of Henry VII.’ This is exaggerated, for the authority conferred on a portion of the council could surely be exerted by the whole body. It is clear that some of the most important powers exercised by the Star Chamber, i.e. by the council in its judicial capacity, were founded on statute, e.g. on the acts of 1412 and 1453, and that others were well established by precedent. What was really illegal, or at least not founded on statute or justified by the analogy of early custom, was that the criminal jurisdiction which belonged to the whole council was exerted, and at length exclusively exerted, by a small and unauthorised part of it. Dr. Gneist misses this fact by ignoring the distinction between the privy and the ordinary council, which had apparently originated in the previous century. In other respects his view of the Star

⁵⁶ *Treatise of the Star-chamber*, in *Collectanea Juridica*, vol. ii.

⁵⁷ *C. H.* ii. 177.

⁵⁸ *Ib.* 188.

⁵⁹ *Const. Hist.* i. 54.

Chamber corresponds with that put forward by Dr. Stubbs in his recently published lectures (Lecture xvi.).

In his account of the high commission court of Elizabeth's reign Dr. Gneist has not used the report of the Ecclesiastical Courts Commission, in the framing of which Dr. Stubbs was principally instrumental, or he would probably have modified some of his views. He treats the court of high commission as if it always acted together and in one place. He even calls it⁶⁰ a 'spiritual privy council,' whereas its efficiency depended on its members being able to act in many different places at once. It was, in fact, much more like the commission of the peace than the privy council. To local institutions Dr. Gneist, as usual, devotes a good deal of attention, and in this respect brings much which is generally neglected to light. He describes at length the parochial system, now an important element in the political constitution; the principles of the new poor-laws; the development of the powers entrusted to justices of the peace, with other kindred matters, as well as the connexion between these local institutions and the central government. It would be hard to find anywhere else within an equally small space so good an account of this part of the subject.

In his sketch of the reformation Dr. Gneist distinguishes two currents of thought and feeling which mark the movement in general: one the opposition to Roman doctrine, the other the revolt of the national principle against the papal sovereignty. He justly remarks that the English reformation differs from the German chiefly in this, that in England the latter current preponderated, in Germany the former. But it is an inadequate view of the English reformation to trace it to these two movements only. It is hardly necessary to point out that there were two other currents of feeling almost as important as the revolt against the doctrine and the power of Rome. There was the demand for a moral reform, which was uppermost in the minds of Colet and More; and there was the deeply rooted dislike of the political influence of the church which had supported Rufus against Anselm and Henry II against Becket, which had animated John of Gaunt and assisted the Yorkists against the Lancastrians. The constitutional results of the reformation cannot be explained unless full weight is given to these tendencies of English feeling.

Dr. Gneist's view of Henry VIII's character and ability is much the same as that of Ranke, Brewer, and Dr. Stubbs. He does not idolise Henry with Mr. Froude, nor condemn him with Mr. Friedmann for a tyrant equally vicious and incapable.

The boldness and acumen with which Henry VIII carried out his scheme, when he had once resolved upon it, give his ruthless and violent personality a providential significance for England.⁶¹

⁶⁰ C. H. ii. 171.

⁶¹ *Ib.* 158.

On the political side he compares him with Richelieu.

It was by no means the passion or caprice of a despot which predominated in his policy. It was rather an anticipation of Richelieu's system, which acting on well-considered reasons of state always strikes directly at the heads of the opposition, in order to prevent contagion.⁶²

But it would be wrong, he declares, to style Henry's government an absolute despotism.

The parliamentary constitution existed, and there was on the part of the Tudors no serious intention of abolishing it, nor on that of their parliaments any idea of permanently abandoning any part of it.⁶³

Dr. Gneist sums up his view of the Tudor period in the following words:—

The defects and cruelties of this courageous, self-willed family were the defects of the time in which they lived and of the nation with whose greatness, welfare, and rights they wished to identify themselves. It is an epoch of great excitement and intellectual movement, such as seldom fails to affect the character of individuals and classes. But all this makes the personality of the Tudors, with their courage and their strength of will, the main feature of an era which in spite of its faults was a great one.⁶⁴

The fifth section of Dr. Gneist's 'Constitutional History,' which deals with the Stuart period, is in some respects the least satisfactory portion of the work. The system of administration, the subject in which our author is most deeply interested, is of less historical importance in the seventeenth century than the great struggle between crown and parliament for the control of that system. But in the history of the struggle Dr. Gneist does not appear to find much that is attractive, and he treats the period in a somewhat superficial manner. His remarks are, as usual, judicious and impartial, but his remarkable insight and penetration are not so obvious when a constitutional conflict is under discussion, as when the problem is to discover the nature of an institution or the bearing of an obscure law. One would have expected a fuller treatment in 'Das englische Parlament,' but this is not the case. It is somewhat strange, too, that Dr. Gneist does not mention in either of his books Mr. Gardiner's great work among his list of authorities, although he mentions several authors of far less importance.

If he has not consulted Mr. Gardiner, he has, nevertheless, arrived at the same conclusions respecting the primary importance of the religious question in the conflict between king and parliament. It is the object of Dr. Gneist's introductory chapter to point out the political danger which resulted from the ecclesiastical reformation. Between the political power of the crown, limited by

⁶² *C. H.* ii. 161.

⁶³ *Ib.* 164.

⁶⁴ *Ib.* 193.

those restrictions which it had been the work of the middle ages to impose, and the unlimited ecclesiastical supremacy which the expulsion of papal authority had placed in its hands, there was a wide difference. This difference Elizabeth had recognised and had been content to maintain. The Stuarts sought to obliterate it by bringing their political power up to a level with their ecclesiastical, while they used their position as heads of the church in such a way as to endanger their headship of the state.

As every political power [says Dr. Gneist⁶⁵] bears within itself a tendency to develop into absolutism, so the monarchy inevitably aimed at transforming the state into an administrative system after the pattern of the church.

The author goes on to point out how natural it was for the church itself to adopt these political theories, and to enhance the royal authority in its own interest.

Thence arose for the first time in England theories about the rights of the crown, based almost exclusively on theological conceptions, and supported by theological arguments.⁶⁶

And again :—

The fate of the monarchy and the constitution depended on the attitude which the Stuart dynasty would adopt towards these new theories. . . . By taking part with one extreme, they drove the other to a resistance which overthrew the monarchy. The English reformation began in the sixteenth century with an alteration in the constitution of the church; it ended in the seventeenth century with a political revolution.⁶⁷

The introductory chapter of this section is excellent. The history of the struggle itself is given in so compressed a form that an adequate account of its chief incidents or appreciation of contending aims and arguments is impossible. Dr. Gneist's *grund-idee*, the reciprocity of rights and duties, which allows him to justify the Tudor absolutism, leads him to condemn the Stuarts in no measured terms.

Hardly has any family of rulers ever mounted a throne which has shown itself so devoid of all sense of kingly duty as that of the Stuarts. . . . The characters of these four monarchs, while differing in other respects, had this one thing in common, a total inability to understand or to respect the law of the land.⁶⁸

He perhaps goes a little too far in saying, 'All aims of this royal race, both domestic and foreign, were mistaken.'⁶⁹ James I was not mistaken in aiming at religious toleration, at the union with Scotland, and at universal peace abroad. It was his methods rather than his objects that were wrong. Dr. Gneist is quite right

⁶⁵ C. H. ii. 226.

⁶⁶ *Das engl. Parl.* 232.

⁶⁷ *Das engl. Parl.* 231.

⁶⁸ C. H. ii. 230.

⁶⁹ C. H. ii. 233.

in laying stress on the dynastic aims of the Stuarts, their insincerity, their 'incapacity for great and lasting political combinations.' But when he brands Strafford as 'a political renegade,' and Charles I as 'equally cowardly and selfish,'⁷⁰ it may be doubted whether his feelings have not got the better of his accustomed impartiality. As to the methods by which Charles I attempted to establish an absolute monarchy, and as to the powers of parliament which he set himself to abolish, Dr. Gneist is clear and to the point, but adds nothing to what previous writers have said. His remarks are of a very general nature, and he altogether omits or mentions only in a cursory manner the great incidents of the constitutional struggle. The student who wishes to know why the system of unparliamentary government broke down, why after so many concessions war nevertheless became inevitable, why the army fell out with the parliament, and many other things about which it is natural to inquire, will be disappointed if he expects to find much light thrown on his difficulties from Dr. Gneist's pages. Perhaps these matters do not strictly belong to a history of the constitution, but it is somewhat surprising to an English reader to find so much that he is apt to call constitutional history left out.

Of Cromwell's character and ability as a ruler Dr. Gneist has a high estimate.

The impartial observer must confess that Cromwell represented the state with honour. . . . The ponderousness (*Schwerfälligkeit*) of the man, combined with his indefatigable activity, the dry, blunt manner with which he makes straight for his object, are incarnations of the English character. So too above all are his truthfulness and the sincerity of his convictions, ignored as these characteristics have been by later writers on account of the biblical unction of his language, which, after all, was but the language of his time and of his party.

The difficulties which obstructed all Cromwell's attempts to form a permanent government are well explained by Dr. Gneist. He traces these difficulties principally to the anti-bureaucratic character of the English system, in fact to the nature of self-government. The whole management of public affairs had been for ages in the hands of the classes opposed to Cromwell's power; they supplied alike members of parliament and justices of the peace; without their aid government could not be carried on. It was this which overthrew Charles I's absolutism. That the English constitution did not share the fate which representative institutions met with on the continent was due 'to the substructure of the English political system, to the equality of classes before the law, and to the mutual cohesion of these classes, which the Stuarts so disastrously misunderstood.'⁷¹ And what saved the constitution from the Stuarts saved it also from Cromwell.

⁷⁰ C. H. ii. 244, 245.

⁷¹ *Das engl. Parl.* 281.

In discussing the results of the restoration, Dr. Gneist is careful to point out that it was, after all, only a half-restoration.

The exaggerated party-watchwords of the royalists, and the violence of their measures against all resistance, may easily make it appear that the barriers of the parliamentary constitution were overstepped in a retrograde direction. And so the restoration has often, though very wrongly, been conceived. . . . The restoration meant the re-establishment of the monarchy by the wealthier classes, who on that very account asserted themselves both in the upper and lower house with a commanding self-consciousness such as had not been heard of since the time of the baronial parliaments.⁷²

In fact, although there was still a wide sphere of influence left to the crown, and although Charles II and his brother used this influence unscrupulously, the reign of Charles II bore more resemblance to that of William III than to that of Charles I. The manner in which the later Stuarts employed the advantages which the long parliament had left to them, especially in the appointment of ministers and of judges and in the control of foreign policy, is well explained by Dr. Gneist, but he treats very slightly the growth of the reaction against the monarchy. He hardly mentions the Test Act or the Exclusion Bill, the Popish Plot or the Habeas Corpus Act; he says nothing of Temple's scheme for a council. On the other hand, he has some useful pages about the great offices of state, and the practice, beginning under Charles I and much developed by Charles II, of delegating the business of the privy council to committees. But in general, it must be allowed, the affairs of this century are treated with scant attention in comparison with those of earlier times.

The last section of Dr. Gneist's 'Constitutional History' carries the subject in some detail down to the end of the eighteenth century, and concludes with a slight sketch of the era of reform, ending with the Reform Act of 1867. In 'Das englische Parlament' the latter portion is rather more fully treated and the story ends with the Reform Act of 1885. In the larger work this section, like the preceding one, is deficient in its treatment of that part of the subject which occupies the chief attention of Hallam and May. A single sentence is all that can be spared for Wilkes; Chatham, Burke, and Fox are not mentioned; we hear next to nothing of whig and tory measures during the reigns of William and Anne; the India bills, Pitt's attempts at reform, the measures taken to deal with the regency question, are hardly, if at all, alluded to; the unions with Scotland and Ireland and the quarrel with the American colonies are only incidentally mentioned, but not discussed or explained. But little notice is taken of the contrast between the self-obliteration of the first two Georges and the efforts of George III to be a king.

⁷² *C. H.* ii. 281.

These omissions are not mentioned as a subject of complaint, for it was not part of Dr. Gneist's plan to dwell much upon such matters, but attention should be called to them. The author has only followed in later times the plan which led him to pass lightly over the baronial struggles of the twelfth century and the constitutional conflict of the seventeenth.

In the opening chapter of the section, Dr. Gneist has some remarks upon that characteristic of the later English system, the supremacy of law, which are in remarkable accord with the main thesis of Professor Dicey's admirable work 'The Law of the Constitution.' Speaking of the powers of the executive, Dr. Gneist says: ⁷³—

The crown is at all times the source, the courts of justice the barrier, and the law the supreme regulator of these powers. . . . The law recognises the crown as the fundamental institution of the land . . . the law controls the sovereign rights of the state . . . the law regulates the exercise of magisterial rights, &c. &c. . . . The long struggle against the absolutism of the Norman kings and the century of Stuart misgovernment brought the specialisation of these rules of law to a climax, which was attained in the eighteenth century. This regulation by law embraces all departments of internal political life.

This result, which had been so long preparing, was finally established by the Revolution of 1688. Many of the author's remarks on this event would gladden the hearts of the most ardent whig. But the true Prussian spirit of obedience to the sovereign and the wisdom of the legist and historian come out in the following words:—

The lesson taught by the glorious revolution . . . was that even the most righteous insurrection of society against the constitutional executive is the greatest disaster that can befall a nation. . . . It was not until the third generation that the wounds caused by the change of dynasty were fully healed.⁷⁴

Dr. Gneist is by no means inclined to minimise the results of the revolution, or to treat it as not marking the commencement of a new epoch.

Every sentence of the Declaration of Rights was but too fully justified by preceding events. The whole chain of negative legislation since the days of Charles I leads to a fundamental alteration in the system of government. . . . Every remnant of dictatorial power, which can have any practical importance in the state, is from that time forth denied to the king.⁷⁵

In support of this view the author sketches the steps by which the crown was brought into dependence on the parliament, or, as he puts it, the 'king in parliament' supersedes to a great extent the 'king in council.' The transition from council to cabinet and the

⁷³ *C. H.* ii. 332, 340.

⁷⁴ *Ib.* 339.

⁷⁵ *Ib.* 407.

introduction of the modern ministerial system through the dissolution of the great offices of state are also discussed, but there is nothing here that calls for remark. It may be noted, however, that the author, with his usual sound common sense, dismisses the idea that representative government without party is practicable.

The philosophical ideals of a perfect political system, which without party strife shall blend the natural diversities of the popular mind into a single and undivided will . . . are based on a misconception of human nature.⁷⁶

In expounding the essential differences between the two great parties he follows very much the same lines as Macaulay in his famous contrast between whigs and tories, but takes care to point out that, whatever were their theories, both parties belonged to the aristocracy and betrayed an equal reluctance to take any steps likely to subvert their order.

In several interesting chapters Dr. Gneist sketches the lower stages of the governmental system in the eighteenth century, and the connexion of sovereign rights and local institutions. He draws a distinction between what he calls economic self-government and magisterial self-government, the two branches of the same system as embodied on the one hand in the local rates, and on the other in the local courts and magistrates. He describes the duties and powers of the justices of the peace and other local officials, for an account of which Hallam and May may be searched in vain. He compares our system with those of Germany and France, but without emphasising, as Professor Dicey does, the great distinction involved in the fact that in England there is no special law for officials such as exists across the Channel. He discusses with great clearness what he calls the 'final consolidation of the ruling class ;' the means by which the aristocracy secured for itself the complete control of affairs, the command of the militia, of justice and police, and of finance ; the close connexion between the peerage and the gentry, the former being merely a higher rank of the latter, constantly recruited from it ; and, lastly, the 'welding' of the church into the 'parliamentary state,' so that it became an essential and important element of the political system. He shows great respect for the sagacity with which cabinet government and the alternate rule of parties was developed. He notes how the problem of combining elasticity and durability was solved, and how the permanence and consequent independence of the judicial and administrative bodies in all but their highest places rendered frequent changes of ministry comparatively innocuous to the state. The members of these bodies discharged for ages their allotted tasks, either individually or by corporate action, as justices of the peace

⁷⁶ *C. H.* ii. 422.

or magistrates, as grand juries or vestries, as churchwardens or constables, undisturbed by parliamentary disputes and turmoils. It is in these humbler stages of our polity, for the most part neglected by continental observers and historians, that Dr. Gneist finds the durable foundations of the English constitution.

It is not [he says] the rights of parliament and the forms of parliamentary government that have founded England's greatness, but, as in ancient Rome, the personal co-operation of all, from the lower classes upward, in the daily duties of public life. The details of this system are simple, sober, and earnest, as in the old Roman state, far removed from the glowing pictures which were disseminated through Europe by the author of the '*Esprit des Lois*.' But these sober institutions are firm and durable, and in the hour of danger, in the strain imposed by great tasks, they display the energy and greatness of character which distinguish a proud, free nation.⁷⁷

These words form the keynote of Dr. Gneist's work. They show the general drift of his thoughts, the main object which he has had in view, the lesson which he has set himself to teach his countrymen and ourselves. It is in the investigation and description of these institutions that the pre-eminent merit of his work consists.

It is no wonder that, regarding the past history of our constitution from this point of view, Dr. Gneist finds grave ground for anxiety as to the future. These foundations of our polity are and have been for some time breaking up. In '*Das englische Parlament*' the author sketches succinctly the progress of social reforms, of the agitation against monopoly of land and capital, of changes in local administration, in the army, the universities, and the civil service. He points out with great force the revolution involved in the abandonment of the connexion between direct taxation and the franchise.

The reduction of society to its atoms was carried out jointly by both parties [in 1867] in active competition for the support of public opinion. Thenceforward there was no principle left which could oppose any claim to the franchise. A very chaos of ideas ensued.⁷⁸

The necessary consequence was the Reform Act of 1885. This act, says Dr. Gneist,⁷⁹

made visible and tangible the organic defect which had originated in the displacement of the bases of the parliamentary constitution. . . . England at the end of the nineteenth century finds herself, though at a higher stage of development, in conditions analogous to those of the continental states at the commencement of their constitutional reforms. Granted that a so-called House of Commons still exists, the *communitates* exist no longer. The ancient combinations for the discharge of common duties are obsolete, and in their place have arisen social groups, maintaining their cohesion through the press and the right of association.⁸⁰

⁷⁷ *C. H.* ii. 438.

⁷⁸ *Das. engl. Parl.* 397.

⁷⁹ *Ib.* 392.

⁸⁰ *Ib.* 400.

In every department of life the tendency to equality is making itself more and more strongly felt. 'With the growth of democracy, the administration becomes more bureaucratic. The age of the caucus and of wire-pullers is come. The simple division into liberals and conservatives exists no longer.' The old parties are dissolving into fragments. 'Till the advent of radical governments nothing but coalition ministries will be possible.' But, in spite of the threatening aspect of circumstances, there is good hope for the future. The remedy is to be found in 'a thorough and uniform enforcement of public duties on all members of the state.'⁸¹ 'The immediate problem for legislation is a reform of the county system, which will render the personal discharge of civic duties incumbent on every person. Self-government in England is the equivalent of universal military service on the continent.' The discharge of public duties alone justifies and renders innocuous the claim for public rights. 'The whole history of this state,' Dr. Gneist hopefully concludes,⁸² 'justifies us in the expectation that the English people will weather the impending storm, and discover in its own past the corner-stones on which it may rebuild a free constitution, like the German nation, whose latent strength lies and has ever lain in the cellular system of its communes.'

G. W. PROTHERO.

⁸¹ *Das engl. Parl.* 401.

⁸² *Ib.* 405.