THE DISAPPEARANCE OF THE EDUCATIONAL SYSTEM
OF THE INNS OF COURT.

The history of the decline and fall of the educational system of the Inns of Court falls into three periods: (i) the late sixteenth and early seventeenth centuries; (ii) the Commonwealth period; and (iii) the latter part of the seventeenth century.

(i) The late sixteenth and early seventeenth centuries.

That we must date the beginnings of the decline of the educational system of the Inns of Court from the latter half of the sixteenth century is reasonably clear from a comparison of two sets of Judges' Orders issued in 1557\(^1\) and 1591\(^2\) respectively. In the first of these sets of Orders it is provided \textit{inter alia} that moot cases in the vacation shall not contain more than two arguable points, and that none of the Bench are to argue more than two points.\(^3\) We gather from this that the Reader’s cases had been too full of arguable points, and that the Benchers engrossed all the argument. This clearly points to such excessive zeal on the part of Readers and Benchers that the moots were not so instructive to the students as they might have been. The second set of Orders tells a very different tale. "Whereas," it runs, "the Readings in Houses of Court have time out of mind continued

\(^1\)Dugdale, Orig. Jurid. 311.
\(^2\)Ibid. 313.
\(^3\)§ 5.
in every Lent and every August yearly, by the space of three
weeks at the least, till of late years, that divers Readers in
the same Houses have made an end of their reading in far
shorter time, and have read fewer Readings, than by the
antient Orders of the said House they ought to do; to the
great hindrance of learning, not only in the said Houses of
Court, but also in the Houses of Chancery, by reason that
the Exercises of Moots, very profitable for study, are by
occasion thereof cut off almost the one half thereof, or more
.......
which, if it should be permitted would be
almost an utter overthrow of the learning and study of the
Law''—therefore the judges proceed to make orders that the
accustomed length and number of readings be maintained.4

The causes for this decline of the educational system
during this period are mainly three—the introduction of
printing, the disinclination of the students, and the disincli-
nation of their teachers.

(1) The effects of the introduction of printing upon the
system of legal education were extensive. It led to the
growth of a very much larger legal literature, and it made
that literature far more accessible. The students could buy
books; and the Inns began to pay increased attention to
their libraries.5 Coke recognised that "timely and orderly
reading" was as necessary a part of legal education as the
practice of moots, and attendance upon Readings and at the
courts.6 The list of books which D'Ewes read in the course

4"That all Single Readers in every of the said Houses of Court, shall
continue every of their Readings by the whole space of three weeks, or till Friday
in the third week after the beginning of every such Reading, at the least. And
that there shall be as many Readings, in every of the said three weeks, as by
Antient Orders of the same Houses have been accustomed. And if there shall
be any cause allowed by the Benchers of the said Houses for fewer Readings;
there shall be, notwithstanding any such cause or excuse three Readings in every
of the said three weeks at the least; any Order to be taken to the contrary
notwithstanding."

5The earliest reference to Gray's Inn Library is in 1555, but till 1646 there
was no Librarian, Pension Book XLIX; in 1629 the barristers and students of
Lincoln's Inn petitioned that the Library might be made more convenient for
them. Black Books ii, 290, 291; in 1631 general orders were made for the
library, ibid. 299; in the Middle Temple the library dates from 1641, Ingpen,

6Co. Litt. 70b.—he advises the student to look up the cases he hears cited
at Readings or in the courts, "but that must not hinder his timely and orderly
reading, which (all excuses set apart) he must bind himself unto."
of his studies at the Temple shows that this fact was well appreciated by the serious students. But this introduced a new problem into legal education. What should be the relation of the students' reading to lectures and to practical exercises in pleading or advocacy? Coke saw that it was a serious problem, and he warned the student that he could not safely neglect either. "There be two things," he said, "to be avoided by him as enemies to learning, praepostera lectio, and praepostera praxis."

(2) The second of the causes for the decline of the old system is largely a direct consequence of the first. Many students neglected Coke's advice. The printed book seemed to provide a short cut to knowledge; and they thought that they could safely neglect the readings, moots, and other exercises required by the Inns. Then as now they excused themselves for their non-compliance with the academic routine by the plea that they could get all the knowledge they wanted more easily and more accurately by their own reading; and this excuse was exceedingly likely to be used by the many students of good family who came to the Inns, not that they might live by the law, but that they might get a good general education. Two entries on the records of Lincoln's Inn illustrate this feeling among the students. The first shows that they had devised a plan of doing their mooting by deputy. In 1615, the Bench found it necessary to order that, in the case of those who "doe the graunde mootes by deputyes, the deputyes shalbe entred into the Booke of Exercises, and not those that take them up." Another method of evasion called forth the following order in 1628: "Forsomuch as it is generally observed that very many of the Utter Barristers and students of this Society

8Co. Litt. 70b.
9"For that the institution of these Societies, was ordained chiefly for the profession of the Law; and in a second degree for the education of the sons and youth of riper years of the Nobility and Gentry of this realm." Orders of the Judges and Benchers, 1614, Dugdale Orig. Jurid. 317; Holdsworth, History of English Law, Vol. I, 424; Evelyn remarks in his Diary, Oct. 4th., 1699, that his brother who had died in that year, aged 83, had gone to the Middle Temple, "as gentlemen of the best quality did, but without intention to study the law as a profession."
10Black Books, ii. 174.
under the Barr lyable to be charged with the exercises of the House, put themselves out of commons when they should be charged . . . although such as so continue out of commons remayne in the House or towne; it is ordered that such as shall so doe shall be nevertheless lyable to exercise, notice being left at their chamber, and shalbe cast againe in commons.¹¹

(3) If the barristers and benchers had been as determined to carry on the old system as their predecessors they could no doubt have overcome the disinclination of the students. But they themselves had begun to show signs of a similar disinclination. This was perhaps partly due to the same cause. Many probably thought that less teaching was needed, now that the students could read the printed books. But it was also due to the prosperity of the legal profession.¹² The lawyers found that the time required for preparation for their Reading could be pecuniarily so much more profitably employed in their practices, that they were willing to pay a fine to escape the duty. Thus the Inns found it almost impossible to get any of their members to “Read double;” and very difficult to get any one to Read single.¹³ Sometimes it was necessary to bribe them to take office; this is illustrated by an entry in the Black Books of Lincoln’s Inn of the year 1605. A Mr. Thomas Hitchcocke whose turn it was “to read single” was “intrecated” to take office. “Who answered and confessed that he had thought upon his Reading, and made some entrance and progresse therein, but protested that he coulde not goe throughe and finishe the same to Reade this sommer without refrayninge and loseinge a greate parte of his practize this presente terme and the next allso.” He was neverthe-

¹¹Ibid. 282.
¹²The large increase in the business of the courts in the latter part of Elizabeth’s reign is shown by the large increase in the number of the plea rolls for that reign; see XXVIII Law Quarterly Review 133.
¹³See e. g., Black Books, ii, 33—“It seemeth very difficulte to affect (i. e., to get Benchers to read double) for that they suppose that theire duble Readinge is rather a hindrance then a furtherance unto them in theire proceedinge, besides theire charge;” for fines for not Reading see ibid. 10, 15, 217; Pension Book. 21, 106, 171, 177, 270, 271, 272; at Lincoln’s Inn and probably at the other Inns a Bencher who paid his fine for not reading retained his seat on the Bench, Black Books, ii. 180; this was certainly the case later in the century; below.
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less appointed Reader, but given £20 above the usual allowances "towards his losse and hinderance." Similarly barristers preferred to be fined and to pay rather than to take the office of Reader in the Inns of Chancery. It is no wonder that students found the readings dull, or that Coke, comparing the modern with the ancient readings, complained that the former had lost their old authority and were "obscure and dark." They were often the work of reluctant teachers lecturing equally reluctant students. The old system needed the willing cooperation of students, barristers and benchers. All now desired to see the end of it.

Nevertheless the judges and the governing bodies of the Inns tried hard to arrest this decline. We have seen that the judges issued Orders on this subject in 1591. Gray's Inn and the judges issued more detailed order with the same object in 1594. In the same year similar orders were issued by the judges to Lincoln's Inn. The Benchers criticized some of the Orders, but promised to see that most of them were carried into effect. Further orders were issued by the judges and the Benchers of the four Inns in 1595, and in 1614, and by the judges in 1627. In 1630, the judges at the command of the Privy Council again repeated their orders. The need for these repeated orders illustrates the decline of the old system; but they were not wholly without effect. Good Readings were sometimes given. D'Ewes, in his autobiography, notes that Feb. 27th, 1626 "Mr. Thomas Mellet, the Queen's Solicitor, began his Lent Reading in our

11Black Books ii. 87.
12Ibid. 229, 250, 270, 294; and sometimes if a reader appeared he found no audience, ibid. 293.
13D'Ewes Autobiography i. 251—"Mr. Ward, the reader, began on Monday morning August the 2nd. (1624), being but a dull and easy lawyer, and gave little satisfaction to his auditors all the time of his reading."
14Co. Litt. 280c—"By the authority of Littleton, ancient Readings may be cited for proof of the law, but the new Readings have not that honour, for that they are so obscure and dark."
15Above p. 201.
16Dugdale, Orig. Jurid. 313-4.
17Black Books ii. 31-34.
18Dugdale, op. cit. 316, Black Books ii. 47-8.
19Dugdale, op. cit. 317-18; Black Books ii. 449.
20Dugdale, op. cit. 319-20; Black Books ii. 456.
21Dugdale, op. cit. 320-21; Black Books ii. 454.
Middle Temple, and performed it very well.” D'Ewes' summary of his performances while student and a barrister show that the system was still alive. "I had, during my continuance in that Society which was in all but five years at the uttermost, twice mooted myself in law French, before I was called to the bar, and several times after I was made an utter barrister in our open hall; thrice also, before I was of the bar, I argued the readers' cases at the Inns of Chancery publicly; and six times after. And then also, being an utter barrister, I had twice argued our Middle Temple readers' case at the cupboard . . . and sat nine times in our Temple Hall at the bench, and argued such cases in English as had been before argued by young gentlemen or utter barristers themselves in law French bareheaded . . . I brought in also many law cases after dinner, and argued them in English; upon which I bestowed not much less study than upon the cases or moot points upon which I sat, as many of them still remaining by me in written copies do sufficient witness." But we can also see from this autobiography that the old lectures moots and exercises were not now the only methods by which the student acquired his knowledge. D'Ewes tells us how he read Littleton's Tenures—"the very key as it were of the

26 Black Books ii. 54, 94, 165-7—a comprehensive set of rules for moots and exercises published in 1614, 262; Pension Book, 4, 16-17, 39, 243.
27 A list of delinquents from Gray's Inn were directed to be sequestered from the Bench and from commons by the judges in 1605, Pension Book, 169, 170.
28 In 1606 the Benchers of Lincoln's Inn and of the other Inns had been summoned by the judges to answer for their disobedience to their orders; they were told, 'that offence was taken in yt ye Readers wch were in ye Lent last before past in every ye same inns of Court, did not contynew therei Readinges seor longe tyme as they should have done; and yt for ye same defaltes . . . as also for faile of attendance and assistaunce to ye Reader of ye inner Temple (who . . . . . was forced to give over his Readinge at ye begininge of ye 3 weeke for want of company both at Bench and Barr) the Judges thought fitt yt ye Governors in ye same Houses of Court should proceed to censure and course of reformacion accordinge to theire private Orders therein," Black Books ii 97, 98.
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common law,”30 and parts of Coke’s reports, and Keilway’s reports.21 He tells us how he made reports in the Star Chamber and the Common Pleas.32 and how he studied records at the Tower. At first he studied these records “only to find out the matter in law contained in them,” and then for the light which they threw upon English history.33 So interesting did he find this study that it usurped the place of the common law, and led to the production of his book on the Elizabethan Parliaments by which he is chiefly remembered.34

But for the constitutional disturbances which led up to the outbreak of the Great Rebellion, the Privy Council, the judges, and the Inns might have succeeded in adapting the old system to the new conditions. If they could have done this the Inns would have continued to be a legal university, and the public teaching of English law would have had a continuous history. This was not to be.

(ii) The Commonwealth period.

During the Great Rebellion the old system of legal education collapsed. Nothing had been done before the outbreak of the civil war to adapt the old system to the new conditions; and when war broke out it was obviously quite

30Op. cit. i 181—“Friday morning, April 13 (1621) I added an end to my reading of Sir Thomas Littleton’s French Tenures, being the very key, as it were, of our common law, and accounted the most absolute work that was ever written touching it.”

31Ibid. 216—April 1622 he read Co. Rep. Pts. 1 and 4, omitting the pleadings; ibid. 224—Feb., 1623 he finished Co. Rep. Pt. 5, and began Keilway’s reports, “which I read afterwards with more satisfaction and delight than I had done formerly any other piece of our common law.” ibid. 231—April, 1823 he read Co. Rep. 6.


33“On Thursday, the 4th day of September, in the afternoon I first began studying records at the Tower of London . . . . From this day forward, I never wholly gave over the study of records; but spent many days and months about it, to my great content and satisfaction; and at last grew so perfect in it, that when I had sent for a copy or transcript of a record, I could without the view of the original, discover many errors which had slipped from the pen of the clerk. I at first read records only to find out the matter of law contained in them, but afterwards perceiving other excellencies might be observed from them, both historical and national, I always continued the study of them after I had left the Middle Temple and given over the study of the common law itself. I especially searched the records of the Exchequer: intending . . . to restore to Great Britain its true history—the exactest that ever was penned of any nation in the Christian world,” op. cit. i. 235–6.

34See ibid. i. 409–10 for his account of the transcription of the Journals of the House of Lords and Commons.
impossible to undertake an adjustment which would have needed tactful and patient consideration on the part of judges, benchers, barristers, and students, and equally tactful exercise of authority on the part of the Privy Council.

The records of the Inns show that attempts were made to restore the old order. Thus in 1646, it appears that at Gray's Inn the students were complaining that they had no opportunity of performing their exercises, and so qualifying for call. The Bench, therefore ordered that the ensuing vacation should be kept as in the old days; and in 1647, the students were allowed to keep their exercises by performing only one moot a day. In 1651 Lincoln's Inn ordered the due performance of the customary exercises both in term and vacation. But it appears from a further order in 1655 that the order of 1651 had been entirely neglected—and more neglected at Lincoln's Inn than at the other Inns. So bad, in fact, was the state of affairs at that Inn that "the Judges in the Publique Courts att Westminster" took notice of the neglect of exercises in that House. But, in spite of the recommendations of Parliament, and the efforts of Judges and Benchers, the old system of legal education could not be revived. The Readers refused to read. The Orders issued were neglected by benchers, barristers, and students. It was growing more and more

38Pension Book, 360.
39Ibid. 365.
40"Ibid. 365.
41Black Books ii. 391; cp. Pension Book 413–4—an order of 1655.
42Black Books 405—"the Masters of the Bench, beinge unwillinge to be behind other inns of Court in a thinge tendinge to the furtherance of students in the laws, doe order that the usuall exercises of moots and bolts be continued."
43Ibid. 410—"Wheareas the Judges in the Publique Courts att Westminster have taken notice of the neglect of exercise in this House, that therefore it is ordered that exercise be performed according to the antient orders of this House . . . And that none be hereafter called to the Barr till they have done their compleate exercise."
44In 1657 Parliament recommended Cromwell and the Council to make the judges revive readings and exercises in the inns of Court, Burton, Diary, June 26, 1657—cited Robinson, Anticipations under the Commonwealth of changes in the law, Essays A. A. L. H. i. 471.
45Pension Book XLIV–XLV; Black Books ii. XXVII.
46During these eleven years (1642–1660) a recommendation of the Council of State and 17 minutes of the Bench endeavour to revive education—but the result is best put in words of the Minute of 1659, 'that the holding up of the Commons in Vacation, intened by the Bench for reviving exercises in the vacations, which have been nevertheless neglected, is a charge, beside the fruitlessnesse thereof, too great for the Revenue of the House,' Black Books ii. XXVII.
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antiquated, and no attempt was made to reform it intelli-
gently. As we shall now see not even the Restoration of the old order in Church and State could revive it.

(iii) The latter part of the seventeenth century.

In 1669, Prynne, in the preface to his Animadversions on Coke's Fourth Institute, put in a strong plea for the re-
vival of the old educational system of the Inns of Court. "I shall importunately intreat all Benchers and others of my own profession to gratifie both themselves, their poster-
ities, yea, the King and whole kingdom, by their unanimous cordial endeavours to support, (and) encourage the declining diligent study, and publicke exercises of the Common law: . . . especially Readings in all Innes of Court and Chancery now overmuch neglected, discontinued, or perfunctorily performed, through sloathfulness, selfishness, or pretended novel Exemptions from them by those ad-
vanced by the law, who have least reason to decline and dis-
courage them, or for want of publicke Privileges formerly due and peculiar to Readers: " which I hope they shall uninterruptedly enjoy for the future, especially from those of their own Robe."

Prynne's hopes were not destined to be realized; but there were many who recognized the justice and urgency of the cause which he pleaded. The Inns of Court tried to reconstitute the old machinery; but their orders do not seem to have had much effect; and, in 1664, their efforts were enforced by a set of orders issued by the Lord Chancel-
lor and all the Judges for the government of the Inns. The Benchers were to see to the proper government of the Inns of Chancery. Only genuine students of the law were to be allowed to reside in the Inn. No student was to be called

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4This perhaps refers to the fact that in some of the Inns the call to the Bar was made, not as before by the Reader, but by the governing body of the Inn; thus at Gray's Inn in 1629, it was ordered that "the calling to Barre shal-bee onely by pencion, and not by the reader," Pension Book, 290.

4See Black Books iii. 9–10, 17, 32–3, 40, 60, 61; Calendar of Inner Temple Records iii. 4, 13, 21, 22; Pension Book, 437–8, 442, 446, 448.

42 Black Books iii. 445–9.
unless he was of seven years standing, had been frequently in commons, and had kept his exercises; and no barrister was to practice in the courts at Westminster till he was of three years standing. Benchers or Readers who refused to read were to be fined, and, if that was of no avail, complaint was to be made to the judges. Readings were to continue for the periods heretofore usual, and members of the Inns were to attend to argue the Reader's cases. Benchers must see that commons were kept both in term and vacation, and that the usual exercises were then performed.

These orders of the judges had no more permanent effect than the orders of the Inns. Attempts were, it is true, made to carry them out. Orders were issued for the performance of exercises, and benchers who refused to read were fined, suspended, and even reported to the judges. At Lincoln's Inn, for instance, these attempts were made up till 1677; but apparently at that date those who opposed the revival of the old educational system gained the upper hand. The last Reading at Lincoln's Inn took place in that year; and Readings in the other Inns of Court ceased at about the same period. It is obvious that when the benchers ceased to perform their educational duties, they could not expect the barristers and students to perform their's. Barristers ceased to be expected to take any share in the education of the students, and, like the benchers, wholly escaped their

44Calendar of Inner Temple Records iii. 186-7; Black Books iii. 61, 85, 103, 123, 160.
45Ibid.
46Pension Books 458-9; Calendar of Inner Temple Records III, 160; Black Books iii. 32-3, 56, 58, 84.
48Black Books iii. 103-4—"to the end," it is there said, "that they may not practise or be heard at the Barr or in the Circuit, nor have any other privileges of their profession till they conform;" cp. Pension Book, 255, 256.
49Black Books iii. XIII, XIV.
50See Pension Book 457 n. 4; Master Worsley's Book 125 n. 1, from which it appears that at the Middle Temple the last Reader who read was appointed in 1684; we may perhaps see the last stage before the final abolition in an order of the Inner Temple made in 1685-6, Calendar iii. 231—"William Longueville, chosen reader, having paid 150 £., is declared an absolute and complete reader;" when a person can get the status of reader by payment it is clear that the whole institution will soon disappear.
obligations. Like the benches, too, they ceased even to incur a fine for their neglect. The students also escaped, but at a price. "It is now usual," said Master Worsley in 1734, "that when a gentleman hath failed, and been fined for so doing, to account his exercise over, he being no more called to that exercise. But formerly such fine was only lookt upon as a punishment for the neglect and did not excuse the performance of the exercise."53 Apparently at the Middle Temple all the obligations of the student could be compounded for the sum of £38. 6s. 2d.54 It was the same with the obligation of residence. In theory residence was obligatory on all students. But Master Worsley explains the ingenious device by which it was evaded. The student agreed "with those who made a practice of supplying gentle-
men" as follows: the tenant of the chambers surrendered them to the student. The student gave a bond to resurrender in three years. He was then admitted on the terms of the bond. The whole cost including the fee to the tenant of five guineas, came to £8. 4s.55

Roger North described the state of affairs at the end of this period with substantial accuracy when he said, that,56 "Of all the professions in the world, that pretend to book-
learning, none is so destitute of institution as that of the common law. Academick studies, which take in that of the civil law, have tutors and professors to aid them, and the students are entertained in colleges, under a discipline, in the midst of societies, that are or should be devoted to study . . . But for the Common law, however, there are Societies, which have the outward show, or pretence of collegiate institution; yet in reality, nothing of that sort is now to be found in them; and, whereas, in more ancient times there were exercises used in the Hall, they were more for

53Master Worsley's Book, 136.
54Ibid. 272—this sum was made up of a number of items in the case when "a gentleman forfeits his vacations, keeps not his terms and fails in the performance of his exercises."
55Master Worsley's Book 210–11—a clause must also be inserted that his executors would pay the value of the chambers if he died within the three years, as in that case the chambers went to the Inn.
56A Discourse on the study of the laws, 1, 2.
probation than institution; now even those are shrunk into mere form and that preserved only for conformity to rules, that gentlemen by tale of appearances in exercise, rather than any sort of performances, might be entitled to be called to the Bar. But none of these called Masters and distinguished as Benchers, with the power of ordering, and disposing all the common affairs of the Society, ever pretended to take upon them the direction of the students, either to put them, or lead them in any way."

Why then did the old system so completely and irrevocably break down during this period in spite of all efforts to revive it? The answer is firstly that all the causes which were leading to its decline in the earlier part of the century were operating with increased force in this period; secondly that the Privy Council and the judges did not exercise so strict a control as in the preceding period; and thirdly that the governing bodies of the Inns partly by reason of the absence of this control, partly by reason of the altered character of their members, ceased to wish to see the old system restored. The executive government at the latter part of the Stuart period had neither the power nor the wish to superintend the activities of bodies entrusted with educational, commercial, or governmental duties in the same spirit and in the same way as it had superintended them in the preceding period. No doubt the government was careful to see that the members of these bodies were politically and religiously orthodox; but its activity generally stopped there. In 1686, it is true, there was "great discourse of a visitation intended by the lord chancellor into the several societies belonging to the law, and that there will be a great regulation made amongst them, especially amongst the bench in each society"—but it came to nothing. Thus the Inns of Court, like other similar bodies, were left to go their own way. And to the governing bodies of the Inns their educational and disciplinary duties were growing more and more distasteful. Of the reasons for this distaste, which gave the final blow to the old system, I must say a few words.

\[\text{Lutterell's Diary i. 378-9.}\]
The rule established in the latter half of the seventeenth century, that all king's counsel must be called to the Bench tended to alter the character of the Bench. These Benchers no longer depended upon becoming Readers for further promotion in the law. They had therefore no inducement to read. Similarly the custom of electing such persons as Masters of Chancery or Masters of Requests supplied another class of Benchers who were quite unfitted to take their part in the old educational routine. On one occasion the king interfered when the Benchers fined a fellow Bencher who was a Master of Requests because he refused to read; and this was not a solitary instance of royal interference with a similar object. Even if the Benchers were not king's counsel or high officials, there was not the same inducement to read as heretofore. In former days it was the Readers who became Benchers, and finally serjeants. But the degree of serjeant was now given by favour, and to have been a Reader no longer improved a lawyer’s chances. Sir John Bramston in his autobiography ascribes with some reason the cessation of readings to this cause.

"XXXVI, Law Quarterly Review 219-20."
"In 1661 it was declared that a Master in Chancery being a Bencher was not exempt from the usual exercises, Black Books iii. 13; but in 1663 when he insisted that being a master he could not be compelled to read he was passed over, and "it was left to his own discretion what compensation he will make for this indulgence and favour," ibid. 33.
"Ibid. 32.
"Ibid. 64, 449, 450.
"Thus in 1662 the king asked the Inner Temple to excuse the attorney of the Duchy of Lancaster from Reading, Calendar of Inner Temple Records iii. 9; S. P. Dom. 1661-2, 242-3, liii. 60; ibid 1673-5, 327; for an earlier interference in 1622 to override a decision that a particular Bencher should always take place after all who have or shall read, see Pension Book 252-5.
"Sir John Bramston tells us that his father read twice before he was made a serjeant, "And here I cannot slip observing the difference of the tymes . . . Now since the restitution of the Kings more are called to be serjeants that never read at all than that have read once. The reasons given were that there wanted serjeants, there was not tyme for readings, that manie fitt had binn on the King's side in the warr, and either wanted monie or were to be indulged etc.; yet readings were injoyed, and some read that found noe advantage. Formerly they read constantly a fortnight, since but a week, and at this tyme readings are totally in all the Inns of Court layd aside; and to speake truth, with great reason, for it was a step once to the dignitie of a serjeant, but not soe now," Bramston's autobiography (C. S.) 6; the manner in which any excuse was seized upon to put off Readings is illustrated by an order of the Inner Temple in 1672 to the effect that, as the other three Inns had put off their Readings that summer vacation, and as there was no precedent for one Inn alone holding a Reading, the Reading is to be put off, Calendar iii. 86."
But though Readings ceased the Reader's feasts continued. In the earlier part of the century the judges' orders had attempted to restrain the extravagance of these feasts.\textsuperscript{64} After the Restoration they became so extravagant that in 1664 the judges\textsuperscript{65} and in 1678 the king\textsuperscript{66} interfered to limit the expenditure of all Readers other than the Recorder of London or a king's counsel. Their extravagance can be seen from Roger North's account of the feast given by his brother when he read in 1672, during his tenure of the office of solicitor general. In the three or four days which it lasted it cost at least £1000. "The grandees of the court dined there and of the quality (as they call it) enough."\textsuperscript{67} It is obvious that the prospect of being obliged to incur this enormous expense would make most persons far prefer to pay a moderate fine to escape from Reading.

It is not surprising to find that under these influences the collegiate life of the Inns disappeared. At the present day the best dean of an Oxford college is a man who understands and is understood by the undergraduate members of his college; and that understanding can only be created by the intimate relations of teacher and pupil, supplemented by social intercourse. When the Benchers were really the teachers of the students and barristers, when they lived with them and mixed with them, it was not difficult to maintain good relations between them. But when the Benchers who governed the Inn ceased to be in these intimate relations with barristers and students, difficulties began. We hear of disorder in the Inns aggravated by want of tact, of the breaking of windows, and threats to pump the benchers or some of them.\textsuperscript{68} In 1678–9, just before the fire in the Middle

\textsuperscript{64}Dugdale, Orig. Jurid, 311, 313, 316.
\textsuperscript{65}Black Books iii. 448.
\textsuperscript{66}Ibid. 120; cp. Calendar of Inner Temple Records iii. 6 for an order of the Inner Temple in 1661 directed against the extravagance of these feasts.
\textsuperscript{67}Lives of the Norths i. 97, 98.
\textsuperscript{68}Roger North, alluding to the Christmas festivities in the course of which much pleasantry was directed against the Bench, says, "the wiser sort make a jest of it . . . but the ill bred sour part of the Bench will be as ridiculously in earnest, and like state politicians argue for their own government, as if they were the Pope's consistory, and these are they which the young gentle-
Temple a formidable rebellion had begun, and the benchers dared not come into the Hall. In 1680 there were disorders at Lincoln's Inn, and in 1681 a rebellion at the Inner Temple, which could only be appeased by the intervention of the judges. Obviously such difficulties were increased by the extravagant Readers' feasts. They encouraged disorder. It was of little use for the Judges or Benchers to attempt to suppress extravagance among the junior members of the Inn in the face of such examples. The disorders at the Readers' feasts were made an excuse—poor enough as North pointed out—for suppressing Readings. Similarly the difficulty which the new school of Benchers found in governing their Inns made them ready enough to suppress the collegiate life of the Inns by acquiescing in the breach of the rules which required all students to reside there during term and during some parts of the Vacation.

Thus both the educational and the collegiate character of the Inns disappeared. The educational system was no doubt antiquated; but it still had in it very great virtues. In our own days the system of mooting has been revived in various centres of legal education to the profit of teacher men usually fall upon and affront; either by breaking windows (which is the way of Temple distress) or threatening to pump them, or such other insolence—but as he admits matters sometimes got more serious, and recourse was had to those of the judges who were members of the society, Lives of the Norths iii. 46-7.

69Ibid. 47.
70Black Books iii. 131—the barristers and students attend the judges and apologise for the disorders in Hall.
71Calendar iii. 161-2—the barristers and students had assembled in Hall, passed votes, made orders, and generally taken on themselves the government of the Society, and threatened the servants if they refused to screen their orders; cp. ibid. 187-9 for another riot in 1682-3.
72See North's account of the scenes in Hall at his brother's feast, Lives of the Norths i. 98.
73For orders of the Benchers forbidding the practice of treating the Hall on call see Black Books iii. 323-4 (1741); for the judges' orders of 1664 see ibid. 448.
74"I do not think it was a just regulation when, for the abuse, they took away such a profitable exercise," Lives of the Norths i 98; as he there points out the old Readings on statutes gave valuable hints to lawyers and their clients as to the true construction of new statutes; that this was long regarded as one of their chief uses can be seen from the fact that a large proportion of the old Readings were on Statutes.
75Above p. 211; thus reversing the old policy which insisted that terms of vacation should be kept; Holdsworth, History of English Law, Vol. II, 425-7; Dugdale, Orig. Jurid. 317, 320; Black Books iii. 446, 448, 449.
and student alike. If the Benchers had really wished to do their duty they could have reformed and worked the old system. The trouble was that they did not want to reform it. They had come to be a set of men who were or who considered themselves to be too busy or too important to be troubled with the education of students; they failed to do their duty; and their example was easily followed both by barristers and students. The decay of the educational system, made it unnecessary to insist upon the residence of the students. The rules as to residence fell into abeyance; and thus a collegiate system—which of all systems is the best aid to education, and of all the most difficult to create artificially—was destroyed. The age was corrupt. The standard of public morality was low. But, after making all possible allowances of this kind, we must admit that the injury inflicted upon English law by the Benchers of this period was as great as the benefits conferred by their ancestors who had founded the Inns and created the system of legal education there carried on. By their action all public teaching of English law was stopped for nearly a century and a half. It is only gradually that the Inns of Court, following the example of other educational bodies, have in our own days again begun to fulfil those functions in return for which the state had, long ago, given them the exclusive privilege of licensing their students to practise in the courts.76

From the latter half of the seventeenth century to the middle of the nineteenth century the student was left to his own resources. In the earlier part of the century books had been written to instruct him as to his course of reading. During this period some valuable advice on this subject was given by Hale in his preface to Rolle's Abridgment,77 and by Phillips in a book entitled Studii Legalis Ratio, or Directions for the Study of the Law, published in 1675; but the best of these books is, A Discourse on the Study of the Laws by Roger North, which was not published till 1824.

76 As to this see an article by the author in 10 Columbia Law Rev., 735–7.
77 Collect Jurid. i. at pp. 276–278.
This little tract displays all the excellencies which made
North so admirable a biographer. His eye for picturesque
details, his enthusiasm for anything which had aroused his
interest, his capacity for shrewd criticism, and his broad
common sense, give this Discourse an interest which books
on methods of study rarely possess. The telling illustra-
tions with which he points his remarks and his counsels
give us glimpses of the state of professional feeling, and of
the standards of professional conduct, not to be found else-
where. It is a valuable historical document because the
author has thought it worth while to write down information
which many lawyers of that day would have regarded as
barren common places. From this point of view it is com-
parable to Fortescue's De Laudibus.78

North begins by warning the student that the law is a
jealous mistress—"it requires the whole man, and must be
his north star, by which he is to direct his time, from the
beginning of his undertaking it, to the end of his life."79
At the same time he reminds him that, if he would be a
really learned lawyer, he must as aids to the study of English
law, know something of English history80 and of the civil
law.81 "Similarly it is a vast advantage to be not only a
common lawyer, but a general scholar, as in latter times
Selden was; for that you call a mere lawyer, seldom reaches
better preferment than to be a puisne judge, if at all to be
ever invited from his chamber."82 To acquire knowledge of
the law the student must read, commonplace, report, and
converse about law. When he has become an adept in these
arts, he may then begin to think about practising.83

To read law a knowledge of law French was regarded
by North as quite indispensable—"lawyer and law French

78Holdsworth, History of English Law, Vol. II. 481.
79p. 7.
80It often lays open the reasons and occasions that have been for changes
that have befallen the Common Law, either by authority of Parliament, or of
81"A man of the law would not be willing to stand mute to the question,
what is the difference between the Civil and the Common Law; what is the
Imperial Law, what the Canon, what the Pandects, Codes, etc." pp. 8, 9.
82p. 9.
83pp. 36-37.
are coincident." There had been a revival of that tongue after the Commonwealth period; and North's political bias led him to exaggerate somewhat the permanence of that revival. But even now there is some truth in his dictum that "a man may be a wrangler, but never a lawyer, without a knowledge of the authentic books of the law in their genuine language." Littleton was still the primary text book; and he wisely advises the student to begin by reading it in the original French, and without Coke's comment. Coke's comment he perhaps unduly depreciates—Coke was not a royalist; but there is some truth in his dictum that it is "only a commonplace book exhausted," with the titles so disposed as to follow Littleton's text. He does not advise the ordinary student to attempt to read all the Year Books; but the Year Books of Henry VII he regards as indispensable; and he notes that really great lawyers like Hale, Maynard and others, have made themselves masters of them. The actual course of reading which he recommends will best be seen from his own table:

<table>
<thead>
<tr>
<th>Course</th>
<th>Aids</th>
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<tbody>
<tr>
<td>Littleton</td>
<td>Terms of the Law</td>
</tr>
<tr>
<td>Perkins</td>
<td>'Diversity of Courts</td>
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<tr>
<td>Plowden</td>
<td>Old Tenures and Doctor and Student</td>
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<td></td>
<td>Fitzherbert's Natura Brevium</td>
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<td></td>
<td>Crompton's Jurisdiction of Courts</td>
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<td></td>
<td>Stanford's Pleas of the Crown</td>
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84"During the English times, as they are called, when the Rump abolished Latin and French, divers books were translated, as the great work of Coke's Reports etc.; but upon the revival of the law, these all died and are now but waste paper," p. 12.
85"I should absolutely interdict reading Littleton etc. in any other than French, and however it is translated, and the English concolumned with it, it should be used only as subsidiary, to give light to the French when it is obscure, and not as a text. For really the Law is scarce expressible properly in English, and, when it is done, it must be Francoise, or very uncouth," pp. 12, 13.
The older books—Bracton, Britton, Fleta and Glanville—are he admits  "to be looked into chiefly for curiosity and accomplishment."

But let us who write or read legal history not forget that he said, what even now is hardly realized either by professors or practitioners, of the law—"To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and without it a lawyer cannot be accounted learned in the law."

North recognized that reading was of little use unless the student "commonplaced" what he read. By "commonplacing" he meant the construction of an alphabetical abridgment of the law. It was an old and well established method of acquiring legal knowledge.

The Abridgments of the Year Books and Rolle's Abridgments are students' commonplace books in print. North gives practical advice as to its construction; and repeats the warning needed as much now as then, that no one else’s commonplace books will be of the slightest value. In fact, as he truly says, ready made commonplaces, abridgments, or indices "are the student's enemies."

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Note: The text contains references to specific pages and sources, which are indicated with superscript numbers. These are citations to support the statements made in the text. The numbers in the text correspond to notes at the end, which provide additional context and sources for the claims made.

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Coke's Jurisdiction of Courts
Plea of the Crown
Commentary on Magna Charta
Petit Brook
Coke on Littleton
Bracton
Britton
Fleta
Glanville

Henry 7.
Keilway.
Leonard
Coke's Reports
Dyer
More
Crook
Palmer

Coke's Jurisdiction of Courts
Plea of the Crown
Commentary on Magna Charta
Petit Brook
Coke on Littleton
Bracton
Britton
Fleta
Glanville
The commonplace book or abridgment of North's day was for the most part an abstract of case law. From the days of the earliest Year Books, commonplace books were of this type. And similarly, from these early days it was recognised that the students must not only abridge the older cases reported by others; they must also go to the courts and report modern cases for themselves. So well was this fact recognized that the judges encouraged their presence and sometimes explained points of law with a view to assist the students. The Crib, of which we read in the Year Books, had its counterpart in the seventeenth century. "I have known" says North, "the court of King's Bench sitting every day from eight till twelve, and the Lord Chief Justice Hale's managing matters of law to all imaginable advantage to the students, and in that he took a pleasure or rather pride; he encouraged arguing when it was to the purpose, and used to debate with counsel, so as the court might have been taken for an academy of Sciences as well as the seat of justice." It had also its counterpart in the eighteenth and nineteenth centuries as a famous tale told by Lord Campbell about Lord Kenyon, a student, and 'a porcelain vase with a handle to it' will testify. North gives the student some advice about reporting. He advises him firstly to avoid the court of King's Bench, which was often crowded with people who came to hear the latest cause celebre and to attend the court of Common Pleas, where solid matters of law were debated; and secondly not to begin reporting

89Ibid. 265.
90pp. 32-3.
91Lives of the Chief Justices iii. 85 n.; cp. ibid. ii. 329 and note—"I have a lively recollection that at Guildhall, the students having a box close by him (Lord Kenyon), he handed the record to us, and he would point out to us the important issues to be tried."
92"The other error is going to the King's Bench and not the Common Pleas. It is said that the Common Law is at home in the Common Pleas, but a guest in the King's Bench; and it is certain that the business of that court is less frequent of law than at the Common Bench. The causes of the Crown, Corporations, matters of the Peace, and concerning the Government, take up most of that little time they allow, which, as I said, are more faction and wrangling than law. But at the Common Pleas there is little but merely matters of law agitated," p. 35; a student can, he says, always get a place in the Common Pleas, but in the King's Bench he may go at six and yet not get a good place p. 36.
till he was well grounded in law by his reading and common-placing, and could profit by what he heard.103

Lastly the students must discuss legal cases among themselves. "I have heard Serjeant Maynard say the law is *ars bablativa* meaning that all the learning in the world will not set a man up in bar practice without a faculty of a ready utterance of it."104 It is the place which discussion should occupy in a legal curriculum that distinguishes a training in law from the training in other sciences. Reading, commonplacing and reporting may teach a man the principles of the law: they will not teach him to be a practical lawyer. It was the recognition of this fact which was the strong point of the older system of legal education. It is the non-recognition of this fact which is the weak part of our modern system of public teaching and examinations in law. The destruction of the old system destroyed to a large extent that organized discussion which prepared the students for actual practice. In our modern system it does not take the place which it once took, unless, as at Oxford and at one or two other places, the pupils are wiser than their teachers, and set up for themselves a moot club, which reproduces some of the advantages of that old system which the benchers of this period were too selfish to maintain.

North does not say anything in his Discourse of the modern practice of reading in Chambers, probably because it was not then established.105 But it is clear that in his day the junior barristers gained experience in somewhat similar ways. Jeffery Palmer, the attorney general, "took a pleasure to encourage young students, and admitted diverse of them in his Society of the Middle Temple, to have access to him at evenings, and to converse familiarly with him; and he was not only affable, but condescended to put cases, as they term it, with him."106 Francis North gained much from his connection with him;107 and he never ceased to be

103pp. 33-4.
104p. 29.
105Lord Campbell, Lives of the Chief Justices ii, 329 says that 'the pupilising system' was introduced at the latter part of the eighteenth century by the celebrated Tom Warren and Mr. Justice Buller.
106Examen 511.
107Lives of the Norths i 45, 47.
grateful to his family. Roger North was helped in a similar way by his brother. The students sometimes did the work of solicitors, and gained experience by court keeping—occupations which correspond to the modern custom of reading for some months in a solicitor's office.

North's Discourse gives us a detailed account of the manner in which the students of the seventeenth century supplied for themselves the place of the instruction formerly given by the Inns of Court. It is clear from his account that legal education, like many other things, then began to present the characteristics which it preserved till quite modern times; and we begin to see some of its effects. A student who pursued with industry such a course as North suggested could make himself a competent English lawyer; but he would probably learn very little else but the rules of English law. And, knowing little else, he would naturally be wholly destitute of any power to criticize what he knew. This was one of the causes of that complacent assurance of the excellence of English institutions and English law which characterized the lawyers of the eighteenth century, and found its literary expression in Blackstone's Commentaries. Thus the solitary education to which the law student was condemned produced effects which, from this point of view, were not unlike the effects of the narrow and self-centered outlook of the mediaeval common lawyers.

Great lawyers, it is true, appeared who rose superior to all the defects of the legal education of the period. Genius will always strike out a path. But we cannot doubt that the average standard of the learning of the English lawyer in this period and the next would have been both higher and more liberal, we cannot doubt that the development of English law would have been freer and less technical, if the older system of legal education, instead of being destroyed, had been adapted to the needs of modern English law.

St. John's College, Oxford W S. Holdsworth.

108Ibid. 193.
109Ibid. iii. 90, 129.
CHANGING THE FUNDAMENTAL LAW.

The great importance of this subject will be better appreciated if we first review the scheme of government established by the Constitution of the United States.

No study of constitutional law can approach a scientific method without first distinguishing between the State and the Government, or, to put it in another form, between the sovereign and the agency through which sovereignty functions. "The absence of the clear and correct distinction between state and government is fatal."¹ The independent sovereign is the state. By the term sovereign is meant the person or body of persons within the territory of a state, over whom there is, politically, no superior power. Sovereignty is that ultimate power of governing a people from which there is no appeal and beyond which there is nothing but revolution. In the United States this independent sovereignty rests with the people of the United States. The first resolution passed by the Convention that framed the Constitution of the United States, sitting as a Committee of the whole, reads:

"Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."²

And the sublime declaration of the Constitution is: "We, the People of the United States * * * do ordain and establish this Constitution for the United States of America."

Mr Chief Justice Marshall, speaking for the Supreme Court of the United States, said:³

"The government of the Union, then * * * is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit."

Ours is a dual government and if, in our conception of it, we draw a horizontal line and place above it all sovereign

² Elliott's Deb., Vol. 1, p. 151.
³ McCulloch v. Maryland, 4 Wheat. 316, 404.
powers regulating international relations and conduct, and interstate relations and conduct, and below the line local and purely domestic—other than interstate—relations and conduct, we have above the line the general field of national or federal sovereignty and below it the sovereignty exercised by the state governments; the whole representing a dual government created by a single sovereign, the "People of the United States." As to the state governments, the people of each state respectively are the sovereign and each state government is the agency through which a state’s sovereignty functions; while, as to the federal government, all the people of the United States "in their political capacity only," are the sovereign and the federal government is the agency through which the great and paramount sovereignty is exercised. In each field of political action the people are the sovereign and the governments are agencies. The people of the United States "guarantee to every State in this Union a Republican Form of Government," protection against invasion, and against domestic violence. The Constitution and laws of the United States made in pursuance thereof and all treaties are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The people of the United States, as a political entity, constitute the independent sovereign. Whatever this sovereignty ordains by constitutional amendments becomes the supreme law of the land from which there is no appeal because there is no higher power. The people of the states, respectively, constitute parts of the greater sovereignty; they are dependent sovereignties, represented in all international and interstate affairs and in war by the paramount government of the whole people of the United States. Mr Chief Justice Taney, speaking for the Supreme Court, said:

4 Penhallow v. Doane's Admr's, 3 Dallas 54.
5 Article IV., Section 4.
6 Article VI., Paragraph 2.
"When the present United States came into existence, under the new Government, it was a new political body, a new Nation, then for the first time taking its place in the family of nations."

Mr Justice Miller, speaking of the establishment of the Federal Constitution, said: "It was then that a Nation was born."

"The whole is greater than its parts" is a truism which applies with full force to the sovereignty of the United States. Speaking through that learned jurist, Mr Justice Story, the Supreme Court said:

"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States. There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle."

This scheme of a consolidated government was recognized by Mr Patrick Henry, perhaps the ablest, certainly the most eloquent, opponent to the adoption of the preamble of the Constitution. In the constitutional convention of Virginia he said:

"And here I would make this inquiry of those worthy characters who composed a part of the late Federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the

7 Scott v. Sanford, 19 How. 293, 441.
8 Miller on the Constitution, p. 83.
9 Martin v. Hunter's Lessee, 1 Wheaton 304, 324.
danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, what right they had to say, We the people? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, We the people, instead of, We the States?"10

In view of the plenary sovereignty of the people of the United States, it is vital to the permanency of our dual form of government that this unlimited sovereignty may not unwittingly, or through ignorance of the issue, by constitutional amendments, disturb the true balance of power by vesting in the Federal Government powers which, under the general scheme of the dual government, belong to the state governments. To say the least, the supreme sovereignty should not draw to itself the local or domestic powers without having full knowledge of, and acting intelligently upon, such proposals.

Constitutions are legislation by the sovereign, not by the legislatures created by the sovereign to legislate upon municipal affairs. Mr Justice Patterson answers the question "what is a constitution," in striking language:11

"It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand."

Mr Bryce says:12

"When we talk of a Constitution, of a State or Nation, we mean those of its rules or laws which determine the form of its government and the respective rights and duties of the government towards the citizens, and of the citizens towards the government."

Mr Cooley says:13

"A Constitution is "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."

10 Elliott's Deb., Vol. 3, p. 22; Jameson, p. 44.
11 Vanhorne's Lessee v. Dorrance, 2 Dallas 304, 308.
12 American Commonwealth, p. 350.
Mr Jameson says:  

By the Constitution of a commonwealth is meant primarily its makeup as a political organization, that special adjustment of instrumentalities, powers, and functions by which its form and operation are determined.

The people of the United States, therefore, acting for the entire territory of the United States, may prescribe by their Constitution the form and jurisdiction of every government within the territory. The governments are the creatures of the sovereign. Mr Justice Patterson, in the case cited, says:

"What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The other one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move."

If we may quote again from Mr. Justice Story in the case cited, where it is said:

"As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."

The Federal Government guarantees to the states a "republican form of government," and the "form" is a political question "solely committed by the Constitution to Congress."

Mr Chief Justice Marshall, speaking for the Supreme Court, said:

"That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness is the basis on which the whole American fabric has been erected."

14 Constitutional Conventions, Sec. 63.
16 Marbury v. Madison, 1 Cranch 137, 176.
Having now before us in clear review the general scheme of our government, we approach the question whether the present method of changing the fundamental and paramount law of the land should be changed. The people of the United States have the power to change the Constitution by any method they adopt. This is not denied. But the question now presented is whether the present method is the one that should prevail in the future, or should we return to the procedure followed in the establishment of the original Constitution. The method pursued in the adoption of the original Constitution is well stated by Chief Justice Marshall:

"The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. * * * * * * * From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity."

By the method pursued in the adoption of the original Constitution there was a referendum to the people. With a full knowledge of the Constitution proposed the people elected representatives to the state constitutional conventions. The delegates chosen represented the views of the people and acted for them. It was through independent bodies, without succession, that the Constitution was proposed and adopted.

In providing for amendments, Article V of the Constitution reads:

17 McCulloch v. Maryland, 4 Wheat. 316, 403.
"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

There are two methods of proposing amendments to the Constitution: first, the Congress, whenever two-thirds of both Houses may deem it necessary, may propose amendments; and, second, on application of the legislatures of two-thirds of the several states the Congress shall call a convention for proposing amendments. There are also two methods of acting upon proposals: first, ratification by the legislatures of three-fourths of the several states; and, second, by conventions in three-fourths thereof, as the one mode or the other may be proposed by the Congress. The second method of proposing and adopting amendments follows the procedure in the establishment of the original Constitution. The method of proposing and ratifying by legislative agencies—the Congress and the legislatures of the several states—was an innovation. The reasons for this innovation are not clearly nor satisfactorily stated in the debates. It may have been a compromise with those who, like Patrick Henry, thought the Constitution of the United States should be the work of the states; or, the expense and difficulty in travelling long distances at that time may have influenced the convention in inserting this provision in Article V. Whatever may have been the reasons then that moved the convention, the question now is, Should this method be continued under present conditions?

A study of the debates in the state constitutional conventions which adopted the original Constitution clearly shows that action by legislative bodies in calling conventions, proposing and adopting amendments, was not ordinary legislation by legislative bodies. As stated by a speaker in the Virginia convention of 1829:
"No one ever supposed that the Acts to take the sense of the people, and to organize a Convention, were Acts of ordinary legislation; or, properly speaking, Acts of legislation at all, as little so as an election by that body of any officer. * * * The truth is, the action of the ordinary legislature on this subject * * * is not of the character of ordinary legislation. It is in the nature of a resolve or ordinance adopted by the agents of the people, not in their legislative character, for the purpose of collecting and ascertaining the public will, both as to the call and organization of a Convention, and upon the ratification or rejection of the work of a Convention."13

But the fact is that the same pressure and considerations which operate in securing ordinary legislation are present and cogent in securing proposals and ratification of amendments to the Constitution. Where the proposal and the ratification are by legislative bodies it cannot be said that the people, with a full knowledge of the amendments suggested and proposed, have in any sense acted directly upon the amendments proposed. The members of a congress proposing an amendment to the Constitution were not elected by the people with reference to such action. Nor were the members of the state legislative bodies elected by the people with reference to representing the people upon any proposed amendment to the Federal Constitution. The act of ratifying, under this method of amending the Constitution, is clearly the act of legislative bodies acting, not in the capacity of legislators, but, theoretically, as delegates of the people to a constitutional convention. But, as already noted, the action of the people in electing delegates to constitutional conventions has reference to specific needs or demands for changes in the fundamental law. The representatives are chosen upon consideration of their views, or political wisdom, regarding amendments suggested or proposed which have been discussed and considered by the people.

When we consider the fact that grave changes in the Federal Constitution may result in taking from the states powers which have always been considered local and domestic,

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wholly under the jurisdiction of the state governments, and vesting such powers in the federal government, it is apparent that the subject should receive full and intelligent consideration by the sovereign people. When jurisdiction of a matter has been claimed by Congress, but not sustained by the courts as within constitutional authority, such jurisdiction may be secured through a constitutional amendment proposed by Congress and ratified by the legislature of three-fourths of the states; and such action, perhaps disturbing the true balance of power in the dual government, is secured without any direct action by the people and by pressure and practices not unfamiliar in securing ordinary legislation. Take for illustration the 18th amendment—and I am not here discussing the merits of that amendment—it had been decided in many cases that the regulation of the manufacture, sale, and transportation in intrastate commerce of liquors for beverage purposes was exclusively within the control of the states. The subject was clearly within the police power of the states. Congress could and did, under the Interstate Commerce Act, exclude from interstate commerce liquor when consigned to states that had forbidden its manufacture and use but in so doing the court expressly recognized that Congress had no power to prevent the manufacture and sale within a state. The only way in which the federal government could secure jurisdiction over the manufacture and sale within a state was by an amendment to the federal constitution vesting the control of this subject in the federal government. Congress therefore proposed an amendment, which was adopted by the legislatures of three-fourths of the states, and by that act the federal jurisdiction was extended to, and the states' jurisdiction was withdrawn from, this subject. It will not be claimed that the members of

Congress who proposed this amendment were elected by the people with reference to such action; nor can it be shown that the state legislators who voted to ratify the amendment were elected by the people with reference to taking such action. By this I do not mean that the subject of prohibition was not publicly discussed or that the 18th amendment was surreptitiously obtained or secured, but the members of the legislative bodies proposing and ratifying the amendment were not elected with a view of expressing the wish of the people upon this question. It may be doubted whether this amendment would have been adopted if the people had voted directly upon it. While the majority of the people of the states may have been, and I think were, in favor of prohibition, it is very doubtful whether they would have voted to transfer the jurisdiction of that subject from the states to the federal government. What was accomplished with reference to the adoption of the 18th amendment may be accomplished with reference to any subject now under the police power of the states. In the child labor cases the Supreme Court, speaking through Mr Justice Day and denying the power of Congress to exclude from interstate commerce products produced by child labor, said:

"The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

But this subject could be taken from the states by an amendment to the Federal Constitution proposed by Congress and adopted by the legislatures of a requisite number of states without any direct or intelligent action by the people. This is also true of various matters about which reforms are proposed and insisted upon by groups of people. In a very able brief, filed in the Supreme Court of the United States in the cases involving the 18th amendment by Hon.

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22 Hammer v. Dagenhart, 247 U. S. 251, 276,
Elihu Root, William D. Guthrie and associates, insisting that Article \ does not authorize legislative bodies to adopt amendments to the Federal Constitution which would take away the police power of the states, it is said:

"If this amendment be valid, the principle which it embodies and the tendency which it establishes and legalizes would authorize the most far-reaching and revolutionary alterations in our governmental system. The right to manufacture, sell and transport in local or intrastate commerce tobacco, condiments, coffee, grain, meat, cotton, or any other products, which three-fourths of the several States at any time deem objectionable, could then unquestionably be prohibited by constitutional amendment. The right of the States to establish and enforce social distinctions between the races and prevent their intermarriage, which a number of our States firmly believe vital to their peace, order and happiness; the right of the States to regulate any other domestic relation; the right of the States to regulate strikes and lockouts; the right of the States to levy and collect their own taxes for their own purposes; the right of the States to forbid the use of child labor or regulate the hours of labor in the factories within their respective borders; the right of the States to enact employers' liability and workmen's compensation laws for the benefit of their inhabitants,—in a word, the entire right of each of the States to regulate the life, conduct and intrastate affairs and business of its citizens in accordance with its own needs and its own views—may all be destroyed by the action of two-thirds of a quorum of both Houses of Congress and the concurrence of the three-fourths of the legislatures of the States, representing it may be a minority of the people of the United States."

I am not suggesting that there is an immediate danger that these sweeping changes will be proposed, or if proposed ratified by the requisite number of state legislatures, but am simply stating the possibility of changes by constitutional amendment which, as Mr Justice Day states, would have the effect of eliminating the power of the states over local matters and "thus our system of government be practically destroyed."

We cannot shut our eyes to the fact that, while proposing or ratifying an amendment to the Constitution is not a legislative act, the influences which secure legislative action are brought to bear in securing proposals and ratification of amendments to the Federal Constitution. If we consider
the action of political parties upon this subject we shall find, without doubt, that an amendment to the Constitution is not a major consideration in electing representatives, either to Congress or to the state legislatures. The selection of a candidate favorable to an amendment is secured by a minority group in many, if not in most, cases. Take, for example, a district where there are 40,000 legal voters nearly equally divided between the two great parties. The interest of a group of persons leads to a union of 5,000 voters in such a district in favor of a particular amendment. To these voters the amendment to the Constitution is of paramount importance over all other political questions at the election. The representatives of this group offer to cast this block of votes to either party, regardless of all other questions, if a representative is selected who will favor the amendment. Without considering or questioning the methods of the party leaders the proposition is accepted by one party and it puts up a man who is in favor of the amendment and he is elected. It cannot be said that in that district there were a majority of the people in favor of the amendment. Five thousand voters held the balance of power between the two great parties and turned the election by their votes. Bolshevism is "a rule by a minority." Changing the fundamental law by the action of small groups in election districts is a rule by minorities. Such rule is in direct opposition to, and destructive of, our scheme and theory of government. No matter how good the cause, "They that go about by disobedience to do no more than reforme the commonwealth shall find that they do thereby destroy it." This method of securing representatives is increasing. It was the boast of the great labor leader that labor secured the defeat or election of fifty members of Congress at the last general election. How was this done, by open debate? No, by the solid labor vote, in Congressional districts, acting solely with reference to its interest and disregarding all other issues. This same method by

23 Hobbs, Leviathan.
well organized groups may secure representatives in Congress and state legislatures who, under the present method, may obtain the proposal and ratification of any amendment to the Federal Constitution, transferring from the states to the federal government powers not heretofore vested in Congress. These movements or reforms, as they are called, may extend to subjects and produce results under the present method of amending the Constitution, which could not be obtained if an appeal had to be made to the popular vote.

Another objection to the present method is that legislators are men who, in most cases, are making a career of public life. These legislative bodies are continuing institutions and their members are seeking reelection. It is a well known fact, and boasted of by some reformers, that members have been compelled to vote upon certain questions by threats that if they did not so vote, groups of voters in their districts would defeat their reelection. Such influences cannot be brought to bear successfully upon delegates in a constitutional convention. The convention has no succession. The delegates are reasonably independent of such influences and considerations which do, more or less, affect members of a legislative body. A member of a state legislature known to have voted against his personal convictions upon the ratification of the 18th amendment was asked why he did so and he replied that he was not prepared to face political bankruptcy. These are modern developments in our political life and such influences should not be permitted to affect so serious a proposition as the adoption of amendments to the Constitution of the United States which may materially change the balance of power in our dual system of government.

It cannot be doubted that constitutional law, like ordinary legislation, must keep pace with economic and social changes within the nation. The Constitution should not be a fetish, but fundamental law subject to change and amendment by its creator, when changes are required to

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See article entitled, Group "Direct Action" on Congress, by Mr. George Perry Morris, Review of Reviews, September, 1920.
properly meet new social and economic conditions. Even the construction given to parts of the Constitution by the Supreme Court of the United States may render those parts unsatisfactory to the people, and whether the provisions as construed are to continue may be a vital question for referendum.

It may be that there should be constitutional conventions held at regular periods, say every ten years after the taking of the census, for the purpose of determining whether amendments or changes in the Constitution are required.

Other objections can be stated to the use of legislative bodies in proposing and ratifying amendments to the Federal Constitution, but enough has been said to open the discussion as to whether the time has not come when we should amend Article V and provide that proposals for amendments be by a constitutional convention duly called to consider this subject, composed of delegates elected by the people of the various states, and that proposals by such conventions should be submitted to the people in each state for a direct vote thereon, giving a chance to adopt or reject any amendment or all the amendments proposed. We now elect our senators by popular vote. Why should not amendments to the Federal Constitution be voted upon by the people as are amendments to state constitutions? We have general elections at stated periods and the people's will can be expressed upon proposed amendments with very little additional expense. The Constitution was ordained by the people of the United States; the form of government and the distribution of sovereign powers in this dual government was determined by them in the exercise of their unlimited sovereignly, and no change should be made in the fundamental law without their direct and well-informed act

Charles Willis Needham.

Washington, D C., January, 1921.