effect, that effect would seem to have been to encourage the practice of shooting at sight, which is neither morally nor socially an improvement on duelling, though apparently exempt from these constitutional penalties.

New York has been so much exercised on the subject of bribery and corruption, as to declare (amendments of 1874), not only that every member of the legislature and every officer shall take an oath that he has given nothing as a consideration for any vote received for him (amendment to Art. xii. § 1), and that the legislature shall pass laws excluding from the suffrage all persons convicted of bribery or of any infamous crime (amendment to Art. ii. § 2), but also (amendment to Art. xv. §§ 1 and 2) that the giving or offering to or receiving by an officer of any bribe shall be a felony. The recent constitutions of North Dakota, Montana, and Wyoming declare log-rolling to be bribery. South Dakota requires her legislators and officers to swear that they have not received and will not receive a free pass over a railroad for any vote or influence they may give, while Kentucky deprives of office (*ipso facto*) any legislative public officer or judge who accepts such a favour. And lobbying, which is openly practised in every building where a legislature meets, is declared by California to be a felony, and by Georgia to be a crime.

challenged, or who shall be second to either party, or shall in any manner aid or assist in such duel, or shall be knowingly the bearer of such challenge or acceptance; but no person shall be so disqualified by reason of his having heretofore fought such duel or sent or accepted such challenge, or been second in such duel, or bearer of such challenge or acceptance" (Constitution of 1830, Art. iii. § 12, repeated in Constitution of 1850, Art. iv. § 17). In her Constitution of 1870 Virginia is not content with suggesting to the legislature to disqualify duellists, but does this directly by Art. iii. § 3. Seventeen Constitutions now declare duellists disqualified for office, and nine others add a disqualification for the franchise. Nearly all are Southern and Western States. Kentucky (Const. of 1891) requires all officers, members of the General Assembly, and persons being admitted to the bar to take an oath that they have not fought a duel since the adoption of the Constitution, nor aided any person in so offending.

CHAPTER XXXIX

DIRECT LEGISLATION BY THE PEOPLE

THE difficulties and defects inherent in the method of legislating by a Constitution are obvious enough. Inasmuch as the people cannot be expected to distinguish carefully between what is and what is not proper for a fundamental instrument, there arises an inconvenient as well as unscientific mixture and confusion of private law and administrative regulation with the frame of government and the general doctrines of public law. This mixture, and the practice of placing in the Constitution directions to the legislature to legislate in a certain sense, or for certain purposes, embarrass a legislature in its working by raising at every turn questions of its competence to legislate, and of the agreement between its acts and the directions contained in the Constitution. And as the legislature is seldom either careful or well-advised, there follows in due course an abundant crop of questions as to the constitutionality of statutes, alleged by those whom they affect prejudicially in any particular instance to be either in substance inconsistent with the Constitution, or such as the legislature was expressly forbidden by it to pass. These inconveniences are no doubt slighter in America than they would be in Europe, because the lawyers and the judges have had so much experience in dealing with questions of constitutional conflict and *ultra vires* legislation that they now handle them with amazing dexterity. Still, they are serious, and such as a well-ordered government ought to avoid. The habit of putting into the Constitution matters proper for an ordinary statute has the further disadvantage that it heightens the difficulty of correcting a mistake or supplying an omission. The process of amending a constitution even in one specific point is a slow one, to which neither the legislature, as the proposing author-

ity, nor the people, as the sanctioning authority, willingly resort. Hence blemishes remain and are tolerated, which a country possessing, like England, a sovereign legislature would correct in the next session of Parliament without trouble or delay.

It is sometimes difficult to induce the people to take a proper interest in the amendment of the Constitution. In those States where a majority of all the qualified voters, and not merely of those voting, is required to affirm an amendment, it often happens that the requisite majority cannot be obtained owing to the small number who vote.[1] This has its good side, for it is a check on hasty or frequent change. But it adds greatly to the difficulty of working a rigid or supreme Constitution, that you may find an admitted, even if not very grave evil, to be practically irremovable, because the mass of the people cannot be induced to care enough about the matter to come to the polls, and there deliver their judgment upon it.

These defects are so obvious that we may expect to find correspondingly strong grounds for the maintenance, and indeed the steady extension of the plan of legislating by and through a Constitution. What are these grounds? Why do the Americans tend more and more to remove legislation from the legislature and entrust it to the people?

One could quite well imagine the several State governments working without fundamental instruments to control them. In a Federal government which rests on, or at least which began from, a compact between a number of originally separate communities, the advantages of having the relations of these communities to one another and to the central authority defined by an instrument placed beyond the reach of the ordinary legislature, and not susceptible of easy change, are clear and strong. Such an instrument is the guarantee for the rights of each member placed above the impulses of a chance majority. The case is quite different when we come to a single homogeneous community. Each American State might now, if it so pleased, conduct its own business, and govern its citizens as a commonwealth "at common law," with a sovereign legislature, whose statutes formed the highest expression of popular will. Nor need it do so upon the cabinet system

[1] This happened more than once of late years in Kentucky and Delaware.

of the British colonies. It might retain the separation from the legislature of the executive governor, elected by the people, and exercising his veto on their behalf, and yet dispense altogether with a rigid fundamental constitution, being content to vest in its representatives and governor the plenitude of its own powers. This, however, no American State does, or has ever done, or is likely to do. And the question why it does not suggests a point of interest for Europeans as well as for Americans.

In the republics of the ancient world, where representative assemblies were unknown, legislative power rested with the citizens meeting in what we should now call primary assemblies, such as the Ecclesia of Syracuse or the Comitia of Rome. The same plan prevailed in the early Teutonic tribes, where the assembly of the freemen exercised all such powers as did not belong to the king. The laws of the kings of the Angles and Saxons, the capitularies of Charlemagne, were promulgated in assemblies of the nation, and may be said, though emanating from the prince, to have been enacted by the people. During the middle ages, the assemblies died out, and the right of making laws passed either to the sovereign or to a representative assembly surrounding the sovereign such as the English Parliament, the older scheme surviving only in such primitive communities as some of the Swiss cantons, and the tiny republics of Andorra and San Marino. The first reappearance in modern Europe of the method of direct legislation by the people is, so far as I know, the provision of the French Constitution framed by the National Convention in 1793, which directs that any law proposed by the legislative body shall be published and sent to all the communes of the Republic, whose primary assemblies shall be convoked to vote upon it, in case objections to it have been raised by one-tenth of these primary assemblies in a majority of the departments. In recent times the plan has become familiar by its introduction, not only into most of the cantons of Switzerland, but into the Swiss Federal Republic, which constantly applies it, under the name of Referendum, by submitting to the vote of the people for approval or rejection laws passed by the Federal legislature.[1]

[1] The Swiss Federal Constitution provides that any Federal law and Federal resolution of general application and not of an urgent character, must on the

In Britain the influence of the same idea may be discovered in two phenomena of recent years. One is the proposal frequently made to refer to the direct vote of the inhabitants of a town or other local area the enactment of some ordinance affecting that district: as, for instance, one determining whether a rate shall be levied for a free library, or whether licences shall be granted for the sale, within the district, of intoxicating liquors. This method of deciding an issue, commonly known as Local Option, is a species of referendum. It differs from the Swiss form, not merely in being locally restricted, but rather in the fact that it is put to the people, not for the sake of confirming an Act of the legislature, but of deciding whether a certain general Act shall or shall not be operative in a given area. But the principle is the same; it is a transference of legislative authority from a representative body, whether the parliament of the nation or the parish vestry or municipal council of the town (as the case may be), to the voters at the polls.

The other English illustration may seem far fetched, but on examination will be seen to involve the same idea. It is now beginning to be maintained as a constitutional doctrine, that when any large measure of change is carried through the House of Commons, the House of Lords has a right to reject it for the purpose of compelling a dissolution of Parliament, that is, an appeal to the voters. The doctrine is as warmly denied as it is asserted; but the material point is that many educated men contend that the House of Commons is not morally, though of course it is legally, entitled to pass a bill seriously changing the Constitution, which was not submitted to the electors at the preceding general election. A general election, although in form a choice of particular persons as members, has now practically become an expression of popular opinion on the two or three leading measures then propounded and discussed by the party leaders, as well as a vote of confidence or no confidence in the Ministry of the day.

demand of eight cantons or of 30,000 voters be submitted to popular vote for acceptance or rejection. This vote is frequently in the negative. See Swiss Federal Constitution, Art. 89; and the remarks of M. Ex-President Numa Droz in his *Instruction civique*, § 172. In some cantons the submission of laws to popular vote is compulsory. In Geneva it is *facultatif*. A referendum exists in every canton except Fribourg and the four which retain a Landesgemeinde. See S. Deploige, *Le Referendum en Suisse*, Brussels, 1892. A provision was in 1891 added to the Federal Constitution, whereby 50,000 voters can demand the submission of a proposition to popular vote.

It is in substance a vote upon those measures; although, of course, a vote only on their general principles, and not, like the Swiss Referendum, upon the statute which the legislature has passed. Even therefore in a country which clings to and founds itself upon the absolute supremacy of its representative chamber, the notion of a direct appeal to the people has made progress.[1]

In the United States, which I need hardly say has in this matter been nowise affected by France or Switzerland or England, but has developed on its own lines, the conception that the people (*i.e.* the citizens at large) are and ought of right to be the supreme legislators, has taken the form of legislation by enacting or amending a Constitution. Instead of, like the Swiss, submitting ordinary laws to the voters after they have passed the legislature, the Americans take subjects which belong to ordinary legislation out of the category of statutes, place them in the Constitution, and then handle them as parts of this fundamental instrument. They are not called laws; but laws they are to all intents and purposes, differing from statutes only in being enacted by an authority which is not a constant but an occasional body, called into action only when a Convention or a legislature lays propositions before it.

I have already explained the historical origin of this system, how it sprang from the fact that the Constitutions of the colonies having been given to them by an external authority superior to the colonial legislature, the people of each State, seeing that they could no longer obtain changes in their Constitution from Britain, assumed to themselves the right and duty of remodelling it; putting the collective citizendom of the State into the place of the British Crown as sovereign. The business of creating or remodelling an independent commonwealth was to their thinking too great a matter to be left to the ordinary organs of State life. This feeling, which had

[1] Much importance has come to be attached in England to casual parliamentary elections occurring when any important measure is before Parliament, because such an election is taken to indicate the attitude of the people generally towards the measure, and by consequence the judgment they would pronounce were a general election held. There have been instances in which a measure or part of a measure pending in Parliament has been dropped, because the result of the "by-election" was taken to indicate that it displeased the people.

begun to grow from 1776 onwards, was much strengthened by the manner in which the Federal Constitution was enacted in 1788 by State conventions. It seemed to have thus received a specially solemn ratification; and even the Federal legislature, which henceforth was the centre of national politics, was placed far beneath the document which expressed the will of the people as a whole.

As the republic went on working out both in theory and in practice those conceptions of democracy and popular sovereignty which had been only vaguely apprehended when enunciated at the Revolution, the faith of the average man in himself became stronger, his love of equality greater, his desire, not only to rule, but to rule directly in his own proper person, more constant. These sentiments would have told still further upon State governments had they not found large scope in local government. However, even in State affairs they made it an article of faith that no Constitution could be enacted save by the direct vote of the citizens; and they inclined the citizens to seize such chances as occurred of making laws for themselves in their own way. Concurrently with the growth of these tendencies there had been a decline in the quality of the State legislatures, and of the legislation which they turned out. They were regarded with less respect; they inspired less confidence. Hence the people had the further excuse for superseding the legislature, that they might reasonably fear it would neglect or spoil the work they desired to see done.

Instead of being stimulated by this distrust to mend their ways and recover their former powers, the State legislatures fell in with the tendency, and promoted their own supersession. The chief interest of their members, as will be explained later, is in the passing of special or local Acts, not of general public legislation. They are extremely timid, easily swayed by any active section of opinion, and afraid to stir when placed between the opposite fires of two such sections, as for instance, between the Prohibitionists and the liquor-sellers. Hence they welcomed the direct intervention of the people as relieving them of embarrassing problems. They began to refer to the decision of a popular vote matters clearly within their own proper competence, such as the question of liquor traffic, or the

creation of a system of gratuitous schools. This happened as far back as thirty years ago. Presently they began to wash their hands by the same device of the troublesome and jealousy-provoking question where the capital of the State, or its leading public institutions, should be "located."[1] In New York, the legislature having been long distracted and perplexed by the question whether articles made by convicts in the State prisons should be allowed to be sold, and so to compete with articles made by private manufacturers, recently resolved to invite the opinion of the multitude, and accordingly passed an Act under which the question was voted on over the whole State. They could not (except of course by proposing a constitutional amendment) enable the people to legislate on the point; for it has been often held by American courts that the legislature, having received a delegated power of law-making, cannot delegate that power to any other person or body.[2] But they could ask the people to advise them how they should legislate; and having obtained its view in this manner, could pass a statute in conformity with its wishes.

The methods by which legislative power is directly vested in the American voters are two. One is the enactment or amendment by them of a Constitution. Here the likeness to the Swiss Referendum is close, because the law to be made is first drafted and passed by the convention or legislature (as the case may be) and then submitted to the people. How wide the scope of this method is will be realized by one who has followed the account already given of the number and variety of the topics dealt with by State Constitutions.

The other method is the submission to popular vote, pursuant to the provisions of the Constitution, of a proposal or proposals therein specified. If such a proposal has been first passed by the legislature, we have here also an instance of a Referendum in the Swiss sense. If however the legislature have not given their decision on the proposal, but the popular

[1] This is now the general rule in new constitutions. Washington provides that though a bare majority may settle where the seat of State government shall be, a majority of two-thirds shall be required to change it.

[2] According to the maxim *Delegata potestas non delegatur*, a maxim which would not apply in England, because there Parliament has an original and not a delegated authority.

Judge Cooley says: "One of the settled maxims of constitutional law is that