Historical Side Lights on Some Constitutional Provisions
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During the last three hundred years, a belt about a thousand miles wide, stretching entirely across North America, has been peopled with one hundred and ten million souls. This belt represents the geographical limits of one of the world’s greatest powers. At the beginning of this period the population of this area, both Indian and white, was about five hundred thousand. Since that time a few struggling settlements on the eastern seaboard grew into prosperous colonies which in turn, after throwing off foreign allegiance, have grown in three centuries to that expanse and populousness which the Roman Empire at its height attained only after ten centuries. Many causes have contributed to make the United States in their collective capacity the nation it now is. Among these was that good sense which enabled the inhabitants of the thirteen original states to profit by their own and the experiences of the old world, and which prompted them or their representatives to embody those experiences in the great instrument which so richly deserves the encomiums showered upon it. Whoever scans the notes of the constitutional convention as written down by Madison, Yates, Hamilton and others at the time, is struck with the frequency of reference which the delegates made to the British unwritten constitution and its historical development. They used it as a guide, both negatively and positively. It is my intention in this brief sketch to show a few (and necessarily only a few) historically interesting particulars wherein the framers of the Constitution turned to account and reaped the fruit of England’s political experiences by codifying and inserting them in our basic law. An examination of the notes referred to will show except in one instance an almost unanimous assent to the insertion of the provisions herein discussed.

The Constitution is not the result of purely fortuitous circumstances. Its principles are based on conclusions drawn from wide experience in the affairs to which they relate. The form of it is the result of four months of the most extensive thought bestowed by an assembly of infant America’s most profound thinkers, and its substance is the crystalized wisdom of many centuries. The original instrument as ratified by the several states and put into operation in 1789, and the first ten amendments thereto adopted shortly thereafter, contain many provisions directly traceable in English history. Among these are the provisions requiring bills for revenue to originate in the House; directing the President to give information to Congress concerning the state of the nation; against the suspension of the Writ of Habeas Corpus except in certain cases; against bills of attainder and ex post facto laws; for the definition of treason and a rule of evidence to prove it; against the establishment and maintenance of a state religion and religious tests for public office; for jury trials; for the rights of free speech and free press; for the rights to bear arms and to petition the government and against taking private property without compensation. Owing, however, to the space into which this article must be compressed our discussion will be confined, first, to the historically interesting and kindred provisions against bills of attainder together with the treason clause; second, the provisions against religious tests for office and the establishment of a state religion and third, the clause forbidding,
with certain exceptions, the suspension of the Writ of Habeas Corpus. Except in one instance these clauses are now of historical rather than practical interest, but, as it is said in the Constitution of Illinois "a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty," we hope that this recurrence to some of them will in a measure be beneficial in that respect.

Bills of Attainder.
A bill of attainder is a legislative act which inflicts punishment for the commission of a crime (real or supposed) without judicial trial; and treason, at common law, consisted generally in subversive acts against the government, attempts on the life of the King or the royal family and war against the King in his realms. The theory of the so-called unwritten constitution of England is that the will of Parliament evidenced by an act duly passed is the supreme law of the land. There is consequently no restriction of the power of Parliament preventing the passage of obnoxious laws which in this country would be unconstitutional. But since the time of the last of the Stuarts Queen Anne (1702-1714), Parliament has rarely abused its absolute power. The privilege of the elective franchise has since those days been extended generally to the masses, and if Parliament should now attempt to pass such legislation every member who voted for it would soon lose his seat. The check on Parliament is therefore political rather than judicial. In the days, however, when Parliament was much under the dominion of the throne such laws were of frequent occurrence and were used to rid the prevailing party of its strongest political opponents. Such legislation is not necessarily to be condemned only because of failure of substantial justice in many cases, but because of the tendency that such a mode of justice be used by unscrupulous persons for their own ends. The case of Sir John Fenwick is illustrative of this tendency.

Sir John was one of the conspirators who had plotted to kill William III. There were only two witnesses who had knowledge of the plot and Fenwick's connection therewith. Under the common law rule which was later written into our Constitution, two witnesses were necessary to the same overt act. While he was in prison awaiting trial for high treason, it was noised abroad that his wife and friends had bribed one of the witnesses to leave England. Parliament ordered an investigation which revealed that such was the truth and accordingly some one in the Commons brought in a bill of attainder against Fenwick. In fairness to the members of the then existing Parliament it may be said that a thorough sifting of all the evidence (much legally inadmissible however), against the prisoner was made before the passage of the bill took place. The bill, the last of its kind in England whereby a person was condemned to death, was carried by a narrow margin of thirty-three votes in the Commons and a narrower one in the House of Lords.

There is now no doubt about the accused's complicity in the act of treason attributed to him but the objection of thinking persons (and it was the greatest argument in the defendant's favor on the floor of both houses) is the substitution of a legislative act for a judicial function. Macaulay, in commenting on Fenwick's case, points out the fairness and advisability of a judicial rather than a legislative mode of trial in political cases. "The prisoner is allowed to challenge any number of jurors with cause and a considerable number
without cause. The twelve, from the moment at which they are invested with their short magistracy, till the moment when they lay it down, are kept separate from the rest of the community. Every precaution is taken to prevent any agent of power from soliciting or corrupting them. Every one of them must hear every word of the evidence and every argument used on either side. The case is then summed up by a judge who knows that, if he is guilty of partiality, he may be called to account by the great inquest of the nation. In the trial of Fenwick at the bar of the House of Commons all these securities were wanting. Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was opened, performed both the functions of judge and jury. They were not restrained as a judge is restrained, by the sense of responsibility; for who was to punish a Parliament? They were not selected, as a jury is selected, in a manner which enables the culprit to exclude his personal and political enemies. The arbiters of his fate came in and went out as they chose. They heard a fragment here and there of what was said against him and a fragment here and there of what was said in his favor and during the progress of the bill they were exposed to every species of influence. In the debates arts were practised and passions excited which are unknown to well constituted tribunals but from which no great popular assembly divided into parties ever was or ever will be free. If the life of the most worthless man could be sported with thus, was the life of the most virtuous man secure?"

To provide against such a species of legislative justice, the framers of the Constitution defined therein the crime of treason and wisely inserted the clause against bills of attainder. To see how great that foresight was, one has only to consider the trial of Aaron Burr as it was before a regularly constituted tribunal and speculate what it might have been on the floor of Congress if no such provision had existed in the Constitution when his trial took place.

The Free Exercise of Religion.

Government, some one has said, exists primarily for the purpose of keeping the peace, for the purpose of compelling citizens to settle their differences and disputes by arbitration instead of settling them by blows, for the purpose of compelling them to supply their wants by industry instead of supplying them by rapine. These, together with some measures of general convenience, are recognized as the principal legitimate spheres of government and the regulation of the religious beliefs of the individual is nowhere mentioned among them. The religious test clause and the clause against the establishment of a state church were therefore put into the Constitution to guard the nation against many of the political crises which distracted the English people from the reign of Henry the Eighth (1509-1547) until comparatively recent times.

It will be remembered that during Henry's reign, the king assumed, after his quarrel with the Pope, the latter's powers over the Catholic Church in England. As a result of this move the theoretical head of the church and the state became the same person, the King. Since that time religion has played a conspicuous part in many of England's political struggles. Now a Protestant ruler would be on the throne and then a Catholic would succeed
him. The Protestant would endeavor to get his subjects as far away from
the Church of Rome as possible while the Catholic would endeavor to heal the
breach made by Henry's action. In any event legislation against non-con-
formist subjects (non-conforming to the King's own faith) would be one of
the principal things discussed upon the accession of a new ruler. In conse-
quence of this so-called union of church and state under the executive branch
of the nation, men lost their political offices regardless of personal fitness,
their fortunes and not infrequently their lives, for no other reason than non-
adherence to the king's belief in purely speculative matters. To separate
religion and politics and to keep the former out of consideration by the gov-
ernment, the Convention decreed that "no religious test shall ever be recog-
nized as a qualification to any office or public trust under the United States"
and that "Congress shall make no law respecting the establishment of religion
or prohibiting the free exercise thereof." Since no good reason has ever been
advanced why a man adhering to one faith cannot perform the duties of public
office and decide affairs of state as well as a man adhering to another, these
clauses are eminently beneficial in securing to the Federal Government the
talents of many intelligent persons who otherwise might be unnecessarily
excluded. This country in consequence has an ideal administration composed
of persons of all sects to govern a people of all sects and, what is more im-
portant, it has an egis against a prolific source of civil discord.

Habeas Corpus.

We come now to a consideration of the habeas corpus suspension clause
which, unlike the former clauses discussed, has both an historical and a prac-
tical interest. The Writ of Habeas Corpus is generally conceded to be the
greatest and most important remedy known to the law. As far back as the
time of the signing of Magna Charta (1215) there existed certain remedies
whereby a person unlawfully deprived of his liberty could be released from
restraint. During the period from Edward III (1326-1377) to the time of
Henry VII (1485-1509) the remedy analogous to our present one was gen-
erally held to be applicable only where one subject detained the person of
another subject and did not apply in cases where a subject was restrained of
his liberty by order of the king. In the reign of Henry VII the Writ was
used successfully even in cases of the latter class. From that time down to
the time of Charles I the constitutionality of the remedy was admitted but
in Charles' reign (1625-1649) certain judges in the Court of King's Bench held
the Writ inapplicable as against the order of the king. Such decisions were
mentioned as grievances in the memorable Petition of Rights (1628) ad-
dressed to Charles I. The first statute on the subject was passed in 1640 on
the eve of the great Rebellion but after the restoration of the House of
Stuart in 1660, when occasion arose the king, Charles II, by judges who
were his creatures, managed to evade it. Finally after the commitment of
one Jenkes by Charles' order in 1676 for an alleged turbulent speech, Par-
liament passed the now famous act by which the right was fully set forth
and secured and the means of obtaining it particularly described. This act
applied only to cases wherein the accused was charged with a crime but in the
reign of George III (1760-1820) the act was amended (1816) to provide relief
in all cases where a person was unlawfully deprived of his liberty.
Granting to the general government, even in a restricted class of cases the power to suspend this valuable right which took centuries to secure, was a very serious matter with the citizens of the thirteen original states. The worth of the right to the people at that time and the value placed on it by them are evidenced by the storm of protest which broke loose against the suspension clause when the Constitution was submitted for ratification. It gave no little difficulty to its advocates in the Convention and in the debates which followed. There is now some agitation for a substantial curtailment of the privileges given persons under the various acts in this country. It is to be admitted that in the large centers of population some, or even we might say, much abuse is made of the writ, yet, nevertheless the safety of many innocent persons is secured against unreasonable detention by the operation of this salutary remedy.

In conclusion it may be said that, since the rights briefly discussed here are firmly placed in the supreme law of the land and since the controversies out of which they arose are long since forgotten save by a few, one would suppose all to be as well as far as they are concerned but, unfortunately, such is not the case. There are certain forces now at work (fostered no doubt by well intentioned persons in most instances) attempting to undermine the very instrument which secures them. We are not bigoted enough to say (as some of its most ardent advocates do) that the Constitution of the United States is well nigh perfect, infallible, and will never need correction to meet future exigencies; or that a time will never come when it will be useless, but we do say this: to abolish the Constitution and to set up another and untried form of government without the rise of an emergency greater than any heretofore encountered in our national history or to make any further amendments thereto without full consideration of the expediency of so doing, would be the height of political and social folly.

Every lawyer, every law student and every other citizen ought to make some effort to understand the Constitution's history and to be familiar with the principles underlying it, to the end that when alterations or an entire change are deemed necessary intelligent discussions may be had concerning them in place of the misapprehensions which are now so prevalent.

SENIORS STAGE RADIO DEBATE.

The second radio debate to be held by Chicago-Kent College of Law took place on Friday, March 20, when two-seniors, Helmer Hansen and William M. James, debated the question, "Resolved: that capital punishment should be abolished." The debate was held at WMAQ, the Chicago Daily News station. Hansen upheld the affirmative side of the question and James the negative. While no decision was rendered, those who were on the air were asked to mail in post cards voicing their sentiments. As yet the returns have not been tabulated.