HIS MAJESTY KING EDWARD VII

W. & D. Downey, photo, London *Eng. by H. F. Davey*

The King

His Prerogatives and Disabilities

By Michael MacDonagh

THE King stands at the head of Parliament. According to the theory of the Constitution, it is his Great Council which he summons to deliberate with him on the affairs of the nation; and a Bill cannot become an Act of Parliament, or, in other words, the law of the land, even though it has passed through the House of Commons and the House of Lords, until it has received his Royal assent. But beyond this legislative power which the King possesses as a separate and independent member, or head, of the Legislature, his Majesty, by right of the prerogative of the Crown, is the supreme executive authority of the land.

And what are the exclusive rights, privileges, and powers which the prerogative confers upon the King? Mr. Pickwick, it will be remembered, was arrested at Ipswich, for contemplating a breach of the peace by fighting a duel. "I believe duelling is one of his Majesty's most undoubted prerogatives, Mr. Jinks?" said the mayor of the town to his clerk when the case came before his worship. "Expressly stipulated in Magna Charta, sir," replied Mr. Jinks. "One of the brightest jewels in the British Crown wrung from his Majesty by the barons, I believe, Mr. Jinks?" said the Mayor. "Just so, sir," assented Mr. Jinks. "Very well," continued the mayor, drawing himself up proudly, "it shall not be violated in this portion of his Majesty's dominions." Now, though the privileges of the Royal prerogative do not include the exclusive right of fighting duels, they are, nevertheless, extremely varied and peculiar. Walter Bagehot, an acute and powerful thinker, attempts in his illuminative work "The English Constitution" to enumerate some of the powers of the Sovereign as the pre-eminent executive authority. Writing of Queen Victoria he says:

She could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the general commanding-in-chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a "university"; she could dismiss most of the civil servants, and she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the realm; could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations.

It would seem, therefore, that the King is, politically, omnipotent. Indeed, if his Majesty were to exercise the extreme, but undoubted, rights of his prerogative, a monstrous and grinding despotism would be established in this ancient home of freedom, without violating the letter, at least, of the existing law. Yet extraordinary as are the powers of the King, as set forth by Bagehot, he possesses other rights and privileges of which few of his subjects, perhaps, are aware, and possibly not even his Majesty himself fully realises the rare and wonderful attributes with which he has been endowed by the Constitution.

The law, for instance, declares that the Sovereign can never be under age. In other words, the law does not recognise the incapacity of an infant Sovereign to exercise the Royal prerogative. Lord Eldon, explaining this dictum of the law during a debate in the House of Lords in 1830, on the question of appointing a Regency in the event of King William's death, until the Princess Victoria, the heir to the throne, was eighteen years of age, said: "If an

infant Sovereign were to be on the throne whose head could not be seen over the integument which covers the head of my noble and learned friend on the Woolsack he would be supposed to have as much sense, knowledge, and experience as if he had reached the years of three score and ten." The law also seems to ascribe immortality to the Sovereign. "The King never dies," is a very ancient maxim of the Constitution. "The King never dies," writes Sir William Blackstone, the eminent commentator on English law. "Henry, Edward, or George may die; but the King survives them all." Thus we find that it is to the Sovereign, as ruler, and not to the Sovereign, as human being, that the law denies the privilege of death. Not for an instant is the throne vacant. The moment the Sovereign dies that moment the reign of his successor begins. "The King is dead; Long live the King." Immediately after the death of George III., which took place at Windsor, at 8 o'clock in the evening of January 28, 1820, a herald appeared at one of the windows of the castle overlooking the town, and, after a fanfare by two State trumpeters to arrest the attention of wayfarers, he cried aloud: "The King is dead; Long live the King!" This ceremony was dispensed with at the deaths of George IV., William IV., and Victoria.

The law also ascribes to the King perfection in deed and thought. One of the most ancient maxims of our Constitution is: "The King can do no wrong," and Blackstone commenting on it, writes: "The King is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." As in theory the King has never been supposed capable of committing any crime or misdeed whatever, should he, in practice, being human, do a wrongful act there is no proceeding known to the law by which he could be made personally responsible. "We are therefore," says the courtly Blackstone, "out of reverence and decency to forbear any idle inquiries of what would be the consequence if the King were to act thus and thus, since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity, and therefore has made no provision to remedy such a grievance." So that if the Sovereign were, we will say, to forge a cheque he could not be brought to trial, or if he were to defame any of his subjects he would not be liable to an action for damages.

The law says that the wrong-doing of a servant is the wrong-doing of the master. But there is an exception made in the case of the King. As his Majesty can do no wrong it is assumed that no wrong either can be done by his servants in the execution of their duty. This is true, at least, to the extent that if a merchant-vessel was wrecked or damaged by the negligent management of a King's ship or a man-of-war, there is no redress. In the case of "Tobin *v.* the Queen," damages were sought for the loss of a schooner which was burned by the captain of a man-of-war under the mistaken impression that it was engaged in the slave trade. The Court dismissed the action on the ground that the maxim "the King can do wrong" was true in the sense that the Sovereign is not liable to be sued, civilly or criminally, for a supposed injury. But this immunity is not extended to those who may do wrong by the King's command. No one can plead the orders of the King in defence of any act not otherwise justifiable by law. This arises out of the abolition, by the Bill of Rights passed in 1689, of the disposing power of the Crown which under the Stuarts was made the cover of all sorts of injustices. "There is no power in the Crown," says the Statute, "to dispense with the obligation to obey a law." Therefore, though the King himself cannot be brought to trial as a criminal or a misdemeanant, any person who acted illegally at his command would be liable to criminal or civil proceedings according to the legal maxim that all persons engaged in an outrage are individually responsible.

"A subject, so long as he continues a subject, has no way to oblige his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract." So writes Samuel Puffendorf, the great Saxon jurist in his "Law of

Nature and Nations." However, though there is not in this country any means at the disposal of a subject to oblige the King to meet his liabilities, there is a procedure known as "Petition of Right," by which a remedy is provided in case the Sovereign should be in wrongful possession of real or personal property, or of money due by him to a subject, either by way of debt, or damages on breach of contract. The first step taken by the subject in such a matter is to present a petition to the Home Secretary setting forth the alleged cause of action. The Secretary of State then informs the King, and if his Majesty orders the petition to be endorsed with the fiat, "let right be done," the suit proceeds in the courts in the ordinary way, as between subject and subject, not upon compulsion, however, but as a matter of grace. Another disability of the King, arising, of course, from his Royal dignity, is that he cannot appear as a witness in a court of law. He is, therefore, unable to give evidence in any cause in which he is a party. But even if judgment be obtained against the King his goods cannot be distrained or taken in execution.

His Majesty is not burdened by any taxes or rates. He is never troubled with the formidable yellow form issued annually by the Inland Revenue Department asking searching questions about the amount of one's income, with a view to taxation; and he is in blissful ignorance of the half-yearly demand of the parish overseers for local rates in respect of his palaces. The Sovereign is exempt from taxation, because the revenue of the realm being his—in theory, now, formerly in reality—it would be useless and ridiculous for him to tax himself. His Majesty is also exempt from toll. In the reign of George III. a toll was charged for crossing Hampton bridge. One day there was a Royal hunt on Hounslow Heath. The stag swam across the river, and the Royal hunting party made for Hampton bridge. Seeing them approaching at a furious canter and being unaware that the King was with them the toll-collector closed the gates. "The King! the King!" shouted the hunters angrily, and the collector at once opened the gates and allowed them to pass. A few minutes later another party appeared, and seeing the gates shut cried out: "The King! the King!" But the collector this time was determined to have his toll. "I've let King George through; God bless him," he said, "and I know no other King in England. If you have brought out the King of France hang me if I let him through without the blunt." Suddenly the King himself appeared in the party; and the toll-collector with many humble apologies flung the gates open. Owing to the delay the stag was lost, and the King in high dudgeon sent an attendant to the collector for an explanation of his conduct. The collector stated that a guinea had always been paid, when the Royal hunt passed over the bridge, and that he had allowed the first party to pass without question, thinking that the King was with them. The King satisfied with the explanation directed that toll should be paid for forty of his attendants. Driving across the bridge a few days later George let down the carriage window, and laughing heartily, cried out to the toll-keeper: "No fear of the King of France coming to-day."

None of the King's household or menial officers or servants employed in waiting or attending on the Royal presence can be arrested, or taken in execution in civil actions, unless the permission of the Board of Green Cloth, which regulates the duties of Royal officials and servants, is first obtained. This privilege was not instituted for the personal benefit of these servants, but in order that the Sovereign may not be put to inconvenience, and also as a mark of respect to the throne. There is a case in which a warrant for the arrest of a Royal servant who was also in trade, and contracted in the course of his business a debt which he objected to pay, was refused by the Court on the ground that he was privileged from arrest. Royal servants are also exempted from serving on juries. The palaces also participate in exemptions of a similar nature. No arrest or anything in the nature of a judicial process can be executed within a Royal residence unless by consent of the Board of Green Cloth. To strike a person in the King's palace, and to draw blood was formerly punishable by the

loss of the offender's right hand and imprisonment for life.

Another prerogative of the King is that his consent must be obtained before any of the Royal family can marry. Formerly it was high treason for any man to contract marriage, without the approval of the Sovereign, with the Sovereign's children, or reputed children, his sisters, or aunts, or the children of his brothers and sisters. Under the Royal Marriage Act of 1772, in the time of George III., a marriage with any of the King's near relations, unless with his Majesty's consent and approbation is null and void. This statute was passed because of the marriages of the Duke of Gloucester with the widow of Lord Waldegrave, and the Duke of Cumberland with the widow of Colonel Horton. Before that time, however, it had been decided by the judges that the King's sanction was necessary to a marriage with one of the Blood Royal. In the year 1718, George I. commanded the Lord Chancellor to obtain the judgment of the judges of the High Court upon the following question: "Whether the care and approbation of his Majesty's grandchildren when grown up did belong of right to his Majesty as King of the realm or not?" Six of the twelve judges answered the question in the affirmative. Charles II. had obliged his brother, the Duke of York (afterwards James II.) to allow the young princesses, his daughters, to be brought up in the Protestant Faith; and arranged the marriage between the eldest, Princess Mary, and the Prince of Orange. "Happy it was for two nations that the King in the marriages of Mary, Queen to William III., and of Queen Anne had his prerogative," said Baron Fortescue Aland in his judgment, "for had the pretended paternal right prevailed the English nation had been for ever undone and our religion destroyed; and we had never seen the many and great blessings we enjoy and are like to enjoy by this family sitting on the throne of Great Britain."

But the matrimonial alliances of the children of the Sovereign must also be approved by the Ministry. In the matter of the disposal by Queen Victoria of the hand of the Princess Louise on the Marquis of Lorne in 1871 the administration of the day were consulted. Gladstone was Prime Minister, and speaking in the House of Commons on Feburary 13, 1871, on the motion that an annuity of £6000 be settled on the Princess for life he said:

"In the resolution which the Queen has taken that the absence of Royal rank shall not of itself, and in every case, form an insuperable bar to the suit for the hand of one of her daughters, she is not acting without the advice of responsible Ministers." This statement was interpreted, in some quarters, to mean that the marriage had really been arranged by the Liberal Government; but, of course, the suggestion was absolutely unfounded. "What I stated," said Gladstone, in a subsequent speech, "was that upon the important question of the deviation from what had recently been the established rule her Majesty had taken the advice of her confidential advisers; and I may as well state that she did so about eighteen months ago, and long anterior to the period when the present arrangement was contemplated."

The King's authority over his subjects also raises some curious points. Under the Common Law a subject may leave the country when he pleases or for any reason he pleases, but as it is the duty of every subject "to defend the King and his realm" his Majesty has power to prevent any subject leaving the kingdom, and to command the immediate return of any subject from abroad. But the King cannot compel a subject to quit the realm. This disability does not cease to operate even in time of war. It is, of course, the duty of every able-bodied man to assist in the defence of the country, but no subject can be forced to leave the kingdom, even to carry on a necessary war. There is no power either in the King to compel an alien to leave the country.

The King has the power of remission of punishment for any crime. This prerogative is based upon the legal dictum that inasmuch as it is the "King's Peace" that is broken by every violation of the law, the King, being himself the offended party, may pardon the criminal. More than that, a

pardon from the Crown can be pleaded when the prisoner is arraigned, and is a complete bar to the indictment. There is only one exception to the exercise of this prerogative. It is provided by the Act of Settlement that no pardon from the Crown is pleadable to an impeachment instituted by the Commons in Parliament. But if, when the impeachment is concluded, a sentence is imposed, the King can exercise the prerogative of pardon. His Majesty, however, cannot interfere in a case of private, as opposed to public, wrong. At the beginning of her reign, Queen Victoria attached her signature to warrants for the execution of condemned criminals; but she soon relegated this unpleasant duty to the Home Secretary. The Queen had the power, of course, to reprieve any and every murderer. She did, in fact, reprieve the first murderer sentenced to be hanged after her accession—a soldier who had a fine record for bravery on active service; but her Majesty rarely, if ever, acted on her own initiative in the exercise of the prerogative of mercy, being content to leave a free hand to the Home Secretary, the Minister responsible for the maintenance of law and order in the realm. The King, nevertheless, could to-morrow on his own Royal authority, issue a general amnesty pardoning and releasing every prisoner in the gaols.

"It is impossible for a man to be in two places at one time, unless he were a bird," said Sir Boyle Roche in the Irish House of Commons. The law of the Constitution attributes to the King the power to be in a thousand courts of justice at the same time. The *Court Circular* may state that yesterday his Majesty was at Windsor; but the Constitution insists that he was at the Law Courts in the Strand, and with every judge holding a court of assize throughout the country. If either of the parties in any action fails to appear when the case is called he is non-suited, or, in other words, the case is dismissed. But the King in whose name many causes and prosecutions are instituted can never be non-suited, because, even if he be a thousand miles away, he is in court, nevertheless. Yet, though he is always present in all his courts, according to the Constitution, he cannot, according to that same strange authority, appear in any of the Courts or dispense justice. The same contradictory theories apply in Parliament. The King is understood to be present at every sitting of the Legislature. But, as a matter of fact, he cannot constitutionally appear in Parliament except when he comes in state to the House of Lords, for the exercise of his prerogative of opening and proroguing Parliament. He may also attend during a session for the purpose of giving the Royal assent to Bills. But his presence on any other occasion would be regarded as an unconstitutional attempt to influence the debates by overawing the assembly. Queen Victoria, therefore, was never present in the House of Commons during the whole course of her long reign of sixty-three years; and the King will never again occupy the seat over the clock in the Peers' Gallery, from which as the Prince of Wales he so often listened to the debates of the Lower Chamber.

Walter Bagehot who admits in "The English Constitution," as already quoted, that the Sovereign by the exercise of his prerogative could break the might of Great Britain, and bring about irretrievable disaster while the Ministers look helplessly on, asserts that he has long ceased to have any legislative power, inasmuch as he is really powerless to veto any Bill which has passed through both Houses of Parliament. Writing of the Queen, Bagehot says: "She must sign her own death warrant if the two Houses unanimously send it up to her." But the weight of evidence is the other way. While the King cannot amend or alter in any way a Bill, nearly all Constitutional authorities agree that he would act within his right in refusing his assent to it. It is true that the Royal assent has not been refused since Queen Anne declined to sign a Scotch Militia Bill; but the legislative veto still, undoubtedly, rests in the Sovereign and may be exercised at any time.

Yet considerable as are the prerogatives of the King, his Majesty is subject to some curious restrictions or disabilities, besides those already mentioned. He cannot, for instance, on his own personal responsibility, send a communication to, or receive a com-

munication from, any other sovereign on a question of State. In 1829 the Duke of Wellington, then Prime Minister, indirectly heard that the King, George IV., had received a letter from the King of Prussia requesting his Majesty to vote for Prince Charles of Mecklenburg to be King of Greece, which had just wrested its independence from the Turk, and that King George had given his assent. The Prime Minister wrote to his Foreign Secretary, the Earl of Aberdeen, indignantly complaining of the action of King George. "It is not usual for the King of England," he said, "to receive from other sovereigns letters which do not pass through the hands of his Ministers. Indeed, I have known instances of letters having been returned because copies were not sent with the sealed letter, the copy being intended for the information of the Minister. But it is still more unusual and improper for the King to answer a letter from another sovereign without the advice of his Minister who, whether he advises or does not, is responsible if he knows of the letter being written." Wellington urged Aberdeen to at once "entreat" the King not to answer the letter until he had heard from him again. It then appeared that the letter in question was from the Grand Duke of Mecklenburg-Strelitz to the Duke of Cumberland, written at the request of the King of Prussia, desiring that King George might be asked to support the candidature of Prince Charles. The King also promised the Foreign Secretary that he would not commit himself on behalf of Prince Charles in his reply to the note from Prussia. But the Ministers were not satisfied. The Foreign Secretary wrote to the British Minister at Berlin desiring him to convey to the King of Prussia the intention of his Britannic Majesty to act in the matter solely under the advice of his responsible Minister.

"Her Majesty cannot be supposed to have a private opinion apart from that of her responsible advisers." So we are gravely told by Sir Erskine May, the erudite Clerk of the House of Commons, referring to Queen Victoria, in his standard work on "Parliamentary Practice." The sentence is curiously phrased; but what, of course, it means is that the Sovereign must not be influenced by his personal predilections in his attitude towards public affairs, at least to the extent of opposing, or refusing to act upon, the advice of his Ministers. In like manner, it is a breach of order in both Houses of Parliament to mention the name of the Sovereign with a view to affect the course of legislation. On December 17, 1783, the House of Commons adopted the following resolution:

> Resolved—That it is now necessary to declare that to report any opinion, or pretended opinion, of his Majesty upon any bill, or other proceeding depending in either House of Parliament, with a view to influence the votes of Members, is a high crime and misdemeanour, derogatory to the honour of the Crown, a breach of the fundamental privileges of Parliament, and subversive of the Constitution of the country.

On February 26, 1808, Tierney speaking in the House of Commons said of Canning: "The right hon. gentleman has forfeited the good opinion of the country, of the House, and as I believe of his Sovereign." The Speaker at once interposed and called Tierney to order for having introduced the personal opinion of the Sovereign into the debate.

The Crown has, in theory, been shorn of none of its ancient rights and privileges. All the executive powers involved in the prerogative are still vested in the Sovereign alone. But under the unwritten laws and customs of the Constitution, which have gradually grown up since the Revolution of 1688, silently, as it were, and almost imperceptibly, the executive powers that are necessary to the smooth working of the Constitution are now put into operation solely on the advice and through the instrumentality of the Ministers. The old constitutional maxim: "The King can do no wrong," which has come down to us from the far-off days when the "Divine right of Kings" was an article of religious belief, therefore obtains in the twentieth century, not in the sense that the King is personally infallible, but in the sense that if any evil or injustice is wrought by the executive acts of Government which are done in the Sovereign's name, it is not the Sovereign that is to blame, but the Minister on whose advice he exercises his Royal prerogative.

Of course, the extent to which the King directs his Ministers, or is himself controlled by them, depends upon his strength of will and obstinacy, and the pliancy of the Ministers. George III. generally succeeded in having his own way in policy and legislation. A plain, blunt, and rather narrow-minded man, he could not understand the subtleties of a Constitution which told him in black and white that he was an absolute ruler incapable of ill-doing; and yet insisted by its unwritten laws and customs that, in practice, he must do nothing on his own responsibility, but everything he is told by his Ministers. In 1799 he informed Dundas how pleased he was to learn that a union between Ireland and Great Britain was in contemplation. "But," he added, "I hope it is not true that the Government is pledged to emancipate the Roman Catholics?" "No," replied the Minister, "that will be a matter for future consideration." The King protested that he could never consent to the emancipation of the Roman Catholics, as it would be a violation of his coronation oath which bound him to uphold the Protestant supremacy. Dundas endeavoured to explain that this oath applied to the King in his executive capacity and not as part of the Legislature. "None of your Scotch metaphysics, Mr. Dundas," cried the monarch angrily. "None of your d—— Scotch metaphysics." The inconsistency between legal theory and actual practice in the Constitution is, indeed, somewhat bewildering. It is also amusing.

The Real Sherlock Holmes

SHERLOCK HOLMES has lately been resuscitated to the no small joy of an omnivorous class of readers who had scarce dared hope Resurgam was writ over his hideous Alpine grave. Most persons now know the answer to the question — Who was Sherlock Holmes? Indeed it has been satisfactorily settled by the author, as likewise by the "onlie begetter" himself, but when the detective exploits first began to entrance the public the prophet was awhile without honour in his own country. Some ladies who had never before read a story of this kind, were sitting round the fire one winter's day reading and discussing Conan Doyle's hero as though he were an actual person, which is one test of literary fame, when they were interrupted by the entrance of a famous and favourite physician who, with an habitual spirit of inquiry, asked what it was they were reading with so much interest? "The Adventures of Sherlock Holmes," they said, the story of a most entrancing individual, whom they only wished it were possible to meet with in real life. "I know the man," observed the doctor quietly; hastening away before they had time to ply him with the many surprised and anxious questions that naturally rose to their lips. Returning shortly from seeing his patient, he came back for one brief minute to finish his story, and to announce with as much modesty as might be, "I am Sherlock Holmes!" A fact that only needed to be declared to be instantly recognised; so that since then all who know the man and study the story have been able to trace the resemblance very clearly for themselves. Fame is too easily bought nowadays, we are constantly being told, while the opinions of that national mouth-piece, the "Man in the Street," are decried as of little or no account: from such a point of view then it would seem as though fame in its highest sense were incompatible with popularity. Be that as it may yet the fact remains that, were Walter Pater still among us, he might write with the tongue of men and angels about Marius the Epicurean without producing any appreciable effect, whereas Conan Doyle has only to write out an announcement of Sherlock Holmes redivivus, to at once command the applause of a prodigious, insatiable audience. And so it will ever be, what is best suited to the greatest number of brains will best command success, and authors who wish to obtain popular fame must write so that he who runs may read.