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CHALMERS AND HOOD PHILLIPS'

CONSTITUTIONAL LAWS

OF

GREAT BRITAIN

THE BRITISH EMPIRE AND COMMONWEALTH

SIXTH EDITION

BY

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PREFACE TO THE SIXTH EDITION.

THIS book is based on the fifth edition of Chalmers and Asquith's *Constitutional Law*. So far as conditions allowed, it has been revised and brought up to date throughout. The writing of students' text-books during a great war, however, is not a reserved occupation. The present task had to be performed mostly in the evenings and at weekends in such time as could be spared from my work in a Government Department, and not seldom it was accompanied by the sound of air-raids, flying bombs or rockets. A further difficulty was to find opportunities of visiting the few libraries which remained accessible. There have been inevitable delays, and my publishers have shown a commendable patience in waiting for copy.

Some of the existing chapters have been amalgamated, others have been divided, and the order of some chapters or passages has been changed. The Appendices have been cut out, and their subject-matter —in so far as it has been retained—has been incorporated into the text. I have sought to eliminate any statements which appeared to betray political prejudice, for—if one may mix metaphors—the exposition of constitutional law is too often the happy hunting-ground of lawyers with political axes to grind. The size of the book has unfortunately grown, mainly owing to the expansion of Parts III. and VI.

Parts I., II. and IV. entailed the least amount of labour, as the law relating to Parliament and the history of the Courts have been thoroughly explored by such masters as May, Anson and Holdsworth, whose works were used in the preparation of previous editions, and changes in the law on these topics have been relatively few. I thought it desirable, however, to rewrite the chapter on the House of Lords, especially in its historical aspects, and to introduce a new chapter on "Judges and Juries," as the independence of the Courts is one of the fundamental principles of the British Constitution. Chapters 24–28 on the history and present organisation of the English Courts could have been omitted as not strictly belonging to constitutional law, but they appear to have been found useful by readers who have not studied the history of English law elsewhere.

In Part III. the treatment of the liability of, and remedies against, public authorities has been considerably expanded, as has the treatment of the Privy Council (which now has a chapter to itself), the armed forces and the Church of England. A new chapter on local government authorities has been inserted.

In Part V. greater emphasis than before has been placed on the general principles relating to the rights and duties of the citizen, both in normal times and in time of emergency, including war. Account has also been taken of developments during the past ten years concerning certain specific rights of the citizen.

Owing to the increasing importance and interest of the laws and conventions relating to the British Empire and Commonwealth, both to students in this country and overseas, Part VI. has been so rewritten and expanded as virtually to amount to a new section, though some passages on the Colonies and India have been retained from the previous edition.

Apart from general revision the main changes may be summarised as follows, the references being to the chapters in the present edition. Chapters 19, 29, 40, 41 and 44 are new; chapters 6, 7, 15, 17, 18, 20, 21, 22, 30, 36, 37, 42 and 43 have been entirely re-written; chapters 1, 3, 16, 23, 27, 35, 38 and 39 have been largely re-written; and chapters 2, 31, 33 and 45 have been partly re-written.

The first four parts of the book went to press towards the end of 1944, and the remainder in the first half of 1945. In the process of reading the proofs I have been able to make a few minor alterations to take account of changes due to the activity of Parliament and the cessation of hostilities. In some instances, however, this was impracticable, and so recourse has been had to a short list of *Addenda*, which I hope will be found by students who do not read Prefaces. Except for the Emergency Laws (Transitional Provisions) Bill and the Supplies and Services (Transitional Powers) Bill, I have not included in the *Addenda* proposed alterations of the law which are at present before Parliament, among which mention may be made of the Police Bill, the Statutory Instruments Bill, the Statutory Orders (Special Procedure) Bill, the Bank of England Bill and the British Settlements Bill. Nor have I referred to the Government's latest proposals for constitutional reform in India, Ceylon and Malaya, or to the interesting case on allegiance and treason (*R.* v. *Joyce* (1945),

62 T. L. R. 57), which at the time of writing is the subject of appeal to the House of Lords.

My sincere thanks are due to Professor Harold Potter for reading Parts I.—V. in manuscript; to Dr. D. W. Logan for reading the proofs of Part VI.; and to my brother, Mr. J. H. Hood Phillips, for reading the proofs of Chapter 19 and various other passages touching on local government.

My publishers have generously relieved me of the burden of compiling the Tables of Cases and Statutes and the Index. This task has been performed with great care by Mr. Clifford Walsh, to whom I am indebted for pointing out a number of errors in the text.

O. H. P.

King's College, London,
Michaelmas Term, 1945

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ADDENDA.

Chapter VIII.—The Parliamentary Franchise and Elections.

Pages 84—6 *The present Parliamentary Franchise.*

The Representation of the People Act, 1945, s. 2, abolishes the spouse's qualification.

Chapter XVI.—The Cabinet

Pages 197—8 *Composition of the Cabinet.*

The Lord Chancellor (Viscount Simon) was not a member of the Cabinet in the "caretaker Government" which was formed after the withdrawal of the Labour Party from the coalition in 1945.

Chapter XVIII.—The Central Government Departments (II.)

Pages 216—7 *The Lord Chancellor*

See the preceding note

Pages 219—20 *The Home Office*

The Ministry of Home Security has been abolished.

Page 238 *The Ministry of Town and Country Planning.*

Further powers have been conferred on the Minister of Town and Country Planning by the Town and Country Planning Act, 1944.

Pages 238—9. *Temporary Departments.*

The Ministry of Aircraft Production is in the process of being amalgamated with the Ministry of Supply.

The Ministry of Production has been merged in the Board of Trade.

The Ministry of Fuel and Power has been put on a permanent basis by the Ministry of Fuel and Power Act, 1945.

A Ministry of National Insurance was established by the Ministry of National Insurance Act, 1944.

A Ministry of Civil Aviation was established by the Ministry of Civil Aviation Act, 1945.

Chapter XIX.—Local Government Authorities.

Pages 252—3. *The Local Government Franchise.*

The Representation of the People Act, 1945, s. 1, extends the local government franchise so as to include all persons who have, or but for incapacity arising from the status of a peer would have, the Parliamentary franchise.

Section 2 of the Act abolishes the spouse's qualification.

Chapter XX.—Legal Liability of Public Authorities.

Pages 269—70. *Immunity in contract.*

Dr. D. W. Logan argues that *Lucas* v. *Lucas* (note (*k*), p. 269) could have been decided on another ground, that the rules governing the relationship between the Crown and members of the armed forces do not automatically apply to civil servants, and that a civil servant can enforce his right to arrears of salary by petition of right: *A Civil Servant and his Pay* (1945), 61 Law Quarterly Review, p. 240.

Pages 280—1. *Failure to perform duties.*

The decisions mentioned in note (*s*), p. 280, were not followed by the Court of Appeal, in *Fisher* v. *Ruislip-Northwood Urban District Council* [1945], K. B. 584, where the authorities are reviewed.

Chapter XXIII.—The Church of England.

Pages 316—7. *English Ecclesiastical Law.*

For the supervisory jurisdiction of the civil Courts over Ecclesiastical Courts, see *Att.-Gen.* v. *Dean and Chapter of Ripon Cathedral*, [1945] Ch. 239.

Chapter XXXIII.—Offences against the State.

Pages 439—43. *Treason.*

The Treason Act, 1945, assimilates the procedure in all cases of treason and misprision of treason to the procedure in cases of murder.

Chapter XXXVI.—Rights and Duties of the Citizen in Time of Emergency.

Pages 506—19. *Statutory powers to deal with an emergency.*

Many Defence Regulations have been revoked; but it is proposed that a number of others shall be temporarily kept in force or turned to new purposes, even after the expiration of the Emergency Powers (Defence) Acts in February, 1946, under the terms of the Supplies and Services (Transitional Powers) Act, 1945, and the Emergency Laws (Transitional Provisions) Bill.

Chapter XLIV.—Eire

Pages 661—4. ***Eire and the British Commonwealth.***

Mr. De Valera stated in the *Dáil* on 17th July, 1945, that Eire was, and had been since 1937, an independent republic associated as a matter of its external policy with the States of the British Commonwealth. More recently, Mr de Valera stated at a party meeting that, although Eire did not accept allegiance to the British Crown, she would, as a mark of her association with the British Commonwealth, continue the practice of obtaining the King's signature on letters of credence to foreign diplomatic representatives coming to Eire and of representatives of Eire going abroad.

CONSTITUTIONAL LAW

PART I.

INTRODUCTION.

CHAPTER I.

THE NATURE OF CONSTITUTIONAL LAW.

The State.—A State is an independent political society occupying a defined territory or territories, the members of which are united together for the purpose of resisting external force and the preservation of internal order (*a*) No independent political society can be termed a State unless it professes to exercise both these functions. But no modern State of any importance contents itself with this narrow range of action. As civilisation advances and population increases the needs of the governed call for increased attention; taxes have to be levied to meet these needs; justice must be administered, commerce regulated, the educational facilities and other social services provided. The State, being all powerful within its sphere, is expected to solve any of the more difficult social problems which present themselves from time to time To prosecute its activities the State is in need of agents or organs through which to operate. To gain a knowledge of a nation's Constitution (*b*) the persons constituting the State must be identified; their relations *inter se* must be determined; the territory or territories comprised within the State must be defined and its organs of govern-

(*a*) The territory of a State includes its territorial waters. As to the British doctrine of territorial waters and the marine league (three-mile) limit, see the Territorial Waters Jurisdiction Act, 1878

(*b*) It may here be pointed out that though the word "nation" is used here for the sake of euphony, there is a cardinal difference between a State and a nation; the latter being a large number of human beings united by a common language and by similar customs and opinions resulting usually from a common ancestry, religion, and historical circumstances (Holland, *Jurisprudence*, p. 46).

ment ascertained, as also must the functions and interaction of these organs.

Simple and composite States.—States are either unitary (or simple) or else composite. An unitary or simple State is one which is not made up of territorial divisions which are States in themselves. A composite State is one which is itself an aggregate of constituent States.

There are four ways in which States may be so closely related to one another as to form a union or federation (*c*).

(i) *Personal Union.*—Two States are said to form a Personal Union if the same monarch succeeds to the throne of each. Examples are England and Scotland from the accession of James VI of Scotland to the English throne as James I of England until the two kingdoms were united by treaty and legislation in the reign of Queen Anne (1707); and Great Britain and Hanover from the accession of George I to the British throne in 1714 under the provisions of the Act of Settlement, 1700, until the death of William IV in 1837, Victoria being disqualified by her sex from succeeding to the throne of Hanover under Hanoverian law. As a matter of constitutional law it was held that persons born in Scotland after the accession of James I were not aliens in England, and that Hanoverians after the death of William IV ceased to owe allegiance to the British sovereign (*d*). A Personal Union is not very important in international law, as the two States do not constitute a single international person, though in fact their foreign policies are likely to run on parallel lines (*e*)

(ii) *Confederation.*—Two or more States are said to be confederated when they are associated by treaty for the maintenance of their internal and external independence into a union with its own organs (*e.g.*, an assembly of diplomatic representatives) having certain powers over the States, but not over their citizens. They do not form an international person, but war between the members is forbidden, except for the purpose of upholding the Treaty of Confederation. There was a Confederation of the Netherlands between 1580 and 1795; and the United States of America from 1778—87, the Swiss

(*c*) Oppenheim, *International Law* (5th ed., ed. Lauterpacht), vol. 1, §§ 85—89.

(*d*) *Calvin's Case* (1608), 27 Co. Rep. 6a; 2 St. Tr. 559; *Isaacson* v. *Durant* (*Stepney Election Petition*) (1886), 17 Q. B. D. 54; see *post*, p. 422.

(*e*) The Act of Settlement, 1700, provided that England should not be obliged to engage in any war for the defence of Hanover without the consent of Parliament.

Cantons from 1291—1798 and from 1815—48, and the German States from 1815 to 1866 were confederated before they became Federal States.

(iii) *Real Union.*—When two States are permanently associated by treaty under the same monarch so as to form one composite international person they are said to form a Real Union. The member States are not themselves international persons which can wage war separately; on the other hand the Union, which is capable of making international treaties and waging war, is not itself a State. Examples of Real Unions were Sweden-Norway from 1814 to 1905, when the Union was dissolved by treaty, and Austria-Hungary from 1867 to the break-up of the Austro-Hungarian Empire in 1918.

(iv) *Federal State.*—A Federal State is formed by the permanent union of two or more States by treaty in such a way that the Union or Federation has, by a federal constitution subsequently adopted, powers both over the member States and over their citizens. The Federation so formed is itself a State distinct from the member States which are federated. Externally the Federal State is an international person with exclusive capacity for making war and peace and entering into political treaties: the member States are also in some cases regarded as international persons to a limited extent, for example, where they are allowed to exchange diplomatic representatives. Internally, the powers of government are distributed between the Federal State and the member States, the federal constitution either specifying the powers of the Federation and leaving the residue of governmental powers in the States, or specifying the powers of the States and vesting the remainder of governmental powers in the Federation. Examples of Federal States are the United States of America since 1787; Switzerland since 1848; the Union of Socialist Soviet Republics ("Russia") since 1918; and Germany from 1871 to 1931, when it became a unitary State.

Within the British Commonwealth of Nations, a unique and somewhat amorphous association of States (*f*), the Dominion of Canada and the Commonwealth of Australia are Federations. The constitution of Canada specifies the powers of the Provinces and vests the residue

(*f*) For attempts to define this association, see Keith, *The Dominions as Sovereign States*, pp. 141—145.

in the Dominion, while the constitution of Australia follows more closely the American model by specifying the powers of the Commonwealth and leaving the residue in the States (*g*).

Functions of Government.—The functions of government are usually classified into three categories: namely, (i) legislative, (ii) executive or administrative, and (iii) judicial.

(i) *The Legislative Function* is the making of new law, and the alteration or repeal of existing law. Legislation is the formulation of law by the appropriate organ of the State, in such a manner that the actual words used are themselves part of the law: the words not only contain the law, but in a sense they constitute the law. The legislature in modern theory derives its authority from the State, and its composition and powers are to be found in the constitutional law of the State. Historically, the authority of the English Parliament was due to its association with the *Curia Regis*, the central organ of government which exercised all three kinds of functions.

Legislation may take the form of the decree of a personal ruler, be he Emperor, King or Dictator, or it may be issued by an autocratic body or by a democratic assembly wholly or partly elected by the people. Without a legislative body of some sort a modern State could not provide law readily enough to meet modern conditions. Thus, the obligations of aviators towards persons and property on the ground necessitated the passing of Air Navigation Acts, which modify any liability for trespass or nuisance which might arise at common law.

Two methods of direct law-making are found in some States—the *referendum* by which certain measures have to be submitted for approval to the electorate, and the *initiative* by which certain kinds of measures may be proposed by a specified number of the electors. These are mostly to be found as methods for amending federal constitutions

(ii) *The Executive or Administrative Function* is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible. In recent times, especially since the industrialisation of most civilised countries, the scope of this function has become extremely wide. It now involves the

(*g*) See *post*, Chapter XLII.

provision and administration or regulation of a vast system of social services—public health, housing, assistance for the sick and unemployed, welfare of industrial workers, education, transport, and so on—as well as the supervision of defence, order and justice, and the finance required therefor which were the original tasks of organised government.

(iii) *The Judicial Function* consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called Courts of Law or Courts of Justice.

Although the above classification of the functions of government is found in Aristotle and has long been accepted as useful in helping one to arrange the facts and to think about the problems of government, the categories are inclined to become blurred when one attempts to apply them to the details of a particular constitution. It is not universally agreed that the *powers* of government are distinguishable in the same way, for some hold that the true distinction lies not in the nature of the powers themselves but merely in the procedure by which they are exercised. Thus legislation involves a formal and instantaneous act designed to establish general rules by which all disputes shall be settled; administration is a continuing and mainly informal process aimed at preventing disputes in classes of cases and does not create rights by establishing precedents; adjudication presupposes an existing dispute in a particular case, is governed by strict rules of procedure and evidence and tends to create rights by establishing precedents.

A complete separation of powers, whereby each function is assigned to a distinct group of State organs, is impracticable. A Court, for example, cannot adjudicate effectively unless it has such executive power as enables it to conduct its proceedings without interference and to see that its decisions are enforced; and an English Court must sometimes, in a sense, make new laws since there is no code and the Court may not decline to give a decision on the ground that there is no existing law applicable to the facts of the case. But at least we can say that a given kind of matter is appropriate to be dealt with by legislative, administrative or judicial procedure and personnel, as the case may be (*k*).

(*k*) See further, Jennings, *The Law and the Constitution* (3rd ed.), ch. 1, § 3, and Appendix I.

The Constitution of a State.—The Constitution of a State is the system of laws, customs and conventions which define the composition and powers of organs of the State and regulate the relations of the various State organs to one another and to the private citizen.

Written and Unwritten Constitutions.—A Constitution is said to be "written" when it or its framework is *enacted*; the expression means more than merely that the Constitution can be found in writing. Nearly all civilised States have written or enacted Constitutions. Those who attain power in a nation, whether as a result of a war of liberation or of civil war or otherwise, usually put into the form of legislative enactment the manner in which the State is to be organised, government carried on and justice administered. The most important laws constituting the basis of the State are specified in one formal document or a series of formal documents which are binding on the Courts and all persons concerned. Thus the United States of America, the U.S.S.R., Switzerland and France have written Constitutions. So have the British Dominions, whose Constitutions were delegated by Parliament. A written Constitution is in practice invariably supplemented, within the limits prescribed by the Constitution, by legislation passed in the ordinary way from time to time to fill in gaps, and usually also—as in the United States and the Dominions—by judicial decisions interpreting the written documents and by customs and conventions regulating the working of the machinery of government.

The British Constitution by contrast is unwritten, its sources being the same as for the rest of English law, namely, statutes, judicial decisions and custom (*i*), to which we must add conventions (*k*). There are, of course, a number of important statutes, such as the Act of Settlement, 1700, and the Parliament Act, 1911 (*l*), but they are not formally related to one another, and they are passed and may be altered in the same way as other statutes and with no more ceremony. The latter statement should, perhaps, be qualified by the fact that the Act of Union with Scotland, 1707, was based on a treaty between

(*i*) See Allen, *Law in the Making* (3rd ed.) A brief summary of the sources of English law is given in Hood Phillips, *The Principles of English Law and the Constitution*, pp. 79—116.

(*k*) For constitutional conventions, see *post*, Chapter III.

(*l*) The Bill of Rights, 1689, is not strictly an Act of Parliament, but it is treated as an authoritative declaration of constitutional principles.

England and Scotland, and the Statute of Westminster, 1931, on conventions between the United Kingdom and the Dominions (*m*).

Rigid and flexible Constitutions.—The most important classification of constitutions is that into "rigid" and "flexible" (*n*). A rigid Constitution is one which is founded on fundamental written laws, whilst in a flexible Constitution all laws can be altered by the same authority and in the same manner. A "fundamental law" is a law affecting the framework of the Constitution which can only be changed by a special machinery provided by the Constitution for that purpose. The United States furnishes the classical example of a rigid Constitution. Its Constitution, as framed in 1787, can only be amended on the motion of two-thirds of each House of Congress, and the proposed amendment must be ratified by the Legislatures of three-fourths of the States composing the Union. In England, on the other hand, a change in the Constitution, for example, diminishing the powers of the House of Lords, can be effected by exactly the same machinery as an alteration in any ordinary law.

If a law passed by the Federal Legislature (Congress) or the Legislature of a State contravenes any provision of the Federal Constitution, the Supreme Court of the United States condemns it as *ultra vires* and invalid if the question arises in a case before it, just as the Judicial Committee of the Privy Council declares invalid any colonial law which conflicts with the provisions of an Imperial Statute. The Courts of the American States have a similar jurisdiction with regard to State Acts which are repugnant to the State Constitution.

Federal Constitutions are always rigid, as it is necessary to safeguard the rights of the States as against the Federation and *vice versa*. And as a matter of fact most truly rigid constitutions are Federal. The Swiss Federal Courts can declare Cantonal legislation unconstitutional; but they cannot declare Federal legislation unconstitutional, though this may be impugned by referendum. On the other hand, in France and Belgium, which are unitary States with written constitutions, the Courts have no authority to declare legislation unconstitutional, though the restrictions on the legislative power are in fact observed. Dicey, who only regarded as law rules which are

(*m*) As to the amendment or repeal of the Statute of Westminster, 1931, see post, Chapters II. and XLI

(*n*) Bryce, *Studies in History and Jurisprudence*, vol. I, Essay 3; Dicey, *Law of the Constitution* (9th ed.), pp. 126 *et seq.*, 146—150.

enforced by the Courts, therefore thought that such restrictions must be merely constitutional conventions resting on public opinion (*o*), and Esmein describes the fundamental rights of the French citizen as "relatively guaranteed" (*p*).

Although all unwritten constitutions are flexible, not all written constitutions are rigid, though they tend to be so. Further, there are degrees of rigidity, the most rigid constitutions being those—mostly Federal—in which the Courts can declare legislation void as being "unconstitutional." Flexible constitutions are naturally adaptable to gradually changing conditions; they can also take the shock of the most violent political changes, as witness the passing of His Majesty's Declaration of Abdication Act, 1936, and the Emergency Powers (Defence) Act, 1939.

Constitutional Law.—The Constitutional Law of a State is the law relating to its Constitution. Where the Constitution is written, it is easy to distinguish the Constitutional Law of a State from the rest of its legal system; but where, as in Britain, the Constitution is unwritten, it is largely a matter of convenience what topics one includes in Constitutional Law, and there is no strict scientific distinction between that and the rest of the law.

It follows from what has been already stated that Constitutional Law deals, in general, with the distribution and exercise of the functions of government and the relations of the government authorities to each other and to the individual in his character of a citizen or subject. More specifically, Constitutional Law embraces that part of a country's laws which relates to the following topics, amongst others: the mode of electing the head of the State, whether he be emperor, king, or president; his powers and prerogatives; the constitution of the legislative body: its powers and the privileges of its members: if there be two chambers, their relations *inter se*; the status of Ministers and the position of the civil service which acts under them; the armed forces of the State and the liability of the citizen to be called on to serve in the army or navy; the relations of Church and State, if these be formally recognised; the relations between the central Government and local authorities to whom subordinate functions of government are delegated; the relations between the mother country and its colonies

(*o*) Cf. Bryce, *op cit.*, pp. 193—198.
(*p*) Esmein, *Éléments de Droit Constitutionnel* (8th ed.), vol. 1, pp. 601—602.

or dependencies; the treaty-making powers, and the rules which regulate intercourse with other States; the persons who constitute the body of citizens, the terms on which foreigners may be admitted to its territories and the privileges which they are permitted to enjoy; the mode in which taxation may be raised and the revenues of the State may be expended; the constitution of the Courts of justice and the tenure and immunities of the Judges; the right to demand trial by jury, and its limits; the limits of personal liberty, free speech, and the right of public meeting or association; the rights of the citizen to vote for elective bodies, central or local, and his liability to perform civic duties, such as serving on juries or aiding in maintaining order.

Administrative Law.—A distinction is commonly drawn in Continental countries between Constitutional law and Administrative law, but because English law is not codified or officially systematised, English jurists have found difficulty in determining where the distinction lies.

Holland says: "The various organs of the sovereign power are described by constitutional law as at rest; but it is also necessary that they should be considered in motion, and that the manner of their activity should be prescribed in detail The branch of the law which does this is called Administrative law, 'Verwaltungsrecht,' in the widest sense of the term" (*q*). If this means, says Maitland, that constitutional law deals with structure and administrative law with function, constitutional law would include the organisation of local authorities, while the prerogative (powers of the Crown) and Parliamentary privileges would be relegated to administrative law; to take an extreme example, the former would tell us how a person became and ceased to be a district councillor, but would not explain the manner in which the King's prerogative of dissolving and summoning Parliament is exercised. Maitland found it more convenient and in accordance with English usage to say that "constitutional law deals with structure and with the broader rules which regulate function; while the details of function are left to administrative law," the difference being one of degree rather than kind, of convenience rather than logic (*r*).

Dr. Jennings, on the other hand, contends that Administrative law, like other branches of law, must be defined according to its

(*q*) Holland, *Jurisprudence* (13th ed.), p. 374.
(*r*) Maitland, *Constitutional History*, pp. 526—539.

subject-matter, namely, public administration. English Administrative law would then be that part of our constitutional law which determines the organisation, functions, powers and duties of administrative authorities (including the civil service, local government authorities and public utility corporations), while the rest of our constitutional law would deal with Parliament, the Courts and the Empire (*s*). This view is slowly gaining ground among academic lawyers (*t*). Many of the books on Administrative law deal with the delegation to the executive of legislative powers (*u*) or judicial powers (*v*) or both (*x*), not because Administrative law is confined to these topics but largely because the great influence of Dicey (*y*) has made them controversial ground and they reveal tendencies which are resented by the more conservative and individualist members of the legal profession (*z*). Dicey's attitude, however, was due not only to his political predelictions in favour of individual liberty as against government "interference," but also to a misunderstanding of the French *Droit Administratif* which led to the false assumption that there could be no Administrative Law without a separate system of Administrative Courts.

Characteristics of the British Constitution.—It may be convenient at this point to summarise some of the more important features of the British Constitution.

(1) The Constitution, though partly written, is yet to be regarded as "unwritten" from the standpoint of constitutional lawyers, inasmuch as it is not codified as a whole in any particular document or body of documents.

(2) It is flexible because Parliament can "make or unmake" any law by the same procedure.

(3) Though the King is the nominal Sovereign and the political sovereignty is in the hands of the Electorate, any particular Parliament during the period of its existence is legally supreme. Parliament can, subject to the Statute of Westminster, 1931, legislate for any

(*s*) Jennings, *The Law and the Constitution* (3rd ed.), ch 6.
(*t*) See, for example, the excellent discussion by Dr. Wade, in Sect. I of the Appendix to the 9th ed. of Dicey, *Law of the Constitution*.
(*u*) *E g*, Carr, *Delegated Legislation*
(*v*) *E.g.*, Robson, *Justice and Administrative Law*,
(*x*) *E.g.*, Carr, *Concerning English Administrative Law*; Port, *Administrative Law*.
(*y*) Dicey, *Law of the Constitution* (9th ed.), ch. 12.
(*z*) See Hewart, *The New Despotism*; Allen, *Bureaucracy Triumphant*; *Report of the Committee on Ministers' Powers* (1932), Cmd. 4060; Allen, *Law and Orders*.

part of the Empire although it only represents the electors of the United Kingdom.

(4) Foreign written Constitutions abound in abstract declarations of rights, although they often provide no remedies for the violation of such rights. In England the rights of the subject are mostly deduced from decisions of the Courts in particular cases in which remedies have been afforded to the victim for their invasion. Thus it is sometimes said that under our Constitution the remedy precedes the right, and the history of the common law writs illustrates and enforces this saying. There is no such thing in English law as a right without a remedy.

(5) In dispensing justice the Judges enjoy little arbitrary power. The law which they administer is defined either by statutes and other documents having statutory validity, or by precedents, *i.e.*, previous judicial decisions.

(6) There are certain important conventional rules which, though capable of violation without an immediate breach of the law as they are not enforced by the Courts, are in practice carefully observed. The following examples of divergence between theory and practice may be given:—

(a) In theory the King in his personal capacity purports to be an active party to the making of laws, whereas in practice he has little more than a shadowy veto.

(b) In theory the King still has very extensive powers of government, but in practice they are exercised through Ministers who are legally responsible to the Courts and politically responsible to Parliament. In other words, the "strong" monarchy, which still remained after the revolution settlement of 1688, is in fact a limited or "constitutional" monarchy dependent on responsible Parliamentary government.

(c) In theory every Lord of Parliament is a Judge of the House of Lords, entitled to take part in appeals from the lower Courts; in practice he always absents himself unless qualified by statute to sit there as one of the quorum.

(7) The Legislature and Executive are joined together by a connecting link, namely, the Cabinet; but the Cabinet is unknown to the

law, except that it is referred to in the Ministers of the Crown Act, 1937, for the purpose of fixing certain ministerial salaries.

(8) England (in which Wales was incorporated by the *Statutum Walliæ*, 1284), is part of the United Kingdom of Great Britain and Northern Ireland, as a result of the Act of Union with Scotland, 1707, and the Government of Ireland Act, 1920, as subsequently modified (*a*), superseding the Act of Union with Ireland, 1800. Many of the principles of English Constitutional Law and convention extend to Scotland and Northern Ireland, and indeed in greater or less degree to the various countries comprising the British Empire and Commonwealth of Nations.

(9) The doctrine of the "separation of powers" propounded by Montesquieu (*b*), *i.e.*, that to prevent tyranny and abuse of power it is necessary to distribute the three kinds of governmental functions among separate organs, each of which is independent of the other and acts as a check on their activities, is not embraced by the English constitution, except that the Courts are independent of the Executive The acceptance of the doctrine is most strongly marked in the Constitution of the United States

(10) Administrative law in England is not systematised and there is no system of Administrative Courts.

(11) The Crown, which for practical purposes means the State, cannot be sued in Court, and though a Petition of Right may be brought for breach of contract or the recovery of property, judgment cannot be enforced against public funds (*c*).

(*a*) Cf. Irish Free State (Consequential Provisions) Act, 1922, Royal and Parliamentary Titles Act, 1927

(*b*) Montesquieu, *L'Esprit des Lois* (1748); of Locke, *Second Treatise of Civil Government* (1690), chh. 12 and 13.

(*c*) *Post*, Chapter XXI.

CHAPTER II.

PARLIAMENTARY SOVEREIGNTY.

The meaning of Parliamentary sovereignty.—The expression "Parliamentary sovereignty" means that the King, the House of Lords and the House of Commons can pass any kind of laws whatsoever, and that there are no "fundamental" laws which Parliament cannot amend or repeal in the same way as ordinary legislation (*a*).

Parliament can pass laws not only for the whole British Empire (*b*), but also in relation to any acts done by any persons on foreign territory, though such statutes would not be enforced in countries which did not recognise English law or in which there were no British Courts. In fact, Parliament does not legislate with regard to acts done in foreign territory, except in so far as it entitles the Crown to legislate under Foreign Jurisdiction Acts (*c*), gives effect to international conventions relating to such matters as copyright, or makes certain crimes committed by British subjects abroad punishable when they come within the territorial jurisdiction. An example of the last was the Offences against the Person Act, 1861, which made bigamy by a British subject an offence, whether the second marriage took place "in England or Ireland or elsewhere," and it was held in *R.* v. *Earl Russell* (*d*) that bigamy committed by a British subject in the United States was punishable in England. As Parliament is the Parliament of the United Kingdom, drawing its representatives from England (including Wales), Scotland and Northern Ireland, Acts of Parliament are presumed to apply to the United Kingdom, and are presumed not to extend further. If an Act is not intended to apply to Scotland or Northern Ireland, or if it is intended to apply to a Colony, this must be expressly stated.

Examples of the positive aspect of the legislative supremacy of Parliament are the Septennial Act, 1715, extending the maximum life

(*a*) See Dicey, *Law of the Constitution* (9th ed.), Part I, but cf. Dr. Wade's Introduction, pp. xxxvi–lxvi.
(*b*) But as to Dominions and self-governing Colonies, see *post*, p. 30.
(*c*) *Post*, Chapter XXXIX.
(*d*) [1901] A. C. 446. This was a trial of a peer by the House of Lords

of a Parliament from three to seven years; the Parliament Act, 1911 (*e*), restricting the power of the House of Lords to withhold its assent to Bills (especially Money Bills) sent up by the Commons, and reducing the maximum life of a Parliament to five years; the prolongation of its own life by annual Acts to eight years by the Parliament which passed the Act of 1911, and the similar prolongation during war of the life of the Parliament which was elected in 1935; the Act of Settlement, 1700, which regulated the succession to the throne and His Majesty's Declaration of Abdication Act, 1936, which altered that succession; the Act of Union with Scotland, 1707, by which the English Parliament extinguished itself and transferred its authority to the Parliament of Great Britain; the Government of Ireland Act, 1920, and the Irish Free State Agreement Act, 1922, dissolving the union between Great Britain and Ireland, setting up a subordinate legislature in Northern Ireland and giving Dominion status to the Irish Free State; the Defence of the Realm Acts and Emergency Powers (Defence) Acts of the two great wars of the present century, conferring extremely wide, though temporary, powers on the executive; Acts of Indemnity, legalising acts which when they were done were illegal; Representation of the People Acts, regulating the Parliamentary franchise; and the British Nationality and Status of Aliens Acts, defining the persons who are to be regarded as British subjects.

The absence of "fundamental" laws means that the Courts have no jurisdiction to declare an Act of Parliament void, as being *ultra vires* or "unconstitutional." The Courts have this power in some constitutions, especially in Federal States like the United States of America, Canada and Australia, and occasionally in unitary States, for example, Eire.

History of the legal supremacy of Parliament.—The legal supremacy of Parliament is a product of the revolution of 1688. Before the early eighteenth century there were several rivals in the field, namely, the King, the King in Council, the Common Law Courts, and the House of Commons acting by resolution.

(1) *Law-Making Power of the King.*—Parliament emerged as an effective body in the fourteenth century (*f*), and it soon asserted its

(*e*) For the Parliament Act, 1911, see *post*, p. 95.
(*f*) See Pollard, *Evolution of Parliament* (2nd ed.), ch. 2.

power in various ways, for example, the establishment of impeachment in the reign of Edward III. In the reign of Henry VI, during the golden age of the later Plantagenets and Lancastrians, the Lords and Commons framed the statutes. Thence flowed rules of debate and procedure generally. The King assented to statutes in much the same fashion as at the present day. Nevertheless, the King continued to legislate by ordinance. He was supposed to legislate thus on matters of trifling moment: matters of importance required, or were supposed to require, a statute. The question, however, what was trifling and what was important, occasioned many a serious conflict. A statute was recorded on the Statute Roll, and could be revoked only by another statute. An ordinance could be revoked by the King in Council at any time.

The King had two modes of legislating. When he wished the law to be promulgated to the public he made use of a proclamation, and in other cases he made use of an ordinance, the ancient equivalent of what is now an "Order in Council."

On the accession of Henry VII there were supposed to be the following restrictions on the royal power:—

No tax could be levied or law passed without consent of Parliament;

No man could be imprisoned without a legal warrant specifying his offence;

Ministers infringing the rights of the public could be sued, and could not plead, by way of defence, the royal authority;

Ministers could be impeached for high misdemeanours;

Questions of fact in civil and criminal cases were triable at common law before a jury of twelve men.

Henry VIII obtained from Parliament the right to legislate by proclamation, in order to deal with "sudden causes and occasions" which "do require speedy remedies" for which there was no time to await the meeting of Parliament. The famous Statute of Proclamations passed in 1539 gave to proclamations the force of law, provided that (except for cases of heresy) they did not impose the death penalty, take away a subject's property, or conflict with existing statutes, customs or common law. This Act was repealed in the first year of Edward VI. Notwithstanding its repeal, and notwithstanding that it was agreed by the Judges in the reign of Mary that no proclamation

could make a new law, but only confirm and ratify an ancient one (*g*), Edward VI's regents, Mary and Elizabeth, continued to make and enforce proclamations.

In the reign of James I the Commons complained of the abuse of proclamations. The opinion of Chief Justice Coke and four of his colleagues was sought and given in the *Case of Proclamations*, 1610 (*h*), to the following effect:—

(a) No new offence can be created by proclamation

(b) The only prerogative possessed by the Crown is such as is conferred by the law of the land.

(c) To prevent offences the King can by proclamation warn his subjects against breaches of the existing law.

This decision was disliked by James I, who wanted to prohibit by proclamation the building of new houses in London in order to check the overgrowth of the capital, and the manufacture of starch from wheat so as to preserve wheat for human consumption. The opinion of Coke had little effect, and time-serving Judges continued to uphold proclamations, disobedience to which in the reign of Charles I was punished in the Star Chamber.

The last instance of attempted prerogative legislation by proclamation occurred during Chathams Ministry, in 1766, when, owing to bad harvests, exportation of wheat was prohibited, but on this occasion the Ministers of the Crown were protected against the possible illegality of their proceedings by an Act of indemnity.

THE SUSPENDING AND DISPENSING POWERS.—These were great impediments to Parliamentary sovereignty. By virtue of the suspending power the King claimed indefinitely to postpone the operation of any given statute; by virtue of the dispensing power he would *ex post facto* annul statutory penalties in favour of any particular individual or individuals. The latter power, if not the former, was derived from the Papal practice of issuing bulls *non obstante statuto*, "any law to the contrary notwithstanding."

Henry III first made use of the *non obstante* clause, and, in fact, exercised both powers. The Commons in the reign of Richard II accorded to that King power to excuse compliance with the Statute

(*g*) The proclamations of Mary and Elizabeth were respecting imports; and also certain religious matters.

(*h*) 2 St. Tr 723.

of Provisors, a statute restricting the Papal power of nominating foreign clerics to English livings and dignities, but stipulated that it should not become a precedent. Henry IV had similar indulgences from Parliament. Again, in the reign of Henry V the Commons prayed for a statute to expel aliens from the country, and the King granted their petition on condition that he might dispense with the statute at his discretion.

In the reign of Henry VII it was decided that the King could at common law dispense with *mala prohibita* but not *mala in se*, and, subject to this restriction, both the suspending and dispensing powers were accepted as parts of the prerogative during the sixteenth and seventeenth centuries. The Stuarts used these so-called prerogatives to subvert fundamental laws, and the unscrupulous use of the suspending power cost James II his throne.

The circumstances of the case were as follows: James II issued a proclamation that a Declaration of Indulgence in matters of religion should be read in the churches and that the bishops should distribute copies of the declaration in their dioceses. The declaration purported to suspend the operation of all laws directed against Romanists. The Primate and six bishops signed a petition that his Majesty should not insist on the declaration being read, on the ground of its being illegal and against their consciences. This petition was printed and circulated by sympathisers, and their conduct resulted in a criminal information for libel against the bishops. They were summoned before the King and his Council, and, on admitting their signatures, were committed to the Tower for seditious libel. At the trial they were acquitted by the jury, the right of the subject to petition the King, which was afterwards contained in the Bill of Rights, being thereby admitted, (*Case of the Seven Bishops*, 1688 (i).)

Charles II had previously made use of the suspending power on two occasions, when he successfully suspended the operation of the Navigation Act, and when he unsuccessfully issued a declaration similar to that of his successor, on which occasion he prudently gave way to Parliament.

The first important case on the dispensing power occurred as far back as the reign of Henry VII, when it was held by the Judges that

(i) 12 St. Tr. 371.

although a statute forbade any man to hold the office of sheriff for over a year and expressly barred the operation of a *non obstante* clause, nevertheless the grant of a shrievalty for life, if it contained such a clause, would be valid. This case was approved by FitzHerbert (*k*).

In the case of *Thomas* v. *Sorrell* (1674) (*l*), the plaintiff claimed a large amount as a penalty for selling wine without a licence contrary to a statute of 12 Charles II. The jury returned a special verdict that they had found a patent of 9 James I incorporating the Vintners Company and granting them permission to sell wine without a licence, *non obstante* an Act of 7 Edw. VI forbidding such sale. The Judges decided that the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the King's benefit.

In *Godden* v. *Hales* (1686) (*m*), a collusive action was brought to test the King's dispensing power. Sir Edward Hales, the defendant, was sued for that he, after being appointed colonel of a foot regiment, had neglected to take the oaths of supremacy and allegiance and to receive the Sacrament according to the Test Act of 25 Charles II. The defendant had been convicted under the above Act at Rochester Assizes, and the plaintiff sued him for a penalty. The defendant pleaded a dispensation of James II discharging him from taking the oaths and also the Sacrament. The Court held, by twelve Judges, that the dispensation barred the right of action.

Blackstone says that the doctrine of *non obstante*, which sets the prerogative above the law, was effectually demolished by the Bill of Rights, and "abdicated Westminster Hall when James II abdicated the Kingdom" (Blackstone, I, 432). This is true of the suspending power, but there may be still perhaps left to the King not only the power to pardon but also a limited *quantum* of dispensing power. The clauses as to the dispensing power in the Bill of Rights are as follows: (a) that the pretended power of dispensing with laws or the execution of laws by regal authority, *as it has been assumed and exercised of late*, is illegal; (b) that no dispensation by *non obstante* be allowed, but that the same shall be held void . . . except a dispensation be allowed of in such statute. The words "*as it hath been assumed and exercised of*

(*k*) A Judge who flourished in the reign of Henry VIII, and the author of a celebrated treatise *De Natura Brevium*.

(*l*) Vaughan, 330. (*m*) 11 St. Tr. 1166; 2 Shower, 275.

late 's deserve attention, as it is by virtue of them that the King's prerogative right to pardon was retained. These words were also relied on as legalising a dispensation in the *Eton College Case* (1815) (*n*), where, owing to their insertion, a fellow of Eton College was allowed to hold a living in conjunction with his fellowship.

There is a clear distinction between pardon and dispensation, the former condoning past offences only, whilst the latter purports to condone future ones as well.

MONOPOLIES.—Formerly the granting of monopolies by the King was assumed to inflict a hardship on the public. In the *Case of Monopolies* (1602) (*o*), Darcy, a servant of Elizabeth and grantee of the sole right of importing and making playing-cards, sued Allein for interfering with his grant. The Court held that the grant was a monopoly and void, and that the Sovereign could not exercise her dispensing power to confer private gain on an individual contrary to the Act 4 Edw. 4, c. 4, which imposed a penalty on the importation of playing-cards and was enacted for the public good. This case was doubtless to some extent instrumental in bringing about the passing of the Statute of Monopolies, 1623, which provided in effect that grants of monopolies were void, with the exception of patents granted to inventors entitling them to the exclusive benefit of their patents for fourteen years (*p*). Notwithstanding the Statute of Monopolies, the grant of a sole right of trading to the East India Company was held valid because the grant was within the prerogative (*East India Company* v. *Sandys* (1684)) (*q*).

(2) *The Judges and the common law.*—The Judges of the seventeenth century, at all events, held that the common law (*r*) might be of superior efficacy to an Act of Parliament. Even Blackstone in the eighteenth century does not treat a statute with the respect it deserves. He says, for example, that statutes contrary to Divine law should be disregarded. Coke, again, stated that "when an Act of Parliament is

(*n*) Williams' Reports; Broom, *Constitutional Law*, p. 503.
(*o*) *Darcy* v. *Allein*, 11 Co. Rep. 85.
(*p*) The time can now be extended by the High Court. As to the Crown using the patent, see *Feather* v. *The Queen* (1865), 6 B. & S. 257.
(*q*) 10 St. Tr. 371, at pp. 515 *et seq.*
(*r*) Common law here means law other than statute law. In other contexts it means the law which used to be administered in the common law Courts as contrasted with the rules of equity. In yet another sense it is used to denote the law common to the whole land as opposed to local custom.

against common right and reason, or repugnant or impossible, the common law will control it." Elsewhere, inconsistently, as it would seem, he says of the power and jurisdiction of Parliament for the making of laws in proceeding by Bill, "it is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds. . . ." But in this passage he refers to Parliament as a "Court," and the chapter in which these words occur is headed "High Court of Parliament," which suggests, in conjunction with the words "Court" and "jurisdiction," that Coke was not referring to Parliament in its legislative capacity (*s*).

Sir Thomas Smith, one of Elizabeth's Secretaries of State, in his *Commonwealth of England*, emphatically endorses the view that Parliament is legally sovereign. Yet Hobart, J., in the case of *Day* v. *Savage* (1615) (*t*), takes Coke's apparent view, as also does Bacon. Hobart said, "Even an Act of Parliament made against natural equity as to make a man a judge in his own cause is void, for *jura naturalia sunt immutabilia*, and they are *leges legum*." This is fallacious. It is true that, as Blackstone says, statutes are to be construed not according to the mere letter but the intent and object with which they were made; but this is the most that can be said. The proper rule is strictly to follow the statute, and only to give weight to the intent with which it was passed when its language is ambiguous. In *Lee* v. *Bude and Torrington Railway Co.* (1871) (*u*), Willes, J., a very high authority indeed, said: "Acts of Parliament are laws of the land and we do not sit as a Court of Appeal from Parliament."

Equity Judges have at times shown a tendency to disregard a statute; they incline to regard it from the standpoint of the evil it seeks to remedy. For example, the Statute of Frauds, 1677, in order to prevent fraud, provided that contracts for sale of land should not be enforceable unless there is some note or memorandum of the contract signed by "the party to be charged . . ." (*i.e.*, the person against whom it is sought to enforce the contract). To prevent fraud Equity Judges have held that such a contract may be enforced even though not in writing where there has been part performance.

(3) *Resolutions of either House of Parliament.*—The two great cases on the legal effect of a resolution of either House are *Stockdale* v.

(*s*) The first reference comes from *Bonham's Case* (1610), 8 Co. Rep. 114.
(*t*) Hob. 85. (*u*) L. R. 6 C. P. 576.

Hansard (1839) (*x*), and *Bowles* v. *The Bank of England* (*y*). In the latter case, Parker, J., held that a resolution of either House in the absence of statutory authority to that effect does not legalise the collection of a tax. In other words, the decision in *Stockdale* v. *Hansard* that a resolution of either House cannot alter the law of the land was upheld. For considerably upwards of a century before Parker, J.'s celebrated judgment, a usage had arisen of collecting certain annual taxes directly after the passing of the Budget Resolutions in Committee of Ways and Means. It began with duties of customs and excise and was afterwards extended to income tax. This usage Parker, J., declared to be a violation of the Bill of Rights. To legalise in a measure this unlawful collection of revenue, the Provisional Collection of Taxes Act, 1913, was passed, which provided that resolutions varying or renewing or reimposing a tax affecting customs or excise duties or income tax should, subject to certain conditions, be valid for four months after the date on which the resolution is expressed to take effect, or, in the absence of a date, after the date on which the resolution is passed by the Committee.

In *Att.-Gen.* v. *Wilts United Dairies* (1921) (*z*) the defendant company agreed with the Food Controller to pay 2d. per gallon of milk sold in consideration of the grant of a licence to sell milk. Several thousands of pounds became due under this contract, and the defendants declined to pay the money. The Court of Appeal held that the Food Controller, by charging for his licence, even by agreement, had infringed the Bill of Rights, this being a levying of money to the use of the Crown without the sanction of Parliament. It was here contended that the Food Controller was acting under regulations authorised by the Defence of the Realm Act, but the Court was of opinion that he was acting outside the powers conferred by the regulations. (See also *Brocklebank, Ltd.* v. *R.* (1925) (*a*), payment to the Government of a bonus for licensing the sale of a ship.)

"Parliament cannot bind its Successors."—One Parliament cannot legally bind its successors, for, since each Parliament is sovereign, the Parliament in existence at any given time will not be legally bound by its predecessors (*b*).

(*x*) 9 A. & E. 1; post, p. 110.
(*y*) [1913] 1 Ch. 57.
(*z*) 91 L. J. K. B. 897; 37 T. L. R. 884.
(*a*) [1925] 1 K. B. 52.
(*b*) A "Parliament" in the sense used here is the Parliament which is summoned after a general election, and which remains in existence in spite of periodical prorogations until it is dissolved preparatory to another general election.

The Act of Union with Ireland, 1800, provided that the government and doctrine of the United Church of England and Ireland should be and should remain "for ever" assimilated to those of the existing Church of England, and that the continuance of the United Church should be deemed "an essential and fundamental part" of the union of the two kingdoms. Nevertheless, the Church of Ireland was disestablished by the Irish Church Act, 1869, some fifty years before the political Union itself was partly dissolved by the creation of the Irish Free State. Similarly, the provisions of the Act of Union with Scotland, 1706, relating to patronage and the Church of Scotland and the necessity for professors of Scottish Universities subscribing the confession of faith were repealed, the former temporarily and the latter permanently.

The Acquisition of Land (Assessment of Compensation) Act, 1919, purported to prescribe the mode in which compensation should be assessed under all future statutes relating to the acquisition of land, but it was held in *Vauxhall Estates, Ltd* v. *Corporation of Liverpool* (*c*) and *Ellen Street Estates, Ltd.* v. *Minister of Health* (*d*) that the differing provisions of the Housing Act, 1925, were to be observed.

An interesting subject for speculation is whether Parliament is bound by section 4 of the Statute of Westminster, 1931, which provides that no Act of Parliament of the United Kingdom passed after the commencement of that Act shall extend to a Dominion as part of the law of that Dominion unless it is expressly declared in the Act concerned that that Dominion has requested and consented to its enactment. This provision, remarkable though it be as a section of an Act of Parliament, merely represents a well-established convention, and it is politically most improbable that Parliament would either ignore or repeal it. As a matter of "abstract law," on the other hand, Parliament could repeal or amend the Statute of Westminster, but, said Lord Sankey, L.C., in *British Coal Corporation* v. *The King* (*e*): "that is theory and has no relation to realities" (*f*). Section 4—taken together with the preamble, which also recites this convention—is at best a very strong expression of Parliament's intention which it would be difficult to evade by implication, and in any event it is the attitude of the Dominion Courts rather than of the British Courts which would probably matter in practice.

(*c*) [1932] 1 K. B. 733.
(*d*) [1934] 1 K. B. 590.
(*e*) [1935] A. C. 500, at p. 520.
(*f*) *Post*, p. 599.

The Manner and Form of Legislation.—It is an ancient constitutional custom that the Lords and Commons should sit separately, and that the Sovereign should not be present at their debates (*g*). The royal assent to bills passed by the two Houses is given verbally in the House of Lords (the Commoners being summoned to the bar of the Upper House) by the King or more usually by a royal commission.

The legislative formula in Acts of Parliament has been long established as follows: "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows. . . ." The only exception is that in an Act passed in accordance with the Parliament Act, 1911, without the consent of the House of Lords (*h*) the words of enactment would be: "Be it enacted by the King's most Excellent Majesty, by and with the consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows. . . ." (*i*).

It has been suggested that the Courts would not be bound to give effect to a statute passed by a resolution of the King, Lords and Commons meeting in joint assembly (*k*), but it is submitted that it would be a brave Court that disregarded it (*l*). On the other hand, it would probably not be seriously contended that the Courts would take notice of the fact that an Act of Parliament had not passed through the customary number of readings in each House. With regard to Acts passed by the King and Commons without the consent of the Lords in accordance with the provisions of the Parliament Act, 1911, it should be noticed that the certificate of the Speaker of the House of Commons that the provisions of the Act have been complied with is conclusive and cannot be questioned by the Courts (*m*).

(*g*) The former custom may be traced back to the reign of Edward III (Pollard, *Evolution of Parliament* (2nd ed.), pp. 120—123), and the latter to the minority of Edward VI (*ibid.* p. 261).

(*h*) For the Parliament Act, 1911, see *post*, p. 95.

(*i*) Parliament Act, 1911, s. 4 (1).

(*k*) Latham, "*The Law and the Commonwealth*," contributed to vol. I of *Survey of British Commonwealth Affairs*, edited by Hancock; see pp. 523—524. Cf. Pollard, *op. cit.*, p. 123.

(*l*) "That which constitutes law is the concurring assent of all the branches of the legislature, wheresoever it may originate, whatever may happen to be the form of it" (Chitty, *Prerogatives of the Crown*, p. 75), and Pollard points out that formal acts of Parliament are, and always have been, done by one body in the parliament chamber (Pollard, *op. cit.*, p. 123).

(*m*) Parliament Act, 1911, s. 3.

Dr. Jennings argues that a "legal" sovereign, as opposed to an absolute political sovereign like the mediæval "Prince," can bind its successors, since the rule merely is that the Courts accept as law that which is made *in the proper legal form*. "The law is," says Dr. Jennings, "that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law [*i.e.*, the King, with the consent of the Lords and Commons] or by the Parliament Act of 1911" (*n*). Therefore, if Parliament passed an Act saying that, in future, Acts of Parliament dealing with certain matters, for example, the succession to the throne, should only be passed after submission to a referendum of the electorate, it would seem to follow that the Courts would not be bound to enforce an Act dealing with one of the matters specified unless it had been submitted to a referendum. One answer might be to say that Parliament, in requiring a referendum, was to that extent transferring its sovereignty to another body consisting of Parliament together with the electorate, just as the English Parliament in 1706 transferred all its powers to the Parliament of Great Britain; so that the Courts would not have to consider whether a subsequent Act was passed by Parliament (*i.e.*, King, Lords and Commons) in the proper form, but whether it was enacted by the body which had power to make such laws, *i.e.*, King, Lords, Commons and electorate.

But it would be more profitable to consider what attitude the Courts would be likely to adopt. In 1929 the New South Wales Legislature enacted an amendment to the Constitution to the effect that the Legislative Council (the Upper House) should not be abolished nor its powers altered, except after a referendum, and this provision was to apply to any Bill repealing or amending this Act. In 1930 two Bills were introduced, the first to repeal this provision of the 1929 statute, and the second to abolish the Legislative Council. An injunction was granted to restrain the presentation of these Bills to the Governor until they had been approved by a referendum, and this decision was upheld by the Privy Council on appeal from the High Court of Australia in *Att.-Gen. for New South Wales* v. *Trethowan* (*o*). The decision was necessarily based on the fact that the law-making power of the Legislature of New South Wales depended on the

(*n*) Jennings, *The Law and the Constitution* (3rd ed.), ch. 4.
(*o*) [1932] A. C. 526.

Constitution Act of 1855 and the Colonial Laws Validity Act, 1865 (*p*), according to which the 1929 Act was valid and the Bills of 1930 therefore invalid, since they were not (as required by section 5 of the Colonial Laws Validity Act, 1865) "passed in such Manner and Form as may from Time to Time be required by any . . . Colonial Law for the time being in force in the said Colony."

An interesting case decided by the Irish Free State Courts on the Free State Constitution of 1922 was *The State* (*Ryan*) v. *Lennon* (*q*). Art. 50 allowed the *Oireachtas* (Legislature) to amend the Constitution (*r*) by the ordinary legislative process within eight years, and thereafter subject to a referendum. Before the eight years expired, the *Oireachtas* passed an amending Act extending to sixteen years the period during which constitutional amendments might be made without a referendum, and it was held that this was valid since Art. 50 was not itself expressly excepted from amendment. It will be recalled that the New South Wales Legislature in 1929 did take this precaution. The views of the *Oireachtas* itself are shown by the fact that the amendment was passed shortly before the eight years expired, and that when it came to enact the new Constitution of Eire in 1937 (after a plebiscite) it expressly provided by Art. 51 that the period of three years during which constitutional amendments might be made without a referendum could not be prolonged by an amendment passed without a referendum within that period (*s*). Both the New South Wales and the Irish Free State Legislatures would be regarded by Dicey as being in different degrees "subordinate" law-making bodies, though the latter—especially since the Statute of Westminster, 1931—would be more nearly "sovereign"; the interesting fact, however, is that the *Oireachtas* was regarded by itself and by the Free State Courts as being free from the authority of the United Kingdom Parliament, but subject to the Constitution as expressing the will of the people.

In *Ndlwana* v. *Hofmeyr*, *N.O.* (*t*), on the other hand, the Supreme Court of the Union of South Africa held that since the Colonial Laws

(*p*) For the Colonial Laws Validity Act, 1865, see *post*, p. 547.
(*q*) [1925] I. R. 170.
(*r*) Within the terms of the Anglo-Irish Treaty of 1921, which was irrelevant for the present purpose.
(*s*) In theory, the Constitution of 1937 was "enacted" by the people, and merely "approved" by the *Dail* or Representative Assembly (the original *Seanad* had been abolished some time before).
(*t*) [1937], App. Div. (South Africa), 229.

Validity Act, 1865, was abolished so far as the Union of South Africa was concerned by the Statute of Westminster, 1931, the Parliament of that Dominion was, by the Status of the Union Act, 1934, a sovereign, legislature, and the Courts would not inquire into the question whether the special procedure prescribed by section 152 of the Union of South Africa Act, 1909, for repealing or amending certain "entrenched" clauses of that Act had been observed. It is probable that the English Courts would adopt a similar attitude in dealing with an Act of the United Kingdom Parliament, and the King's Printer's copy would be accepted as conclusive evidence that the Act had been passed in the proper manner and form.

Three points may be mentioned in conclusion. Firstly, the certificate of the Speaker is required by the Parliament Act, 1911, not for the benefit of the Courts, but to certify to the House of Lords that the Bill in question is a Money Bill and to certify to the King that the requirements of the Parliament Act have been complied with. Secondly, although the Statute of Westminster, 1931, recites in the preamble that the Parliament of the United Kingdom should not thereafter legislate for a Dominion, except at its request and with its consent, the operative part of the Act, namely, section 4, merely says that an Act of the United Kingdom Parliament shall not extend to a Dominion as part of the law of that Dominion, unless it is expressly *declared* in that Act that the Dominion has requested and consented to its enactment. English Courts would probably not enquire whether in fact that Dominion had requested and consented to a given Act, but would at most look to the declaration in the preamble to the Act concerned. Thirdly, the Statute of Westminster has no clause stating that the statute itself may not be repealed without the request and consent of the Dominions, but in this exceptional case the statement of principle in the preamble (which is not strictly an operative part of a statute) is probably of more practical effect.

Practical limitations on Parliamentary sovereignty. — The "sovereignty" or legislative supremacy of Parliament is a *legal* doctrine, having special reference to the attitude of the Courts towards Acts of Parliament. In fact there are limitations on the power of Parliament to pass whatever laws it chooses, of which the following are some of the most important.

(a) *Public opinion.*—The Commons are the preponderating element in Parliament, and they are accountable to the electorate. Most of them will seek re-election at the next general election, and it therefore behoves them to remember the "mandate" on which they were elected, and also to keep in touch with changing political opinion in their constituencies. The Government, which almost monopolises Parliamentary time, must observe the Constitutional conventions which enable the machinery of government to work in the manner evolved by the political history of the country (*u*). If a comprehensive scheme of education or public health is to be introduced, common sense requires that local authorities and other educational bodies and the churches, or the medical profession and the voluntary hospitals, as the case may be, should first be consulted, at least on the more important details (*x*). Parliament may be the legal sovereign, but the electorate is the political sovereign, and can in the long run impose its will on Parliament. It is hardly necessary to go so far as Dicey and to say that the fear of revolution keeps the "sovereign" in check, though the ultimate possibility of revolution is always in the background.

(b) *The Statute of Westminster, 1931.*—Just as Parliament must bear in mind the constitutional conventions which affect the working of the machinery of government at home, so it must in practice observe the conventions which regulate the relations between the United Kingdom on the one hand and the various Dominions on the other. The "Dominions" are the Dominion of Canada, the Commonwealth of Australia, the Union of South Africa, New Zealand, Eire (rather half-heartedly) and Newfoundland (Dominion status in suspense) (*y*). These conventions, which have been formulated at a series of Imperial Conferences, are something more than the understandings or practices which regulate our domestic government, for they have something of the character of the provisions of international treaties. Indeed, the word "convention" is sometimes used by international lawyers to mean a treaty or agreement between States. Whether the conventions of imperial constitutional law will ever attain the status of international treaties, however, depends on how the British Commonwealth of Nations will develop.

(*u*) See next chapter. (*x*) See Jennings, *Parliament*, ch. 7.

(*y*) The same principle applies to self-governing Colonies, *e.g.*, Southern Rhodesia, and to Northern Ireland.

The Statute of Westminster, 1931, was passed by the United Kingdom Parliament at the request and with the consent of the Dominions in order to give effect to certain resolutions of the Imperial Conferences held in 1926 and 1930. It recites that (i) any alteration in the law touching the succession to the Throne or the Royal Style and Titles shall thereafter require the assent of all the *Dominion Parliaments* as well as of the Parliament of the United Kingdom, and (ii) no Act of the United Kingdom Parliament passed thereafter shall extend to any of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that *Dominion*. The latter convention was, as has already been said, enacted as section 4 of the Statute of Westminster, except that section 4 only requires the request and consent of the Dominion to be expressly *declared* in the Act. Both conventions were observed so far as circumstances required when His Majesty's Declaration of Abdication Act, 1936, was passed (z).

(c) *International Law.*—Blackstone said that "International Law is part of the Law of England" (a), and there are decisions of English Courts during the next hundred years which appear to confirm this view, but in *R.* v. *Keyn*, also commonly known as the case of *The Franconia* (b), it was held by seven Judges out of thirteen that, assuming that a State has by International Law criminal jurisdiction over all persons in its territorial waters (which was doubtful), an English Court had no jurisdiction at common law over crimes committed in territorial waters except by British subjects in a British ship. As a result of this decision, the Territorial Waters Jurisdiction Act, 1878, was passed, declaring that English Courts had jurisdiction to try any offence committed by any person in British territorial waters, whether committed in a British or a foreign ship. Blackstone's statement is commonly thought to have been confirmed by Lord Alverstone, C.J., in *West Rand Central Gold Mining Co.* v. *The King* (c), where the question was whether the Crown was liable for a debt due from a conquered South African Republic, and it was held

(z) The matter was in fact rather complicated, as Australia and New Zealand had not adopted the Statute of Westminster, and on the other hand, some of the Dominions preferred to pass their own legislation. See further, *post*, p. 600.

(a) Blackstone, *Comm.*, IV, 5.

(b) (1876), L. R. 2 Ex. D. 63. Manslaughter by an alien in a foreign ship.

(c) [1905] 2 K. B. 391.

that there was no liability by international law apart from express stipulation. "Whatever has received the common consent of civilised nations," said Lord Alverstone, "must have received the assent of our country," and the doctrines of International Law would be acknowledged and applied as such by English Courts.

The most that can be said with safety is that the customary rules of International Law have presumably been adopted by this country, so that an English Court would apply them as part of English law; there is therefore a *presumption* that Parliament does not intend to legislate contrary to the principles of International Law, and a statute would be interpreted as far as possible so as not to conflict with International Law (*d*). The activities of Parliament are in fact constrained by International Law, but the legal power of Parliament to make laws contrary thereto remains, and redress would have to be sought by diplomatic action and not through the Courts (*e*).

(d) *Common Law Presumptions.*—The Courts employ certain presumptions in interpreting Acts of Parliament, for Parliament is presumed not to intend to alter the general principles of the common law, including constitutional law; such an intention will not be implied. In other words, if Parliament wishes to make such changes it must do so "by express words or necessary intendment."

The Courts "lean against" interference with personal liberty (*R.* v. *Halliday, Ex p. Zadig* (*f*), Order in Council made under the Defence of the Realm Act giving the government power to intern enemy aliens to prevent them from communicating with the enemy held valid), and interference with property (*Manchester Corporation* v. *Farnworth* (*g*), corporation liable for nuisance caused by poisonous fumes from generating station operated under statutory powers as reasonable steps had not been taken to prevent it). Express words would be required in an Act before a subject's right of access to the Courts could be denied or delayed (*Chester* v. *Bateson* (*h*), regulation made under the Defence or the Realm Act prohibiting

(*d*) For a full discussion, see Lauterpacht, "*Is International Law a Part of the Law of England?*" (*Grotius Society Transactions*, vol. 25 (1940), pp. 51—68).

(*e*) For the authority of international law in English Prize Courts, see *The Zamora*, [1916] 2 A. C. 77; Potter, *The Foundations of Modern Prize Law* (*Grotius Society Transactions*, vol 10 (1925), pp. 37—46).

(*f*) [1917] A. C. 260. And see Lord Atkin's dissenting judgment in *Liversidge* v. *Anderson*, [1942] 1 A. C. 206; *post*, p. 467.

(*g*) [1930] A. C. 171.

(*h*) [1920] 1 K. B. 829.

landlords from taking judicial proceedings to evict munition workers without the consent of the Minister of Munitions held invalid). Penal and taxing statutes are strictly construed, and there is a general presumption against retrospective effect.

There is a presumption against constitutional changes. Thus it was held in *Nairn* v. *The University of St. Andrews* (*i*) that the Universities (Scotland) Act, 1889, allowing Scottish Universities to grant degrees to women, could not be taken to mean that women graduates should be entitled to the Parliamentary franchise as "persons" registered as graduates under the Representation of the People (Scotland) Act, 1868. "If it was intended," said Lord Ashbourne, "to make a vast constitutional change in favour of women graduates, we would expect to find plain language and express statement. . . . It is inconceivable that Parliament should do this by implication without a word to indicate the intention." Parliament, after all, must be presumed to know the law, including the principles of statutory interpretation.

Parliament and subordinate law-making bodies. In contrast to the United Kingdom Parliament, there are numerous subordinate law-making bodies, both in this country and throughout the British Empire and Commonwealth of Nations, on whom legislative powers have been conferred. The legislative powers of subordinate law-making bodies are limited by, and can be revoked by, the supreme legislature which created them. But it would be wrong to suppose that all such bodies are treated in the same way.

At the top of the scale come the Parliaments of the Dominions, which have in the course of time acquired the position of "autonomous" Legislatures, which are "sovereign within their powers." This is a result of political developments crystallised into constitutional conventions formulated at Imperial Conferences and to some extent, as already stated, recited or enacted in the Statute of Westminster, 1931. The chief remaining limitations on the powers of the Parliaments of the Dominion of Canada and the Commonwealth of Australia are due to the federal nature of the Canadian and Australian Constitutions, rather than to any inferiority to the Parliament of the United Kingdom.

(*i*) [1909] A. C. 147, at pp. 163—164. See also *Viscountess Rhondda's Peerage Claim*, [1922] 2 A. C. 339; *post*, p. 63.

Next come the Legislatures of the Canadian Provinces, the Australian States and self-governing Colonies, such as Southern Rhodesia; and after them the Legislatures of other Colonies. A Colonial Legislature, besides being bound by the Constitution Act of the Colony, is subject to the provisions of the Colonial Laws Validity Act, 1865, according to which a Colonial statute is void to the extent that it is repugnant to any statute of the British Parliament applying to that Colony or to any document which the Colonial Laws Validity Act says is to have the force of law in the Colony. Having besides their particular powers a general power to make laws for "the peace order and good government" of their territories, the above Legislatures are not regarded as mere "delegates" of the Parliament at Westminster (*k*).

Local authorities and public utility corporations, on the other hand, have no powers beyond those specified in statutes; if their by-laws go beyond these in any particular the Courts will declare them *ultra vires*. They are subject to the maxim *delegatus non potest delegare*. Their by-laws may be declared void if they are unreasonable, or if they are repugnant to statute law or the common law. They have no general law-making power for the good order and government of persons or property.

Local authorities, however, are responsible bodies, elected by the ratepayers in the manner prescribed by Parliament to administer local affairs, and therefore the Courts would hesitate to declare local by-laws void as being "unreasonable" unless they were also "oppressive." The by-laws of public utility companies, such as railway companies, and the miscellaneous bodies at the bottom of the scale, may be impugned if they are not both *intra vires* and reasonable, and the Courts would "lean" against them rather than in their favour.

The King without Parliament has subordinate law-making powers exercised by Orders in Council and Proclamations, the latter being used rather to give publicity than to alter the law. The common law (or "prerogative") power to legislate by Order in Council—which cannot be called "delegated" since it is older than Parliament—is now limited to the making of laws for the government of newly conquered or ceded territories (*l*). The power which is frequently

(*k*) See further, Chapter XXXVIII. (*l*) *Post*, Chapter XXXVIII.

conferred by Parliament to issue Orders in Council on a wide variety of particular matters is delegated legislation and is treated by the Courts as such. In practice the Orders are drafted by or on behalf of Government departments under the supervision of the Ministers concerned. Ministers themselves have also many statutory powers to issue rules, orders and regulations, and the Judges have a statutory power to regulate judicial proceedings by Rules of Court.

CHAPTER III.

THE CONVENTIONS OF THE CONSTITUTION.

CERTAIN important "conventions" control the entire working of the Constitution. They may be defined as rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as the Courts would not enforce them if the matter came before them (*a*). There is no direct legal sanction for their breach, but to exclude them from the province of Constitutional Law would be to give a false and misleading impression of the British Constitution.

Constitutional conventions fall into three main groups. (1) relating to the exercise of the royal prerogative and the working of the Cabinet system; (2) regulating the relations between the Lords and Commons, and proceedings in Parliament; and (3) regulating the relations between the Members of the British Commonwealth of Nations, *i.e.*, the United Kingdom and the Dominions (*b*).

(1) Conventions relating to the exercise of the royal prerogative and the working of the Cabinet system.—The legal powers of the King are still vast. Bagehot wrote in 1867: "I said in this book that it would very much surprise people if they were only told how many things the Queen could do without consulting Parliament, and it certainly has so proved, for when the Queen abolished purchase in the army by an Act of Prerogative (after the Lords had rejected the Bill for doing so) there was a great and general astonishment. But this is nothing to what the Queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to

(*a*) To define laws as "rules of conduct which the Courts will enforce" would not give an adequate description of the nature of law, but it may be said that rules of conduct which the Courts would not enforce are not laws (see Hood Phillips, *Principles of English Law and the Constitution*, pp 26—29).

(*b*) See Dicey, *Law of the Constitution* (9th ed.), chh. 14 and 15, but cf. Dr. Wade's Introduction, pp. xov—cxlvi. See also Jennings, *The Law and the Constitution* (3rd ed.) ch. 3; *Cabinet Government*, ch. 1; *Parliament*, ch. 3; Wheare, *The Statute of Westminster and Dominion Status* (2nd ed.), ch. 1; Keith, *The Dominions as Sovereign States*, pp. 141—145, 161—167.

engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors, 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; she could pardon all offenders. In a word the Queen could by prerogative upset all the action of civil government within the Government, 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" (*c*) Most of this is as true as when Bagehot wrote it eighty years ago.

He might have added that the Sovereign can legally dissolve Parliament at any time, and need not summon another for three years; that he could refuse his assent to measures passed by both Houses of Parliament; that he could at any time dismiss his Ministers and appoint others, and so on. The exercise of these powers, however, is either restricted altogether or regulated by conventions, of which the following are some of the most important.

(i) The King must invite the most influential leader of the party or group commanding a majority of the House of Commons to form a Ministry. When two or more leaders enjoy in much the same degree the confidence of such party or group he is probably free to call on either or any of them. Events since 1922 suggest that if of two such persons one is a peer, the other will be called upon. The person so called on is the "Prime Minister." In law the Prime Minister until recently did not exist, and even now he is only referred to incidentally in two or three statutes, *e g.*, the Chequers Estate Act, 1917 (country residence), the Ministers of the Crown Act, 1937 (salary and pension), and the Physical Training and Recreation Act, 1937 (appointment of committee for physical training) (*d*).

(ii) The King must appoint as his other Ministers such persons as the Prime Minister advises him to appoint. By law the King can appoint and dismiss his Ministers at his pleasure.

(*c*) Bagehot, *The English Constitution*.

(*d*) The Prime Minister is, however, mentioned under that name in many official documents, notably the Treaty of Berlin, 1878, and a Royal Warrant of 1905 giving him precedence next after the Archbishop of York.

(iii) The body of Ministers so appointed become the "Government," and an inner ring of them are called the "Cabinet." (Cabinet Ministers are always made Privy Councillors, if not such already.) The Cabinet is entirely the product of convention, and is unknown to the law except for the incidental reference in the Ministers of the Crown Act, 1937 (*c*).

(iv) The King is bound to exercise his legal powers in accordance with the advice tendered to him by the Cabinet. He has the right to be kept informed and to express his views on the questions at issue, but not to override Ministerial advice.

(v) The King must assent to every Bill passed by the Houses of Parliament, or passed by the House of Commons only in accordance with the Parliament Act, 1911. (No Bill has the force of law until the King gives his assent, but there is no law requiring him to give it.)

(vi) Parliament must be summoned to meet at least once each year. (By the Triennial Act, 1694, Parliament must be summoned at least once in three years.)

(vii) *Prima facie* the Ministry is entitled to continue in office so long as it enjoys the confidence of a majority of the House of Commons. It is bound to resign or advise the King to dissolve if placed in a minority in the House of Commons on a major issue. It is further entitled, though not defeated in the Commons, to advise a dissolution if there are good grounds for thinking that it no longer enjoys the confidence of the electors. If a Ministry, which has been defeated in the House of Commons, has advised a dissolution and is defeated in the country at the ensuing general election, the Ministry should resign, either at once or after a defeat in the Commons, and cannot properly advise a second dissolution. (By law, subject to the Triennial Act, 1694, and the Parliament Act, 1911 (fixing the maximum duration of a Parliament at five years), the King has power to summon and dissolve Parliament at his pleasure.)

(viii) The Ministry are collectively responsible to Parliament for the general conduct of the affairs of the country. The collective responsibility of the Ministry to Parliament requires that on a major question the most influential members of the Ministry, *i.e.*, the Cabinet, shall be of one mind and voice. If any member of the

(*c*) *Post*, p. 196.

Ministry does not agree with the policy of the majority of his colleagues, he or they must resign office.

(ix) A Ministry should not advise the Crown to declare war, make peace, or conclude a treaty, unless there is ample ground for supposing that the Commons approve of such war, peace, or treaty. (By law, the power to make war and peace, and to enter into international treaties, is vested in the King, who is not bound to consult advisers or Parliament, though the Bill of Rights, 1689, prevents him from imposing taxation to meet financial commitments.)

(2) Conventions regulating the relations between the Lords and Commons, and proceedings in Parliament.—The House of Commons being the representative assembly, its will ought ultimately to prevail in cases of conflict with the House of Lords, which is mainly hereditary and partly nominated. Since mediæval times, the Commons have claimed to control national finance, that is, the levying of taxation and the supervision of the expenditure of public money. Each House must have power to control the conduct of its own proceedings free from outside interference, and in course of time the Houses have evolved rules and customs, privileges and practice regulating legislative procedure and the conduct of debate. Parliamentary custom is not by any means all contained in Standing Orders; most of the Standing Orders of the House of Commons are less than two hundred years old, and any of them can be suspended, altered or repealed by resolution of the House. The two main purposes of Standing Orders are to make the most economical use of Parliamentary time and to protect the rights of minorities (*f*).

The following are some of the most important conventions in this group:—

(i) In cases of conflict the Lords should ultimately yield to the Commons. Until the Parliament Act, 1911, was passed, it was legitimate for a Ministry in the case of an important measure being rejected by the Lords, in the last resort to advise the Sovereign to create a sufficient number of peers to ensure its passage in the Upper House. The Treaty of Utrecht was ratified by this method in 1712, and the Reform Act, 1832, and the Parliament Act, 1911, were passed by the threat of recourse to it. (The Parliament Act itself by substituting

(*f*) Ilbert, *Parliament*, pp. 131—133.

for the absolute veto of the House of Lords a suspensive veto in the case of general legislation, and by abolishing the absolute veto altogether in the case of Money Bills, has made recourse to this expedient for the future unnecessary and possibly improper.)

(ii) Peers who do not hold or have not held high judicial office do not attend when the House of Lords is sitting as a Court. (The Appellate Jurisdiction Acts, 1876, *et seq.*, provide for the appointment of a certain number of "Law Lords," but there is no law that lay peers may not sit as well.)

(iii) Proposals involving the expenditure of public money may only be introduced on behalf of the Crown by a Minister in the House of Commons. Standing Orders provide that a financial resolution shall only be proposed by a Minister on behalf of the Crown and shall be considered in a Committee of the whole House. (The Parliament Act, 1911, assumes that Money Bills will only be introduced in the Commons.)

(iv) The business of the House of Commons is arranged informally "behind the Speaker's chair" between the Prime Minister and the "Leader of the Opposition." The latter is a product of convention more recent than the Prime Minister, and fulfils the function of a sparring partner. (The Ministers of the Crown Act, 1937—rather paradoxically, a foreigner might think—gives the Leader of the Opposition a salary payable out of the Consolidated Fund.)

(v) The political parties are represented in Parliamentary committees in proportion to the number of their adherents in the House. (The Ministers of the Crown Act, 1937, indirectly recognises the existence of political parties in its definition of the Leader of the Opposition.)

(3) Conventions regulating the relations between the United Kingdom and the Dominions.—A number of conventions have grown up regulating the relations between the United Kingdom on the one hand and the Dominions on the other, providing methods of co-operation and communication between the members of the British Commonwealth among themselves, and concerning negotiations between them and foreign countries. Many of these conventions are formulated as resolutions of Imperial Conferences, though this does not give them legal effect. They are not referred to in statutes, except for some

of those relating to the legislative power. The following are some of the most important of this group of conventions:—

(i) The Parliament of the United Kingdom may not legislate for a Dominion except at its request and with its consent. (This convention is recited in the Preamble to the Statute of Westminster, 1931, and enacted as section 4 of that Act) (*g*).

(ii) Any alteration in the law touching the Succession to the Throne or the Royal Style and Titles requires the assent of the Parliaments of all the Dominions as well as of the Parliament of the United Kingdom. (This convention is recited in the Preamble to the Statute of Westminster, 1931) (*g*).

(iii) The King in appointing the Governor-General of a Dominion acts on the advice of the *Dominion* Prime Minister.

(iv) The Governor-General is the representative of the King, not of the British Government, and acts on the advice of the *Dominion* government (*h*).

(v) The governments of the United Kingdom and the Dominions keep each other informed with regard to the negotiation of treaties and the conduct of foreign affairs, and none of them can commit the others without their consent. (The Crown or the Governor-General would not be bound by English law to observe these last three conventions, but such conventions may be enacted in Dominion constitutions.)

The Purpose of Constitutional Conventions.—It may be said that the ultimate object of almost all the conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors. The reason why the Ministry must be chosen from the party or parties enjoying a majority in the Commons is that, on the assumption that the majority of the Commons reflect the views of the majority of the electors, a Ministry so selected will be most likely to give effect to the will of the nation as a whole. And this is also the reason why the King should act on the advice of Ministers, why Ministers should resign if defeated in the Commons, and why the House of Lords should ultimately give way to the House of Commons.

(*g*) For a discussion of the legal position, see *post*, p. 592.
(*h*) The President of Eire is legally bound by the Constitution of Eire to act on the advice of the Government of Eire, but he is not the King's representative.

To ensure that the power of government shall be exercised in accordance with the popular will; that will must be ascertained from those best qualified to know it, namely, the elected representatives of the people; hence the convention requiring Parliament to be summoned annually. If there is reason to suppose that it no longer represents the will of the country, the Ministry may properly advise a dissolution in order to enable the electors, through a new Parlament, to obtain a new Ministry more after its heart.

In this way the legal framework of 1688, a strong monarchy limited in certain specific ways, has become a "constitutional" monarchy, that is to say, a democratic political system with a hereditary head of the State practically bereft of governmental powers. To meet current political ideas and social needs, conventions have facilitated the growth of the Cabinet system; changed the emphasis on the functions of Parliament, which is now largely occupied in representing the views of the electors by criticising the Government's activities and debating their measures; and developed the autonomy of the Dominions.

Conventions make the legal constitution work by providing means for co-operation in the practice of government. In particular, the Cabinet system co-ordinates the work of the various government departments among themselves, and promotes co-operation between the departments and Parliament and between the Ministry and the King. Similarly, the conventions relating to Dominion status enable the United Kingdom and the Dominions to co-operate to a great extent in their defence and foreign policy.

Why are Conventions observed?—What is it that compels obedience to certain of these extra-legal or conventional rules? The answer seems to be that obedience is yielded to the conventions because of the consequences which would plainly ensue if they were disregarded. Thus if Parliament were not summoned annually the army would fall to pieces, an important part of the public revenue, namely, income tax, could not be lawfully raised, and even less could be lawfully spent. If the King appointed as his First Minister someone who did not enjoy the confidence of the majority of the Commons, he and his colleagues could be defeated in the Lower House. If such Ministry (or any Ministry) after its defeat declined to resign or dissolve, the

Commons could paralyse the business of government by refusing supplies or throwing out the Army (Annual) Bill. Even if a Government succeeded in carrying on for a time in disregard of Parliament, it would cease to be in touch with the will of the electors and would forfeit their favour, assuming this had not been already lost by their recourse to extra-parliamentary government.

Some conventions are not always observed if special circumstances warrant a departure from established practice, but if they were not regularly observed they would not be conventions. It is the reason or purpose for which they stand that both leads to their development and secures their observance. The "agreement to differ" in 1932, whereby certain Liberal members of the Cabinet were permitted by their colleagues to disagree openly on the majority's fiscal policy, was sought to be justified by the necessity of preserving the National (Coalition) Government in view of the "economic crisis"; but it did not work, and the recalcitrant members soon resigned office (*i*). On the other hand a convention that the Speaker should not be opposed in his constituency at a general election in order to preserve his political impartiality, might become obsolete if it were thought more important that his constituents should not be virtually disfranchised for a long period and no other way of avoiding this difficulty could be found.

Dicey (*k*) considered the sanction of constitutional conventions to be that a person who persisted in the breach of convention would inevitably be led into a breach of the law sooner or later—in one place he says "immediately." Thus if Parliament were not summoned in any one year, so that the annual Finance and Appropriation and Army Acts expired, the collection of most of the national revenue, the expenditure of most of the public funds and the maintenance of a standing army and the enforcement of military discipline would be illegal under the Bill of Rights.

For the reasons given above, it is not thought necessary to go as far as this, but in any event Dicey's answer is not complete. In the first place, Dicey only deals with one group of conventions, though admittedly the most important, namely, those which regulate the relations between the Executive and Parliament, especially those between the Government and the House of Commons. Thus no

(*i*) *Post*, p. 197. (*k*) Dicey, *op. cit.*, ch. 15.

breach of law would follow if lay peers attended a trial in the House of Lords or the United Kingdom Parliament legislated for a Dominion without its consent. Secondly, certain qualifications must be made even in the case of those conventions to which Dicey's argument applies. If the Government retained the confidence of Parliament it could procure the alteration of the law, as it did with the Provisional Collection of Taxes Act, 1913, following the decision of *Bowles* v. *The Bank of England* (*l*), or the passage of an Act of Indemnity, thus indicating that the convention in question was, either generally or in the particular circumstances, undesirable or had lost its purpose. Even if the Government lost the confidence of the Commons, it might possibly remain in office for as long as nine months without breaking the law owing to the time-lag between the lapsing of the Finance and Army Acts and the beginning of the next financial year when the Commons must be asked for fresh supplies.

(*l*) [1913] 1 Ch. 57; *ante*, p. 21.

PART II.

PARLIAMENT.

CHAPTER IV.

THE HIGH COURT OF PARLIAMENT.

Historical Introduction.—When we speak of the "High Court of Parliament" at the present day we mean the legislature, but the expression should remind us that Parliament was, and still is, a Court—the highest Court in the land. Coke, in his treatment of the jurisdiction of the Courts, deals first with "The High and most Honourable Court of Parliament" (*a*), and says that "the Lords in their House have power of Judicature, and the Commons in their House have power of Judicature, and both Houses together have power of Judicature" (*b*). The distant precursor of Parliament was the *Curia Regis*, in which the judicial, executive and legislative powers were fused, and its remotest ancestor was the Witan, which also exercised all three functions of government.

Within the *Curia Regis* noteworthy cleavages developed. In 1215, as a result of the provision of Magna Carta, c. 17, that "Common pleas shall not follow one Court, but shall be held in some fixed place," the new Court of Common Pleas became established in Westminster. After the fall of the Justiciar in the reign of Henry III, the three great Courts of Common Law split off from the Council, and the appellate jurisdiction—such as it was—passed to the Lords. Finally, the Council may be said to have separated from Parliament in the reign of Richard II (*c*).

The primary function of the High Court of Parliament was probably judicature, and the primary function of the Model Parliament of Edward I was judicature. In the statutes of the Lords Ordainers (*temp.* Edward II in 1311) we come across the following passage:

(*a*) 4 *Inst.* 3, 4. (*b*) 4 *Inst.* 15.

(*c*) McIlwain, *The High Court of Parliament*, ch. 3; Baldwin, *The King's Council during the Middle Ages*, chh. 1 and 12; Pollard, *Evolution of Parliament* (2nd ed.), ch. 2; Pike, *Constitutional History of the House of Lords*, ch. 4.

"Whereas many folk are delayed in the King's Court because defendants allege that the plaintiffs ought not to be answering in the absence of the King, and many also are wronged by Ministers, which wrong they cannot get redressed without Parliament: we order that the King hold a Parliament once a year or twice if need be, and that in a convenient place and in the same Parliament state pleas which have been delayed, and pleas about which the judges differ be recorded and determined" (*d*).

Before treating of the legislative functions of Parliament we may with advantage glance at its judicial functions. The remnants of this judicial function of the King in Parliament are to be found as follows. (1) The appellate jurisdiction of the Lords, both civil and criminal. (2) The joint judicial and quasi-judicial functions of the Lords and Commons relating to impeachments and bills of attainder. (3) The judicial functions of the Lords and Commons within the sphere of their privileges (*e*) (4) The jurisdiction of the Lords and the Commons in committees dealing with private bills (*f*). (5) The judicial functions of the Lords with regard to claims to ancient peerages, provided that the King (as he has done for over two hundred years) refer such claim to them (*g*). (6) The judicial function of the Speaker of the House of Commons when, after consulting, if practicable, two members appointed from the Chairman's panel, he decides whether any given bill is a Money Bill (*h*). (7) The right of the Lords as a Court of first instance to try peers and peeresses for treason or felony (*i*).

The Commons never, except on two occasions, laid claim to exercise criminal jurisdiction, or indeed any purely judicial function outside their privileges, and in 1399 both Houses passed resolutions that the judicial power of Parliament was not vested in the Lower House.

The two occasions on which they usurped criminal judicial functions were the case of Floyd in 1621 and the case of Mist in 1721. Edward Floyd was a barrister and a Roman Catholic, who wrote slightingly of the Elector Palatine, and the Commons, animated by Protestant zeal, sentenced Floyd to the pillory and ordered a whipping and a fine of £1,000, with imprisonment for life thrown in. The Lords remonstrated,

(*d*) Pollard, *op. cit.*, pp. 35—36
(*e*) *Post*, Chapter X.
(*f*) *Post*, Chapter XI.
(*g*) *Post*, Chapter VI.
(*h*) *Post*, Chapter IX.
(*i*) *Post*, Chapter VI.

and in the end the Commons allowed Floyd to be tried in the Lords. The Lords inflicted a punishment still more severe on Floyd, though the whipping was remitted. Here both Houses illegally usurped criminal judicial functions. (*Floyd's Case* (1621) (*j*).)

In 1721 Mist, a printer, was committed to Newgate by the Commons for printing a Jacobite newspaper which the Commons considered a traitorous libel. This was an illegal extension of the privileges of the House of Commons, as they can commit only for contempt. (*Mist's Case* (1721) (*k*).)

The House of Lords once thought that it possessed original jurisdiction to try civil cases. They attempted to assert this jurisdiction in the case of *Skinner* v. *The East India Company* (1666) (*l*), but were forced in the end to abandon their claim.

In the case of *Shirley* v. *Fagg* (1675) (*m*), the Commons contested the right of the Lords to hear appeals in equity, but were unsuccessful.

At the present day claims to ancient peerages are invariably referred to the Committee of Privileges of the House of Lords. In strictness the King, to whom the petition is addressed, has a prerogative right to refer these claims to any Court he selects; but as he has not attempted to exercise this prerogative for over two hundred years it is probably obsolete.

Effect of the Judicature and Appellate Jurisdiction Acts.—By the Judicature Act, 1873, the appellate jurisdiction of the Lords was abolished, but it was revived by the Appellant Jurisdiction Act, 1876, before its abolition took effect.

Appeals in civil cases.—By the latter Act the House of Lords was constituted a final Court of Appeal for civil appeals from English, Irish and Scottish Courts. Though all the Lords may act as Judges, by convention the lay peers absent themselves, and the statute provides that no appeal can be heard unless there be present three at least of the following persons: (1) the Lord Chancellor; (2) a Lord or Lords of Appeal in Ordinary (of whom the Appellate Jurisdiction Acts, 1876—1929, give power to appoint seven); (3) Lords of Parliament who have held high judicial office.

The appellant prays for a review of the judgment and that "the

(*j*) 2 St. Tr. 1153.
(*k*) Hallam, *Constitutional History*, ii, 379.
(*l*) 6 St. Tr. 710.
(*m*) 6 St. Tr. 1122.

order may be reversed, varied or altered, or that the petitioner may have such other relief . . . as to His Majesty the King in His High Court of Parliament may seem meet." Technically an appeal is won or lost on a vote in the House.

The House of Lords will not hear an appeal where the terms on which the Court of Appeal gave leave to appeal (*e.g.*, that the appellants are to pay the costs in the House of Lords in any event and not to ask for the return of any money ordered to be paid by the Court of Appeal) are such that it is a matter of indifference to the respondent whether he wins or loses (*n*).

The Court can sit during a prorogation and after a dissolution of Parliament, and in cases of difficulty their lordships may call to their assistance the Judges of the King's Bench Division

Appeals in criminal cases.—The House of Lords, as above constituted, is now a Court of final appeal in criminal cases by virtue of the Criminal Appeal Act, 1907. It can hear appeals in all cases cognisable by the Court of Criminal Appeal; but the accused or the Director of Public Prosecutions or the prosecutor, as the case may be, must obtain the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought. (Criminal Appeal Act, 1907, s. 1.)

Trial of peers.—The Lords have for centuries tried all peers by blood, and peeresses by blood or marriage, for treason or felony. The accused is summoned or arrested in the ordinary way and committed for trial by justices of the peace. The case used next to go before a grand jury. Since the abolition of grand juries by the Administration of Justice (Miscellaneous Provisions) Act, 1933, the next step is to indict the accused at the Old Bailey, the case being then removed to the House of Lords by writ of *certiorari*. If Parliament is sitting the accused is tried before the Lords themselves as judges of law and fact, a person appointed by the King as Lord High Steward presiding. Each peer then gives his verdict, commencing with the junior peer (*o*). If Parliament is not sitting the King appoints a Lord High Steward, who acts as Judge of law, and a minimum of twelve peers—though all (or possibly a maximum of twenty-three) have a right to attend—

(*n*) *Sun Life Assurance Co. of Canada* v. *Jervis* (1944), 170 L. T. Rep. 345.
(*o*) *R.* v. *Earl Russell*, [1901] A. C. 446.

act as judges of fact. Although a Lord High Steward is appointed in both cases, in the latter case the Court before which the trial takes place is called the Court of the Lord High Steward, and not the House of Lords. There has been no trial in the Lord High Steward's Court since that of *Lord Delamere* (1686) (*p*), and the procedure is obscure and a matter of controversy. The last trial of a peer before the House of Lords was that of Lord de Clifford for manslaughter in 1935 (*q*).

The lords spiritual have the right—and, under the Constitutions of Clarendon, 1164, the duty—to be present at the trial of a peer in the House of Lords; but as, according to the canons of the Church, they may not consent to the death of a man, and felony as well as treason would in former times usually involve the death penalty, they withdraw before judgment is given The lords spiritual are not summoned to the Court of the Lord High Steward, though it seems that until the fifteenth century they might appoint a procurator to represent them there (*r*).

Irish and Scottish peers (even though not lords of Parliament) and peeresses are triable before the Lords, but not bishops (even though lords spiritual), for they are not peers (*s*).

Impeachment.—An impeachment is a judicial proceeding against a lord or a commoner who is accused of a high crime or misdemeanour, or of treason or felony. In an impeachment the Commons are the accusers, and the Lords are judges both of fact and law.

The first recorded case of impeachment occurred in 1376, when Lords Latimer and Neville and four commoners—viz., Lyons, Ellys, Peachey, and Bury—were charged with the removal of the staple from Calais, lending the King money at usurious interest, and buying Crown debts for small sums and then paying themselves in full out of the Treasury.

In 1386 Michael de la Pole, the Chancellor, was impeached and dismissed for official misconduct. William de la Pole was impeached in the reign of Henry VI. After this there was no impeachment till the reign of James I, bills of attainder taking their place. In 1621

(*p*) 11 St. Tr. 510

(*q*) *R.* v. *Baron de Clifford, Times Newspaper*, 13th December, 1935, pp 15—16, *Proceedings on the Trial of Lord de Clifford*, H M. Stationery Office, 1936.

(*r*) Pike, *Constitutional History of the House of Lords*, pp. 218, 227—228.

(*s*) Pike, *op. cit.*, p. 221, Palmer, *Peerage Law in England*, p. 152.

Lord Bacon and Sir Giles Mompesson were impeached, and down to the Revolution there were forty cases of impeachment. From the accession of William III to the death of George I there were fifteen cases. There was one case during the reign of George II.

The *Case of FitzHarris* (1681) (*t*) was noteworthy, as it raised the question whether a commoner could be impeached for a capital offence. The Commons impeached FitzHarris with the real object of manipulating the exclusion of James II from the throne. The Lords refused to entertain the impeachment on the ground that they had no jurisdiction to try a commoner for a capital offence. Charles II thereupon directed the prosecution of FitzHarris in the King's Bench. The Commons resolved that the action of the Lords in refusing to try the accused was a denial of justice and a violation of the constitution of Parliament, and that if any inferior Court tried FitzHarris, it would be guilty of a breach of the privileges of the Commons. Charles II dissolved Parliament, and afterwards FitzHarris was tried in the King's Bench, condemned, and executed.

In the case of Sir Adam Blair and four others, who were impeached for treason in 1689 for publishing a proclamation of James II, the Lords proceeded with the impeachment, and now it seems to be settled law that the Lords can try a commoner in a capital case, as well as for misdemeanour (*u*).

The last two cases of impeachment were those of Warren Hastings (1787) (*v*) and Lord Melville (1805) (*x*). At these trials the question arose whether a prorogation or dissolution caused an impeachment to lapse. It was held that neither did so, yet in both cases statutes were passed legalising the continuance of the trials. This contention was also raised in *Danby's Case* (1679).

Impeachment may perhaps be said to be now obsolete It is still talked about in times of political excitement, but circumstances are not easily imaginable in which resort to it might still be necessary. So far as Ministers are concerned this is mainly due to the development of the conventions relating to responsible Parliamentary government.

The Act of Settlement, 1700, provides that a pardon under the

(*t*) 8 St Tr. 255. 1 Vent 354

(*u*) *Impeachment of Sir Adam Blair*, 12 St. Tr. 1207, Pike, *op cit.*, pp. 232—233; Anson, *Law and Custom of the Constitution*, vol I (5th ed.), pp. 384—386

(*v*) *Impeachment of Warren Hastings* (1787), Lords' Journals, xxxvii, 678; (1795), Lords' Journals, xl, 388.

(*x*) *Impeachment of Lord Melville* (1805), 29 St. Tr 549.

Great Seal cannot be pleaded by way of defence to an impeachment of the Commons. The King can, however, pardon after the Lords have passed sentence, and this was done in the case of three Lords who were impeached and sentenced after the Rebellion of 1715.

This provision of the Act of Settlement arose out of the case of Danby. Danby was impeached in connection with a letter written by him to the English ambassador at Versailles at the express command of Charles II, who wrote on the letter: "This letter is writ by my Order.—C. R." (*y*).

Acts of attainder.—An Act of Attainder, though it has served the same purpose as impeachment, is strictly a legislative and not a judicial act. It is an Act of Parliament finding a person guilty of an offence, usually a political one of a rather insubstantial kind, and inflicting a punishment on him. It was not necessarily preceded by a trial in which the accused could defend himself. One of the first Acts of Attainder of which we know was that of the Duke of Clarence in 1477, and from about that time until James I's reign this procedure was commonly used instead of impeachment. Bacon, the Lord Chancellor, was impeached in 1621 and Buckingham in 1626 but the process of attainder was revived against Strafford in 1641, and Laud in 1645, and in a few other cases down to those of Bolingbroke and Ormonde in 1715.

The Act for the Attainder of Strafford (*z*), after reciting that Strafford had been impeached by the Commons of high treason for endeavouring to subvert the ancient and fundamental laws of the realms of England and Ireland and to introduce arbitrary and tyrannical government into those kingdoms, for exercising a tyrannous and exorbitant power against the rights of His Majesty's subjects, advising the King to use the army in Ireland to overawe this country, and instigating wars between England and Scotland, enacts that the said Earl "stand and be adjudged attainted of high treason," and condemns him to suffer the pains of death and forfeiture of all his property in England and Ireland.

(*y*) The letter is on view in the British Museum in normal times. *Danby's Case* (1679), 11 St Tr 599, involved the following constitutional questions: (1) Whether a Minister of the Crown can shield himself by pleading the express command of his Sovereign; (2) Whether the Lords can deny justice when a man is impeached; (3) The right of pleading the royal pardon by way of defence, (4) The right of the bishops to be present at the trial before the Lords of a capital offence provided they retire before verdict given. The Commons objected to the presence of the bishops on the ground that final judgment frequently depends on preliminary proceedings.

(*z*) 16 Car. I, c. 38.

CHAPTER V.

PARLIAMENT AND THE CROWN.

The Royal Prerogative in relation to Parliament.—A "Parliament" is the period covered by the sittings of the Legislature between its summons and its termination by dissolution or lapse of time. During a single Parliament there are a number of "sessions"—before 1914, generally not more than one a year, since 1918, often two. A session is terminated by "prorogation." Within a session there are a number of sittings separated from each other by adjournments. Parliament can be adjourned of its own motion without any exercise of the prerogative. Such an exercise is, however, necessary to summon, prorogue or dissolve Parliament. The Royal Proclamation which dissolves one Parliament also summons the next. On the accession of a new Sovereign, Parliament, if not sitting, is to assemble without delay.

In medieval times certain Sovereigns pleased themselves whether they would convene Parliament, though as early as Edward III's reign in 1330, a statute provided that Parliament should be convened annually, or oftener if need be. In the reign of Charles I the Long Parliament, in 1641, passed the first Triennial Act, which enacted that a Parliament should be held in every third year. This Act, moreover, enabled the peers to meet and issue writs for the election of the House of Commons, should the King omit so to do for three years; and if the peers made default, the sheriffs and mayors were to see to the election. In the reign of Charles II the Triennial Act of 1641 was repealed by the second Triennial Act of 1664. This Act provided, in effect, that the sitting of Parliament should not be discontinued for over three years; but it laid down no machinery for the summoning of Parliament should the clause be disregarded. This provision of the Triennial Act, 1664, that a Parliament should be held once at least in three years (a provision which is still law) was re-enacted in the Triennial Act of 1694, which also provided that no Parliament should *last* for more than three years: at the end of that period it was to die a natural death.

The latter provision of the Triennial Act, 1694, was repealed by the Septennial Act, 1715, which provided that a Parliament shall

last for a period not exceeding seven years. This provision in its turn was, in effect, repealed by the Parliament Act, 1911, which provided (section 7) that the maximum duration of a Parliament should be five years. That is the maximum legal duration of a Parliament to-day.

It is the practice in war-time to extend the life of the existing Parliament from year to year by annual Acts, amending the Parliament Act, 1911, and the Septennial Act, 1715, thus avoiding the confusion, waste of time and recrudescence of party warfare that would be occasioned by a general election, apart from the fact that the armed forces—at any rate, those stationed abroad—would be unable to vote. Thus the Parliament that passed the Parliament Act, 1911, survived until after the Armistice in 1918, and the Parliament elected in 1935 lasted until 1945 (*a*).

The Bill of Rights, 1688, declared (section 13) that for the redress of all grievances and for the amending, strengthening, and preserving of all laws, Parliament ought to be held "frequently." The real security of the nation, however, for the frequent, indeed, the annual, meeting of Parliament, consists in the following facts. (1) that unless Parliament met each year the Army Act, 1881, which has to be re-enacted annually, would lapse; (2) the levying of certain taxes, notably income tax, which are imposed annually, would be illegal; (3) the expenditure of public money, which requires the annual sanction of Parliament, would cease to be lawful; and (4) a large number of annual Acts, some of which are of the greatest importance, which are usually re-enacted by Parliament by the Expiring Laws Continuance Acts, would lapse. This is, of course, the reason why it is the practice of Parliament to make these Acts annual Acts. Moreover, it is necessary to keep Parliament in almost constant session, not only to legislate but to deal with emergencies.

The existence of Parliament is terminated by lapse of time, viz., five years, under the provisions of the Parliament Act, 1911, or by a dissolution. In practice, the Government takes or makes an opportunity favourable to its own interests to advise a dissolution during the fifth year if no crisis has occurred before then.

(*a*) Prolongation of Parliament Acts, 1941—44. The composition of the House of Commons gradually changes in the course of time owing to the death or retirement of members. More than 100 by-elections were held between 1935 and 1944.

Prorogation.—While dissolution terminates a Parliament, prorogation terminates a session. Under the Meeting of Parliament Act, 1797, as amended by the Meeting of Parliament Act, 1870, the Crown could by proclamation summon a Parliament which stood prorogued to meet within not less than six days. By the Parliament (Elections and Meeting) Act, 1943, a prorogued Parliament may be summoned to meet any day after the date of the proclamation. Before 1914 there was, as a rule, one session in the year, beginning in February and ending about the beginning of August. Even then, however, there were in exceptional cases "autumn sessions." An "autumn session" is sometimes in the strict sense an additional session, following the prorogation of the Easter session: but the term is loosely used also to cover the resumption, at some future date, of an earlier session which has not been prorogued but merely adjourned.

Bills in progress have their careers checked by a prorogation and must be introduced *de novo* in the next session or else abandoned, a rule which is subject to criticism and should be considered along with other proposals for the reform of Parliamentary procedure (*b*). Impeachments and appeals to the House of Lords are not now affected, nor are local bills.

Parliament and the demise of the Crown.—Formerly Parliament expired when the King died. 7 & 8 Will. 3, c 15, provided that Parliament should not expire till the King had been dead six months, unless the new King chose to dissolve it. Now, by the Representation of the People Act, 1867, the death of the King is not to affect the existence of Parliament at all.

Dissolution.—Parliament is dissolved by a Royal Proclamation, expressed to be issued with the advice of the Privy Council. Though the King can dissolve Parliament when he likes, his conduct, though legal, would be unconstitutional if he did so without the consent of his Ministers. It has been the uniform practice for more than a century that the Sovereign should not refuse a dissolution when advised by his Ministers to dissolve. Anson, while affirming this to be a settled convention of the Constitution, points out that it is also a convention that dissolutions should not be improperly advised, and

(*b*) There is a useful summary of recent proposals for the reform of Parliament in a pamphlet by R. S. W. Pollard, *How to Reform Parliament* (1944); see at pp. 26—27.

that the first rule might not have become established if the second had not been uniformly observed. Hence if a dissolution were requested improperly, the Sovereign might in an extreme case be justified in refusing the request. A dissolution can properly be requested when there is reason to think that the House of Commons no longer reflects the opinion of the nation, and with the object of restoring harmony between the two.

A dissolution would be improperly requested by a Ministry which, after suffering defeat in the House of Commons, and being placed in a minority at the ensuing general election, immediately thereafter asked the King to dissolve again. In the circumstances supposed the second general election would not be needed to restore harmony between the nation and the Commons, since such harmony would already exist by virtue of the first general election (*c*).

Adjournments.—Either House may adjourn its sittings for any given number of hours, days, weeks, or even (in modern times) months, but the Crown possesses a statutory power to order resumption of business when both Houses stand adjourned for more than six days. (Meeting of Parliament Acts, 1797 and 1870.)

The King's visits to Parliament.—The King by custom does not visit Parliament officially save on certain solemn occasions. He may attend at the opening and close of Parliament and of each parliamentary session. He can also personally attend Parliament to assent to laws, though he seldom does so. The Speech from the Throne at the opening of the session, after dealing with foreign relations and other matters of national importance, indicates the Government programme of legislation, while the Speech when Parliament is prorogued sums up the legislative results of the session.

The Royal Assent to Legislation.—A Sovereign has not refused assent to a Bill of the British Parliament since the reign of Queen Anne, and the exercise of this prerogative to-day would be unconstitutional. The Royal Assent is now almost invariably given by royal commission under 33 Hen. 8, c. 21 (*d*). Should the King refuse his assent, the words "*Le Roy s'avisera*" would be used. When the King assents

(*c*) Anson, *Law and Custom of the Constitution*, vol I (5th ed., Gwyer), pp. 325—330. See further, Jennings, *Cabinet Government*, Appendix IV.

(*d*) See Ilbert, *Parliament*, p. 75.

to a public Bill the words "*Le Roy le veult*" are used. For a private Bill the words "*Soit fait comme il est désiré*" are used, and for a money Bill the following, "*Le Roy remercie ses bons sujets, accepte leur bénévolence et ainsi le veult.*"

Convention of a New Parliament.—When the King is advised by the Cabinet to dissolve, a proclamation is published dissolving the existing Parliament. This is followed by the Order in Council (heralded by the proclamation) enjoining the issue of writs to the temporal and spiritual peers and returning officers, and a separate proclamation directing the election of sixteen representative peers of Scotland to serve during the ensuing Parliament. The Clerk of the Crown in Chancery then prepares writs, which on being sealed are sent to the following persons:-

(1) Temporal peers of the United Kingdom, who are summoned on their "faith and allegiance"

(2) The twenty-six spiritual peers, who are summoned on their "faith and love." Their writs contain a *præmunientes* clause, bidding them bring also archdeacons, deans and representatives of their clergy; this, however, they do not now do.

(3) The twenty-eight Irish peers, elected for life.

(4) The Judges and the Law Officers of the Crown. They are summoned to "treat and give counsel." They take no part in the debates, but may be asked to advise the Law Lords.

(5) Returning officers. The returning officer of a county is the sheriff, of a borough the mayor, of an urban district council the chairman of the council, and of a University the Vice-Chancellor or similar official (*e*). They are instructed to cause election to be made according to law of a member to serve in Parliament for the constituency mentioned, and to return the name to the Crown Office in Chancery. Their duties in relation to the conduct of elections are normally performed by the registration officers.

Meeting of new Parliament.—On the appointed day each House assembles in its own chamber until the Gentleman Usher of the Black Rod requires attendance of the Commons at the bar of the Lords.

(*e*) Before the Parliamentary Elections Act, 1853, all writs were sent to the sheriffs. The issue of writs to returning officers is now governed by Part II of the Parliament (Elections and Meeting) Act, 1943.

As many members as space permits then proceed with the Under-Clerk of Parliament (Clerk to the House of Commons) to the bar. The commission for opening Parliament is then read, unless the Sovereign is present, in which event no commission is necessary.

When this has been done by the Lord Chancellor, the Commons are bidden by him to retire and proceed to the election of a Speaker. The Clerk of the House then takes the chair and a Speaker is elected, and this ends the day.

After the election the new Speaker proceeds with the Commons to the bar of the House of Lords. He announces his election, which is confirmed by the Lord Chancellor in the name of the Sovereign. After this the Speaker claims certain ancient privileges of the House (*f*). The King, if present, reads his speech; if he is absent his speech may be read for him by the Lord Chancellor; or he may choose to read it himself on a future day. After this the Commons retire, and each member of either House proves his right to membership. Then members of both Houses take the statutory oath (Oaths Act, 1866) or affirmation (Oaths Act, 1888) of allegiance (*g*).

New Session.—At the beginning of each session (including, of course, the first), on the return of the Speaker from the Lords, the usual sessional orders are moved and a Bill is read formally the first time. The Speaker then reads a copy of the King's Speech to the House, and an address of thanks to His Majesty for the speech is moved and seconded. On that question amendments may be moved, and a general debate on the address takes place, in which the Government programme is discussed and criticised.

Evidence of right to membership.—In the Lords, Garter King-at-Arms produces a roll of peers entitled to be summoned as lords of Parliament. Each peer places his writ on the table of the House. A new peer hands his patent of nobility to the Lord Chancellor, kneeling as he does so. A hereditary peer does not require an introduction, nor does an elected Irish peer, but a newly created peer must be proposed and seconded. The certificate of the Lord

(*f*) *Post*, p. 99.

(*g*) For the events leading up to the passing of the Oaths Act, 1888, see *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 38; *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, *Bradlaugh* v. *Gossett* (1884), 12 Q. B. D. 271; *Att.-Gen.* v. *Bradlaugh* (1885), 14 Q. B. D. 667; cf. *post*, p. 108.

Clerk Register's return of Scottish peers is evidence of a Scottish peer's right to sit in the House.

The book of returns of elected commoners entitled to sit in the lower House, which is made out by the Clerk to the Crown in Chancery, is evidence of the right of each commoner to sit. Where a member, new or old, is elected at a by-election, he must be introduced by two other members.

All members of both Houses take the oath of allegiance to the new Sovereign on the demise of the Crown. But it is a fallacy to suppose that Privy Councillors, Judges, and other officers are bound as a condition of continuing to discharge their functions to renew any oath (*h*).

(*h*) Demise of the Crown Act, 1901: Reference to the Judicial Committee of the Privy Council after the death of Edward VII.

CHAPTER VI.

THE HOUSE OF LORDS.

The Composition of the House of Lords.—The House of Lords is composed of the Lords Spiritual and Temporal, who may be divided into the following groups:—

(1) The Lords Temporal:

(a) All hereditary peers of the United Kingdom,

save those who are subject to special disqualifications. They number about 700, and include holders of peerages of England created before the Union with Scotland in 1707, and holders of peerages of Great Britain created after that Union and before the Union with Ireland in 1800.

(b) The sixteen representative peers of Scotland.

(c) The representative peers of Ireland.

(d) The seven Lords of Appeal in Ordinary.

(2) The Lords Spiritual, consisting of the two Archbishops and twenty-four senior Bishops of the Church of England.

In addition, the Judges of the Supreme Court and the Law Officers of the Crown are summoned as advisers, but they do not now attend, except perhaps as spectators of the opening ceremony.

The formation of the House of Lords.—Before examining in more detail the various classes of Lords of Parliament it is necessary to glance at the history of the composition of the House of Lords in order to find out how such a curious collection of persons came to form the upper chamber of the "mother of Parliaments." Here the main difficulty lies with the hereditary peers, who are also hereditary Lords of Parliament.

The Feudal Council.—The origin of the House of Lords is to be found in the Great Council (*magnum concilium*), which goes back to Norman times, and—in the form of the Witenagemot—even earlier (*a*). The *magnum concilium* of the Norman and early Plantagenet Kings was a

(*a*) See Pike, *Constitutional History of the House of Lords*, ch. 4.

Council of the chief men of the nation, summoned by the King because of their wealth or skill. Wealth and power went with the holding of land, which was in the main hereditary; and no doubt lands were often granted to those whose knowledge and ability had helped the King in his task of government, but these qualities are not necessarily inherited. Obedience to a summons to the Great Council was a duty which was not always obeyed. It seems that the King could summon such of his tenants-in-chief and great officers as he chose. Chapter 14 of Magna Carta (1215), which required the issue of writs of summons to the archbishops, bishops, abbots, earls and greater barons (*majores barones*) individually, and to all others of the King's tenants-in-chief generally through the sheriffs, merely prescribed the method for obtaining the advice or consent of the King's tenants-in-chief, which was required by chapter 12 of the Charter before levying extraordinary feudal aid (*b*).

Baronage.—The connection between summons to early Parliaments and what later became "peerage" lies in the confused theory of baronage. Earls (counts) and those ecclesiastics who attended were also barons, and the former at least probably sat as barons; while at the time of which we are speaking dukes, marquesses and viscounts were not created. "*Baron*" (Latin *baro*) was the Norman-French for "man," and "the King's barons" were the King's men. In Norman times this may have meant those who held land directly under the King and owed him homage and other services; or it may have meant those who held certain offices from the King and, in particular, performed certain judicial functions. At any rate, baronage was connected in early times both with jurisdiction and with tenure.

The Norman earl, besides being a large landholder, also had important judicial and administrative functions corresponding roughly to the county, but for present purposes he may be regarded as one of the greater barons. The distinction between the greater and the lesser barons, mentioned above, is found in the reign of Henry II, and had fiscal and military significance, but it is doubtful how it was drawn. It is sufficient to say that in the thirteenth century those who were summoned individually to the King's Council in Parliament were the holders of a barony (*baronia*), and that the meaning of *baronia* had become restricted, possibly to not less than 13⅓ knights' fees. The

(*b*) McKechnie, *Magna Carta* (2nd ed.), pp. 248 *et seq.*

lesser barons, during the course of the century, ceased to be summoned collectively through the sheriffs but were represented in Parliament by the knights of the shire, and thus became commoners.

Peerage.—The next development is the notion of peerage. The extension of the activity and the growth of the authority of Parliament created the desire to be summoned, and what was once a duty rather reluctantly obeyed became a right, in later times too often neglected. Nor was this all, for it came to be held that a person who had received a summons and had taken his seat acquired not only a right to be summoned to future Parliaments but a hereditary right to be summoned which descended to his heirs. If a baron was entitled to be summoned and took his seat, his heir was entitled to be summoned. Owing to the early connection between barony and land tenure, it is not surprising that for a time it was asserted that the mere holding of certain land entitled the owner to a summons.

The ordinary meaning of the word "peer" is simply "equal," and when *Magna Carta*, c. 39, declared that the person or property of a freeman should not be taken in execution except by the lawful judgment of his peers (*per legale judicium parium suorum*), it was asserting the right of every freeman (*i.e.*, freeholder) in a feudal society to be judged by his equals, or rather, not by his inferiors (*c*). Judgment against the King's tenants would normally be given in the *Curia Regis*, and it is a later refinement of the word "peer" that gives it the meaning of one who is entitled to be tried by the King's Council in Parliament.

Eventually we reach the position that a baron is entitled to be summoned to Parliament, that this right is hereditary, that he is entitled to be tried by the House of Lords for treason or felony (that is, offences which would involve forfeiture of his dignity and estates), and that he is a peer whose blood and that of his heirs is ennobled. Similar rights attached to earls and, when these came to be created, to dukes, marquesses and viscounts, and it is not necessary to discuss the question whether this was because they were also barons.

Representative Peers and Law Lords.—The other Lords Temporal can be quickly passed over in this brief historical review. It was agreed on the Unions with Scotland in 1707 and Ireland in 1800 that

(*c*) McKechnie, *op. cit.*, pp. 375 *et seq.*

the peers of those countries should be represented in Parliament by a specified number of representatives elected from among themselves in the manner prescribed by the Acts of Union. In the middle of the nineteenth century attention was drawn to the dearth of qualified lawyers in the House of Lords, which in one of its capacities is the highest court of appeal. The only solution, if the appellate jurisdiction of the House of Lords was to be retained, was to make a limited number of qualified Judges Lords of Parliament for life, or at least during their tenure of office; and, as at common law a peer could not be created for a term of years, and the House ruled that a peer for life could not take his seat, the Lords of Appeal in Ordinary were introduced by the Appellate Jurisdiction Act, 1876.

Lords Spiritual.—It does not need any continental theory of "estates of the realm" (*d*) to account for the presence of ecclesiastics in Parliament. The Archbishops and some of the Bishops would in any case be summoned to the King's Council as holders of important offices of State, while the Archbishops, Bishops, many of the Abbots and some of the Priors would in any event be summoned individually to early Parliaments as tenants-in-chief or holders of baronies, and as such would sit with the greater barons. The Archbishops and Bishops probably had the double right (spiritual and lay) to attend; but the Abbots regarded attendance as a duty attaching only if they held baronies, so that the number of Abbots summoned greatly declined in the fourteenth century. The Lords Spiritual did not claim the privilege of trial by peers, nor, of course, was their title hereditary; and therefore—for the first if not the second reason—they were not regarded as "peers" by their temporal brethren when the notion of peerage came to be formed.

The Abbots and Priors disappeared from Parliament when Henry VIII dissolved the monasteries. The Bishops were excluded by the Long Parliament in 1641, but this Act was repealed at the restoration of Charles II. Until the Reformation the Lords Spiritual formed a large proportion, and sometimes a majority, of the House of Lords; but this proportion has diminished greatly since then owing to the very considerable increase in the number of new peerages. A few Irish Bishops sat between 1800 and the disestablishment of the

(*d*) Clergy, barons and commons—"those who pray, those who fight, those who work" (Maitland, *Constitutional History*, p. 75).

Church of Ireland by the Irish Church Act, 1869. Holders of Welsh sees have been excluded since the Church in Wales was disestablished by the Welsh Church Act, 1914. In spite of the increase in the number of Church of England sees in the nineteenth and twentieth centuries, the number of Bishops who may be summoned to the House of Lords has been limited by the Acts creating the new sees to the number that existed in 1847, when the Bishopric of Manchester was created.

THE PEERS OF THE UNITED KINGDOM.

Under this heading we include holders of peerages of England and of Great Britain, our purpose being to explain the present legal position of the hereditary Lords of Parliament.

(1) Creation of Peers.—The creation of peers is a prerogative of the King, the fountain of honour and dignity. There is no legal limit to the number of peers of the United Kingdom that may be created, a fact which occasionally—as in 1910—can be of great importance as the threat to create enough peers to carry a vote may be used to induce the House of Lords to pass a bill which they do not like The creation of peers is now done on the advice of the Prime Minister.

As regards the manner in which peerages are created, this has for centuries been done by letters patent under the Great Seal. Other methods were used in former times. In the reign of Edward I baronies were created by writ of summons to Parliament followed by sitting pursuant thereto. Richard II first created a barony by letters patent in 1387. These two methods existed side by side, but the latter had almost ousted the former by the time of James I. Dukedoms, marquisates and earldoms were, before the reign of Henry VI, often created by charter, which differed slightly in form from letters patent, and sometimes by investiture in Parliament. Peerages have occasionally been created or confirmed by Act of Parliament, a procedure which is, of course, still possible (*e*).

(2) Right to Writ of Summons.—Before a person can sit and vote in the House of Lords he must receive a writ of summons, and a person is entitled to a writ of summons if either (a) a patent has been issued conferring a peerage on him and his heirs descendible in a manner

(*e*) Palmer, *Peerage Law in England*, pp. 28—31, 46 *et seq.*

known to the common law or (b) he can prove that a writ of summons was issued to his ancestor and that the latter took his seat.

By Patent.—Although the Crown has power to confer a life peerage, the grantee is not entitled to sit in the House of Lords. (*Wensleydale Peerage Case* (1856) (*f*).) The case mentioned shows that the House of Lords, acting on the advice of its Committee of Privileges, can itself and of its own motion determine the validity of the creation of a new peerage and the question whether the grantee is entitled to a writ of summons.

By Writ.—"The law is well settled," says Palmer (*g*), "that if a writ of summons to Parliament, in the form usual in the case of temporal peers, has been issued to a commoner, and the person so summoned has, in response to such summons, taken his seat in the House of Lords . . . the person so summoned and sitting is to be taken thereby to have acquired what is called a barony by writ descendible to the heirs general of his body, and this is so even though the summons was issued to him by mistake" The leading case on this subject is the *Clifton Peerage Case* (1673) (*h*), where the Barony of Clifton was successfully claimed by the lineal descendant of Sir Jervas Clifton, who was summoned to Parliament in 1612 and took his seat as one of the peers. This case was followed in *De Clifford Peerage Case* (1691) (*i*), where the claimant's ancestor had been summoned to, and sat in, the Parliament of 28 Edw. I.

It is not sufficient to prove that the ancestor received a writ of summons; it must also be shown that the ancestor took his seat (*Freschville Peerage Case* (1677) (*k*)) and that he sat in full Parliament. (*St. John Peerage Case*, (1916) (*l*).) In the latter case, the claimant failed on the ground that the Parliament in which the ancestor sat in 1290 was not a full Parliament, since the knights of the shire did not attend till the following July.

(3) Peerage Claims.—In order to establish his right to attend Parliament, a new peer presents his letters patent and writ of summons to the Lord Chancellor at the Woolsack. Other peers present their writs of summons at the table of the House.

(*f*) 5 H. L. C. 958, *post*, p. 66.
(*g*) Palmer, *op cit.*, p. 38.
(*h*) Collins' Claims, 291
(*i*) Collins' Claims, 306.
(*k*) Lords' Rep. iii, 2.
(*l*) [1915] A. C. 282, *cf. Hastings Peerage Case* (1840), 8 Cl. & Fin. 144

Claims to old peerages are made by petition to the Crown through the Home Secretary, and are referred by him to the Attorney-General. The Crown may accept or reject the claim on the Attorney-General's report, but if—as is usually the case—there is some doubt, it is the practice for the Crown to refer the matter to the House of Lords. The House in turn refers the question to its Committee of Privileges, which hears the arguments of the claimant or his counsel and of the Attorney-General on behalf of the Crown, and reports to the House The House of Lords may summon the Judges to advise the House on a matter of law (*m*).

Lapse of time is no bar to a peerage claim. Thus in the *Hastings Peerage Case* (*n*) the peerage had remained unclaimed for 450 years, and in the *Camoys Peerage Case* (*o*) the peerage was called out of abeyance after 420 years.

It seems that the Crown is not bound to refer a claim to the House of Lords, but it has almost invariably done so, and this course is obviously desirable, as a decision of the Crown would not be conclusive (*p*). There is no precedent for proceedings in a peerage claim being taken in a Court of law, and a Court has no jurisdiction to determine even incidentally any question relating to a dignity. (*Earl Cowley* v *Countess Cowley* (*q*).)

Where a peer is entitled to a writ of summons and does not receive one, his remedy is to bring a petition of right against the Crown. If the petition is ignored, he may bring the matter to the attention of the House of Lords, who would regard the refusal of a writ as an infringement of its privileges. In the *Bristol Peerage Case* (1626) (*r*) the House pointed out to Charles I that there was no precedent for the refusal of a writ to a peer who was capable of sitting in Parliament, and the King yielded.

(4) **No barony by tenure.**—Whatever may have been the case in early times, there is no such thing now as a "barony by tenure," that is to say, a peerage with the right to a writ of summons as owner of a particular piece of land The notion probably arose from the fact that originally attendance at the Great Council was—like other services—

(*m*) Palmer, *op. cit.*, pp. 231—235.
(*n*) (1840), 8 Cl. & Fin. 144.
(*o*) (1839), 6 Cl. & Fin. 789.
(*p*) Pike, *op. cit.*, pp. 285—286, Palmer, *op. cit.*, pp. 10—11, 14.
(*q*) [1901] A. C. 450.
(*r*) 3 Lords' Journals, 544.

a duty which attached to the lands of a tenant-in-chief holding a barony, so that when the theory of peerage and hereditary right to a summons to Parliament developed, there was some doubt whether the right of summons went with the dignity or with the lands in cases where these had become separated. In the *Fitzwalter Barony Case* (1668) (*s*) it was held that "baronies by tenure had been discontinued for many ages and were not then in being and so they were not fit to be revived." As late as 1861 the tenant for life of the Castle of Berkeley claimed the dignity and honour of Baron of Berkeley by reason of his possession of the estates under the will of the last Earl Berkeley; but the claim was disallowed on the ground (*inter alia*) that for the past four centuries there had been no other title to a seat in the House than a writ of summons or patent of the Crown. (*Berkeley Peerage Case* (*t*).)

A peeress in her own right is not entitled to sit in the House of Lords. (*Viscountess Rhondda's Claim* (1922) (*u*).)

(5) Restrictions on the limitation of peerages.—There are certain restrictions on the manner in which a peerage may be made to descend.

A peerage may not be granted for a term of years, because, as Coke explains, it might pass to the executors or administrators. Nor is a peerage during the pleasure of the Crown valid. Coke thought that a peerage for life was valid (*v*); and there are a number of examples between 1377 and 1433 (*x*); but this is regarded as doubtful law at the present day, though the question is not of much importance since the *Wensleydale Peerage Case* (*y*) decided that a life peer could not sit in the House of Lords.

A peerage may not be granted for an estate of inheritance not known to the common law. The leading case on this principle is the *Wiltes Peerage Case* (1869) (*z*), where a grant to a man "and his heirs male for ever" was held void.

A peerage may be limited by way of remainder, whether after a life estate or an estate tail, but not so as to shift the estate over before it

(*s*) Collins' Claims, 268.
(*t*) (1861), 8 H. L. C. 21; cf. *Arundel Peerage Case* (1433), Rot. Parl. 11 Hen VI, Nos. 32—35, *De Lisle Peerage Case* (1441), Nicolas' Rep. 204, *Abergavenny Peerage Case* (1604), Collins' Claims, 61.
(*u*) [1922] A. C. 339.
(*v*) 1 *Inst.* 16b.
(*x*) See Palmer, *op. cit.*, pp. 85—86.
(*y*) (1856), 5 H. L. C. 958.
(*z*) L. R. 4 H. L. 126, cf. *Devon Peerage Case* (1831), 2 Dow. & C. 204.

terminates in the ordinary course. In the *Buckhurst Peerage Case* (1876) (*a*) it was held that the attempt to keep the Barony of Buckhurst separate from the Earldom of De la Warr by means of a shifting clause was unsuccessful and the gift over void.

(6) Peerage and nobility.—The doctrines of peerage and nobility only concern the constitutional lawyer in so far as they have legal consequences. A peerage has been held to be an incorporeal hereditament (*b*), and is classed as real property (*c*).

When a peer receives his writ and takes his seat in the House of Lords his blood is ennobled, and that nobility descends to the heirs as and when they succeed to the peerage. From this doctrine the consequence was deduced that a person cannot transfer his peerage to another *inter vivos* or by will, and cannot ever surrender it to the Crown. The peerage continues until failure of heirs or attainder, for attainder corrupts the blood (*d*). (*Norfolk Peerage Case* (1907) (*e*); *Grey de Ruthyn Peerage Case* (1640) (*f*); *Purbeck Peerage Case* (1678) (*g*); *Berkeley Peerage Case* (1861) (*h*).) Parliament, of course, can deprive a person of a peerage or restore one that has been forfeited on attainder, and in 1917 the Titles Deprivation Act was passed taking away the right to a writ of summons from peers who had fought in the enemy forces

The principles laid down in peerage cases apply retrospectively and are regarded by the House of Lords as always having been the law, that is, back to 1290 or 1295. Some of them—notably peerage by writ (*Clifton Peerage Case* (*i*)), and the doctrine of blood—have therefore been castigated from an historical point of view as a mass of absurd fictions (*k*).

(7) Proposals for reform.—It is owing to the hereditary element that most demands for the abolition or reform of the House of Lords have been made. The Rump Parliament ejected the lay lords in 1649, seven years after the lords spiritual had been excluded, but they both

(*a*) 2 App Cas. 1
(*b*) *Nevils' Case* (1605), 7 Co. Rep. 33; *Grey de Rythyn Peerage Case* (1640), Collins' Claims, 244, *Earl Cowley* v. *Countess Cowley*, [1901] A. C. 450.
(*c*) *Buckhurst Peerage Case, supra.*
(*d*) As to corruption of blood, however, cf. Forfeiture Act, 1870, s. 1.
(*e*) [1907] A. C. 10.
(*f*) Collins' Claims, 195, 256.
(*g*) Collins' Claims, 293.
(*h*) 8 H. L. C. 79.
(*i*) *Ante*, p. 61.
(*k*) Pollard, *Evolution of Parliament* (2nd ed.), p. 44; ch. 5; p. 312.

came back at the Restoration. In 1719, as a consequence of the creation of twelve peers to forward the policy of the Treaty of Utrecht, Lord Sunderland introduced a Bill to prevent the creation of new peers, except when peerages lapsed, but it was defeated A number of proposals for reform have been made in recent years, in particular, by a Select Committee of the House of Lords set up by Lord Rosebery in 1908, Lord Lansdowne in 1911, the Bryce Conference in 1917, and the Government in 1922 (*l*); while it will be remembered that the preamble to the Parliament Act, 1911, recited that it was intended eventually "to substitute for the House of Lords as it at present exists a Second Chamber, constituted on a popular instead of hereditary basis"

THE REPRESENTATIVE PEERS OF SCOTLAND

The Act of Union, 1707, provides that sixteen representatives of the peers of Scotland shall be elected for each Parliament. The royal proclamation which directs the election bids the Scottish peers to assemble at Holyrood, Edinburgh, to choose their representatives. The Lord Clerk Register presides, and when the election is over forwards the list of elected peers to the Clerk of the Crown in Chancery.

The Act does not provide for the creation of fresh Scottish peers, so that eventually their number may be reduced to sixteen.

It was held in the *Duke of Hamilton's Case* (1782) (*m*) that the Duke of Hamilton was entitled to sit in the House of Lords by virtue of his peerage of Brandon in the United Kingdom.

THE REPRESENTATIVE PEERS OF IRELAND.

The Act of Union, 1800, provided that twenty-eight representative peers of Ireland should be elected for life. When one of the representative Irish peers died, the Lord Chancellor of Great Britain sent a mandate to the Lord Chancellor of Ireland to direct the issue of voting papers. The Irish Clerk of the Crown transmitted the voting papers to all Irish peers entitled to vote, and the peer with the largest number of votes was elected to sit in the House of Lords. When the Irish Free State was established in 1922, the offices of Lord Chancellor

(*l*) See McKechnie, *Reform of the House of Lords*, chh. 6 and 9; Lees-Smith, *Second Chambers in Theory and Practice*, chh. 11 and 12; Jennings, *Parliament*, pp. 394—399; 416—424.

(*m*) 36 Lords' Journ. 517, reversing the decision of 1711, 19 Lords' Journ 348.

of Ireland and Irish Clerk of the Crown were left vacant, so that there is now no machinery for the election of representative Irish peers, and the existing representatives will eventually die out.

The Act of Union further provided that the Crown might only create one new peer of Ireland for every three Irish peerages that became extinct, except that the number of Irish peers who were not hereditary lords of Parliament might be kept up to 100 by the creation of a new peer for each vacancy occurring below that number. It seems that in practice Irish peers are no longer created.

THE LORDS OF APPEAL IN ORDINARY.

The "Law Lords" are appointed under the Appellate Jurisdiction Act, 1876, and amending Acts (*n*). The Act of 1876 was passed after the failure of the Crown's attempt to give Sir James Parke a life peerage with the right to sit in the House. (*Wensleydale Peerage Case* (*o*).) Their number is now seven.

The Act of 1876 made the Lords of Appeal in Ordinary lords of Parliament during their tenure of office only, but the Appellate Jurisdiction Act, 1887, entitled them to sit in the House for life with the dignity of baron. There is a difference of opinion as to whether they are "peers," since their dignity is not an inheritance, and the question whether they are entitled to be tried by the House of Lords for treason or felony has not arisen in practice.

THE LORDS SPIRITUAL.

The Lords Spiritual consist of the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and twenty-one other Bishops of the Church of England in order of seniority of appointment. A Bishop is summoned on his "faith and love," while a temporal peer is summoned on his "faith and allegiance." The seniority of the Bishoprics of London, Durham and Winchester dates from the reign of Henry VIII, under whose legislation (repealed by Mary and re-enacted by Elizabeth) bishops are still appointed (*p*). The number of bishoprics remained constant from the time of Henry VIII to the middle of the nineteenth century. Since 1847 the

(*n*) See *ante*, p. 44.
(*o*) (1856), 5 H. L. C. 958. An account of this case is given in Pike, *op. cit.*, pp. 372—384.
(*p*) For the appointment of bishops, see *post*, p. 323.

number has been considerably increased, but by a series of Acts the number of Lords Spiritual is limited to twenty-six, as set out above.

Bishops and other prelates in the reigns of Edward III and Richard II claimed to be peers by virtue of their baronies, though they only held their baronies while in office. By Henry VIII's time they had dropped this claim, largely because they could not take part in the trial of peers in the Court of the Lord High Steward (*q*). Henceforth they were lords of Parliament only, and now some of them are not even that. Furthermore, since 1830 their lands have been vested in the Ecclesiastical Commissioners (*r*).

If a bishop resigns his see he ceases to be entitled to sit in the House of Lords, but he retains rank, dignity and privilege. (Bishops' Resignation Act, 1869.)

Disqualifications from sitting in the House.—The following persons are disqualified from sitting in the House of Lords:—

(i) infants (Standing Order, 22nd May, 1685);

(ii) peeresses in their own right (*Viscountess Rhondda's Claim* (*s*);

(iii) persons convicted of treason or felony, until they have suffered their punishment or received a pardon (Forfeiture Act, 1870, s. 2);

(iv) aliens (cf. Act of Settlement, 1701, s. 3);

(v) a bankrupt cannot sit in the House of Lords, or be elected a representative Scottish or Irish peer, unless the adjudication is annulled or he is discharged with a certificate that the bankruptcy was caused by misfortune and not misconduct, or five years have elapsed since the date of discharge. (Bankruptcy Acts.)

Officers of the House of Lords.—*Speaker of the Lords.*—The Speaker of the House of Lords is now almost invariably the Lord Chancellor, who sits on "the Woolsack." The Speaker of the House of Lords need not be a peer, the Woolsack being notionally outside the limits of the House; and he has, on occasion, been a commoner. A functionary called the Lord Keeper (a commoner) can be Speaker in the Lords, though this is most unusual.

(*q*) *Ante*, p. 45; Pike, *op. cit.*, ch. 9.
(*r*) See *post*, p. 312.
(*s*) [1922] 2 A. C. 339.

The Lord Chancellor was originally summoned as a bishop.[t] When he was a layman he was not summoned, but was present *ex officio;* he presided but, being a commoner, did not vote (*t*). He is now invariably a layman and, as the official who issues the writs of summons, he is present *ex officio;* and it is now the practice to make him a peer (viscount) soon after his appointment, if he is not one already.

Neither the Lord Chancellor nor the Lord Keeper has the powers of the Speaker of the Commons for maintaining order in the House. Questions of order are settled by the House itself, and in debate peers address the House and not the occupant of the Woolsack. On a division the Lord Chancellor votes first. He has no casting vote.

Chairman of Committees.—This officer takes the chair when the House is in committee. He holds office during the whole Parliament. He also superintends all matters relating to private Bills.

Gentleman Usher of the Black Rod.—"Black Rod" is appointed by Letters Patent under the Great Seal. He is a member of the Royal Household, and sits within the Bar. He executes warrants of commitment, and desires the attendance of the Commons when necessary. He is assisted by the Yeoman Usher of the Black Rod. The Gentleman Usher is an officer of the Order of the Garter. He derives his name from the black wand, surmounted by a golden lion, which is used as the Mace of the Lords. Black Rod has in his custody all persons detained for trial by the Lords, either as peers or as the result of an impeachment. He also assists at the introduction of new peers.

The Serjeant-at-Arms carries the Mace when the Lord Chancellor enters and leaves the House.

The Clerk of Parliament keeps the journals of the House of Lords

(*t*) Pike, *op. cit*, pp. 351—354.

CHAPTER VII.

THE HOUSE OF COMMONS.

Origin of membership of the Commons.—From the Conquest till Magna Carta the qualification for attendance at the Great Council was tenure *in capite*. The earliest hint of representation was in 1213, when the sheriffs summoned to the Great Council four men and the reeve from every township.

In 1254 two knights were summoned from each county to vote an aid for the expenses of the French war. In 1261 the rebel barons summoned three knights from each county to a council held by them at St. Albans, *secum tractaturos super communibus negotiis regni*, and the King summoned the same knights to Windsor. Simon de Montfort summoned to his Parliament in 1265 two knights from each county, two citizens from each city, and two burgesses from each borough.

To Edward I's Model Parliament in 1295 the clergy, consisting of the two archbishops, the bishops and heads of monasteries, were summoned by special writ: archbishops and bishops were to bring with them deans, archdeacons, canons, and inferior clergy. Seven earls and forty-one barons—by no means a fair proportion—and two knights from each county, two citizens from each city, and two burgesses from each borough were also summoned. The three estates thus convened voted taxation separately.

It is not possible to fix a definite date for the division of Parliament into two houses, but it may be said to have taken place in the reign of Edward III. The great majority of petitions brought in early Parliaments were individual petitions involving judicial decisions, and were therefore dealt with by the Council and the Courts. The knights and the burgesses were concerned with common petitions and requests by the King for aids; and it became the practice for the knights to confer by themselves and the burgesses to confer by themselves, and later for the knights and burgesses to confer together but separately from the councillors. Thus in time they came to form a House of Commons, appointing a Speaker to reply in the Parliament chamber

to the King's requests and demanding that their common petitions be made statutes (*a*).

The knights were elected in the County Court, at first probably by all the freeholders, and in the reign of Henry VI by freeholders of land of a yearly value of 40s. and upwards. The borough franchise in early times varied considerably according to the customs and privileges of the various boroughs.

From an early date the members and voters for counties had to be resident therein, and by a statute of Henry V borough members had to be resident within the borough; but these provisions were evaded from an early period.

A series of statutes from the time of Henry VI onwards required county members and borough members respectively to own property of various amounts; but these provisions also were frequently evaded, and in 1858 the property qualifications were abolished.

The Catholic Emancipation Act, 1829, threw open Parliament to Roman Catholics, and the oath was made acceptable to Jews by the Jews Relief Act, 1858. Quakers and others who held religious beliefs but who objected to taking any oath were allowed to make an affirmation by the Promissory Oaths Act, 1868, while atheists were catered for by the Oaths Act, 1888.

Disqualifications from membership.—There are a number of disqualifications from membership of the House of Commons, of which the following are some of the chief examples:—

(1) Advisers to the Secretary of State for India (Government of India Act, 1935) or Burma (Government of Burma Act, 1935).

(2) Aliens (British Nationality and Status of Aliens Acts, 1914—43 (*R.* v. *Speyer* (*b*)).

(3) Bankrupts (undischarged) and officials of the Bankruptcy Court (Bankruptcy Acts, 1883—1914).

(4) Barristers appointed to try alleged corrupt practices at Parliamentary elections (15 & 16 Vict. c. 57) or to try municipal election petitions (Municipal Corporations Act, 1882).

(5) Members of the British Overseas Airways Corporation (British Overseas Airways Act, 1939).

(*a*) Pollard, *The Evolution of Parliament* (2nd ed.), pp. 117—128.
(*b*) [1916] 2 K. B. 858.

(6) Members of the Central Electricity Board (Electricity (Supply) Act, 1926).

(7) Charity Commissioners, paid (Charitable Trusts Act, 1853).

(8) Clergy of the Church of England and the Presbyterian Church of Scotland (House of Commons (Clergy Disqualification) Act, 1801) and of the Roman Catholic Church (Roman Catholic Relief Act, 1829).

(9) Comptroller and Auditor-General (Exchequer and Audit Departments Act, 1866).

(10) County Council officers, whole time paid (Local Government Act, 1888).

(11) Felons, unless they have served their time or have received a pardon (Forfeiture Act, 1870).

(12) Infants (7 & 8 Will. 3, c. 25), though it appears that Charles James Fox and Lord John Russell sat in Parliament during infancy (*c*).

(13) Judges of the High Court and Court of Appeal (Judicature (Consolidation) Act, 1925) (*d*), and of County Courts (County Courts Act, 1934)

(14) Members of the London Passenger Transport Board (London Passenger Transport Act, 1933).

(15) Metropolitan Police Commissioners, Assistant Commissioners and Receiver (10 Geo. 4, c. 44; 19 & 20 Vict. c. 2).

(16) Peers are disqualified by the law and custom of Parliament, except that non-representative Irish peers may sit for a constituency in Great Britain (Act of Union with Ireland, 1800).

(17) Recorders, as regards their own boroughs or cities, except the City of London (Municipal Corporations Act, 1882).

(18) Returning officer, unless all his duties are discharged by the registration officer (Representation of the People Act, 1918).

(19) Road Traffic Commissioner (Road Traffic Act, 1930).

(20) Special Area Commissioner (25 & 26 Geo. 5, c. 1).

(21) Stipendiary magistrates for certain districts (various Acts).

(22) Persons guilty of corrupt or illegal practices at Parliamentary elections (Corrupt and Illegal Practices Prevention Act, 1883), as to which see below (*e*).

(*c*) Anson, *Law and Custom of Parliament*, vol. I (5th ed.), p. 81.
(*d*) The Lord Chancellor is *ex-officio* a Judge of the High Court and the Court of Appeal.
(*e*) *Post*, p. 79.

(23) Holders of certain offices or places of profit from or under the Crown and of certain pensions from the Crown, a matter of considerable interest and importance which is discussed in the next section.

Holders of offices or places of profit from or under the Crown.—The following principles had come to be established by the end of the eighteenth century, having made their appearance in the order shown:—"(1) incompatibility of certain non-ministerial offices with membership of the House of Commons (which must be taken to cover questions of a member's relations with, and duties to, his constituents), (2) the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House, and (3) the essential condition of a certain number of ministers being members of the House for the purpose of ensuring control of the executive by Parliament" (*f*) The sources of these principles were statutes, resolutions of the House of Commons and judicial or quasi-judicial decisions of the House interpreting the law in individual cases.

The first stage in the development of these principles was the insistence of the Commons that a position, the duties of which entailed prolonged absence from the House, whether abroad or at home, was inconsistent with a seat in the House. For this reason in the time of James I, the Commons contended against the King that judges, the attorney-general, ambassadors (whose duties were formerly regarded as temporary), colonial governors and sheriffs should be excluded. There were also other formidable reasons for excluding the Judges. The Commons at that time were considering the duties of a member to the House, but we should now stress also a member's duties to his constituents.

The Commons next had regard to the relations between the House and the King, and various Bills were introduced after the Restoration of 1660 to exclude executive officers in order to diminish the influence of the Crown over Parliament. Section 6 of the Act of Settlement, 1701, provided that "no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons." A rule as wide

(*f*) *Report of the Select Committee on Offices or Places of Profit under the Crown* (1941), H. C. Pap. 120, pp. xiii—xiv.

as this would have prevented the development of responsible Parliamentary government and the Cabinet system. Fortunately it was not to take effect until the accession of the house of Hanover, and Parliament, realising that it had gone too far, repealed this section before it came into force.

The growth of the financial powers of the Commons in the seventeenth century, especially the power of appropriating grants of supply to specific purposes, coupled with the increasing cost of government, had made the King more and more dependent on the Commons; and in fact office-holding is a useful link between Parliament and the Crown. The presence in the House of a certain number of ministers "afforded the King a means of securing the co-operation of the Commons, and the Commons a method of making their wishes known to the King, more serviceable in everyday matters than the formal method of messages and addresses" (*g*). A compromise was therefore reached in the Succession to the Crown Act, 1705, which was repealed and re-enacted in 1707 to take account of the Union with Scotland. The resulting Succession to the Crown Act, 1707, repealed section 6 of the Act of Settlement, 1701, and provided as follows:—

"Section 24. No person who shall have . . . any new office or place of profit whatsoever under the Crown, which at any time since 25th October, 1705, have been created or erected, or hereafter shall be created or erected . . nor any governor or deputy-governor of any of the plantations [Colonies] . . . nor any person having any pension from the Crown during pleasure, shall be capable of being elected, or of sitting or voting as a member of the House of Commons. . . .

"Section 25. Provided always that if any person being chosen a member of the House of Commons shall accept of any office of profit from the Crown during such time as he shall continue a member, his election shall be void and is hereby declared to be void, and a new writ shall be issued for a new election, as if such person so accepting was naturally dead. Provided nevertheless that such person shall be capable of being again elected as if his place had not become void as aforesaid."

By section 27 the disqualifying provisions were not to extend to any member, being an officer in the navy or army, who should receive any

(*g*) *Ibid.*, p. xii.

new or other commission; but if a member received a commission for the first time he had to vacate his seat, though he was eligible for re-election.

Heavy fines at the suit of a common informer were imposed for sitting and voting as a member when disqualified.

It will be seen that section 24 limited exclusion to the holders of *new* offices, *i.e.*, those created after 25th October, 1705. Section 25 is obscure and appears to be inconsistent with section 24, but should probably be taken to apply to *old* offices, *i.e.*, those existing on 25th October, 1705. Further, while section 24 refers to offices or places held *under* the Crown, section 25 specifies offices accepted *from* the Crown, which are probably limited to appointments made directly by the Crown and not through the medium of a minister, *i.e.*, senior ministerial offices and Household offices.

Pensions from the Crown are a disqualification only if they are held "during pleasure," or (according to the Pensioners Civil Disabilities Relief Act, 1869) for any term or number of years.

A series of statutes following the Succession to the Crown Act, 1707, converted the distinction between the holders of "old" offices (qualified) and "new" offices (disqualified) into a distinction between the holders of political offices (qualified within limits) and non-political offices (disqualified) by disqualifying or suppressing many old offices of a non-ministerial nature and providing for the eligibility of the ministerial heads of new departments subject to the necessity for re-election if already members. The House of Commons Disqualification Act, 1741, in particular, disqualified the holders of a list of offices in the civil service as it existed at that time. The list was probably meant to be exhaustive but is now out of date. One important by-product of this process was to ensure the political neutrality of the civil service.

The next step was to remove the requirement of vacation of seat and re-election in those cases to which it applied. The Re-election of Ministers Act, 1919, provided that a member of the House of Commons should not vacate his seat by reason only of his acceptance of an office of profit if that office was an office the holder of which was capable of being elected to or sitting or voting in that House, and if such acceptance took place within nine months after the issue of a proclamation summoning a new Parliament. The Re-election of

Ministers Act, 1926, repealed the nine months' limitation and so abolished altogether the necessity for re-election on appointment as minister. Under the previous law it was the practice for the Prime Minister to appoint most of the principal ministers before a general election so as to avoid the necessity for their re-election if the government's appeal to the country was successful. This had the advantage that the electorate knew approximately what the composition of the government would be if its party were returned to power.

Finally, a limit was set to the number of ministers who might sit in the House of Commons. The Re-election of Ministers Act, 1919, s. 2, provides that a Privy Councillor may be appointed a Minister of the Crown without any specific duties at a salary and may sit and vote in the House of Commons, provided that not more than three are appointed at the same time Examples of such Ministers of State are Mr. Eden in 1935 and Lord Beaverbrook and Mr. Casey in 1941—3. The number of Secretaries of State who might sit in the Lower House was formerly strictly limited, though the number was increased by the Secretaries of State Act, 1926, to six Secretaries and six Under-Secretaries. The Ministers of the Crown Act, 1937, abolished the distinction in this respect between Secretaries of State and other ministers. That Act provided that not more than fifteen of the seventeen Ministers (including Secretaries) whose offices normally carry Cabinet rank, and not more than twenty of the twenty-four then existing Under-Secretaries and Parliamentary Secretaries, might sit in the Commons; and further, that not more than three of the holders of the offices of Lord President of the Council, Lord Privy Seal, Postmaster-General and First Commissioner of Works might sit in that House. The Ministry of Supply Act, 1939, adds the Minister of Supply to those eligible under the former category.

War-time Relaxations.—The Ministers of the Crown (Emergency Appointments) Act, 1939—a temporary measure—allows Ministers appointed under the Act for the prosecution of the war to sit in the Commons together with one Parliamentary Secretary from each Department so created. The House of Commons (Service in His Majesty's Forces) Act, 1939—another temporary measure—exempts members of His Majesty's forces from disqualification.

The House of Commons Disqualification (Temporary Provisions) Act, 1941, provided that if the First Lord of the Treasury [*i.e.*, the

Prime Minister] certified that the appointment of any member of the House of Commons to any office or place under the Crown was required in the public interest for purposes connected with the prosecution of the war, that person should not be deemed to be incapable of being elected a member of the Commons, or of sitting or voting, by reason only of his holding that office or place during the war period. A copy of such certificate was to be laid before the House of Commons. The Act was to remain in force for one year only.

The Ministers of the Crown and House of Commons Disqualification Act, 1942, continued the Act of 1941 for another year, but limited the number of certificates that might be issued thereunder at any time to twenty-five. The Prime Minister's power to issue such certificates was further continued by annual House of Commons Disqualification (Temporary Provisions) Acts, though the Commons showed some dissatisfaction over the large number of members serving the Government in one capacity or another in war-time, and the prolonged absence abroad of some members to whom certificates had been granted, *e.g.*, Mr. Malcolm Macdonald (High Commissioner in Canada), Sir Ronald Cross (High Commissioner in Australia), Major-General Spears (Minister to Syria and Lebanon), Mr. Harold Macmillan (Minister Resident in North-West Africa), Mr. Ben Smith (Minister Resident in Washington) and Mr. Duff Cooper (Government Representative to the French National Committee of Liberation). The Act of 1944 required the Treasury to lay an annual return before the Commons. Nineteen certificates were in force at the beginning of that year.

Proposed Reform and Consolidation of the Law.—The debates on the House of Commons (Temporary Disqualifications) Bill in 1941, though primarily concerned with war-time conditions, incidentally brought into prominence "the archaic, confused and unsatisfactory condition of the law" relating to the disqualification of holders of offices or places of profit from or under the Crown and pensions from the Crown. The fortunate result was the setting up of a Select Committee, which recommended the passing of an Act to reform and consolidate the law on this subject, the chief provisions of which should be as follows (*h*):—

(1) Subject to the exceptions stated below, all persons holding an

(*h*) *Report of the Select Committee on Offices or Places of Profit under the Crown* (1941), H. C. Pap 120.

office from or under the Crown (or some such expression, which should be clearly defined) should be disqualified for election to, or for sitting as a member of, the House of Commons.

(2) A list of ministerial offices excepted from disqualification should be scheduled, to include all the existing ministerial offices, of which there are about eighty. There should be no necessity for resignation or re-election on appointment to such office. Not more than sixty such persons should at any one time be members of the House of Commons, and the proportions between Ministers and Parliamentary Secretaries laid down in the Ministers of the Crown Act, 1937, should be maintained. This proviso would limit the number of ministers to about 10 per cent of members, and would ensure adequate representation of the Government in the House of Lords.

(3) There should also be a schedule of non-ministerial offices exempted from disqualification and from any necessity for resignation or re-election on appointment. This list would include officers and men of the regular forces of the Crown not on the active service list; officers and men of the auxiliary and reserve forces (*i*); Lord Lieutenant otherwise than in respect of the county of which he is Lord Lieutenant; High Sheriff otherwise than in respect of constituencies of which he is returning officer in Parliamentary elections and of boroughs within the administrative county of which he is High Sheriff; Recorder (except the Recorder of London); Justice of the Peace; Commissioner of Assize; Chairman and Deputy-Chairman of Quarter Sessions other than London Quarter Sessions; Lord Warden of the Cinque Ports; and Regius Professors of the Universities of Oxford and Cambridge. (The position of some of these under the present law is doubtful.)

(4) The offices of steward or bailiff of His Majesty's three Chiltern Hundreds of Stoke, Desborough and Burnham, and steward or bailiff of the Manors of East Hendred, Northstead or Hempholme, should continue to be deemed offices of profit under the Crown, acceptance of which by a member of the House of Commons causes him to vacate his seat. (This is to preserve the general principle stated in paragraph (1), and also the traditional method of enabling a member to resign.)

(*i*) See further, *post*, p. 301, for the position of members of the armed forces in this respect.

(5) No member of the House of Commons shall be appointed without his consent to a disqualifying office. (It might otherwise be possible for the Government to prevent or terminate the membership of anyone to whom they objected, *e.g.*, by having him appointed Sheriff—an appointment which cannot generally be refused.)

(6) Pensions should not be a disqualification, unless they can be terminated at the will of the Crown otherwise than for good reason such as misconduct. (It is doubtful whether there are in fact any pensions of this exceptional kind.)

(7) In order to remove doubts and to fill in gaps in the statute law, it should be expressly provided that certain officers are disqualified from election, in particular, the holders of judicial offices not adequately covered by the existing law, *e.g.*, the Recorder of London, the Common Serjeant of the City of London, and all Stipendiary Magistrates, including those paid out of local funds; Ambassadors (probably the only civil service post not covered by the Succession to the Crown Act, 1707, and the House of Commons Disqualification Act, 1741 (*k*)); High Commissioners; and civil servants while they remain servants of the Crown, though they should not be prevented from standing as candidates (*l*).

(8) A member should be protected against inadvertently losing his seat. This could be effected by a provision that if the House passed a resolution that a member had accepted office by inadvertence and without realising that such acceptance would disqualify him, and the member resigned the office forthwith, such acceptance should be deemed not to have vacated his seat.

(9) The sections of the Succession to the Crown Act, 1707, dealing with disqualification, vacation of seat and penalties for sitting and voting when disqualified, and all other enactments on the same subject to be repealed. The existing provisions as to penalties should be repealed without any re-enactment or substituted provisions, thus abolishing the rights of the common informer, who "even in 1707 . . . was regarded as an odious and objectionable person." The effect of the latter would be to take away the jurisdiction of the Courts with regard to disqualification for election, which in fact has never been

(*k*) *Report of the Select Committee on Offices or Places of Profit under the Crown* (1941), H. C. Pap. 120, p. 170 (Memorandum by the Permanent Secretary to the Treasury).

(*l*) See further, *post*, p. 213, as to the position of civil servants in this respect.

exercised (no common informer having informed), and to leave the matter entirely in the hands of the House of Commons, where it properly belongs.

Persons guilty of corrupt and illegal practices.—Various statutes constitute certain kinds of conduct at Parliamentary elections "corrupt" or "illegal" practices, and the consequences so far as disqualification from sitting in the House of Commons are concerned are laid down in the Corrupt and Illegal Practices Prevention Act, 1883.

A person who has been convicted of personally committing or of being privy to a *corrupt practice* is disqualified for ever from sitting for the constitutency to which the offence relates, and if he is already elected the election is void. Nor can he sit for another constituency for seven years after conviction. Where a candidate has been reported as having innocently through his agents (*m*) been guilty of a corrupt practice he cannot sit in Parliament for that constituency for seven years, unless the election Judges on proper evidence exonerate him from all blame.

Where a candidate is found to have been guilty of, or privy to, an *illegal practice*, he cannot sit in Parliament for the particular constituency for seven years, and if he has been elected the election is void. Where an illegal practice has been committed by an agent of the candidate without his privity, the candidate cannot sit for the particular constituency during the life of the existing Parliament.

Payment of members.—In mediæval times knights of the shire received 4s. a day, and citizens and burgesses 2s. a day. This was a common law right enforced by the writ *de expensis levandis*. It was enforced against a constituency as late as 1681, and enforceable, according to Lord Campbell, in the nineteenth century. The right was balanced by statutory penalties for absenteeism. A statute of 1381 provided for a fine or other punishment if a member failed to obey the summons to Parliament unless he gave the King some reasonable and honest excuse, and a statute of 1515 provided that no member

(*m*) Candidates for Parliament as a rule employ regular election agents, and very often accept the services of persons who offer gratuitous help in the election. For all these persons he is answerable. Lush, J., said, in the *Harwich Case* (1880), P. 227, that "a person may become an agent by actual employment, and by recognition and acceptance of what has been done."

should be absent without the Speaker's licence on pain of losing his wages. The statutory penalties are now obsolete.

Since 1911 members of the House of Commons have received a salary and travelling allowances payable under the annual Appropriation Act out of the Consolidated Fund. The salary of £400 a year was raised to £600 in 1937 when the Ministers of the Crown Act increased Ministers' salaries. It is not conditional on attendance, and apparently continues to be payable even if the member becomes disqualified, *e.g.*, by bankruptcy. (*Hollinshead* v. *Hazelton* (*n*).)

The House of Commons Members' Fund Act, 1939, established a fund for granting pensions to former members of the House of Commons and their widows or orphans. The trust fund is derived from a deduction of £12 per annum from members' salaries.

Officers of the House of Commons.—*The Speaker.*—The Speaker is elected at a new Parliament, the Speaker of the old Parliament being generally chosen if he has discharged his duties to the satisfaction of the House. The King may legally refuse to accept the choice of a Speaker by the Commons, but by convention he never does so.

The Speaker claims from the Sovereign certain "ancient and undoubted" privileges of the Commons at the beginning of each Parliament (*o*), and he is the channel of communication between the Commons and the King and between the Commons and the Lords.

When the House is not in committee the Speaker occupies the chair. When in the chair he maintains order and guides the House on all questions of privilege and practice. He gives rulings as to procedure; signs warrants of committal for contempt and reprimands members and others when necessary; and signs warrants for the issue of writs for by-elections. He also has the duty under the Parliament Act, 1911, of certifying Money Bills.

He has an official residence, and a salary of £5,000 per annum paid out of the Consolidated Fund. When he retires, it is customary to bestow on him a peerage and a pension.

Under-Clerk of Parliament.—This office is worth £2,000 per annum, and the appointment is by Letters Patent under the Great Seal. When the Commons retire to elect a Speaker, the Clerk of the House occupies the chair. He makes entries of what transpires in the House,

(*n*) [1916] 1 A. C. 428.

(*o*) *Post*, p. 99.

and from these materials prepares the journals. He endorses Bills sent up to the Lords.

The Serjeant-at-Arms is appointed by Letters Patent under the Great Seal. During session he attends the Speaker when the latter enters and leaves the House. His duty is to carry out directions for maintaining order, and to arrest strangers who have no business in the House. He executes warrants for contempt, and when ordered to do so brings persons in custody before the Bar of the House. He or his assistants serve processes of the House. When a person is arrested by order of the House the Serjeant-at-Arms keeps the prisoner in his custody till arrangements are made for his bestowal elsewhere.

The Chairman of Ways and Means, who has a salary of £2,500 a year, takes the chair when the House is in committee, and acts as Deputy-Speaker when necessary. He maintains order in committee, and can "name" members; but where a suspension is necessary the Speaker reoccupies the chair. The closure can be applied by the Chairman in committee. He has important duties in conjunction with the Chairman of Committees of the House of Lords relating to Private Bills. There is a Deputy-Chairman, with a salary of £1,000 a year.

Government and Opposition "Whips."—The Government "Whips" consist of the patronage secretary to the Treasury, or "Chief Whip," and the "Junior Whips," who are junior Lords of the Treasury. It is the duty of the "Whips," whether acting for the Government or not, to see that their party is duly represented at a division. They must know their men by sight, keep them within sound of the division bell, and muster so far as possible their full strength in a division. When an important debate is pending, the "Whips" plan the order of the speeches, and sometimes have to persuade a member to continue speaking till they can bring up reinforcements They also keep their leaders informed of the state of feeling in the party. Again, they act as intermediaries between the leaders of the party and the local organisations, and can often influence the local association in its choice of a candidate.

The "Chief Whip" as a rule controls the party funds, which in law are his private property, unimpressed with any trust. The "Junior Whips" also do some routine work in the Treasury (*p*).

(*p*) See, further, Jennings, *Parliament*, pp. 75—86.

CHAPTER VIII.

THE PARLIAMENTARY FRANCHISE AND ELECTIONS.

History of the Franchise.—(1) *The County franchise.*—The county electors were originally the freeholders who attended the ancient County Courts, and were divided into two classes—(a) tenants in chief, and (b) other freeholders. Attendance at the Courts was an onerous privilege annexed to the tenure of a particular piece of land. Holdings of land were, owing to *subinfeudation* and other kinds of transfer, split up gradually into smaller and more numerous units, but there was no increase in the number of attendances or "suits" due to the County Court. Those who owned the smaller units settled among themselves who was to go to the County Courts.

The persons who, as the result of these bargains or otherwise, were bound to attend the County Court, also voted for the knights of the shire who went to Parliament. The greater and lesser barons were originally the only persons consulted about taxation and other matters, but in the reign of Edward I the county franchise was vested in the freeholders who attended the County Court. In 1430 the county franchise was regulated by a statute of Henry VI, which provided that knights of the shire were to be elected by freeholders who owned land of the clear yearly value of 40s. (*a*) or upwards, residence in the county being indispensable The restriction of residence appears to have been gradually evaded, but was not abolished till 1774.

(2) *The Borough franchise.*—The borough franchise has been described as being an "Augean Stable" till the passing of the Reform Act, 1832. It was a sink of corruption. The Crown and its adherents could easily command a majority. Originally, the borough franchise was regulated on a more or less democratic basis. Members, and persons who were subject to scot (municipal impositions) and lot (liability to hold municipal offices) enjoyed the franchise, but gradually encroachments on the right of electing were made and prescriptive rights arose.

(*a*) The value of money was much greater than it is to-day, or—though the difference was not so great—than it was at the time of the Reform Act, 1832 (*post*, p. 83).

The Tudors inaugurated a system of granting charters of incorporation to boroughs. These instruments specified who were to elect the borough member or members. Sometimes members were eligible by a Crown-chosen mayor and corporation. Obscure villages received corporate rights. The borough of Old Sarum, for instance, consisted of a ploughed field.

In the provincial towns at the time of the Reform Act, 1832, the franchise was regulated in four different ways. It belonged to:—

(1) Burgage tenants (*b*); or
(2) Freemen of the borough or guild; or
(3) Householders liable to scot and lot; or
(4) Borough corporations.

By a statute of Henry V residence was essential for a borough vote, but this requirement was gradually evaded and was repealed by a statute of 1774. The Stuarts, like the Tudors, granted numerous charters, whereby they vested the franchise in a select few upon whom the Crown could rely.

A Bill for reforming the franchise was proposed by Wilkes in 1776, and a similar measure by the Duke of Richmond shortly afterwards. After this Grey, Sir Francis Burdett, and Lord Russell introduced Reform Bills without results. In 1831 the famous Reform Bill was thrown out by the Lords. It was reintroduced in 1832 and became law, the peers yielding when it was known that William IV had consented to create sufficient peers to carry it.

By the Reform Act, 1832, the following changes were made. A number of "rotten boroughs," like Old Sarum, were abolished. The old forty-shilling freeholder lost his vote unless he occupied the qualifying property or had an heritable estate therein or had acquired such estate by marriage, marriage settlement, office, devise, or promotion to benefices, or had a life estate of a clear yearly value of £10 or more. Copyholders (*c*) (legal or equitable) of heritable estates of the yearly value of £10 obtained the franchise, as did lessees, sub-lessees, and assignees of land of the yearly value of £10 or more holding for terms of years originally created for sixty years or more; lessees,

(*b*) Burgage, or Borough English, was a custom by which freeholds in certain boroughs descended on intestacy to the *youngest* son.

(*c*) Copyhold was an unfree tenure held by copy of the Court roll of the manor; see Potter, *Historical Introduction to English Law* (2nd ed.), pp. 426—429.

sub-lessees and assignees of land of the clear yearly value of £50 or more whose terms were created for a period of not less than twenty years; and leaseholders paying a rent of £50 or upwards.

A £10 occupation franchise was (subject to certain restrictions as to previous residence and payment of rates) conferred on certain inhabitants of boroughs.

By the Reform Act, 1867, the £10 qualification of tenants for life of freeholds, copyholders and leaseholders for the county franchise was reduced to £5, and a £12 occupation franchise (subject to restrictions as to occupation and payment of rates) was introduced. Two new borough franchises were created, namely, occupation of a dwelling-house of any value, and the lodger qualification in respect of lodgings of the rateable value of £10, if let unfurnished. Eleven boroughs were disfranchised and twenty-three boroughs deprived of one member Additional boroughs were created, the county seats were increased and certain University seats were called into existence.

By the Representation of the People Act of 1884 the lodger and householder qualifications were extended to counties, and a service qualification, giving the vote to people who occupied houses in the capacity of servants, was created.

The general effect of the Acts of 1867 and 1884 respectively was to confer a vote on the urban artisan and the agricultural worker.

The present parliamentary franchise.—Under the Representation of the People Act, 1918, a man to be registered as a voter must (1) be a British subject natural-born or naturalised; (2) be twenty-one years of age, and (3) be under no legal incapacity (section 1).

The following are subject to legal incapacities: (1) Aliens not naturalised; (2) infants; (3) returning officers, except that they have a casting vote when the votes are equal under the Ballot Act, 1872; (4) lunatics, save in lucid intervals; (5) idiots; (6) imbeciles; (7) English peers; (8) Scottish peers and Irish peers, unless elected or serving for a British constituency; (9) traitors and felons, unless they have endured their punishment or have been pardoned; (10) persons who have been found guilty within the last seven years of *corrupt* practices at a parliamentary election; (11) persons who have been found guilty of the like conduct at a municipal election; (12) certain persons who have been found guilty of *illegal* practices

at parliamentary, municipal and certain other local elections, for five years after conviction.

In order to obtain a vote a man must be on the register of voters, and the fact of being on the register is, in the absence of evidence to the contrary, conclusive of the right to vote. A man to be registered as a parliamentary elector in a constituency must have either the requisite residence qualification or the requisite business premises qualification (section 1, sub-section 1 (a)).

A man can be registered as an elector for an English University constituency if he is of full age, is not subject to legal incapacity and has taken a degree (not honorary) at such University (section 2). This section also deals with voting for Scottish and Irish Universities.

Under the Act of 1918 a woman could be registered as a parliamentary elector if she (a) was under no legal incapacity; (b) had attained the age of thirty; and (c) was entitled to be registered as a local government elector in respect of the occupation of land or premises (other than a dwelling-house) of the yearly value of £5, or of a dwelling-house, or was the wife of a husband entitled to be so registered. (Section 3 provides that a man can be registered as a local government elector if he is on the last day of the qualifying period occupying as owner or tenant any land or premises, and has during the whole of that period occupied any land or premises in the same area.)

Again, under the Act of 1918, a woman could be registered as a University parliamentary voter if she had attained the age of thirty years and had either obtained a degree or had fulfilled the conditions required of women in the University in question as to residence, and had passed all the examinations which would entitle a man at that University to a degree.

The Representation of the People (Equal Franchise) Act, 1928, was passed to assimilate the franchise for men and women in respect of parliamentary and local government elections. Under this Act a person is entitled to be registered as a parliamentary elector for a constituency (other than a University constituency) if he or she is of full age (*i.e.*, is over twenty-one) and not subject to any legal incapacity, and (a) has the requisite residence qualification, or (b) has the requisite business premises qualification, or (c) is the husband or wife of a person entitled to be so registered in respect of a business premises qualification.

To have the requisite residence qualification or the requisite business premises qualification a man or woman must on the last day of the qualifying period be residing in premises or be occupying business premises in the constituency, as the case may be, and must during the whole of the qualifying period have resided in premises or occupied business premises in or near the constituency. "Business premises" means land or other premises of the yearly value of not less than £10 occupied for the purpose of the business, profession or trade of the person to be registered.

The Act of 1928 further does away with the requirement that a woman to be registered as a parliamentary elector for a University constituency must have attained the age of thirty.

Persons on war service are entitled to be registered for any constituency for which they might have been registered but for such war service, but when the right relates to a residence qualification they must make a special claim, together with a declaration in special form, that they have taken steps to prevent registration in another constituency. The declaration is to be presumptive evidence of their right to registration. "Serving on war service" means serving on full pay in the Army, Navy or Air Force, or being abroad or afloat in connection with any war in which His Majesty is engaged. War service includes service of a military or naval character, Red Cross service, and any employment recognised by the Admiralty, Army Council, or Air Council as work of national importance.

No person, whether male or female, may have more than *two* votes, one of which must be a *residence* vote. For example, if a person has a University vote, a business vote, and a residence vote, he may vote only twice though he is on three registers, and one of the two votes which he exercises must be a residence vote (*d*).

The receipt of public assistance is no longer a disqualification for voting.

Registration.—It is provided by the Economy (Miscellaneous Provisions) Act, 1926, that one register of electors shall be made

(*d*) A freeman of the City of London who is a liveryman of one of the City Companies may be placed on the register of liverymen and become entitled to vote in that capacity, but he cannot exercise more than two votes, of which one must be in respect of his residence qualification For a criticism of the business premises and University qualifications, see Jennings, *Parliament must be Reformed*, pp 28—31.

each year, and the qualifying period prescribed by the Representation of the People Act, 1918, shall be three months instead of six months. It is further provided by this statute that the qualifying period for voting purposes shall be a period of three months ending the first day of June in any given year, including that day. Exceptions are made in the case of members and certain specified ex-members of the military, naval and air forces (*e*).

Every parliamentary borough or county is to be a registration area. The Town Clerk is to be the registration officer for the former and the Clerk to the County Council for the latter. The registration officer has judicial duties as well as those of preparing and publishing lists of voters, for any person may send notice to him objecting to another person's being on the list. The Clerk then notifies the person whose registration is objected to, and a date is fixed for the Clerk to hear both sides. If either party is dissatisfied with the ruling of the registration officer he can appeal to the County Court Judge, with a further and ultimate right of appeal to the Court of Appeal. Pending an appeal, the person thereby affected may vote. The officials of the Appeal Court are bound to notify the registration officer of the result of any appeal.

An official who intentionally omits to insert in the register the name of a person entitled to vote commits an indictable offence (*R.* v. *Hall* (1891) (*f*)).

University registers.—The governing body of a University are to keep a register of persons entitled to a vote for their constituency, and to allow inspection of their register.

Absent voters.—Persons who are entitled to be registered as parliamentary electors may, not later than 18th February, or for the Autumn register 18th August, in any given year, claim to be placed on an absent voters' list, and the registration officer, if satisfied that there is a probability that the claimant, by reason of his occupation, service, or employment, may be debarred from voting during the period the particular register is in force, shall place his name on the

(*e*) Owing to the postponement of the preparation of annual registers and the movement of the population during the war, temporary provisions were made by Part I of the Parliament (Elections and Meeting) Act, 1943, as amended by the Parliamentary Electors (War-Time Registration) Act, 1944, for the preparation of continuous registers and a relaxation of the residence qualification.

(*f*) [1891] 1 Q. B. 747.

absent voters' list, and the officer is bound to place in such list without any claim being made persons in the Army, Navy or Air Force. The addresses of absent voters must be kept and proper instructions on the method of voting sent to them.

The registration officer may require from any household any necessary information, and the giving of false information constitutes a summary offence.

A kind of proportional representation is applied at contested elections for University constituencies where there are two or more members to be elected. It may also be applied in certain other constituencies returning three or more members if and when a scheme for the selection of these constituencies is approved by Parliament In either case the principle of proportional representation is operated by conferring on each elector a single transferable vote.

Elections.—At a general election all polls are to be held on the same day, with exceptions for outlying rural districts and University elections, the latter being conducted by post

Every candidate for Parliament must deposit £150. If a candidate is not elected and the number of votes polled by him does not exceed, in the case of a constituency returning one or two members one-eighth of the total number of votes polled, or in the case of a constituency returning more than two members one-eighth of the number of votes polled divided by the number of members to be elected, the deposit in each case is forfeited to the Crown.

It is not the modern practice to hold general elections in wartime, but by-elections are required from time to time as members die or retire or become peers (*g*).

History of right of Commons to control elections.—The sheriffs, acting on behalf of the Crown, formerly controlled elections. The writ directed the sheriff to return two knights for each county and two burgesses for each borough, and the sheriff selected the places which he considered ought to have members. The boroughs shirked representation, as they had to pay 2s per day to each burgess. The first Statute of Westminster (1275) declared that elections ought to be free, and an Act of Richard II fined sheriffs who omitted to make returns

(*g*) *Ante*, p. 50

of boroughs which had previously returned members. Mediæval sheriffs often made false returns of men not properly elected.

An Act of Henry IV gave two justices of assize power to inquire into disputed returns. An Act of Henry VI awarded additional fines for false returns, and enjoined the sheriff to send precepts to mayors and bailiffs of boroughs directing them to elect borough members.

The King and Council originally settled election disputes, but as early as the reign of Richard II the Commons remonstrated against this course of action. During the Lancastrian period the Commons continued to remonstrate, but there is no recorded instance of their further complaining till the reign of Elizabeth, when they protested against the county of Norfolk election. James I interested himself much in the kind of men who were to be elected, as is evidenced by his proclamation at his first Parliament. In this reign the famous *Goodwin Case* occurred In 1604 Goodwin was returned for Bucks, but the Clerk of the Crown vacated the return on the ground that he was an outlaw A second writ was issued and one Fortescue was elected, but the Commons disputed Goodwin's outlawry, and contended that in any event outlawry did not disqualify him The Crown and the Commons consented to submit the dispute to the Judges, but no reference took place. Finally, James I admitted the right of the Commons to settle election controversies. The Commons also claimed to settle the rights of electors, and this gave rise to the celebrated episodes of *Ashby* v. *White* and the *Aylesbury Men* (*h*).

After *Goodwin's Case* (1604) (*i*), Select Committees of the Commons for a time tried the issues on disputed elections, but in 1672 a committee of the whole House tried these cases. Decisions, under these conditions, were not arrived at on the merits but on party lines. It is noteworthy that Walpole's Ministry resigned owing to being outvoted on the Chippenham Election Petition.

In 1770 Grenville's Act was passed to secure impartiality. Forty-nine members were chosen by lot, and then the petitioner and the respondent each struck out a name in turns until the number was reduced to thirteen, and then each nominated a member. This committee could compel the attendance of witnesses and examine them on oath. By Peel's Act, in 1839, the number of the committee

(*h*) *Post*, p. 106.
(*i*) Parl. Hist. i, 993; Tanner, *Constitutional Documents of James I*, p. 202.

was reduced to six. By the Parliamentary Elections Act, 1868, jurisdiction in disputed elections was handed over to the Court of Common Pleas, proper safeguards being added to secure to the Commons their privileges; and by a subsequent Act this jurisdiction was, with the like safeguards being preserved, committed to two Judges of the High Court. The Judges report the facts to the House, and the Commons can then determine the result.

Proposals for electoral reform and redistribution of seats.—An all-party Speaker's Conference on electoral reform and redistribution of seats reported in May, 1944 (*k*), and the following resolutions—which have largely been adopted by Parliament already—were passed.

Redistribution of seats.—There should be a general redistribution of seats on the basis of an approximately equal number of qualified electors, the total number of seats remaining substantially as at present (615). For this purpose four Boundary Commissions should be set up for England, Scotland, Wales and Monmouthshire, and Northern Ireland, the Speaker to be *ex officio* chairman of all four Commissions. Each Commission would undertake at intervals of from three to seven years a general review of representation in the House of Commons of that part of the United Kingdom with which it was concerned. The first general reports would be given effect by Act of Parliament, while subsequent reports would be laid before Parliament by the Home Secretary or Secretary of State for Scotland with draft Orders in Council, which would require an affirmative resolution. The City of London, however, should retain its two members and University constituencies should remain undisturbed.

An Act to give effect to these proposals was passed in October, 1944 (*l*).

Reform of the franchise and methods of election.—(i) The business premises qualification to be retained, but the husband or wife of a person having a business premises qualification should not be entitled as such to be registered as an elector.

(ii) The existing University representation and methods of election to be retained, but every graduate should be automatically registered without payment of a registration fee.

(*k*) *Conference on Electoral Reform and Redistribution of Seats* (1944), Cmd. 6534.
(*l*) House of Commons (Redistribution of Seats) Act, 1944.

(iii) If administratively practicable, a person should be entitled to be registered for not more than one residence qualification and not more than one business premises qualification.

The Conference rejected proposals that no person should vote more than once at any election, and also disapproved of the adoption of systems of proportional representation or the alternative vote except in so far as they obtain in University elections.

A further report was issued on the conduct and costs of Parliamentary elections, and expenses falling on candidates and members of Parliament.

The Conference also recommended the assimilation of the local government franchise to the Parliamentary franchise (*m*).

(*m*) See now, Representation of the People Act, 1945.

CHAPTER IX.

THE LORDS AND COMMONS IN CONFLICT.

Judicial conflicts.—Conflict has arisen between the two Houses mainly over legislation, and especially financial legislation, but they have on occasion been at variance on judicial issues For instance, in *Floyd's Case* (1621) (*a*), the Commons tried to exercise criminal jurisdiction outside the scope of their privileges, but abandoned their claim at the request of the Lords. The Lower House had itself, in the reign of Henry IV, resolved that it had no right to exercise such jurisdiction. In *Skinner's Case* (1668) (*b*) there was a serious controversy over the claim of the Lords to an original jurisdiction in civil cases, and the conflict raged for a year and a quarter. In the case of *Shirley* v. *Fagg* (1675) (*c*) the Lords successfully upheld their claim to hear equity appeals In 1704 the Lords and Commons had a serious duel over the cases of *Ashby* v. *White* and *The Aylesbury Men* (*d*), and the deadlock was only resolved by prorogation, which set free prisoners arrested for contempt.

Legislative conflicts.—In 1640 the Commons, led by Pym and Hampden, desired that redress of grievances should precede supply, and a committee was appointed to wait on the Lords with a list of grievances. Charles I was impatient for supplies and called on the Lords to assist him. The Lords responded to this appeal with a resolution that supply should precede redress of grievances. The Commons resolved that this was a breach of their privileges regarding money votes

In the years 1671 and 1678 the Commons passed two important resolutions denying the right of the Lords to amend or alter money Bills. The resolution of 1671 ran: "That in all aids given to the King by the Commons, the rate of tax ought not to be altered." In 1678 they resolved: "That all aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the Commons; . . . and

(*a*) 2 St Tr. 1153 (*b*) *Skinner* v. *East India Company*, 6 St. Tr. 709.
(*c*) 6 St Tr. 1121.
(*d*) 2 Ld Raym. 938, 1105. The latter case is also known as *Paty's Case*.

that "it is the undoubted and sole right of the Commons to direct, limit and appoint in such Bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants; which ought not to be changed or altered in the House of Lords." These resolutions did not specifically deny the legal right of the Lords to reject a money Bill, a right which the Lords continued formally to claim, though until 1860 they exercised it extremely rarely

In 1832 there was a severe controversy over the Reform Bill. The Commons prevailed against the Lords. William IV, much against his inclination, supported Lord Grey by threatening to use the prerogative right of creating sufficient peers to carry the measure. This right had actually been exercised in the time of Queen Anne, in 1712, in order to pass the Treaty of Utrecht through the House of Lords.

In 1860 the Lords exercised their legal right of rejecting money Bills by throwing out a measure for the repeal of the paper duty. On the motion of Lord Palmerston (an Irish peer sitting in the Commons) three resolutions to the following effect were carried in the Commons: (1) That the right of granting aid and supplies is in the Commons alone. (2) That, although the Lords could legally reject money Bills, yet the exercise of that power was regarded by the House with peculiar jealousy. (3) That the Commons had the power to impose and remit taxation and to frame Bills of supply, and that the right of the Commons as to the matters, manners, measure and time should be maintained inviolate. In the following year, Gladstone being then Chancellor of the Exchequer, the opposition of the Peers was overridden by the insertion of the provision regarding paper duties in a general financial measure for the services of the year. The House of Lords therefore had to face the alternative of passing the provision they disliked, or of rejecting the whole financial provision for the year. From the second alternative they shrank in 1861. They were destined to adopt it, with momentous consequences to themselves, in 1909.

In 1869 the Irish Church Disestablishment Bill was violently opposed by the Lords, but the difficulty was surmounted by Lord Cairns's influence and the clearly expressed wishes of the electorate.

Another memorable dispute concerned the rejection of the Army Purchase Bill in 1872. In this case the Commons carried their point without resort to legislation. Purchase of commissions was forbidden

by statute save so far as authorised by royal warrant, and the warrant was cancelled. Thus the Government attained their object without a direct conflict between the Commons and Lords.

There was considerable friction between the two Houses when the Lords rejected the Representation of the People Bill in 1884. In this case Queen Victoria intervened and acted as mediator between the disputants. Lord Salisbury on the one hand, and Mr. Gladstone on the other, by their temperate conduct and their readiness to make mutual concessions were instrumental in securing the passage of a measure which harmonised with popular opinion.

The next dispute was over Mr. Gladstone's second Home Rule Bill, in 1893, but as the Lords were in this case supported by the electorate at a subsequent general election their position was for the time being maintained. It was doubtless this event which encouraged Lord Lansdowne to state, as he did in 1906, that it was the duty of the Upper House to reject a measure when there was good reason for supposing that it was unpopular with the electorate or where such measure was carried in the Commons hastily or without sufficient consideration.

In 1905—06 the Liberals returned to power with a gigantic majority, only to find that their principal measures continued to be rejected by the Upper House. In 1907 the Commons passed resolutions to the effect that the veto of the Lords should be curtailed. These resolutions, which indicated the nature and extent of the curtailment desired, afterwards became the basis of the Parliament Act, 1911. In 1908—09 Liberal measures—and notably the Licensing Bill—were again thrown out by the Lords. The climax was reached when the Budget for 1909 was rejected in its entirety. At two general elections in 1910 (*e*), in both of which the veto was the principal issue, the Liberals were returned with reduced, but still substantial, majorities. Between these elections intervened the death of Edward VII, and an abortive conference at Buckingham Palace between the leaders of the Government and the Opposition. After the second election, in 1911, the Parliament Act was passed in the teeth of fierce resistance, the Lords reluctantly yielding, after being informed that the King had consented,

(*e*) It is now clear that the second general election was embarked on in deference to the wishes of Edward VII expressed shortly before his death.

if necessary, to create a sufficient number of peers to override their opposition.

The Parliament Act 1911.—In effect, the Parliament Act wholly abolished the Lords' veto over Money Bills, and substituted for their absolute veto over other legislation a suspensive veto of two years. It further, as we have seen, reduced the maximum duration of Parliaments from seven to five years.

The provisions of the Act are to the following effect: After reciting (*inter alia*) that it was eventually intended to substitute for the House of Lords, as it then existed, a second chamber constituted on a popular instead of an hereditary basis (*f*), it was provided that:—

Section 1.—(1) If a Money Bill, having been framed by the Commons and sent to the Lords at least one month before the end of the session, is not passed by the Lords without amendment within one month after it has been sent up, the Bill, unless the Commons direct to the contrary, shall be presented to the King and become a statute on receipt of the Royal Assent without the consent of the Lords.

(2) A Money Bill means a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with the following topics:—

imposition, repeal, remission, alteration, or regulation of taxation;
imposition for any financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation of such charges,
supply;
appropriation, receipt, custody, issue or audit of accounts of public money;
raising or guarantee of any loan or the repayment thereof; or
subordinate matters incidental to the above topics or any of them.

Bills relating to rates or loans raised by local authorities are not to be regarded as Money Bills.

(3) There shall be endorsed on a Money Bill when sent up to the Lords, and when presented to the King for assent, a certificate signed

(*f*) For subsequent attempts or proposals to reform or abolish the House of Lords, see Jennings, *Parliament*, pp. 416—432.

by the Speaker that the Bill is a Money Bill. Before so certifying the Speaker is to consult, if practicable, two members to be appointed from the Chairman's Panel at the beginning of the session by the Committee of Selection.

Section 2.—(1) If any Public Bill (*g*) (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the Commons in three successive sessions (whether of the same Parliament or not), and, having been sent to the Lords at least one month before the end of the session, is rejected by the Lords in each of these sessions, that Bill shall, on the third rejection by the Lords, unless the Commons direct to the contrary, be presented to the King for the Royal Assent and thereupon become an Act of Parliament without the consent of the Lords. But the foregoing provision is not to take effect unless two years have elapsed between the date of second reading in the first of the sessions in the Commons and the date of its passing the Commons in the third session.

(2) When a Bill is presented to the King for assent under this section, the signed certificate of the Speaker that the requirements of this section have been complied with shall be endorsed thereon.

(3) A Bill shall be deemed to be rejected by the Lords if it is not passed by them without amendment or with amendments agreed to by both Houses

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the Lords in the preceding session if, when sent to the Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker to be necessary owing to lapse of time since the date of the former Bill, or to represent amendments made by the Lords in the former Bill in the preceding session and agreed to by the Commons

The Commons may, if they choose, in the second or third session suggest further amendments without inserting them in the Bill, and such suggested amendments, if agreed to by the Lords, shall be treated as amendments agreed to by both Houses; but the exercise of this power by the Commons shall not affect the operation of this section in the event of rejection of the Bill by the Lords.

(*g*) Not including a Bill for confirming a Provisional Order (s. 5). For Provisional Orders, see *post*, p. 122.

Section 3. The Speaker's certificate "shall be conclusive for all purposes, and shall not be questioned in any Court of law."

Section 4. When a Bill is sent up for the Royal Assent without the consent of the Lords the enacting formula is as follows:—

"Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows."

Section 6. "Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons" (*h*).

Two Acts have received the Royal Assent in accordance with the provisions of the Parliament Act, 1911, namely, the Government of Ireland Act, 1914, and the Welsh Church Act, 1914. The former in fact never came into force as it was postponed by the outbreak of war and eventually superseded by the Government of Ireland Act, 1920.

(*h*) See next chapter.

CHAPTER X.

PARLIAMENTARY PRIVILEGE.

The Nature of Parliamentary Privilege.—Each House exercises certain powers and privileges which are essential to the dignity and proper functioning of Parliament (*a*). "As every Court of justice," says Coke, "hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, etc., so the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit.* It is *lex et consuetudo parliamenti* that all weighty matters in any Parliament moved concerning the peers of the realm or commons in parliament assembled, ought to be determined, adjudged and discussed by the course of the parliament, and not by the civil law, nor yet by the common laws of this realm used in more inferior Courts" (*b*). Parliamentary privilege is to some extent analogous to royal prerogative (*c*), except that the prerogative is part of the common law while privilege is "the law and custom of Parliament"—to be collected, says Coke, "out of the rolls of Parliament and other records, and by precedents and continued experience."

It is clear that the Courts cannot interfere with the decision of either House where one of its undoubted privileges is infringed, and that on the other hand neither House can create new privileges; but there is debatable territory in between, as some of the cases mentioned later will show. The question is, whether the House has power to decide not only whether there has been a breach of privilege but also that the alleged privilege exists.

I.—PRIVILEGES OF THE COMMONS.

These privileges are divided by Anson into two classes, namely, those claimed by the Speaker at the opening of a new Parliament and those not so claimed (*d*), though the fact of a privilege being

(*a*) The chief authority and work of reference on this subject is May, *Parliamentary Practice*, chh. 3—6.
(*b*) 4 *Inst.* 15. For a discussion of Parliamentary privilege in the seventeenth century, see Holdsworth, *History of English Law*, vol. VI, pp. 92—100.
(*c*) *Post*, p. 151.
(*d*) Anson, *Law and Custom of the Constitution*, vol. I (5th ed., Gwyer) pp. 163—164.

claimed by the Speaker carries with it no superior force, for all privileges are of equal validity.

The privileges claimed by the Speaker are:—(1) freedom of speech; (2) freedom from arrest; (3) access of the Commons to the Crown through the Speaker; and (4) that the Crown will place the most favourable interpretation on the deliberations of the Commons.

The privileges not claimed by the Speaker are:—

(1) The right of the House to regulate its own constitution. This used to include the right to settle disputed elections, and to pronounce on the legality of an election and on the legality of qualifications for membership, but Parliament has latterly devolved upon the law Courts the hearing of election petitions (*e*). It still includes the right to suspend and expel members.

(2) The right to take exclusive cognisance of what transpires within the House (*Bradlaugh* v. *Gossett* (1884) (*f*)).

(3) The right to punish members and outsiders for contempt, as can any other Court of record.

(4) The right of impeachment (*g*).

(5) The right to control finance and initiate financial legislation (*h*).

Freedom of speech.—Freedom of speech, which was first demanded by the Speaker in 1541, is the essential attribute of every free legislature, and may be regarded as inherent in the constitution of Parliament. In the reign of Edward III the Commons debated many matters relating to the royal prerogative, and petitioned for laws to be made, adversely affecting the prerogative, without being interrupted or restrained by the King. The proceedings against *Haxey* in 1397 for treason in introducing a Bill for the curtailment of Richard II's household expenses (*i*) were the cause of Henry IV's recognition of the right to parliamentary freedom of speech. Henry IV said it was his wish that the Commons should treat of all matters amongst themselves in order to bring them to the best conclusion, and that he would hear no person before such matters were brought before him by the consent of the Commons. In Henry VIII's reign one *Strode* was imprisoned at the instance of the Stannaries Courts for

(*e*) *Ante*, p. 90.
(*f*) (1884), 12 Q. B. D. 271.
(*g*) *Ante*, p. 46.
(*h*) *Post*, Chapter XII.
(*i*) *Haxey's Case* (1397), Rot. Parl., iii, 434; Stubbs, *Constitutional History*, vol. II, p. 516; Taswell-Langmead, *Constitutional History*, p. 268.

introducing Bills to regulate those Courts. After the expiration of three weeks he was released by writ of privilege, and Strode's Act (*k*) was passed, which provided "that all suits, accusements, executions, ... punishments, etc., against all persons of that particular or any other Parliament . . . for any Bill, or speaking . . . of any matter concerning the Parliament be of none effect."

In Elizabeth's reign members were punished by the Crown for words used in Parliament, and members were warned in Parliament not to be free with their language. In 1629, Eliot, Hollis and Valentine were imprisoned for injudicious language in Parliament. The Court held that Strode's Act was not a public Act, but the Commons resolved that it was. These proceedings were reversed in Charles II's reign on the ground that words spoken in Parliament could only be judged of in Parliament (*l*) No legal proceedings were ever taken, after this case, in the ordinary Courts against anyone in respect of utterances in Parliament Yet, in the reign of George III, General Conway lost his command for statements and conduct in Parliament, and similar oppressions have been attributed to Walpole.

What is said within the walls of Parliament cannot form the subject-matter of an action for defamation (*Dillon* v. *Balfour* (1888) (*m*)).

In 1938 Mr. Duncan Sandys asked a question in the House about the anti-aircraft defences of London, the nature of the question suggesting to the Government (of which he was not then a member) that he had obtained official information which was supposed to be secret. The Army Council wished to set up a court of enquiry, and when Mr. Sandys refused to reveal the source of his information the Attorney-General hinted that he might become liable to penalties under the Official Secrets Acts. A Select Committee of the House reported unfavourably on the Attorney-General's conduct, and the House accepted the Committee's opinion that the sending of a summons to Mr. Sandys was a breach of privilege (*n*).

So far as Mr. Sandys was concerned the matter rested there, but another Select Committee was set up to consider the general question of the manner in which members can properly make use of information supplied to them in contravention of the Official Secrets Acts. The

(*k*) 4 Hen. 8, c. 8.
(*l*) *Eliot's Case* (1629), 3 St. Tr. 294. (*m*) 20 L. R. Ir. 600.
(*n*) (1938), H. C. Pap. 173. Interrogation under the Acts now generally requires the permission of a Secretary of State: see Official Secrets Act, 1939, s. 1.

committee advised that while members are privileged from prosecution under the Acts for disclosures made in the House, they should use their immunity with discretion. The privilege does not entitle a member to solicit or knowingly to receive information from public servants in contravention of the Acts, though (unless the House agreed otherwise) the offence would have to be proved without the evidence of anything a member said in the House. The committee added that the Government also should show discretion in exercising their powers under the Official Secrets Acts, so as not to impede members in the discharge of their duties (*o*).

Punishment by the House itself for parliamentary misbehaviour.—The House of Commons punishes improper conduct of all kinds in Parliament. No member may allude to any debate of the same session, or any debate in the other House, neither may he use the King's name in an irreverent manner nor for the purpose of influencing the House, nor may he refer to any other member by name. He must not speak insultingly of either House, or any member of either House. It is the Speaker's duty to preserve order, and his ruling must be obeyed by members. He, or (in committee) the Chairman of Ways and Means, or the Deputy-Chairman, can stop speeches either on the ground of improper language or irrelevance (*p*).

Suspension.—Where a member disobeys the Speaker or the Chairman or Deputy-Chairman in committee, is guilty of obstruction, or behaves objectionably, the Speaker or Chairman may be asked to name him. The question of suspension is then put, and if it is carried he can be expelled for as long as the rest of the session.

Effect of expulsion of members.—The House of Commons has an undoubted right to expel its members, but this course of action has only a limited efficacy, as the constituency which he represents can go on re-electing him. The celebrated John Wilkes was expelled from the House, and his constituents re-elected him. The Commons then, acting in their then judicial capacity, declared the election null and void. This procedure was repeated after a second re-election. In

(*o*) (1939), H. C. Pap. 101. For the Official Secrets Acts, see *post*, p. 447.

(*p*) On this and the following topics, see *Standing Orders of the House of Commons*, published annually by H.M. Stationery Office; May, *Parliamentary Practice*, ch. 12.

1774 Wilkes, being re-elected to a new Parliament, took his seat without opposition.

Right to exclude strangers.—This may be regarded either as a corollary to the principle of freedom of speech, or as necessary for the orderly conduct of business where there is a danger of disorderly interruption. Formerly any member could object to strangers being present, but now he must direct the Speaker's attention to the fact, and the question of turning out such strangers is determined by vote. The Speaker also has the power of ordering strangers to withdraw.

Right to restrain publication of debates.—This is another corollary of the privilege of freedom of speech. Members formerly desired secrecy of debate to protect themselves from the Crown, and they subsequently desired it to protect themselves from their constituents. It became quite common in the eighteenth century for political writers under various disguises to publish extracts from speeches made in the House. In 1771 action taken by Colonel Onslow brought this question to a head. Certain printers of debates were summoned to the bar of the Commons, and one of them named Miller, who refused to attend, was arrested in the City. Miller gave the messenger of the House into custody for assault. The case was heard by the Lord Mayor, Alderman John Wilkes and Alderman Oliver, who released Miller and committed the arresting messenger. The Lord Mayor and the two aldermen were committed by the House to the Tower, but such convulsions ensued that publication of debates has not been since interfered with.

For some time after this reporters were beset with difficulties. They could not get seats, or take notes, and objection was often taken to the presence of strangers. The year 1834 was marked by the provision of reporters' galleries, but publication of division lists was not permitted till 1836 (*q*). The year 1835 first witnessed the publication and sale of Parliamentary reports and papers at a cheap rate. Then came the series of reports of Parliamentary debates known as "Hansard," from the name of the original publisher. This name has recently been revived in application to the series of official reports which began in 1910.

It had long been established that immunity attached to a petition

(*q*) Taswell-Langmead *Constitutional History* (9th ed.), pp. 719 *et seq.*

circulated only among members of Parliament (*Lake* v. *King* (1667) (*r*)), but it was held in *Stockdale* v. *Hansard* (1839) (*s*), that papers published generally by order of either House were not privileged. The latter decision was nullified by sections 1 and 2 of the Parliamentary Papers Act, 1840, which give absolute privilege to reports and papers published by order of either House.

Section 3 of the Act gives qualified privilege to unauthorised extracts from or abstracts of authorised Parliamentary papers or reports; that is to say, no criminal or civil proceedings lie in respect of defamatory statements contained in such extracts or abstracts unless they are published for an improper motive ("maliciously") (*t*). A member would not be liable if he *bona fide* published an extract from a Parliamentary debate for the information of his constituents. (*Davison* v. *Duncan* (1887) (*u*).)

In *Wason* v. *Walter* (1868) (*x*) it was held that qualified privilege attaches to fair and accurate (unauthorised) reports of Parliamentary proceedings. Cockburn, C.J., after remarking that reports of Parliamentary proceedings were on the same legal footing as judicial proceedings, observed that it was of paramount public and national importance that Parliamentary proceedings should be communicated to the public, which has the deepest interest in knowing what passes in Parliament. But a garbled or partial report, or a report of detached parts of proceedings, published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection (*y*).

Comments are privileged if made upon a matter of public interest with an honest belief in their justice, and with such reasonable moderation as in the opinion of the jury stamps them as fair and legitimate criticism of the conduct and motives of the person concerned.

Where an allegation is made against anyone in a privileged document

(*r*) 1 Wms. Saund. 131.

(*s*) 9 A. & E. 1.

(*t*) *Mangena* v. *Wright*, [1909] 2 K. B. 958; cf. *Mangena* v. *Lloyd* (1908), 99 L. T. 824 (protection does not extend to headlines which are not part of the report).

(*u*) 7 E. & B. 229. Cf. *R.* v. *Creevey* (1813), 1 M. & S. 273 (publication by a member in a newspaper of a single defamatory Parliamentary speech for the purpose of injuring an individual).

(*x*) L. R. 4 Q. B. 73. This case is not one of Parliamentary privilege, but it is convenient to mention it here.

(*y*) See also Newspaper Libel and Registration Act, 1881.

like a Parliamentary paper, any person not being the person who has made the allegation in question may comment in a fair manner thereon, without exposing himself to proceedings even though the allegation be untrue.

Freedom from arrest (*z*).—It seems that a law of the Saxon Ethelbert provided that "if the King call his people to him, and if anyone do them evil, let him pay a bot [compensation] and 50s. to the King." The privilege commenced forty days before Parliament sat, and lasted during the session and forty days thereafter, and formerly extended to the goods of members and their servants. In Edward I's reign the Master of the Temple petitioned the King to distrain on the goods of his tenant, the Bishop of St. Davids. The King refused the request on the ground of the above privilege touching the goods of members of his council. In the case of the Prior of Malton (1315), who was arrested *en route* to Parliament, the privilege was again acknowledged (*a*).

In the reign of Henry VI an Act declaratory of the common law was passed, which awarded double damages in the event of an assault on persons *en route* to Parliament. In the same reign Speaker Thorpe, a Lancastrian and a Judge, was arrested for seizing in a judicial capacity certain property of the Duke of York. The Commons demanded Thorpe's release and the point was referred to the Judges, who, though favourable to a release, did not act on their opinion, with the result that Thorpe was detained in prison (*b*).

Before 1543 members were released by special statute or writ of privilege. In 1543, however, the Commons demanded the release of one Ferrers, on their own account, and committed the sheriff for contempt (*c*). Demands for release were thenceforward made by the House of Commons. In 1575 one Smalley, a member's servant, was arrested for debt, and afterwards freed by order of the House of Commons. As the arrest was a collusive one, in order to get rid of the debt, Smalley was sent to goal for a month and ordered to pay the creditor £100 (*d*).

In 1603, Sir Thomas Shirley, a member of the House, was imprisoned for debt in the Fleet. His release, demanded by the Commons, was

(*z*) **May**, *Parliamentary Practice*, ch. 5. (*a*) 1 Rot. Parl. 61; 4 *Inst.* 24 e.
(*b*) *Thorpe's Case* (1452), 5 Rot. Parl. 239; Taswell-Langmead, *Constitutional History*, p. 290.
(*c*) *Ferrers' Case* (1543), Tanner, *Tudor Constitutional Documents*, pp. 560—563.
(*d*) *Smalley's Case* (1575), Tanner, *op. cit.*, pp. 584—585.

refused by the warden on the ground that he would be liable to an action for escape at the instance of the execution creditor. The House committed the warden to the Tower for contempt (*e*). The King procured Shirley's release, but an Act was soon afterwards passed providing that a prison governor releasing a member of Parliament was to be free from liability to an action by the creditor for escape, and that the creditor after the expiration of the privilege was to be at liberty to re-arrest. The statute also recognised the right of the House to set at liberty members of Parliament when arrested, the privilege of freedom of speech, and the right to punish persons procuring the arrest of members of Parliament during time of privilege.

The privileges touching the persons, servants, and goods of members, which had come to be abused, were curtailed by the combined effect of Acts passed in 1701, 1704, 1737 and 1769 (*f*), and only the actual persons of members thereafter remained immune from civil arrest. The result is that a member is free during Parliament, and for forty days before and after it sits; but he is not further protected, nor are his servants protected at all. In *Goudy* v. *Duncombe* (1847) (*g*) it was decided that the immunity lasted during a session of Parliament and forty days before and after; that it applied equally where Parliament was dissolved or prorogued, and that it could be claimed by one who was a member of the old Parliament but had not been elected to the new.

The privilege of freedom from arrest has never extended to cases of treason, felony, or breach of the peace, neither does it now extend to cases of contempt of Court. In 1839 Long Wellesley was imprisoned by the Chancery Court for taking one of its wards out of the jurisdiction. A member named Charlton was also arrested for contempt. In 1873 Whalley and Guildford Onslow were similarly arrested in connection with the great *Tichborne Case*.

When a member of Parliament commits a crime he is arrested like anyone else, and if he is convicted the Judge notifies the Speaker. The papers are then laid before the House at their request, and the question of expulsion is considered.

The case of Alcock, who became insane during his membership,

(*e*) *Shirley's Case* (1603), 1 Hatsell, 107.
(*f*) 12 & 13 Will. III, c. 3; 2 & 3 Anne, c. 18; 11 Geo. II, c. 24; and 10 Geo. III, c. 50.
(*g*) (1847), 1 Exch. 430.

brought about the Lunacy (Vacation of Seats) Act, 1886, which provided that persons who have received a lunatic Member into an asylum must notify the Speaker at once. A report on his mental condition is then asked for, and a further report at the end of six months, and if by that time there is no immediate prospect of recovery, the seat may be declared vacant.

In 1939 Captain Ramsay, M.P., was placed in preventive detention under regulation 18B of the Defence (General) Regulations, 1939, by which the Home Secretary had power to certify that he had reasonable cause to believe that a person had been recently concerned in acts prejudicial to the public safety or the defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it was necessary to exercise control over him. No criminal charge was involved. A Committee of Privileges reported that the Home Secretary's action was not a breach of privilege, though it would have been otherwise if a member had been detained for words spoken in the House (*h*). Captain Ramsay was not released until five years later.

Right of the House to regulate its own constitution.—This privilege, as stated above, used to embrace the privilege of controlling elections. Since *Goodwin's Case* (1604) (*i*), the Crown has never directly interfered with Parliamentary elections, though indirect interference was practised at any rate till 1832. Corruption among candidates, moreover, was fairly general till the Ballot Act, 1872, but the Corrupt and Illegal Practices Act (1883) contributed greatly to its suppression (*k*).

In *Ashby* v. *White* (1704) (*l*) one Ashby, a voter of Aylesbury, was refused a vote by the returning officer. No damage was sustained, as the candidate for whom Ashby would have voted was elected, but on proceedings being taken judgment was recovered on the principle *ubi jus ibi remedium*. On motion in arrest of judgment it was held (Holt, C.J., *dissentiente*) that no action lay, but the Lords on appeal decided otherwise. The Commons passed a resolution that this constituted an infringement of their privilege.

In *The Case of the Men of Aylesbury* (1705) (*m*), five Aylesbury voters brought actions on similar lines to Ashby's, and were sent by

(*h*) (1939—40), H. C. Pap. 164.
(*i*) 2 St. Tr. 91.
(*k*) See Keir, *The Constitutional History of Modern Britain, 1485—1937* (2nd ed.), pp. 464—467.
(*l*) 2 Ld. Raym. 938; 3 Ld. Raym. 320; 14 St. Tr. 695.
(*m*) *Paty's Case*, 2 Ld. Raym. 1105.

the Commons to prison for contempt. Writs of *habeas corpus* were unsuccessfully applied for. The men nearly gained their liberty by an appeal to the House of Lords on a writ of error; but Queen Anne, on being petitioned about the privilege by the Commons, cut the knot by proroguing Parliament. The effect of this was to set the captives at liberty.

The right of the Commons to decide contested elections was liable to be abused for party purposes, and by the Parliamentary Elections Act, 1868 (as subsequently amended), the trial of cases of disputed elections was transferred to the Judges, two Judges from the rota of election Judges now deciding these cases in the rare instances in which they still arise. The statute leaves nominally intact the ancient privilege of the Commons, who, in practice, give effect to the decisions of the Bench. The Act enables defeated candidates and persons entitled to vote to present a petition to the King's Bench Division for the election to be declared void, and lays down rules of procedure. As regards England, the petition must be presented within twenty-one days after the proper returning officer has made his return to the writ, and £1,000 must be paid into Court or secured to meet the respondents' costs should they succeed. The election may be declared void where corrupt and illegal practices have been traced to the candidate or his agents, and also in cases where corruption has been sufficiently prevalent to prove the election unfair. The Judges have power to waive irregularities where there has been no actual miscarriage of justice, and have, moreover, ample discretion as to costs.

In Scotland election petitions are tried before a Judge of the Court of Session, and certain modifications of procedure apply by virtue of section 58 of the Act of 1868.

In *Barnardiston* v. *Soame* (1674) (*n*) a returning officer was sued for making a double return (*i.e.*, declaring two members elected) for one vacancy. The plaintiff won, but the verdict was upset. Afterwards, nevertheless, the making of a double return was, in theory, deemed illegal; though a custom arose whereby the Commons allowed the practice in difficult cases. By a statute of 1695 returning officers *falsely* making double returns are exposed to the penalties specified therein. This Act disposes of all contentions as to double returns being illegal. It is now fully recognised that a returning officer, when

(*n*) 6 St. Tr. 1092; (1689), 6 St. Tr. 1119.

the voting is equal, has a casting vote, but that he need not exercise it. On an equality of votes he may return two or more members for one vacancy instead.

Though the House has practically transferred to the Law Courts judicial cognisance of disputed election cases, it may still, if it chooses, question the legality of any given election. The House can also expel or refuse to admit persons whom it deems unworthy to be members of their assembly, whether interested parties have moved in the matter or not. Rossa was expelled in 1870, O'Donovan and Mitchell in 1875, and Davitt in 1882. In the matter of expulsion, a new Parliament is not affected by the conduct of a former one and when the House expels, it cannot, as has been seen in the case of Wilkes, prevent the re-election of the expelled member.

Right of the House to decide matters arising within its own walls. The leading case on this is *Bradlaugh* v. *Gossett* (1884) (*o*). The Serjeant-at-Arms, acting under orders, prevented the entrance of Bradlaugh to the House. Bradlaugh thereupon sued for a declaration that the order of the House for his exclusion was invalid. The Court decided against him on the ground that the decision of the Commons on matters arising within the precincts of the House could not be controlled by the Courts of justice. Stephen, J., however, was of opinion that the line must be drawn somewhere, and that the House could not try, say, a murder which took place under its roof

In *R.* v. *Sir R. Graham-Campbell, Ex p. Herbert* (1935) (*p*) the Divisional Court reaffirmed the principle that no Court of law can interfere with the privileges of the House in a case in which a criminal offence was involved. The Court decided that neither members of the Kitchen Committee of the House, nor the manager of the Refreshment Department, were liable to be summoned for selling, in the precincts of the House, intoxicating liquor which they were not licensed to sell under the Licensing (Consolidation) Act, 1910. Incidentally, it was doubtful whether the Act could apply within the precincts of the House, being part of a royal palace.

Right to punish members and outsiders for contempt.—In the case of *Howard* v. *Gossett* (1847) (*q*), a person was arrested by the Serjeant-

(*o*) 12 Q. B. D. 271.
(*p*) [1935] 1 K. B. 594.
(*q*) 10 Q. B. 451.

at-Arms for refusing to appear as a witness before the House. Judgment to the following effect was pronounced by Parke, B. The House, which forms the Grand Inquest of the nation, can compel attendance of witnesses, and in case of disobedience bring them in custody to them for examination; and secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer, and then a wilful disobedience of that order, the House may cause the offender to be brought in custody to answer the charge, and the House is the proper judge as to when these powers should be exercised.

Burdett v. *Abbot* (1811) (*r*) was an action of trespass against an officer of the Commons for breaking into the plaintiff's house and carrying him to the Tower. The Court held, firstly, that the power of either House to commit for contempt is reasonable and necessary and well established by precedents; and secondly, that the execution of a process for contempt justified the breaking into the plaintiff's house. Lord Ellenborough said: "If a commitment appeared to be for contempt of the House of Commons generally, I would neither in the case of that Court nor of any other of the superior Courts enquire further; but if it did not profess to commit for contempt, *but for some matter appearing on the return* which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably arbitrary, unjust, and contrary to every principle of natural justice, I say that in case of such a commitment we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded" (*s*).

Shaftesbury's Case (1673) (*t*) shows the power of the Lords to commit for contempt, and *Burdett* v. *Abbot* shows that the Commons have a similar power, but there is this difference, that the Commons can only commit till the close of the session, whereas the Lords can commit for a definite period.

The modes of punishment which may be imposed by the Commons are four, viz., admonition, reprimand, fine and imprisonment. When an admonition is contemplated, the offender is asked to attend at the Bar of the House, and is rebuked by the Speaker. In cases of reprimand he is brought by force to the bar and then reprimanded.

(*r*) 14 East, 1.
(*s*) 14 East, at p. 150.
(*t*) 1 Mod. Rep. 144.

Fines are now obsolete, though an offender may be detained till he has paid House fees. When a man is committed by order of the House, he is in some cases, but not necessarily, given an opportunity of apologising; he may, however, be committed peremptorily. Whichever course is pursued, he is set free at the end of the session, and if not set free could demand a *habeas corpus*.

Conflicts between Parliament and the Law Courts concerning Privilege.—Of these conflicts the cases of *Ashby* v. *White* and the *Aylesbury Men* are memorable instances; but the leading decision on the subject is *Stockdale* v. *Hansard* (1839) (*u*). The House of Commons instructed Messrs. Hansard, the parliamentary printers, to publish copies of reports of certain inspectors of prisons. These reports were distributed to members and sold to the public. Stockdale, considering himself libelled by these reports, sued Messrs. Hansard and won, the Court holding that it is no defence to a libel action that the defamatory matter was part of a document which was by order of the House laid before it, and thereupon became part of its proceedings, and which was afterwards by like order printed and published by the defendant. After this decision, the Commons resolved that the right to publish their proceedings and reports was necessary for the constitutional functioning of Parliament, and that any person bringing an action, and any Court giving a decision, on a matter of privilege contrary to the determination of either House, would be guilty of a breach of privilege.

The sheriff levied execution, and he (the sheriff), Stockdale and his solicitor were committed by the House for breach of privilege. Finally, the deadlock was resolved by the passing of the Parliamentary Papers Act, 1840, which provided, in effect, that all actions like that of *Stockdale* v. *Hansard* should be stayed on production of a certificate or affidavit that the paper complained of had been published by order of either House.

The existence of two tribunals—the ordinary Courts and the "High Court of Parliament"—with an ill-defined frontier between their jurisdiction, but without any appellate Court to resolve conflicts between them by determining that frontier, is obviously unsatisfactory, and it has been suggested that some legal process analogous to an

(*u*) 9 A. & E. 1.

injunction and binding on the Courts as well as on the parties should be instituted to restrain the commencement and hearing of actions at common law arising out of the exercise of parliamentary privilege (*x*).

The case of *Stockdale* v. *Hansard* also caused a dispute between the two Houses concerning the right of the Upper House to exercise its appellate jurisdiction in such a way as to deprive the Lower House of its privileges, and so acute was the controversy that Parliament had to be prorogued.

II.—PRIVILEGES OF THE LORDS.

Privileges of the House.—The House of Lords has seldom come into conflict either with the King or with the Courts in respect of its privileges. The juridical nature of the privileges of the House of Lords is similar to that of the privileges of the House of Commons, and, while it is convenient to enumerate them separately since their contents differ in some respects, it should be remembered that strictly both are parts of the privileges of Parliament (*y*). The Lords passed a resolution in 1704 declaring that neither House has power to create for itself new privileges not warranted by the known laws and customs of Parliament, and the Commons assented (*z*).

(1) The power to declare the law with regard to its own constitution, and to determine the validity of the creation of new peerages (*Wensleydale Peerage Case* (1856) (*a*)). For these purposes lay peers may take part in the proceedings, and there is no quorum of legal experts.

(2) The right to regulate its own proceedings without interference, and to commit for breach of privilege or contempt (*Lord Shaftesbury's Case* (1673) (*b*)). Where no period is fixed, the person committed is released when Parliament is either prorogued or dissolved.

(3) The power to try peers and peeresses for treason and felony.

(4) The power to try impeachments instituted by the Commons.

(5) Its jurisdiction as the final court of appeal from the superior Courts of law in England, Scotland and Northern Ireland (Appellate Jurisdiction Acts and Judicature Acts).

(*x*) Cf. Jennings, *The Law and the Constitution* (3rd. ed.), pp. 108—112.
(*y*) May, *Parliamentary Practice* (13th ed.), p. 72.
(*z*) 14 Commons' Journals, 555.
(*a*) 5 H. L. C. 958.
(*b*) 1 Mod. Rep. 144. Cf. *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; *per* Lord Denman, at p. 127.

(6) The exclusive right to initiate Bills which may affect the rights of the peerage, and to suffer no amendments thereto in the House of Commons.

(7) The right to summon the Judges for advice on points of law.

(8) The power to issue a warrant for the release of a peer who is improperly arrested.

Personal Privileges of Peers—

(1) Freedom from arrest, except in cases of treason, felony, or refusal to give security to keep the peace (*Earl of Lonsdale* v. *Littledale* (1793) (*c*); *Duke of Newcastle* v. *Morris* (1870) (*d*)). This privilege extends in the case of a peer from forty days before Parliament sits until forty days after the session; and in the case of his servants from twenty days before until twenty days after a session. It is not now of much importance since the abolition of arrest as a mesne process in civil cases.

(2) Freedom of speech in Parliament. This privilege is similar to that of the Commons.

(3) Right to trial by peers for treason, felony, or misprision of either (*e*)

(4) Right of individual access to the Sovereign. This privilege is a relic of the days when the peers were hereditary Councillors, and is not now of constitutional importance owing to the conventional doctrine of ministerial responsibility.

(5) Exemption from jury service. This very ancient privilege was confirmed by the Jury Act, 1870.

(6) The right of a peer to enter a protest on the journals of the House against a resolution with which he disagrees. This is subject to the collective right of the House to delete protests.

(7) The right of a lord spiritual or temporal, on the way to or from Parliament, when passing through a royal forest to kill one or two of the King's deer without warrant in view of the forester if present, or on blowing a horn if he be not present, that he may not seem to take the King's venison by stealth (Charter of the Forest, 1225). This privilege is said to be obsolete.

(*c*) 2 Anst 356
(*d*) L. R. 4 H. L. 661.
(*e*) *Ante*, pp. 45 and 58.

CHAPTER XI.

PARLIAMENTARY PROCEDURE.

I.—PROCEDURE IN THE COMMONS.

Order of business (*a*).—The usual order of business in the House of Commons (after prayers, which are read at 2.45 p.m.), is as follows:—(1) Private business which is purely formal; (2) public petitions orally presented (if any); (3) questions, which must, as a rule, be over by 3.45 p.m.; (4) motions for adjournment under Standing Order 10; (5) matters taken at commencement of public business; and (6) orders of the day and notices of motions. The House normally rises at 11.30 p.m. On Fridays the hours are 11 a.m. to 4.30 p.m., when the House adjourns for the week-end (*b*).

It is to be noted that every matter is determined in both Houses upon questions put by the Speaker and resolved in the affirmative or negative, as the case may be, *e.g.*, "That this Bill be read a second time."

Public petitions.—The following rules must be observed:—(1) They must be written and not printed, lithographed, or typed; (2) they must be addressed to the House of Commons; (3) if not in English, they must be accompanied by a translation, for the correctness of which the introducing member is responsible; (4) there must be neither interlineations nor erasures; (5) the petitions must conclude with prayers; (6) they must be signed by the petitioners if they are neither ill nor incapable of signing; (7) no documents must be annexed to petitions; (8) they must be temperately and also respectfully worded; (9) no references must be made to debates in Parliament or to notices of motion not set down in the paper; (10) the introducing member is responsible for all rules relative to petitions being observed; (11) no petitions for any sums relating to the public service, or for any money which is to be charged on Indian revenue, can be presented without leave of the Crown; (12) petitions for leave to compound

(*a*) May, *Parliamentary Practice*, chh. 8 and 9; Jennings, *Parliament*, ch. 4.
(*b*) Parliament sits less frequently in war-time, when Ministers cannot spare so much time for attendance.

Crown debts will not be received without a certificate giving certain information to the House; (13) no member is permitted to present his own petition, but he may present a petition signed by himself in a representative capacity.

All petitions presented to the House lie on the table, and are referred to the Public Petitions Committee. They therefore do not form the subject of debate, and are no longer of much practical importance.

In the case of *Lake* v. *King* (1667) (*c*) it was decided that no action for libel lies with respect to the contents of a Parliamentary petition.

Questions.—Unless the Speaker gives special leave, written notice of intention to ask a question must be delivered to the Clerk of the House at the table beforehand. Where an answer by word of mouth is required an asterisk is affixed to the notice. In all cases where there is no asterisk, or the member or some friend of his is not in the House to ask the question, or the question is not reached by 3.45 p.m., the Minister who has to answer it has the answer printed and circulated with the votes. The questioning member, may, however, postpone his question. The time for asking the question is signified by the Speaker, who calls out the name of the questioning member.

No question should contain any unnecessary name or statement, and the questioning member is responsible for the correctness of any statement of fact. Opinions must not be asked, and purely legal questions are not allowed; nor may a question refer to any debate that has occurred, or answer that has been given, in the current session. No imputations on private character are permitted, but imputations on official character may be made with certain reservations. No questions can be put as to matters pending in a committee till the report of that committee is issued. No argument or irony is permitted, and the Speaker is sole judge of the propriety of a question.

A Minister may decline to answer a question on the ground of public policy, and the Minister for Foreign Affairs has on this account great latitude given him. All questions directed to Ministers must relate to their respective departments.

The asking of questions is now one of the most important functions of Parliament. Questions are asked in order to focus attention on matters of topical interest either to individual constituents or to the

(*c*) 1 Wms. Saund. 131

public generally. Owing to the publicity given by the Press, the practice is indulged in more for the benefit of the electorate than of the House. If a Minister's reply is not considered satisfactory, supplementary questions may be asked. A good deal of time is taken up in some Government departments in looking up the facts and "briefing" the Minister. When used skilfully by members of the opposition, the asking of questions may be made a source of considerable embarrassment to the Government.

Owing to the strictness of party discipline in modern times, debates tend to run on party lines. Question time therefore constitutes an important check on the activities of the executive. It is then that the private member, who is not attached to any of the great parties, comes into his own, and he is more likely than party members to put forward the grievances of individual citizens who have suffered at the hands of Government departments. On the other hand, a disadvantage of the institution of question time is that it fosters that spirit of timidity in civil servants which is regarded as one of their chief defects.

If a member is not satisfied with an answer, he may give notice that he intends to raise the question on the adjournment. The motion for the adjournment of the House provides a half-hour in which almost any matter not involving legislation may be discussed.

Royal communications.—These are delivered either (1) by speech from the Throne to both Houses, the speech being delivered in the Lords, either by the King or the Lord Chancellor, or (2) by Lords Commissioners under the Great Seal.

In the Commons, messages are delivered (1) under the Sign Manual; (2) through a Minister; or (3) through a Privy Councillor.

Royal messages under the Sign Manual are sent to announce some event of importance or sudden emergency, necessitating the calling out of reserve forces; or to request provision for some person who has rendered valuable services to the Crown, or to demand a marriage provision for a royal prince or princess. The message is brought by a Minister, who informs the Speaker of his mission and then brings it to the Chair. Whilst the Speaker reads the message, members uncover their heads. Notification of a royal bereavement is also of a formal character.

Informal messages are delivered either by a member of the Household,

or a Minister of the Crown. Members do not uncover when such messages are delivered.

Rules of debate.—No reference must be made *eo nomine* to debates in the House of Lords or to the House of Lords (which is commonly referred to as "another place"); nor to any matter *sub judice* in a law Court. The name of the King must not be mentioned either disrespectfully or in order to influence the House. No treasonable or seditious words are allowed, neither may a person speak to obstruct business. Members must not be referred to by name, but as "the Hon. Member for Camford," etc., nor may any offensive expressions against members be used or personal charges made. No debate of the session must be mentioned, nor any question not at the time under discussion. A member may refer to notes, but must not read his speech.

Count-Out.—When forty members are not present, either in debate or in a committee of the whole House, the Speaker or Chairman gives the order for the withdrawal of strangers and for the summons of members from other parts of the building. Two minutes are allowed for members to assemble. The members are then counted twice, and if there are less than forty at the time of the second count the House adjourns until the next sitting day. There is no count-out at dinner time (8.15 p.m.—9.15 p.m.).

Censures.—When a member contumaciously declines to accept a ruling of the Speaker or is guilty of misbehaviour, or flagrantly breaks the rules of the House, the Speaker may be asked to "name" him. The question is then put that the member be suspended from the service of the House, and if the motion is carried he is suspended till the end of the session or until further order.

Closure.—This is a device for bringing to an end a debate or a speech. A member moves "that the question be now put," and if the Speaker or Chairman accepts the motion, and it is carried, not less than one hundred members voting in its support, further debate on the subject must cease. The Speaker has a duty cast on him of stopping the motion for closure where he considers that the rights of the minority have been infringed, or that the motion operates as an abuse of the rules of the House (*d*).

(*d*) Jennings, *Parliament*, pp. 115—118.

The "Guillotine."—This is an elaboration of the ordinary closure. Definite periods are set apart for discussing the successive stages of a Bill; on the effluxion of each period the "guillotine" falls and no further debate in respect of that stage can take place (*e*).

The "Kangaroo."—During the debate on a Bill in a committee of the whole House, the Chairman may choose which amendments shall be discussed. The same power is vested in the Speaker on the report stage. The effect is that amendments not selected are left undiscussed with a corresponding saving of Parliamentary time. The fact that these amendments are jumped over has earned this procedure its name (*f*).

Committees.—The House of Commons has three kinds of Committees, namely, (i) Committees of the whole House, *e.g.*, the Committee of Supply and the Committee of Ways and Means (*g*), (ii) Standing Committees of 30—85 members each, before whom all Bills (other than financial measures and Bills for confirming Provisional Orders) pass (*h*), and (iii) Select Committees consisting of a few members nominated for a particular purpose, which are now rare in the case of Public Bills (*i*).

Committee of Selection.—This committee consists of eleven members chosen by the House at the commencement of a session.

The principal functions of this committee are to classify or divide into appropriate groups all private Bills, and to appoint the select committee to try each private Bill.

It also nominates members of the standing committees, and in certain cases members of other committees.

Committee of Privileges.—This committee is appointed each session to consider matters relating to the ancient privileges of the House.

Committee of Public Accounts.—This committe is charged with the examination of public accounts submitted by the Comptroller and Auditor-General. It consists of fifteen members nominated at the

(*e*) A "guillotine" motion is set out in full in Jennings, *op. cit.*, Appendix III; see also *op. cit.*, pp. 238—242.
(*f*) Jennings, *op. cit.*, pp. 237—238.
(*g*) *Post*, p. 136. (*h*) *Post*, p. 126.
(*i*) May, *op. cit.*, chh. 14 and 15. It has been suggested that the committee system should be greatly extended by the appointment of standing committees to supervise the work of the various Government Departments; see Jennings, *Parliamentary Reform*; R. S. W. Pollard, *How to Reform Parliament*, pp. 9—18.

beginning of the session, and presided over by a member of the opposition (*k*).

Select committees.—The scope of an inquiry into a matter by a select committee is determined by the Order creating it, but the powers of the committee may be increased or curtailed afterwards by the House. Select committees can, if empowered by the House but not otherwise, order the production of documents, and compel the attendance of witnesses; and since the Parliamentary Witnesses Oaths Act, 1871, any committee of the House may administer an oath to any witnesses called before it and force them to answer questions on oath. When witnesses are disobedient they can be attached for contempt by the House (*Howard* v. *Gossett* (1847) (*l*)), and any attempt to bribe or coerce witnesses or to spirit them away is a breach of privilege. The chairman has a casting vote. Not more than fifteen members may be appointed to serve, and the quorum is determined by the House itself. To threaten persons giving evidence before a select committee is a misdemeanour punishable under the Witnesses (Public Inquiries) Protection Act, 1892. Giving false evidence is perjury. An oath that no personal interest of his is concerned has to be taken by each member of a select committee before acting.

Select Committee on Delegated Legislation.—There was much criticism in Parliament and in the Press during the period between the two wars of the extent to which Parliament was abdicating its functions by delegating legislative powers to Ministers and Government departments without reserving adequate powers of scrutiny (*m*). The Act delegating the power of law-making may require regulations made thereunder to be laid before the Houses, and this provision may take any one of three forms; either (i) the regulations will come into force unless they are annulled by resolution before a certain time, or (ii) the regulations will be of no effect unless and until they are approved by the Houses within a certain time, or (iii) the regulations in draft or in final form must be laid before the Houses—either indefinitely or for a certain time—with no further directions.

An interesting example of (i) was the Fire Services (Emergency Provisions) Act, 1941, which gave power to the Home Secretary to

(*k*) *Post*, p 139. (*l*) 10 Q. B. 451.
(*m*) See, *e.g.*, Hewart, *The New Despotism*, Allen, *Bureaucracy Triumphant*, *Report of the Committee on Ministers' Powers* (1932), Cmd. 4060.

issue regulations amalgamating local fire services and creating a National Fire Service for the war period. The regulations were required to be laid before Parliament "as soon as may be" after they were made, and if either House within twenty-eight days resolved that a regulation should be annulled the regulation should thereupon cease to have effect except as regards things previously done thereunder. Three years later the Home Secretary confessed to the House of Commons that a series of regulations had been made under the Act, but that he had overlooked the requirement that they should be laid before Parliament. The House, satisfied of his penitence, forgave him, and Parliament forthwith passed the National Fire Service Regulations (Indemnity) Act, 1944, which provided that "the Secretary of State is hereby freed, discharged and indemnified from and against all consequences whatsoever, if any, incurred or to be incurred by him by reason of the said failure to lay before Parliament the regulations specified in the schedule to this Act as soon as may be after they were made, and those regulations shall be deemed to have been duly laid before Parliament in accordance with the requirements of the statute under which they were made."

Some doubt was expressed whether in the absence of an Act of Indemnity the regulations would be valid, or whether the Courts—if called upon—would have required a certificate that they had been laid before Parliament. Indeed, more than one magistrate was reported to have said that he would not hear a charge under a ministerial regulation unless he was satisfied that the order under which it was made had fulfilled the statutory requirements in this respect. The Home Secretary then drew attention to the Documentary Evidence Act, 1868, saying that "the effect of that Act is that the production of a statutory rule or order purported to be printed by the Government printer is *prima facie* evidence of an order, and a Court is not entitled to require any further evidence unless of course a defendant should be able to prove by affirmative evidence that the order is invalid" (*n*).

Where the Rules Publication Act, 1893, applies, notice of the proposed rule must be published in the *London Gazette*. But this Act only applies to rules, regulations and by-laws (not drafts or orders) which are required to be laid before Parliament after coming into

n) *The Times Newspaper*, 3rd August, 1944.

operation; and it excludes rules of the Minister of Health concerning local government, rules of the Board of Trade and the Revenue Departments, and rules concerning the Post Office and Scotland. It is generally admitted that members of Parliament have neither the time nor the capacity to scrutinise the vast mass of detail involved in modern legislation, and that a certain amount of delegation to Government departments is inevitable. It is further realised that the delegation of law-making power in matters of detail will tend to increase under the system of social legislation envisaged for the period following the end of the war.

As the result of a debate on this subject in the House of Commons in 1944, the Home Secretary (Mr. Herbert Morrison) therefore announced the Government's proposal for the setting up of a Select Committee of eleven members drawn from the various parties and to have the assistance of Sir Cecil Carr, Counsel to the Speaker, and formerly editor of Statutory Rules and Orders. The function of this Select Committee will be: "to consider every Statutory Rule or Order . . . laid or laid in draft before the House, being a Rule Order or Draft upon which proceedings may be taken in either House in pursuance of any Act of Parliament, with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:—(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government department or to any local or public authority in consideration of any licence or consent, or of any services to be rendered, or prescribes the amount of any such charge or payments; (ii) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the Courts, either at all times or after the expiration of a specified period; (iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made; (iv) that there appears to have been unjustifiable delay in the publication of it; (v) that for any special reason, its form or purport calls for elucidation." The Committee may require the Government department concerned to explain, either by memorandum or witness, any order, etc. under consideration, and it is instructed to afford the department concerned an opportunity of furnishing an explanation before the Committee draws the special attention of the House to any order, etc.

II.—HISTORY OF LEGISLATION.

We can trace three distinct epochs:—(1) that of Royal legislation, by the King and his Council; (2) that of legislation by petition, the period when the estates of the realm, and afterwards the two Houses, petitioned the King for a given law, and the King either complied with their wishes or not as he pleased, and in what way he pleased; and (3) the epoch of legislation by Bill, when both chambers of the Legislature drafted the measure petitioned for (called, as at the present day, a Bill), and the King assented to it, as he does now. Legislation by Bill dates from the time of Henry VI, though the way had been prepared for it in the preceding reign (*o*).

(1) **Royal Legislation.**—The laws made by the King went by various names. There were "Charters" or quasi-treaties made between King and people; "Constitutions," probably so called after the imperial constitutions of the Roman Empire; "Ordinances," or laws made by the King in Council; and "Assizes."

(2) **Legislation by petition.**—It is difficult to fix a precise date for the commencement of legislation by petition, but it is significant that in the reign of Edward I the statute *Quia Emptores* (1290) was passed *instantia magnatum*. So, again, in the reign of Edward III the Statute of Treasons (1351) was passed at the instance of the Commons, who wanted a declaration by Parliament as to what was treason and what was not.

Legislation by petition had the disadvantages that the King might alter the wording of the law required by the petitioners, and he might grant an "ordinance" which, being a law made by the King and his Council, could be annulled the next day by the same body which made it. The ordinance was not like a statute, publicly enrolled and only revocable by another statute.

In the reign of Henry V the Commons petitioned the King that they, being assentors as well as petitioners, requested that from that time no law be made and engrossed as a statute which differed in wording from the corresponding petition, whether by additions, deletions or otherwise. The King assented to this petition, saving his royal prerogative to grant or deny what he chose. The King still legislates

(*o*) Cf. Pollard, *Evolution of Parliament* (2nd ed.), pp. 130, 438—440.

by the equivalent of ordinances—now styled Orders in Council—for conquered and ceded colonies or such of them as have not been granted representative legislatures.

(3) **Legislation by Bill** is the form of legislation now existing. Its introduction in the reign of Henry VI had important consequences. Rules of debate and of procedure sprang up, and a necessity arose for committees to consider bills. Legislation by Bill has the advantages that experts—in the case of a Government Bill, at any rate—will have been consulted before its introduction; the Bill is published and sold, the Press can comment on its provisions, and the opinion of the governed can be sounded before it is enacted.

III.—LEGISLATIVE PROCEDURE.

Various kinds of Bills.—A project of law during its passage through Parliament is called a Bill, and its sub-divisions are called clauses. Every Bill must have a short title. There are four classes of Bills:—

(1) *Public Bills, i.e.*, measures affecting the community at large or altering the general law.

(2) *Private Bills, i.e.*, measures dealing with local or personal matters, such as railway Bills, and Bills giving special powers to Local Authorities, or altering settlements.

(3) *Hybrid Bills, i.e.*, Bills which, though they are brought in as public Bills, affect private interests in such a way that if they were private Bills preliminary notices to persons affected would have to be given under the Standing Orders, *e.g.*, a Bill introduced by the Government to regulate Crown lands.

(4) *Provisional Order Confirmation Bills.*—These are Bills confirming orders and schemes made by public departments under statutory powers which would otherwise have to be dealt with by Private Bills. The delay and expense of Private Bill legislation is thus saved. Local authorities in particular acquire powers in this way by ministerial order under various statutes. The procedure varies but the general method laid down by section 285 of the Local Government Act, 1933, may be adopted as regards future local government legislation. That section provides that the Minister of Health, before making a provisional order, shall publish his intention in the *London Gazette* and in one or more local newspapers. He must then consider any objections by

persons affected thereby and if necessary hold a local enquiry, which is of a quasi-judicial nature. A provisional order has no effect until confirmed by Parliament. It is scheduled, along with others, to a Provisional Orders Confirmation Bill, which is introduced by the Minister as a Public Bill. Owing to the necessity for a preliminary enquiry it is not usually opposed in the House. If the Bill is opposed, however, the later stages are like those of a Private Bill, though the Bill when passed becomes a Public General Act (*p*).

The procedure on Public Bills and Private Bills demands fuller treatment.

(1) **Public Bills** (*q*).—Most kinds of public Bills may originate either in the Commons or the Lords, but there are certain classes of Bills, such as money Bills and Bills dealing with the representation of the people, which by convention can only originate in the Commons. In practice, many more Bills originate in the Commons than in the Lords, though the latter method is convenient for controversial topics which require serious discussion on non-party lines, such as the Matrimonial Causes Act, 1937. The great majority of public Bills are introduced by Ministers on behalf of the Government ("Government Bills"), and are, therefore, assured of the general backing of the Government's supporters, but public Bills may be introduced by private members ("Private Members' Bills" (*r*)), except in so far as they involve taxation.

The normal procedure on a public Bill in the Commons is as follows: When a member wishes to introduce a Bill, he must either move for leave to do so or present it at the table. Notice must be given before either course is adopted. The Bill is ordinarily laid on the table in "dummy," *i.e.*, a sheet of paper on which is the name of the member and the title of the Bill. The "*first reading*" of the Bill is usually a matter of form. The title only is referred to, but sometimes if the Bill is likely to be opposed a short explanatory statement is allowed. When the Bill has been read a first time it is ordered to be printed, and the print is then circulated to members and put on sale.

The next stage is the "*second reading*." At this stage the main

(*p*) For the distinction between Public General Acts, Local Acts and Private Acts, and the manner of their publication, see Ilbert, *Legislative Methods and Forms*, pp. 26—28.

(*q*) May, *op. cit.*, ch. 19.

(*r*) Distinguish Private Bills.

principles of the Bill are discussed. If no one objects to the Bill, it can be read a second time when unopposed business is taken. If it is opposed, it can only come on on one of the days fixed for taking opposed Bills. The Government, of course, can arrange their own order of business, but the days for private members' Bills are limited. Precedence on those days is accordingly balloted for. When a second reading is opposed, the opponent does not as a rule move that the Bill be rejected (though he may do so (*s*)), but "that it be read a second time on that day six months." If his motion is carried the Bill is disposed of for that session.

When a Bill (other than a Money Bill) has been read a second time it goes to one of the five standing committees, unless the House otherwise orders. If the House otherwise orders it may be referred to a committee of the whole House or to a select committee, or occasionally to a joint committee of the two Houses. The "*committee stage*" is the stage for amending a Bill. The Bill is taken clause by clause, and amendments are moved in the order in which they come in the clause. In the committee stage members may speak more than once in support of amendments. When the clauses are finished new clauses and postponed clauses are considered. After that the schedules, if any, are taken. The Bill is then "reported" to the House. When the House goes into committee, the Speaker leaves the chair and his place is taken by the Chairman of Committees.

If a Bill has passed through committee of the whole House without amendment, it may at once be put down for "*third reading*," and then, when read a third time, sent up to the Lords. But when it has been amended, it must be put down for consideration on report. On the "*report stage*" the Bill may, with certain restrictions, be amended as in committee, but new clauses come first and the clauses as they left committee are taken afterwards. After the Bill has been considered on report, it is put down for third reading. At this stage only verbal amendments can be moved, but the Bill as a whole can be opposed. When a Bill has been read a third time, the Commons have done with it, and it is sent up to the Lords, and placed in charge of some peer to conduct it through that House.

The procedure in the Lords resembles generally the procedure in the

(*s*) In 1772 a Bill was rejected, thrown about, and kicked out of the House; Anson, *Law and Custom of the Constitution*, vol. I (5th ed., Gwyer), p. 272.

Commons, but there are certain points of difference, and there is greater elasticity as to forms. Bills, after going through committee of the whole House, usually go also to a standing committee, and amendments may be moved on third reading and also on the motion that the Bill do pass. If a Bill coming from the Commons passes through the Lords without amendment, it only awaits the Royal assent; but if it is amended, the amendments come back to the Commons for consideration. The Commons may assent to them, or dissent from them, or further amend them, and when they dissent a committee is appointed to draw up reasons. If eventually the two Houses cannot come to an agreement, then (subject to the Parliament Act, 1911, where that applies (*t*)) the Bill is lost. But if the two Houses agree, the Bill receives the Royal assent in the House of Lords. This is usually given by commission, though it might be given by the King in person.

Money Bills and clauses.—The right of initiating taxation or allocating the expenditure of the revenues of the State is the province of the House of Commons. As Sir Erskine May says, "The Crown demands money, the Commons grant it, and the Lords assent to the grant." Money Bills, that is to say, Bills of which the main object is to raise money by taxation, can only be introduced in the House of Commons, and their introduction must be authorised by resolution in committee of the whole House, moved by a Minister of the Crown. Bills for other purposes, but containing financial clauses, may be brought in in the ordinary way, but their financial provisions must be authorised by a similar resolution. Bills containing clauses imposing rates or dealing with rates must likewise be initiated in the House of Commons, but no special procedure is then required.

The House of Lords cannot amend a Money Bill or any clause in a Bill dealing with taxation, and strictly speaking cannot touch a rating clause, but the House of Commons waives its privileges in respect of pecuniary penalties, fees for services rendered and rating clauses in private Bills. Where a Bill is introduced into the House of Lords, and it would be incomplete without some financial provision, the necessary clause is printed in italics. It is no part of the Bill itself,

(*t*) *Ante*, pp. 95—97.

and is a mere indication by the Lords to the Commons of what they suggest would be an appropriate financial provision.

Standing Committees for Public Bills.—To economise the time of the House, two standing committees were appointed in 1883 as a substitute for a committee of the whole House in the case of public Bills. More were added later, and there are now five altogether—the A, B, C and D Committees, and the Committee on Scottish Bills.

In 1907 an important reform was introduced. Whereas previously Bills were referred after second reading to a committee of the whole House, unless the House otherwise ordered, Bills are now referred to standing committees, unless the House orders them to be referred to committee of the whole House. Money Bills, however, *e.g.*, any Bill whereby a tax is imposed, Consolidated Fund Bills, or Appropriation Bills, continue to be referred without exception to a committee of the whole House (*u*); and the tendency is to accord the same treatment to any first-class controversial measure.

Each standing committee should be a microcosm of the whole House, so that a majority of votes in the committee, when a party Bill is involved, should reflect the views of the predominating party. With the exception of the Committee on Scottish Bills, each standing committee usually consists of between forty and sixty members, who are nominated by the Committee of Selection.

A part of a Bill may be considered by a standing committee, and another part by a committee of the whole House.

When a Bill relates to Monmouthshire or Wales, all the members for Monmouthshire and Wales must be on the committee. The Committee on Scottish Bills consists of all the members for Scottish constituencies together with not less than ten nor more than fifteen other members.

(2) Private Bills (*v*).—Private Bills are classified by the House of Lords as (i) "Local," and (ii) "Personal."

(i) Bills of the kind which the Lords call "Local" are divided by both Houses into two classes:—

(a) dealing with the construction or alteration of works, *e.g.*, bridges,

(*u*) *Post*, pp. 136—137.

(*v*) May, *Parliamentary Practice*, Book III; Jennings, *Parliament*, ch. 12.

canals, docks, harbours, ports, roads, railways, tramways and waterworks; and

(b) all others, *e.g.*, extending the powers of local authorities and of gas, electricity and other public utility undertakers; altering the powers or charters of other corporations and companies; and concerning Crown and Church property, and charities. "Local" Bills may be initiated in either House, and arrangements are made to ensure that roughly the same number are introduced into each.

(ii) Bills of the kind which the Lords call "Personal" deal with estates, names, naturalisation, divorce, peerage and any other matters which are not classified as "Local." The standing orders of both Houses require that such Bills must be initiated in the Lords.

For various reasons, in particular the passing of the Settled Land Acts, the Naturalisation Act, 1870, British Nationality and Status of Aliens Acts and Matrimonial Causes Acts, "Personal" Bills are now comparatively rare.

There has also in recent years been a decline in the number of "Local" Bills, owing partly to the expense involved and partly to the increased use of Public General Acts such as the Public Health Act, 1875, and Lands Clauses Acts, and of Provisional Orders (*x*) to deal with topics formerly covered by Private Local Acts.

The procedure on private Bills assumes a quasi-judicial character (*y*). Parliament requires that full notice should be given, so that the parties affected may come in and oppose, and when the Bill is referred to a committee, counsel and witnesses are heard on behalf of the contending parties.

In the months of October and November the proposals of the Bill must be publicly advertised in certain newspapers. On or before 20th November in the year preceding the prospective passing of the Bill, plans of the proposed scheme, sections and books of reference, according with directions specified in the Standing Orders, must be left with certain local authorities. On or before 27th November the petition for the Bill, a copy of the Bill itself, and a formal declaration made by the agent must be deposited in the Committee

(*x*) *Ante*, p. 122.

(*y*) This sketch does not apply to Scottish Bills, for which a special procedure was provided by the Private Legislation Procedure (Scotland) Act, 1899.

and Private Bill Office. A printed copy of the Bill has to be sent to the Treasury and various other Government Departments on or before 4th December. On or before 5th December owners and occupiers of land affected by the scheme must be served individually with notice thereof by post. Memorials that Standing Orders have not been complied with may be lodged in the Committee and Private Bill Office.

On 18th January the examiners begin their sittings for the purpose of ascertaining whether the Standing Orders have been complied with, and compliance is certified by indorsing the Bill to that effect. These examiners are two in number, one being appointed by the House of Lords and the other by the Speaker. When the examiners report that Standing Orders have not been complied with, this report goes to the Select Committee on Standing Orders, who have power to dispense with non-compliance. On or before 8th January the Chairman of Ways and Means in the Commons, and the Chairman of Committees in the Lords, fix personally, or through their counsel, in which House a given Bill is to be first considered. The 30th January is the last day for the presentation of petitions against the Bill by persons having a *locus standi*, *i.e.*, whose property or interests are specially and directly affected.

The procedure on private Bills when they reach either House of Parliament is exceedingly complicated, because of their semi-litigious and semi-legislative character. Assuming that the Standing Orders have been complied with, or that, pursuant to the report of the examiners, compliance with the Standing Orders has been dispensed with, a private Bill is usually introduced by being presented at the table by the Clerk of the Private Bill Office. When it has been laid on the table it is deemed to have been read a first time, and is ordered to be read a second time at a future date. Intricate questions frequently arise as to the *locus standi* of various parties to appear and be heard before the Select Committee. These questions are determined in the House of Commons by the Court of Referees, and in the House of Lords by the Chairman of Committees. When the Bill has passed the second reading, which it usually does unopposed or with directions to the Committee to delete or insert certain provisions, it goes either to the Committee on Unopposed Bills consisting of the Chairman and Deputy Chairman of Ways and Means and three members selected

by the Chairman from a panel appointed at the beginning of the session by the Committee of Selection, or, if opposed at this stage, to the Committee of Selection. In the latter event the Committee of Selection appoint a Select Committee of four members, who must have no personal interest and whose constituents must have no local interest in the Bill.

The Select Committee proceeds to hear counsel and witnesses for and against the objects of the Bill, and if it finds that a sufficient case for legislation has been made out, declares the preamble proved. The clauses are then gone through before the contending parties, evidence is taken and arguments of counsel heard, and amendments, if necessary, are made. The Bill, as amended in Committee, is then reported to the House, and further amendments may be made on the consideration stage. After third reading, at which only verbal amendments are allowed, the Bill is sent to the House of Lords. When a Bill has been amended in one House, it is hardly ever amended in the other House, unless by consent, but the principle is again gone into, and not infrequently a Bill passed by one House is rejected by the other. If passed by both Houses, the Bill receives the Royal assent in the same way as a Public Bill, except that a different form of words is used (*z*).

It must be borne in mind that though Private Bills are subject to a number of formalities which do not apply to other Bills, yet when they come before either House they are read the same number of times and treated in each stage in a similar way to Public Bills.

(*z*) *Ante*, p. 53.

CHAPTER XII.

TAXATION AND FINANCE.

I. THE KING'S EXTRAORDINARY REVENUES.

THE Norman King had his "ordinary" and "extraordinary" revenues, the ordinary consisting of his feudal dues, money raised from Jews, *bona vacantia*, waifs, estrays, whales and sturgeons, profits made from his Courts of justice by the imposition of fines, etc.—consisting, in fact, precisely of those items which we should to-day regard as exceptional. When money was required for a war and in an emergency, he asked for what were called "extraordinary" aids. Henry II taxed personal property for the Crusades, the tax being known as the Saladin Tithe. The great complaint against John was his unfair taxation. During his reign taxation included both direct taxes, *i.e.*, taxes levied directly on the person who has to pay them, and indirect taxes, *i.e.*, taxes levied on A with the expectation and intention that he shall pass on the burden to B. The barons in John's time complained of both kinds of taxation, and Magna Carta contained provisions relating to both sorts. Art. 12 of Magna Carta provided that the King should demand no aid other than the three accustomed aids, viz., for the purposes of marrying the King's eldest daughter, redeeming the King's body from captivity, and knighting his eldest son. Art. 13 provided that the City of London should retain its ancient liberties and free customs, and other cities, boroughs, and ports should have the like privilege. By Art. 41 foreign merchants were not to be liable to evil tolls, but only to the ancient and proper customs duties, except during war.

By the *Confirmatio Cartarum* (1297) the charters of John and Henry III and the Charter of the Forest were confirmed. It provided that aids, tasks, and prizes be not taken in future without the consent of all the realm, saving the ancient aids. It was further provided that the maltote—a toll of 40s. on each sack of wool—and other like tolls be not levied but by consent of the realm, saving the ancient aids and customs due, and customs of wools, wool skins, and leather already granted by the commonalty aforesaid.

A statute was said to have been passed in 1297 forbidding tallage, and it was known as *De tallagio non concedendo.* Tallage was an impost levied by the King, in his character as landlord, on his own demesne lands.

In Stuart times import duties were not considered as taxes, but rather in the light of licences or concessions. In *Bates's Case* (1606) (*a*) John Bates, a Levantine merchant, refused to pay a duty on currants imposed by James I. The Barons of the Exchequer held that the King's power was both ordinary and absolute: the ordinary or common law power, which exists for the purposes of civil justice, cannot be changed without the leave of Parliament; but the King's absolute power, affecting matters of State, is *salus populi*, and is not directed by rules of common law, but varies according to the royal wisdom. Customs are a material matter of State. Judgment in matters of prerogative must not be according to common law but according to Exchequer precedents. Reference was made to customs duties levied by Edward I, Henry VIII, and Mary. All customs are the effect of foreign commerce, and all commerce and foreign affairs are in the hands of the King. The seaports are the King's gates, which he may open or shut to whom he pleases. He provides for safety. If he may restrain the person by a writ of *ne exeat regno*, he may *a fortiori* restrain the importation of goods, and if he may restrain these absolutely, he may do so *sub modo*. If the King may impose, he may impose what he pleases. The Court therefore upheld the tax as an exercise of the King's "absolute" power.

Bates's Case is sometimes called the "*Case of Impositions.*" Impositions without Parliamentary grant were declared illegal by a statute of 1640. They were probably illegal at the time when *Bates's Case* was decided, and though customs duties had been imposed by Mary and Elizabeth, the opinion of the Judges, taken in Elizabeth's reign, was against their legality.

In the *Five Knights' Case*, also known as *Darnel's Case* (1627) (*b*), the defendants were imprisoned for refusing to pay a forced loan (*c*). They applied for a *habeas corpus*, but Hyde, J. and other Judges held that detention by special command of the King was legal. This case

(*a*) 2 St. Tr. 371. (*b*) 3 St. Tr. 1.

(*c*) Forced loans were said to have been first imposed in the reign of Edward II, but were possibly imposed earlier.

was largely instrumental in bringing about the Petition of Right (1628), which forbade tallages, aids, forced loans, benevolences (*d*), taxes, and such-like charges "without common consent by Act of Parliament"

In 1637, when the Petition of Right was still fresh in men's minds, John Hampden, of Buckinghamshire, refused to pay a direct tax known as "ship money." An action was brought, and, on Hampden demurring, the case was argued in the Court of Exchequer Chamber. Finch, C.J., delivered judgment to the following effect. The defence of the kingdom must be at the charge of the whole kingdom. The law which has given the King his interest and sovereignty of defending and governing the kingdom also gives him power to charge his subjects with its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties, but yet when the danger is general they go to inland counties also. Acts of Parliament to take away the royal power in the defence of the kingdom are void. (*R.* v. *Hampden* or *The Case of Ship Money* (*e*) This decision rests on the principle *salus populi suprema lex* It is bewildering, like many seventeenth century decisions, to the modern reader, who has learnt to regard statutes as supreme The claim of the Crown in the ship-money case was contrary to the principles underlying the Petition of Right, yet it was upheld. It should be borne in mind that the Bench was subservient to the throne, and that the overriding authority of Acts of Parliament was not clearly recognised or generally acknowledged in the sixteenth and seventeenth centuries.

In 1688 the Bill of Rights declared "that the levying of money to the use of the Crown by pretence of prerogative without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal." For an unsuccessful attempt in modern times to levy money under a statute not clearly conferring the right to do so, see *Att.-Gen.* v. *Wilts United Dairies* (1921) (*f*).

II. MODERN PUBLIC FINANCE (*g*).

May says: "The Crown acting on the advice of its responsible Ministers being the executive power is charged with the management

(*d*) The first instance of a benevolence was probably in the reign of Edward IV.
(*e*) (1637), 3 St. Tr. 825. (*f*) 37 T. L. R. 884; 91 L. J. K. B. 897.
(*g*) See May, *Parliamentary Practice*, ch. 22; Jennings, *Parliament*, ch. 9; Heath, *The Treasury*.

of all the revenues of the country and with all payments for the public service. The Crown, in the first instance, makes known to the Commons the pecuniary necessities of the Government, and the Commons grant such aids and supplies as are required to satisfy these demands, and provide by taxes and appropriation of other sources of public income the ways and means to meet the supplies granted to them. *The Crown demands money, the Commons grant it, and the Lords assent to the grant.* But the Commons do not vote money unless it be required by the Crown, nor impose or augment taxes unless taxation be necessary for the public service, as declared by the Crown through its responsible Ministers."

Four points should here be noticed:—

(1) Public money cannot be raised or spent without the authority of Parliament.

(2) The House of Commons has exclusive control of finance, a control now reinforced and placed beyond question by the Parliament Act, 1911. ("The Lords assent to the grant.")

(3) The House of Commons cannot authorise the levy or expenditure of public money of its own motion. No private member, for example, can propose a tax. All financial legislation must proceed on the initiative of the Crown, *i.e.*, of the Government (*h*). ("The Crown demands money.") Nor can the Commons increase the financial provision proposed by the Government.

(4) All money Bills must originate in the Commons. ("The Commons grant it.")

Public revenue.—The national revenue is not solely derived from taxation. The Exchequer derives a certain revenue from the Crown lands (in respect of which and other hereditary Crown revenues Parliament pays over to the King a fixed annual sum called the Civil List (*i*)), and receives the profits of its holding of Suez Canal shares. It is the practice to impose some taxes by "permanent Acts," *i.e.*, Acts which remain in force until repealed or amended, and to impose others by "annual Acts," which remain in force for one year only. The greater the amount or importance of the annual as opposed to permanent taxation, the greater becomes the control over finance of

(*h*) *Standing Order of the House of Commons* (*Public Business*), No. 63. This Order dates from 1713.

(*i*) *Post*, p. 166.

the House of Commons, and the more powerful the security for the annual summoning of Parliament.

All the national revenue of whatever kind goes into the Bank of England, where it is credited to the Government account, called "*the Consolidated Fund.*" Before 1787 the taxes were charged arbitrarily on particular sources of revenue. In that year the younger Pitt established a single Consolidated Fund, and charged public expenditure on it.

Public expenditure.—There are, as we have seen, two kinds of expenditure, permanent and annual. The following kinds of expenditure belong to the first class:—(i) The King's Civil List; (ii) the salaries of the Judges of the High Court, the Speaker, the Comptroller and Auditor-General, the Leader of the Opposition and certain other persons. Payments authorised by permanent statutes are said to be in respect of *Consolidated Fund services* and to be made "out of the Consolidated Fund" (*k*).

Expenditure of the second class includes the cost of the Army, Navy, Air Force, and Civil Service, and is said to be in respect of *Supply Services* and to be made out of "moneys provided by Parliament" (*k*). These services account for the bulk of the expenses incurred by the Government.

The National Debt.—It frequently happens that after payment of all anticipated calls there is a small surplus. This surplus is never retained, but passes automatically by statute to the reduction of the National Debt. Till the days of the Stuarts there was no National Debt, but during the Civil War many persons left money with the goldsmiths of the City of London, and after the Restoration these goldsmiths began to act as bankers and lent money to Charles II on the security of the public revenue. In 1671 repayment was postponed for twelve months, and there was further indefinite delay. In 1677 partial relief was given by the Government to its creditors by the granting of annuities out of the hereditary excise (*l*). These annuities,

(*k*) This is Parliamentary and Treasury language. Strictly, both kinds of expenditure are made out of the Consolidated Fund from moneys provided by Parliament; Ilbert, *Parliament*, p. 94.

(*l*) When the King gave up his military feudal dues owing to knight service being converted into free and common socage by the Statute for the Abolition of Military Tenures, 1660, he had certain excise profits settled on him by way of compensation. This is one of the very few instances of the Crown being compensated for loss of its prerogative.

though often in arrear, were paid till 1683, but ceased after that year. About the time of the Revolution suits were brought by petitions to the Barons of the Exchequer for payment of the arrears, and the matter was then argued in the Exchequer Chamber. On this occasion it was held by a majority of the Judges that the King could alienate the revenues of the Crown. (*Bankers' Case* (1700) (*m*).)

The Crown granted no relief to suppliants until, by a statute of 1700, the hereditary excise was ordered to be charged with a yearly amount equivalent to interest at £3 per cent. until redeemed by repayment of one-half of the principal sum. This was the origin of the £3 per cent. Consolidated Bank Annuities, or, popularly, "Consols" (*n*).

The funded debt.—"Consols" are "funded debt." When a man buys "Consols" he does not get back his principal, but if he wishes to realise his holding he sells it in the market. As against the Government, he has only a claim to interest. The Government, however, can redeem these securities at par.

The term "funded debt" is sometimes loosely used for debt repayable indeed, but repayable at a distant date. To fund debt means, in general, to postpone repayment.

Unfunded debt.—This consists of loaned moneys repayable at certain fixed dates. When contrasted with "funded debt" used in its second and loose sense, it means short-term debt, *e.g.*, Treasury Bills, the principal of which is repayable in a matter of months. Instances are Treasury Bills and 5 per cent. War Loan.

The Sinking Funds.—Any surplus remaining after the annual expenditure goes to redeem the National Debt. By the Sinking Fund Act, 1875, the Treasury have within fifteen days after the expiration of the financial year (31st March) to prepare a statement of income and expenditure. Any surplus remaining in the Bank of England goes to the National Debt Commissioners and is known as the *Old Sinking Fund.* The Act also imposes on the Consolidated Fund a permanent annual charge for payment of *interest* on the National Debt, and directs

(*m*) 14 St. Tr. 1.

(*n*) These are called the 3 per cents. because 3 per cent. was for a long time paid. They came to be called "Consolidated" because by a statute of 1752 two masses of these annuities were consolidated and the taxes whereon they were severally charged were pooled. They are called bank annuities because the dividends are paid by the Bank of England and stock is transferred in its books. They are called annuities because one purchases an annual sum in perpetuity.

that *any surplus of this interest* not required for the payment thus directed is to be applied by the National Debt Commissioners in reduction of the principal of the National Debt. This last is the *New Sinking Fund.*

The Estimates.—Every autumn the Government Departments send estimates of the amounts they propose to spend for departmental purposes to the Treasury. In peace time the Chancellor of the Exchequer, in the interests of the taxpayer, tries to cut down these departmental estimates to the lowest amount compatible with the Government's policy for the service administered by the department concerned; but in war-time, although extravagance is to be avoided, the primary consideration is the efficient prosecution of the war. Should any dispute arise between the departments and the Treasury, it is for the Cabinet to decide.

Committees of Supply and Ways and Means.—The first business of a new Parliament or Session is the "Debate on the Address." As soon as this is finished, Committees of the whole House, called the "Committee of Supply" and the "Committee of Ways and Means," are constituted (*o*). The *Committee of Supply* decides how much money the Commons shall grant to the Crown, and for what purposes. The *Committee of Ways and Means* decides how the money shall be provided. The practice of appointing Committees of the whole House for these purposes has been employed since the reign of Charles I, and dates from the time when the Speaker was, or might be, under the influence of the King; in effect it means that the House debates these matters out of the hearing of the Speaker (*p*).

The estimates for the ensuing year are brought before the Committee of Supply. They are divided into naval, military, air, revenue and civil estimates (*q*). Twenty days are allocated for their discussion by that Committee, with a possible addition of three days if the business of the session permits. After the expiration of the allotted time, the estimates are voted on without discussion. When the estimates are

(*o*) *Standing Orders of the House of Commons* (*Public Business*), Nos. 13—15.

(*p*) Standing Orders 63—70 require all financial resolutions to be considered in a committee of the whole House. This requirement has been criticised as being frequently inconvenient.

(*q*) The Revenue Departments are the Board of Inland Revenue, the Board of Customs and Excise, and (for this purpose) the Post Office. The "civil" estimates are the remaining Departments

under discussion the debate consists of general criticisms of the conduct or policy of the various Ministers rather than of detailed criticisms of the expenditure proposed. If a member wishes to oppose the estimates of a given service, the practice is to do this under the form of a motion to reduce the salary of the Minister in charge by the nominal sum of £100 per annum. Members may not move an increase in the estimates.

The duties of the Committee of Ways and Means are to authorise grants out of the Consolidated Fund, and to vote the necessary taxes for the year.

The Budget.—The financial year begins on 1st April (*r*), and the Chancellor of the Exchequer usually makes his financial statement in the Committee of Ways and Means—or, as it is said, "introduces the Budget"—somewhere near that date In the Budget Speech he reviews the public finance of the last year, gives an estimate of the requirements of the current year, and submits his proposals for meeting those requirements.

When the Budget resolutions have been passed, fixing the new taxation for the year, they are later embodied in the *Finance Act*, and the allocation of the sums voted in Committee of Supply is afterwards embodied in an Act called the *Appropriation Act*. The annual Appropriation Act authorises in detail the application of the amounts voted to the purposes for which voted. It often happens, however, that money is wanted by the departments before the Appropriation Act is passed. Interim statutes called *Consolidated Fund Acts* are therefore passed from time to time, incorporating the decisions of the Committees of Supply and Ways and Means. The Appropriation Act, following upon these, deals with the balances of money voted but so far undisposed of, and confirms retrospectively the appropriations made by the Consolidated Fund Acts.

The Finance Act and the Appropriation Act are passed at the end of the session, *i.e.*, in July or August, unless there is an "autumn session," in which case they may not be passed until later.

The theory of the Constitution with regard to finance is clearly shown in the special enacting formula of the annual Finance Acts: "Most Gracious Sovereign, We, Your Majesty's most dutiful and

(*r*) The income tax year begins on 6th April.

loyal subjects the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—."

How the proper expenditure of the revenue is secured.—As has been said, the revenue is paid into the Bank of England to the credit of the Exchequer. Grants are made by Consolidated Funds Acts or the Appropriation Act. An Order under the Royal Sign Manual countersigned by two Lords of the Treasury directs the Treasury Commissioners to transfer the moneys granted to the credit of the various Government departments. The Treasury Commissioners send an authority to the Comptroller and Auditor-General, who, after being satisfied that there is statutory authority for the grant and that all statutory requirements have been complied with, issues a formal direction to the Bank to transfer the money to the account of the Paymaster-General, who pays it over to the appropriate departments. The Paymaster-General is a political officer, but his duties are purely ministerial.

The Comptroller and Auditor-General.—The full name of this important official is the Comptroller-General of the Receipt and Issue of His Majesty's Exchequer and the Auditor-General of the Public Accounts, and as his name implies he has two main functions. As Comptroller he must see that no money leaves the Consolidated Fund without statutory authority, and that money which has left the Consolidated Fund is properly applied. As Auditor he prepares accounts of income and expenditure for the Public Accounts Committee of the Commons, together with a report on anything requiring notice.

The Comptroller and Auditor-General is paid out of the Consolidated Fund to emphasise the non-political nature of his office. He is appointed by letters patent and holds office during good behaviour, being removable only on an address from both Houses (Exchequer and Audit Departments Act, 1866). He is the head of the Exchequer

and Audit Department created by the Act of 1866, which has a staff of auditors some of whom are attached to the various Government departments. The department is, of course, closely associated with the Treasury.

The Public Accounts Committee.—This Committee consists of fifteen members of the Commons appointed at the beginning of each session. It does not exert much practical control over expenditure owing to the period which elapses before the accounts of a given year are examined, and also to the fact that the Commons either have not the time or have not the inclination to study the Committee's report. The mere existence of the Committee, which cross-examines the chief accounting officer and other senior officials of each Government department, is nevertheless always present in the minds of the departments and tends to check proposals for extravagant expenditure at their source.

PART III.

THE CROWN; CENTRAL AND LOCAL GOVERNMENT.

CHAPTER XIII.

THE MONARCHY,

Title to the Throne.—Under the Saxons the title to the Crown was by election, but generally, where he was fit to govern, the eldest son of the deceased King was elected if of full age. Under our common law as it developed after the Norman conquest the title to the throne may be said to have been hereditary, the nearest male feudal heir being chosen. But (1) where the Throne devolved upon a female the eldest female and her issue were preferred (*a*) The first Queen Regnant was Mary, who came to the throne under Henry VIII's will, sanctioned by an Act of Parliament; and, to allay all possible doubts as to her powers, she being a married woman, a statute (1 Mary, sess. 3, c. 1) was passed conferring upon her as Queen Regnant all the powers of a King. (2) The ancient legal rule relating to the exclusion of the half-blood never applied to the title to the Crown (*b*).

The first four Norman Kings were elected; the fifth, Henry II, a grandson of Henry I in the female line, succeeded (1154) owing to a compromise after the civil war in that reign. Richard I (1189) was the eldest surviving son of Henry II. John (1199) was the youngest son of Henry II, and is supposed to have murdered Arthur of Brittany—the son of Geoffrey, his elder brother—in order that he might lay claim to the Dukedom of Normandy, then annexed to the English Crown. Hereditary descent was in John's time not strictly recognised, but was gradually asserting itself owing to the close association of the Crown with the land; the Norman kingship, unlike the Saxon, being territorial rather than personal. This may have been the reason for the murder of his nephew attributed by historians to John.

(*a*) Instead of coparcenary as applied to land; see Potter, *Historical Introduction to English Law* (2nd ed.), p. 480.

(*b*) Blackstone, *Commentaries*, I, ch. 3.

It is a significant fact that Henry III (1216), John's infant son, was chosen as his successor, though at the time of his accession he was only nine years of age. Edward I (1272) was the son of Henry III and, although abroad in Palestine at his father's death, he was proclaimed King *jure hæreditario*.

Edward II (1307) was the eldest and only son of Edward I, and Edward III (1327) was Edward II's eldest son. Richard II (1377) was the grandson of Edward III, being the son of the Black Prince, the eldest son of Edward III.

Richard II was deposed and was succeeded by Henry IV (1399), the son of John of Gaunt and grandson of Edward III, who succeeded to the throne under an Act of Parliament entailing the Crown on him and the issue of his body. Henry V (1413) and Henry VI (1422) succeeded under the same parliamentary entail.

Edward IV (1461) succeeded by conquest and by pedigree, which was afterwards fortified by statute, and Richard III (1483), Edward IV's brother, is credited with usurping the throne after murdering—a fact which is open to doubt—the two sons of Edward IV. Richard III based his right of succession on the fact that an alleged precontract of marriage of Edward IV rendered his issue by Elizabeth Gray bastards.

Henry VII (1485) had no claim to the Crown whatever save as a descendant of Edward III, but he was the recognised head of the Lancastrian party and the winner of the Battle of Bosworth. There was, moreover, no legitimate heir of the House of Lancaster, but Henry, who married the heiress of the Yorkist House, nevertheless procured from Parliament a statutory entail on himself and the issue of his body.

Henry VIII (1509) was succeeded under a parliamentary entail by Edward VI (1547), his son by Jane Seymour. Edward VI died in infancy and was succeeded by his half-sister Mary (1553), and, after her death, by his half-sister Elizabeth (1558), both of them succeeding under a statute of Henry VIII, subject nevertheless to restrictions and conditions made by Henry VIII's will.

Mary and Elizabeth both died without issue. Henry VIII, acting under a statutory power, had devised the Crown, on failure of issue of his three children, to the heirs of the body of his younger sister Mary, Duchess of Suffolk, ignoring the prior claim of his elder sister

Margaret. James I (1603) (*c*), having the support of Elizabeth's Council, was proclaimed King, though Henry VIII's will was indisputable. James I, however, sought a parliamentary title, and got it. Charles I (1625) was the eldest surviving son of James I, and Charles II (1649; restored 1660) and James II (1685), as sons of Charles I, succeeded as lawful heirs.

The Bill of Rights, 1689, declared that James II had abdicated and that the throne had thereby become vacant. The Crown was settled by Parliament on William III and his wife Mary (daughter of James II) during their joint lives and on the survivor of them during his or her life, remainder to the Princess Anne of Denmark (Mary's sister) and her issue, remainder to the issue of William III.

In 1700, William III having no issue, and Anne seeming likely to have no surviving issue, the Act of Settlement was passed settling the throne on Sophia, Electress of Hanover, and the heirs of her body being Protestants. Sophia was a daughter of Elizabeth, daughter of James I, who married the Elector Palatine of Hanover. Sophia's son, George I (1714), succeeded Anne under the Act of Settlement.

From the time of George I to the present the succession has never failed, the legal heir under the Act of Settlement (as amended by His Majesty's Declaration of Abdication Act, 1936) succeeding (*d*). Under the Act of Settlement any successor to the Crown who is a Papist, or who marries a Papist, is incapacitated. The successors to the Crown must also take the Coronation Oath and sign the declaration prescribed by the Bill of Rights. The successor to the throne is to be in communion with the Church of England.

Accession.—When the King dies his successor accedes to the throne immediately. Before the time of Edward I, however, there would be an *interregnum*, and *election* and *coronation* were necessary before the Crown vested in the successor, a rule which was found inconvenient and even dangerous at the time of the Crusades. The automatic succession of the new monarch is sometimes expressed in the maxim, "The King never dies." At Common Law a King, however young, is not subject to any of the disabilities of infancy, a rule which is expressed

(*c*) James VI of Scotland; great-grandson of Margaret.
(*d*) The present order is Princess Elizabeth; Princess Margaret; the Duke of Gloucester and his children; the Duke of Kent, his brother and sister; the Princess Royal and her children. The Duke of Windsor and his issue are barred from the succession by the Act of 1936.

in the maxim, "The King is never an infant." So far as royal functions are concerned, however, there would be a regency until he was eighteen (*e*).

As soon as conveniently possible after the death or abdication of a King an Accession Council meets, composed of the Lords Spiritual and Temporal, assisted by members of the late King's Privy Council, "with numbers of other principal gentlemen of quality, with the Lord Mayor, Aldermen and citizens of London." The Accession Councils of 1936 for the first time included the High Commissioners of the Dominions. The new King then takes the oath for the security of the Church of Scotland prescribed by the Act of Union, 1707. Before the first opening of Parliament or at his Coronation he must declare that he is a Protestant and promise to uphold the enactments securing the Protestant succession to the throne. (Accession Declaration Act, 1910.)

Coronation.—Coronation is the ceremony, largely religious in form, at which the King is invested with the symbols of his office—orb, ring, sceptre and crown. It customarily takes place in Westminster Abbey some months after accession, and is conducted by the Archbishop of Canterbury, assisted by the Archbishop of York. After the presentation of the King to the people, and before his actual crowning and enthronement (*f*), he makes the Accession Declaration (in so far as this may not already have been done) and takes the Coronation Oath, based on the Coronation Oath Act, 1688, as is required by the Act of Settlement, 1701, amended by the Acts of Union. The Coronation Oath taken by King George VI in 1937 was to govern *the peoples of Great Britain, Ireland, Canada, Australia, New Zealand and the Union of South Africa*, of his Possessions and the other Territories to any of them belonging or pertaining, and of his *Empire of India*, according to their respective laws and customs: to the utmost of his power to cause Law and Justice, in Mercy, to be executed in all his judgments: to the utmost of his power to maintain the laws of God and the true profession of the Gospel: to the utmost of his power to maintain *in the United Kingdom* the Protestant Reformed Religion established by law: and to preserve the settlement of the Church of England, its

(*e*) *Post*, p. 149.
(*f*) For a description of the coronation ceremony, see Keith, *The King and the Imperial Crown*, pp. 20—29.

doctrine, worship, discipline and government as by law established in England, and the rights and privileges of its members. The chief differences between this oath and that taken by George V are that the first part of the oath taken in 1911 was to govern *the peoples of the United Kingdom of Great Britain and Ireland and the Dominions thereto belonging, according to the statutes in Parliament agreed on* and their respective laws and customs, and that in 1937 the maintenance of the Protestant Reformed Religion was limited to the United Kingdom. The former change was made to assert the equality of the Dominions with the United Kingdom, and to do away with the idea of the subordination of the Dominions to the legislation of Parliament. The meaning of the latter change is obscure, for there is no established religion in Wales or Northern Ireland. These changes were prescribed by Order in Council without Parliamentary authority, and it therefore seems to follow that the King's oath to obey the law was itself unlawful (*g*).

Abdication.—There have been formal abdications forced on unwilling Kings, for example, Edward II in 1327, and Richard II in 1399. There was no formal abdication in 1688; the Houses of Parliament declared that James II had "abdicated the Government," and "the throne being thereby vacant" they invited William of Orange and his wife Mary (daughter of James II) to occupy it. There is no precedent for a voluntary abdication before 1936, when King Edward VIII was given the choice of abdicating or giving up his proposed marriage with Mrs. Simpson, to whom the Prime Minister (Mr. Baldwin) and the Archbishop of Canterbury (Dr. Lang) objected.

The procedure then was as follows. The King signed an Instrument of Abdication declaring his irrevocable determination to renounce the throne for himself and his descendants, and his desire that immediate effect should be given to the Instrument. The King's signature was witnessed by his three brothers. The King then sent a message to Parliament asking that a Bill should be passed accordingly to alter the succession to the throne, and issued a commission to signify his assent thereto. His Majesty's Declaration of Abdication Act, 1936 (*h*), provided that the instrument of abdication set out in the schedule

(*g*) Keith, *The King, The Constitution, The Empire, and Foreign Affairs*, pp. 13—21.
(*h*) 1 Edw. VIII, c. 3.

should take effect, and that therefore His Majesty should cease to be King and there should be a demise of the Crown, and the member of the Royal Family then next in succession to the throne should succeed. The Act amended the Act of Settlement, 1701, by excluding King Edward (now Duke of Windsor) and his descendants from the succession to the throne, and exempted them from the provisions of the Royal Marriages Act, 1772 (*i*).

The Royal Style and Titles.—The royal style and titles, *i.e.*, the manner in which the King is referred to in official documents, such as proclamations and treaties, are altered from time to time by Act of Parliament, or by Proclamation issued thereunder. The title of George V when he came to the throne was: "George V, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India." (Royal Titles Act, 1901.) The first part of his title was derived from the existing Union of Great Britain and Ireland; "the British Dominions beyond the Seas" referred to all the overseas colonies and dominions and was added by Edward VII; the title "Defender of the Faith" was conferred by the Pope on Henry VIII in recognition of his attack on Luther, the reformer, and was paradoxically confirmed by Parliament after the Reformation; Victoria assumed the title "Empress of India" by proclamation made under the Royal Titles Act, 1876.

This style was retained after 1922, but the Imperial Conference of 1926 pointed out that it was inconsistent with the new status of the Irish Free State as a Dominion and not part of the United Kingdom. It was accordingly altered by proclamation made under the Royal and Parliamentary Titles Act, 1927, to: "George V, by the Grace of God, *of Great Britain, Ireland and the British Dominions beyond the Seas* King, Defender of the Faith, Emperor of India." It was thought, incidentally, that the revival of the title "King of Ireland" might facilitate the reunion of that country. King George VI's title is the same, though the expression "by the Grace of God" was considered inapplicable in 1936 to a declaration of abdication and the proclamation of the succession to an abdicated King.

(*i*) With regard to the Dominions, see *post*, p. 600.

The Royal Family.—*The King.*—The King is the chief officer of the State. He is an essential part of the Legislature. Justice is administered in his name, and the process of his own Courts, therefore, cannot be directed against him. The central government of the country is carried on in his name and on his behalf, but what were formerly the personal prerogatives of the Sovereign have now become so largely the privileges of the executive that they can only be dealt with collectively as prerogatives of the Crown (*k*).

Apart from India, the King is an Imperial Majesty, and his dominions are an Empire by statute (*l*).

Queen Regnant.—The Queen Regnant has the same powers and status as a King (1 Mary I, c. 1, 1553).

Queen Consort.—The life and chastity of the Queen Consort are protected by the Statute of Treasons, 1351. The Queen Consort, though married, was in law always a *feme sole*, and could sue and be sued at common law without her husband being joined (*m*). She could always purchase property for herself, convey property, and grant leases, the justification in theory being that the King's time is so much taken up that he ought not to be troubled with his wife's business matters. It is uncertain whether the Queen is bound by a Statute of Limitations. She has her own Attorney- and Solicitor-General; she pays no toll, neither can she be amerced in any Court She is the King's subject, and is thus amenable to criminal process. She was formerly entitled to certain reservations out of the royal demesne lands, and to a perquisite called "Queen's Gold."

It rests with the King whether he will have her crowned or not. (*Queen Caroline's Case* (1821) (*n*).)

On the King's death the Queen Consort becomes the Queen Dowager, and the statute relating to treason no longer applies to her.

Prince Consort.—There are four instances of Queens Regnant having been married. Mary I married Philip II of Spain, and Mary II was married to William III. Their husbands enjoyed the title of King. Prince George of Denmark, husband of Anne, and Prince Albert, husband of Victoria, were Princes Consort. Prince Albert at

(*k*) *Post*, Chapter XIV.

(*l*) 24 Hen. VIII, c. 12, also Bill of Rights, 1689; Act of Union with Ireland, 1800; Royal Titles Acts, 1876 and 1901.

(*m*) Co. Litt. 133a.

(*n*) 1 St. Tr. (N. S.) 949.

State functions took precedence next to the Queen. He was accorded the title of Prince Consort by Letters Patent. He was made a British subject on taking the oath of allegiance and the oath of supremacy, and was allowed to attend Privy Council meetings, though he was never a Privy Councillor.

The Prince of Wales.—The life of the King's eldest son is protected by the Statute of Treasons, 1351.

When the King's eldest son is born he immediately becomes by custom Duke of Cornwall if his father (or mother) is on the Throne. When he succeeds to the Throne, the Duchy of Cornwall immediately vests in his eldest son.

If and when the King chooses, he can make his eldest son Prince of Wales and Earl of Chester by Letters Patent. The last Prince of Wales (later Edward VIII and now Duke of Windsor) was made Prince of Wales by Letters Patent and an additional ceremony.

The reigning Sovereign can control the custody and education of the children of his heir, and, according to the better opinion, the custody of all princes and princesses of the blood royal save the issue of princesses who have married into foreign royal families. The chastity and life of the Princess of Wales during marriage are safeguarded by the Statute of Treasons, 1351.

Princes and princesses of the blood royal.—These royal persons take precedence of all peers and public officials. A statute of 1540 provides that nobody save the King's descendants shall presume to sit at the side of the Cloth of State in Parliament. This privilege extends to the King's brothers, nephews and uncles.

Princes of the blood, till summoned by the House of Lords, are commoners. It is usual to give them dukedoms when they come of age.

Royal marriages.—By the Royal Marriages Act, 1772, no descendant of the body of George II (other than the issue of princesses married into foreign families) can lawfully marry without the royal consent signified under the Great Seal and declared in council, and all other marriages are void. (*Sussex Peerage Case* (1844) (*o*).) All persons solemnising such marriages, or who are privy and consenting thereto,

(*o*) 11 Cl. & F. 85.

are to incur the penalties of a *præmunire* (*p*). A descendant of George II over twenty-five years of age may marry without the Sovereign's consent on giving twelve months' notice to the Privy Council, provided that no objection be taken by Parliament in the interim.

The Regency Acts, 1937 and 1943.—The common law made no provision for the delegation of royal functions when the Sovereign was ill or absent from the realm, or for a Regency when the Sovereign was suffering from mental or physical incapacity or was of tender years. In early times when the King was abroad, a Justiciar used to be appointed to act for him. When the office of Justiciar fell into disuse (*q*), special statutes had to be passed from time to time allowing the King to delegate his functions by commission under the Great Seal, as when George I and George II went to Hanover and George V attended the Coronation Durbar in India in 1911 The same necessity arose when the Sovereign was seriously ill, as was George V in 1928. Great inconvenience was caused in 1811 by the fact that George III was already insane and therefore could not in fact give his assent to the appointment of a Regent. These matters are now regulated by the Regency Acts, 1937 and 1943.

(i) *Delegation of functions to Counsellors of State.*—The Regency Act, 1937, authorises the Sovereign to appoint Counsellors of State by letters patent, and to delegate to them such of the royal functions as may be specified in the letters patent, whenever he is absent or intends to be absent from the United Kingdom, or is suffering from infirmity of mind or body not amounting to incapacity such as would warrant a Regency under the Act. The persons to be appointed Counsellors of State are the wife or husband of the Sovereign and the four persons next in succession to the throne, excluding any person who would be disqualified from being Regent. The former practice was to include in such commissions important officers of State, such as the Lord Chancellor, the Prime Minister and the Archbishop of Canterbury, but in view of the Imperial significance of the monarchy at the present day it was thought desirable that only members of the Royal Family should be appointed to the exclusion of United Kingdom ministers.

(*p*) *I.e.*, to appear before the Council and to be punished according to the discretion of the Council.

(*q*) *Post*, p. 343.

The Counsellors may not be given authority to dissolve Parliament otherwise than at the express instructions of the Sovereign.

The Regency Act, 1943, provides that: (i) if a person who would be included among the Counsellors of State is absent from the United Kingdom or intends to be absent during the whole or part of the period of delegation, he may be excepted during his absence; and (ii) " the heir apparent or heir presumptive to the throne if not under the age of 18 years shall not be disqualified from being a Counsellor of State by reason only of his not being of full age." The latter provision was no doubt inspired by the fact that Princess Elizabeth would attain the age of eighteen years on 21st April, 1944, and the former by the fact that the Duke of Gloucester would shortly take up his duties as Governor-General of Australia.

(ii) *Regency.*—(a) The Regency Act, 1937, provides that if *the Sovereign is under eighteen years of age* the royal functions are to be performed until he is eighteen by a Regent, who shall act in the name and on behalf of the Sovereign. The Sovereign is deemed to accede to the throne when he attains the age of eighteen years for the purpose of taking statutory oaths and declarations. The Regent is to be the person of full age next in succession to the throne who is a British subject resident in the United Kingdom and who is not disqualified on religious grounds. The Regent is to take oaths of allegiance, good government and maintenance of the Protestant religion in England and Scotland. He is empowered to exercise all royal functions, except that he may not assent to a Bill altering the succession to the throne or repealing the Acts for securing the Scottish Protestant Religion and Church. It was suggested in the House of Commons during the debate on the Regency Bill that these exceptions might themselves be repealed by the Regent and the two Houses.

The Act also provides for the *guardianship* of the person of a Sovereign under eighteen years. Of an unmarried Sovereign his or her mother is to be the guardian; of a married Sovereign the Sovereign's spouse will be guardian. If in the first case the Sovereign has no mother or in the second case the Consort is under age, then the Regent will be guardian.

(b) The Regency Act, 1937, further provides for the appointment of a Regent if a declaration is made by certain persons that they are

"satisfied by evidence which shall include the evidence of physicians that *the Sovereign is by infirmity of mind or body incapable* for the time being of performing the royal functions," or that they are "satisfied by evidence that the Sovereign is for some definite cause *not available*" for the performance of those functions (*r*). The Regency will continue until a contrary declaration is made. The persons who may make such declaration are the wife or husband of the Sovereign, the Lord Chancellor of Great Britain, the Speaker of the House of Commons, the Lord Chief Justice of England and the Master of the Rolls, or any three or more of them. It will be noticed that the person who would be Regent is not one of those who may make this declaration. The declaration must be made in writing to the Privy Council, and is to be communicated to the Governments of the Dominions (*s*) and of India. The functions of the Regent in this event are the same as when the Sovereign is under age, and similar provisions are made for the guardianship of the Sovereign's person.

(*r*) The Sovereign would not be available, for example, if he were made a prisoner of war.

(*s*) In accordance with the Statute of Westminster, 1931, however, the Regency Act does not apply to Canada, South Africa or Eire unless adopted by them.

CHAPTER XIV.

THE ROYAL PREROGATIVE.

GENERAL NATURE OF THE PREROGATIVE.

BLACKSTONE defines the royal prerogative as "that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. . . . It can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects" (*a*). The essential characteristic of the royal prerogative, then, is that it is unique and pre-eminent. It is not, however, "out of the ordinary course of the common law" in the sense of being *above* the law: it is part of the common law, and the Courts have jurisdiction to determine whether or not an alleged prerogative exists.

Much subtlety of reasoning was displayed by seventeenth century lawyers in analysing the royal prerogatives. The matter was of great importance at that time of constitutional conflict (*b*), but their classifications are of little practical importance at the present day. Thus he was said to have "natural" and "politic" capacities, the former being those which he had by nature as a man, and the latter having attached to them those abstract qualities—such as perpetuity ("the King never dies") and perfection ("the King can do no wrong")—which pertained to him as the personification of the State.

This distinction did not establish itself in English legal theory. The King was also said to have "ordinary," "absolute" and "inseparable" powers. By "ordinary" powers was meant such powers as those involved in the administration of justice, which have long been exercised without discretion according to definite principles and procedure. The "absolute" powers we should now call discretionary, for example, the direction of foreign policy and the pardoning of criminals. At the present day we do not usually treat of the

(*a*) Blackstone, *Commentaries*, I, ch. 7.
(*b*) See Holdsworth, *History of English Law*, vol. VI, pp. 19—24.

"ordinary" powers under the heading of prerogative. It is now admitted that he has no "inseparable" powers, that is, none which cannot be taken away by Act of Parliament (*c*).

Dicey's description of the royal prerogative as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" has been judicially approved (*d*), and may be accepted as a basis for an examination of the general nature of the prerogative if it is understood to refer only to *common law* rights, etc. and if the word "arbitrary" is omitted as ambiguous and misleading.

The prerogative is a *residue* because Parliament can take away any prerogative and has frequently done so. It is seldom abolished expressly, however, but is impliedly abolished, curtailed, or merely suspended. (See *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.* (1920) (*e*); *In re Ferdinand, Ex Tsar of Bulgaria* (1921) (*e*).) Since the prerogative is part of the common law, the King cannot claim that a new prerogative has come into existence (*f*). It can only be the residue at any given time of the rights and powers which the King had before the days of Parliaments.

A prerogative power is *discretionary* because, though its existence is determinable by the Courts, the manner of its exercise is outside their jurisdiction (*g*). This is not true of statutory powers (*h*), though the exercise of a statutory power may involve the exercise of discretion.

Lastly, the prerogatives are *legally* vested in the King, though this is now a matter of form. By custom and convention prerogative powers must be exercised through and on the advice of other persons. The necessity of knowing whether or not an executive act is an expression of the King's will and of making someone other than the King legally liable for its consequences has given rise to complex rules which determine how the King's acts are to be authenticated; while the discretionary character of prerogative powers has given rise to the Cabinet system, the most important development in modern British

(*c*) *Att.-Gen.* v. *De Keyser's Royal Hotel*, [1920] A. C. 508.
(*d*) Dicey, *Law of the Constitution* (9th ed.), p. 424; approved by Lord Dunedin in *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A. C. 508, at p. 526.
(*e*) [1921] 1 Ch. 107.
(*f*) *Case of Monopolies* (1602), 11 Co. Rep. 84 b.
(*g*) See, *e.g.*, *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272; *Engelke* v. *Musmann*, 1928] A. C. 433; *Denning* v. *Secretary of State for India* (1920), 37 T. L. R. 136.
(*h*) *Post*, Chapter XX.

constitutional history (*i*). Even in the few cases where the King could act orally, as in proroguing or dissolving Parliament, some Minister would be politically responsible (*j*).

The present position of the King as a person.—In theory and by strict law the King had enormous, and still has very extensive, legal powers. Legislation has reduced these; and the powers so reduced have further in their practical exercise had to submit to the ever-tightening control of the conventions. Before the Revolution the King and Council conducted the government, and moreover the King was not constitutionally bound, as now, to take the advice of his Ministers. Parliament could not prevent, as now, threatened mischief, but could only impeach the offender after the event.

After William and Mary's accession the prerogative was in point of law substantially curtailed by the Bill of Rights, 1689, and in point of practice trammelled by conventions which took their rise in the Revolution.

The result of the Revolution was to establish gradually three main principles upon which our system of government now rests: (1) The Sovereign is irresponsible, but (2) Ministers are responsible to Parliament for the exercise of every prerogative, and (3) it is the right and duty of Parliament to enquire into the way in which Ministers exercise the prerogative and approve or condemn the mode of exercise.

It is therefore the King's constitutional duty to choose Ministers who enjoy the confidence of Parliament, which in effect means who can command a majority in the Commons, and to retain them so long as that confidence is continued.

It is the Ministers' duty to endure parliamentary supervision over their public conduct, to submit their policy, with no further concealment than the national interests may sometimes demand, to Parliament's judgment, and to accept Parliament's adverse opinion upon any important article of their policy or administration as an implied summons to resign. These principles gradually began to assume shape after the Revolution. Their application led to the establishment of party government.

By "party government" is meant the wielding of the prerogative

(*i*) *Ante*, Chapter III, and *post*, Chapters XV and XVI.

(*j*) Keith, *The British Cabinet System, 1830—1938*, pp. 450—451.

by Ministers chosen from the party or group commanding a majority in the House of Commons. We first hear of party government in the days of William III, who gave effect to it at times, but kept foreign affairs under his control. The idea gained more definite shape in Walpole's day. Walpole retired in 1742 on a hostile vote, and so did North in 1782; but these were the only two cases of such resignations before the Reform Act of 1832.

Walpole can hardly be called the first "Prime Minister," though he approximated to that position. He was invited by the King to join the Cabinet as the King's friend; he was not asked to form a Ministry or choose his colleagues (*k*). By force of character and not of official position he gained an ascendancy over his colleagues. Pulteney, on being asked by George II to form a Cabinet, only requested the filling up of three or four posts. The better opinion is that there was no party government in the modern sense till Pitt the younger came into power in 1782.

At the present day there are no longer only two parties in the Commons, but several groups embracing different views, and the man who commands the support of most groups has the best claim to be Premier.

The personal influence of the King declined in the reigns of George I and George II. Neither of them could speak English well; they ceased to attend Cabinet meetings; and since then English Sovereigns have not found it expedient to attend them. The member of the Privy Council who sat in the chair when the King ceased to attend was the forerunner of the present Premier.

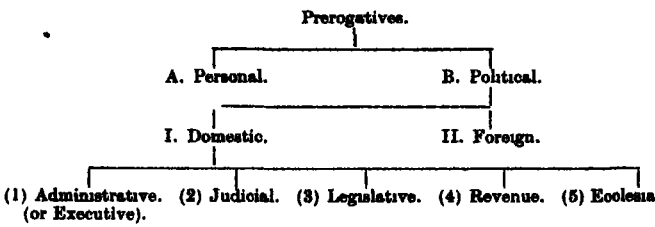
Classification of the prerogatives.—Blackstone divides the prerogatives into three kinds:—(1) Those regarding the royal character; (2) those regarding the royal authority; and (3) those regarding the royal revenue. The first two of these were called by the feudal writers the *majora regalia*, and the third was called the *minora regalia*. Blackstone's classification of the prerogatives is now obsolete, as is his whole treatment of the subject. To read him one would suppose that the King is the main source of power in the State, an autocrat more absolute than Henry VIII. In practice the powers exercised in his name are exercised by his Ministers, and though his views when

(*k*) Keir, *The Constitutional History of Modern Britain, 1485—1937* (2nd ed.), p. 332.

expressed are treated with respect, he cannot constitutionally enforce them in the teeth of Cabinet opposition, and would not to-day attempt to do so.

Maitland arrives at a better classification:—(1) Those prerogatives relating to the convening, proroguing, and dissolving Parliament and assenting to statutes; (2) powers relating to foreign affairs, war, peace, treaties, etc.; (3) powers of appointing and dismissing officers civil, military, executive, and judicial; (4) powers affecting the collection and expenditure of the revenue; (5) powers touching the naval and military forces; (6) powers relating to the administration of justice; (7) powers connected with the maintenance of order; (8) powers relating to social and economic affairs, such as public health, education, trade, etc.; and (9) powers in respect of religion and the national Church (*l*).

We think, however, that it will be more convenient for our discussion, which must be largely historical, to classify the prerogatives as follows:—



and to deal with them in this order.

A. PERSONAL PREROGATIVES.

The personal prerogatives still exist, but to a great extent they overlap the political. Chief among them are the following:—(1) the King can do no wrong; (2) the King never dies; (3) lapse of time does not bar the right of the Crown; (4) the King is not bound by statutes unless named therein; (5) the King is never an infant.

(1) *The King can do no wrong.*—The King cannot be sued in his Courts (*m*), and therefore cannot be made liable for acts done by

(*l*) Maitland, *Constitutional History*, p. 422. He emphasises that not all the powers relating to these matters are prerogative powers—many are statutory.

(*m*) The legend perpetuated by Bracton, that writs lay against the King down to Edward I's time, is refuted by other authorities; see Holdsworth, *History of English Law*, IX, p. 12.

himself or by his Ministers or other servants or agents. In certain cases, however, a subject may bring a petition of right, which is handed over to the Courts to try, the procedure now being governed by the Petition of Right Act, 1860. Even then, satisfaction of the petitioner's claim is theoretically a matter of grace (*n*).

Not only can the King not do wrong, but he cannot think wrong. When, therefore, by misinformation or inadvertence he invades the rights of a subject, as by granting a franchise (*i.e.*, a royal privilege in the hands of a subject) contrary to reason or prejudicial to the community, the law declares that the King has been deceived in his grant, and such grant is void.

Again, the Crown cannot in derogation of the rights of the public fetter the exercise of the prerogative which is vested in it for the public good; nor can it dispense with anything wherein the subject is interested, or make a grant repugnant to the common law or prejudicial to the interests of an individual.

(2) *The King never dies.*—The King has the attribute of legal immortality. "Henry, Edward, and George may die, but the King survives them all. For immediately upon the decease of the reigning prince his kingship by act of law, without any interregnum or interval, vests in the King's heir" (*o*).

It is a mistake, however, to think that the theory of the continuance of the royal person is given effect to without qualification. In the case of *Att.-Gen.* v. *Kohler* (1861) (*p*), for example, it was held that a Sovereign could not be held responsible to refund money paid to the Treasury by mistake in the reign of his predecessor (*q*).

(3) *Nullum tempus occurrit regi.*—Lapse of time will not, as a general rule, bar the right of the Crown to sue or prosecute.

Exceptions, however, are now numerous. Thus statutes have been passed barring the rights of the Crown to death duties after the period

(*n*) See *post*, pp. 273 and 283.

(*o*) Blackstone, *Commentaries*, I, p. 249. For the effect of the demise of the Crown on Parliament, see *ante*, p. 51, and on the continuance in office of the Judges, *post*, p. 393.

(*p*) 9 H. L. C. 654; 5 L. T. 5.

(*q*) Chitty, *Prerogatives of the Crown* (1820), p. 208, quoting Coke in relation to succession to property, says that the Crown is a corporation sole. On the question whether the Crown is a corporation sole, see Pollock and Maitland, *History of English Law*, I, 511—526; Holdsworth, *History of English Law*, III, 456—469; cf. Maitland, *The Crown as Corporation* (Selected Essays, 104—127). On the question of what *ought* to be, Maitland thought that the concept of a corporation sole was not of much use in relation to the Crown, but suggested that the State or Commonwealth should be recognised as a corporation aggregate with the King as its head.

named in the statutes has elapsed. Informations against usurpers of corporate offices must under a statute of 1792 be exhibited within six years after the usurpation. Indictments for treason (cases of attempted assassination of the King excepted) must by a statute of 1696 be found within three years after the commission of the crime. There are also numerous cases where criminal proceedings must be taken within a limited period. Complaints on information before Courts of summary jurisdiction must, as a rule, be laid within six months of the commission of the offence.

The Limitation Act, 1939, provides that no action shall be brought by the Crown to recover any land after the expiration of thirty years from the date on which the right of action accrued, except that an action to recover foreshore (*r*) may be brought within sixty years. (Section 4 (1).) Section 14 of the same Act limits the time within which the Crown may bring an action to enforce an advowson (*i.e.*, the right to present to, or bestow, any ecclesiastical benefice) as patron. The Limitation Act, 1939, applies generally to proceedings by and against the Crown—including petitions of right—save in so far as periods of limitation are prescribed by any other statutes. (Sections 30 and 32.)

(4) *The King is not bound by statute unless expressly named therein.* —It is said, however, that a statute may bind the King by necessary implication as well as by express language. The King is also supposed to be bound, though not named therein, by statutes for the public good, for the preservation of public rights, suppression of public wrong, relief and maintenance of the poor, advancement of learning, religion and justice, the prevention of fraud, and by statutes tending to perform the will of a grantor, donor or founder. (*Case of Ecclesiastical Persons* (1601) (*s*).) The presumption, however, is against a statute binding the Crown or Crown property. (*Att.-Gen.* v. *Donaldson* (1842) (*t*).) This rule has been applied so as to relieve from liability the driver of a War Office lorry who was exceeding the speed limit. (*Cooper* v. *Hawkins* (1904) (*u*).)

By the Weights and Measures Act, 1878, persons having in their

(*r*) "'Foreshore' means the shore and bed of the sea and of any tidal water, below the line of the medium high tide between the spring tides and the neap tides" (s. 31 (1)).
(*s*) 6 Co. Rep. 14 b. (*t*) 10 M. & W. 117.
(*u*) [1904] 2 K. B. 164; but cf. Road Traffic Act, 1930, s. 121.

possession for use in trade untrue scales were liable to a fine. Nicholls, a baker and also a postmaster, had untrue scales belonging to the Government and used them for the purposes of his trade as a baker. An information having been laid against him under the Weights and Measures Act, a writ of prohibition was applied for, and the Court held that the magistrates had no jurisdiction to hear the case, because the provisions of the Weights and Measures Act did not apply to scales which were Crown property. (*R.* v. *Kent Justices* (1890) (*x*).)

In *Hornsey Urban District Council* v. *Hennell* (1902) (*y*), the Court held that where land had been acquired and occupied by a Volunteer Corps for military purposes and held under the Volunteer Act, 1863, and the Military Lands Act, 1892, and vested in the commanding officer of the corps for the time being, it was land owned and occupied for the purposes of the Crown. The commanding officer, therefore, was not liable for expenses incurred by a local authority under the Public Health Acts for repaving the street.

(5) *The King is never an infant.*—Royal grants and statutes assented to by an infant King are valid. No provision is made by the common law for the Sovereign being a minor, or from any other reason being incapable of fulfilling the duties of his office. It has been the custom, however, to provide beforehand for a royal minority by statute. These statutes are called Regency Acts, as they give to a Regent limited powers of doing the work of the Sovereign till the latter reaches a specified age (*z*).

B. POLITICAL PREROGATIVES.

I. DOMESTIC.

(1) **Executive or Administrative prerogatives.**—To this class belong such prerogatives as the appointment and dismissal of Ministers and other Government officials; the headship of the Army, the Royal Navy, the Royal Air Force and the Civil Service; the creation of peers (*a*) and the conferment of honours ("the King is the fountain of honour") (*b*), and the creation of corporations (*c*).

(*x*) 24 Q. B. D. 181.
(*y*) [1902] 2 K. B. 73.
(*z*) See now Regency Acts, 1937—43, *ante*, pp. 148—149. (*a*) *Ante*, Chapter VI.
(*b*) *The Prince's Case* (1606), 8 Co. Rep. 1 a, 18 b. The Honours (Prevention of Abuses) Act, 1925, makes it a misdemeanour for a person to give or receive a reward for a dignity. (*c*) See *post*, p. 246.

Numerous appointments, warrants, and other documents require the King's signature. Ministers countersigning these are responsible for the royal act.

The exercise of such prerogatives, and their relation to statutory powers and constitutional conventions, form the bulk of the contents of this part (Part III) of the book.

(2) **Judicial prerogatives.**—The King is the fountain of justice and general conservator of the peace of the kingdom. By the expression "fountain of justice" the law does not mean the author or originator, but only the distributor, of justice. Justice is not derived from the King as his free gift, but he is the steward of the public to dispense it to whom it is due. The King formerly sat in Court as a Judge, and took part in decisions, though he did not always actively interfere. In the *Dialogus de Scaccario*, a treatise written about the time of Henry II by Fitzneal, Bishop of London, on the functions and working of the Exchequer, we find these words: "*in qua* [*Curia Regis*] *ipse* [*Rex*] *in propria persona jura decernit.*" Instances are recorded of John, Henry III, Edward I, and Edward II personally dealing with criminal cases. Edward IV sat with his Judges for three days to see how they did their work; but the personal interference of the King with his Judges was of infrequent occurrence, and Coke told James I that though he could sit in Court he could not give an opinion (*d*).

The King is not the spring, but the reservoir, whence right and equity are conducted by a thousand channels to every individual. The King alone has the right of erecting Courts of justice where these are not created by statute, as modern Courts invariably are. All jurisdictions of Courts are mediately or immediately derived from the Crown. All proceedings run in the King's name. In criminal proceedings the King nominally prosecutes, and in civil proceedings in the Superior Courts the King directs the defendant to enter an appearance to the writ of summons issued by the plaintiff.

In County Courts and in some other local Courts the proceedings do not disclose on their face any connection with the King (*e*). Although in ancient times the Kings dispensed justice in Court, for centuries

(*d*) *Case of Prohibitions* (1607), 12 Co. Rep. 63, 64; Holdsworth, *History of English Law*, vol. I (5th ed.), pp. 194, 207.

(*e*) Except that the Administration of Justice (Miscellaneous Provisions) Act, 1933, allows certain proceedings by the Crown to be instituted in County Courts.

they have delegated this duty to their Judges; and to maintain the independence of the Judges of the Supreme Courts, the Act of Settlement provided that their commissions should be made not *durante placito*, but *quam diu se bene gesserint*.

By an Act of 1760 it was provided that the Judges should be continued in their offices during good behaviour, notwithstanding any demise of the Crown. The King is restricted in his appointment of Judges by the Judicature Acts and Appellate Jurisdiction Acts.

The King cannot to-day determine any cause or proceeding save by the mouth of his Judges, whose power, nevertheless, is only an emanation of the prerogative (*Case of Prohibitions* (1607) (*f*)). Courts of justice have gained a well-defined jurisdiction and their decisions must be regulated by certain and established rules of law.

It necessarily follows that even our Kings themselves cannot, without parliamentary sanction, grant any addition of jurisdiction to such Courts, nor authorise anyone to hold them in a manner dissimilar to that established by the common law or statute law of the land. His Majesty cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery (now a Division of the High Court of Justice), which has immemorially possessed a jurisdiction in such cases. The King cannot legally authorise any Court in the United Kingdom to proceed contrary to English law (*g*).

In the *Bishop of Natal's Case* (1865) (*h*) the Court held that though the Crown by its prerogative may establish Courts to proceed according to common law, yet it cannot create any Court to administer any other law. It was also decided that, as no ecclesiastical tribunal or jurisdiction is required in a colony or settlement where there is no established Church, the ecclesiastical law of England cannot be treated as part of the law which settlers carry with them from the Mother Country.

After pointing out that the modern County Courts were created by statute, Maitland goes on to explain why new Courts are not

(*f*) 12 Co. Rep. 63.

(*g*) As regards Colonial Courts it would perhaps be more correct to say that the King cannot create any Court contrary to English notions of right and justice, *e.g.*, permitting torture.

(*h*) *In re Bishop of Natal* (1865), 3 Moo. P. C. (*N. S.*) 115; and see *Ward* v. *Bishop of Mauritius* (1906), 22 T. L. R. 52.

nowadays constituted by an exercise of the prerogative. These reasons are, firstly, that a Court of pure common law would be so clumsy as to be comparatively useless, and, secondly, that the King cannot tax his subjects for the upkeep of Courts he chooses to erect (*i*).

Pardon.—Pardon is a part of the judicial prerogative. A pardon may be pleaded in bar to an indictment, or after verdict in arrest of judgment, or after judgment in bar of execution. The grant of a free pardon absolves the offender from all punishment or disqualification (*k*). By convention the King only pardons on the advice of the Home Secretary.

No pardon can be pleaded by way of defence to an impeachment of the Commons (Act of Settlement, 1700, s. 3), but the King may remit penalties resulting from the impeachment. Thus, three lords who were impeached and attainted after the Rebellion of 1715 were subsequently pardoned The King cannot grant a pardon to a person who has incurred the penalty of *præmunire* by sending a man in custody out of the kingdom contrary to the Habeas Corpus Act, 1679

Where an offence affects the public only the King can, as a rule, pardon, but in many cases the maxim applies that the King cannot pardon one person so as to cause injury and loss to others. Thus the Sovereign is unable to pardon a public nuisance whilst it is still unabated. Again, the King cannot remit a recognisance to keep the peace.

When once a common informer had commenced a penal action, the King could not remit the penalty, as this would be calculated to prejudice the common informer. Now, however, by virtue of the Remission of Penalties Act, 1859, penalties for offences may be remitted by the Crown, though payable to parties other than the Crown.

By a statute of Richard II (1390) no pardon for treason, murder, or rape shall be valid unless the offence be particularly specified therein, and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense.

(*i*) Maitland, *Constitutional History*, p 420

(*k*) Criminal Law Act, 1827, s. 13, *Hay* v *Tower Division Justices* (1899), 24 Q. B D. 561

Civil Proceedings at the Suit of the Crown.—(i) *Proceedings on the Revenue side of the King's Bench Division.*—The King, and also the Duke of Cornwall (a title invariably held by the heir apparent), have the privilege of bringing actions in which the procedure is not only archaic but also severe. The proceedings usually begin by filing in the office of the King's Remembrancer (the Senior Master of the King's Bench Division) a document called a *Latin information*. These informations are of two kinds, viz. *in rem* and *in personam*.

In the former case the Crown is already in possession of property and seeks to have its title confirmed. In the latter the Crown claims in debt for sums due to it as penalties or otherwise, or claims in respect of "intrusion" by the subject on property, real or personal, belonging to the Crown. (Where the Crown claims under a debt of record the action can be commenced by writ of *scire facias*, but in these cases the writ is usually accompanied by an information.)

Common instances of proceedings *in personam* are actions to recover penalties due to the Inland Revenue authorities on behalf of the Crown under the Customs Acts. They are usually commenced by a writ of subpœna. The writ of subpœna is addressed to the defendant and warns him, under fear of incurring a penalty, to appear before the Court in his own proper person on a named occasion, day or time. Actions for customs penalties frequently begin with a writ of *capias*, which commands the sheriff to seize the defendant and bring him in custody before the Court. No writ of *capias* is valid until the Attorney-General has authorised its issue The fiat of a Judge is also necessary. After arrest the defendant must, in order to regain liberty, get provisional bail from the sheriff, and then he can appear on giving special bail to the Crown.

The "writ of extent" is the process under which the Crown seizes the body, lands, goods or choses in action of the defendant, but as a rule the body of the debtor is not seized unless there is danger of the debt being lost to the Crown and an affidavit is led to that effect.

(ii) "*English Informations.*"—Under this form of process the Crown (a) asserts its title, where that is obscure, to corporeal or incorporeal hereditaments, *e.g.*, foreshores, and (b) asserts its right to money owed, when discovery and an account are required, *e.g.*, when claiming death duties.

(iii) ***Writ of summons in the High Court.***—The Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 4, provides that any debt due to the Crown may, without prejudice to the recovery of the same by means of an information in the High Court, be recovered by proceedings instituted by writ of summons. Thus the Crown can, if it wills, short-circuit the archaic procedure of information in the case of debt.

(iv) ***Action in County Court.***—The Administration of Justice (Miscellaneous Provisions) Act, 1933, also provides that proceedings by the Crown may be instituted in the County Court.

The King as arbiter of commerce.—As protector of commerce the King alone possessed the power of creating markets and fairs, nor could anyone claim them but by royal grant, or by prescription, which presupposes such grant This prerogative is now unimportant as it has been superseded by statute.

(3) Legislative prerogatives.—The relations between the Crown and Parliament have been dealt with above in Chapter V. The King has no prerogative power to legislate within the realm (*Case of Proclamations* (1610) (*l*)), nor for British settlements overseas except for the purpose of providing them with a Constitution being an elected Legislature (*m*).

The King has power at common law to legislate by Order in Council or proclamation for newly conquered or ceded colonies until he, without express reservation of his rights, sanctions a Constitution with a representative Legislature (*Campbell* v. *Hall* (1774) (*n*)); and also for Protectorates (*North Charterland Exploration Co.* v. *The King* (1931) (*o*)).

(4) Revenue prerogatives.—The Norman and early Plantagenet Kings had "ordinary" and "extraordinary" revenues, and this classification and terminology were still used at the beginning of the nineteenth century (*p*). The "ordinary" revenues consisted of

(*l*) 2 St. Tr. 723.

(*m*) This power is now exercised in accordance with the provisions of the British Settlements Act, 1887, see *post*, p. 534.

(*n*) 20 St. Tr. 239; *Jephson* v. *Riera* (1835), 3 Knapp, at p 152, *Abeyesekera* v. *Jayatilaka*, [1932] A C. 260; cf. *Sammut* v. *Strickland*, [1938] A. C 678

(*o*) [1931] 1 Ch 169. The exercise of this power, and that in relation to mandated territories, is regulated by the Foreign Jurisdiction Act, 1890, *post*, Chapter XXXIX.

(*p*) Chitty, *Prerogatives of the Crown* (1820), p 200

ancient customary hereditary revenues such as feudal dues, taxes raised from Jews, *bona vacantia*, perquisites connected with the judicature, and other miscellaneous sources of income which are now exchanged for the Civil List (*q*). "Extraordinary" revenues, or "aids," were raised from time to time to meet the needs of war or other public emergency The latter are now the main source of the public revenue, and can only be raised by the authority of Parliament.

(a) "Ordinary" Revenue.—Feudal Dues.—Under the feudal system the King was lord paramount of all the land in the kingdom. He was the supreme feudal lord and not the mere tribal chieftain of early Saxon times. His gains from this source were a principal element in his "ordinary" revenues, and their nature may be seen from the following summary of the various kinds of free tenures by which the King's tenants-in-chief held their land

Knight service - This was the most honourable tenure, but was subject to burdensome "incidents," which included the following - (a) Aids, namely (i) liability to contribute towards the expenses of making the King's eldest son a knight, (ii) a similar contribution towards portioning once the King's eldest daughter; (iii) a contribution towards ransoming the King from captivity (Richard I was ransomed.) (b) Reliefs, or sums payable by a tenant on succeeding to the estate of the ancestor (c) Fine on alienation of the estate. (d) Primer seisin, which was the right of the King to the first year's profits from the "fee," provided the heir was of full age when he succeeded his ancestor (e) Wardship, *i.e.*, the right to the custody of the person, and to the rents and profits of the land, of an infant heir. (f) Marriage, or the right of disposing of the hand of infant wards of either sex, with the right to the rents and profits or a fine if the match was refused. (g) Escheat, or the right to take the estate on failure of the tenant's heirs, and also in the event of the tenant committing treason or felony, or being outlawed, or abjuring the realm in certain instances

To ascertain profits arising from tenure *in capite* an inquest was held by the King's Justices to fix the reliefs and other feudal incidents (if any), later, this business was transacted by a special Court called the Court of Wards and Liveries.

(*q*) *Post*, p. 168.

Grand serjeanty.—This tenure was subject to the incidents of marriage and wardship, but its main feature was the holding of land subject to rendering the King a special service, *e.g.*, being the King's cup-bearer, such service being valued at £5 a year or upwards; though, according to Littleton, the tenant held of the King by some personal service only.

Petty serjeanty in Littleton's time (fifteenth century) was the tenure whereby a man held of the King, yielding him annually some implement of war. In earlier times the tenant also held his estate in exchange for some trifling service.

Socage.—The socager received his estate in exchange for fixed services and afterwards for a fixed annual sum. Like the tenant in knight-service, he owed to the King fealty, aids, reliefs and, occasionally, homage. The King had rights of escheat, but not of wardship or marriage.

By the Statute of Tenures (1660), in the reign of Charles II, tenure by knight-service was converted into free and common socage, thus enabling all tenants to devise the whole of their lands by will. The Law of Property Act, 1922, abolished copyhold (or "unfree") tenure and converted that also into socage, provision being made for compensation for lords of the manor. Apart from certain manorial incidents which continue to exist, unless extinguished by mutual consent (*r*), and the honorary incidents of grand serjeanty which manifest themselves chiefly at coronations and State banquets which are seldom held (*s*), the only vestige left of the feudal system of tenure is socage. Such incidents of socage tenure as survived the statute of 1660 were abolished by the Law of Property Act, 1925, except fealty, which has no commercial value and is not in practice exacted, escheat of real property being replaced by *bona vacantia*.

Ecclesiastical Revenues.—These included:—

(1) The custody of a bishop's temporalities—*i.e.*, the right of the Crown to take the profits whilst the episcopal see is vacant; but these are held by the Ecclesiastical Commissioners in trust for his successor.

(*r*) The most important of these are tenant's rights of common, lord's or tenant's rights to mines, minerals, etc., and lord's sporting rights.

(*s*) The personal services due to the King at his coronation are determined by the Court of Claims, which is set up at the beginning of every reign.

(2) The right to annates and tenths. Annates (or first fruits) were the first year's profits of a church benefice, and tenths were the tenth part of the annual profits of a church benefice. They were originally papal dues, but were payable to the Crown after the Reformation by statutes of Henry VIII. Since a statute of 1704 they have been paid to the governors of the charitable fund known as Queen Anne's Bounty, in so far as they have not been extinguished or redeemed (*t*).

Crown Lands.—These are lands which have become vested in the King "in his body politic in right of the Crown," and include the ancient demesne lands of the Crown and lands subsequently acquired by prerogative right, *e.g.*, by escheat or forfeiture, the foreshore and lands formed by alluvion. Crown lands are managed by the Commissioners of Crown Lands under the Crown Lands Acts, 1829—1943, their powers relating to woods and forests being delegated to the Forestry Commissioners. The revenue derived from this source is about £1,300,000 a year.

Bona Vacantia.—*Wreck.*—Wrecks, subject to certain restrictions, were Crown property, but no ship was a wreck if a human being, or any living creature, escaped alive from it.

The whole matter is now regulated by the Merchant Shipping Act, 1894. Owners of wrecked ships, goods and cargo are now entitled to claim their property as against the Crown within a year. They have, however, to satisfy salvage claims. Finders of wreck must deliver it to district receivers of wreck For the purposes of the statute governing the law on the subject, the following things are wreck, namely, *flotsam* (things found floating near shore); *jetsam* (things jettisoned to save the ship and not floating); and *ligan* (things tied to a buoy or like object for preservation) (*u*). Where goods are unclaimed for a year and a day they pass to the Crown and, subject to payment thereout of salvage claims, go into the Consolidated Fund.

(*t*) *Bishop of Rochester* v. *Le Fanu*, [1906] 2 Ch. 513, at pp. 519—520; Ecclesiastical Commissioners Act, 1836; First Fruits and Tenths Measure, 1926, No. 5.

(*u*) *De Prerogativa Regis* This statute, supposed to be of 17 Edw. II, is believed not to be genuine. Cf. *Sir Henry Constable's Case* (1601), 5 Co. Rep. 106. For a fuller description of the sources of royal revenue mentioned in these pages, see Blackstone, *Commentaries*, I, ch. 8

Treasure trove.—This consists of money, coin, bullion, plate, silver, or gold hidden in the earth or some secret place, and subsequently discovered without trace of the owner. The concealment must have been made a long time before its discovery (*vetus depositio pecuniæ*). As treasure trove goes entirely to the Crown, it is a misdemeanour to conceal the discovery. What is treasure trove is determined by a coroner and a jury. As a matter of grace, the Crown has latterly often paid the finder the value of the treasure trove (*x*).

Estrays.—These are beasts of value belonging to unknown owners which are found wandering at large within the precincts of a manor. These beasts belong to the King or his grantee (usually the lord of the manor) after a year and a day have elapsed, during which period the owner can have them on payment of expenses for keep (*y*)

Waifs.—*Bona waviata* were goods thrown away by a thief in his flight from justice. The property was confiscated by way of punishing the owner for not prosecuting the thief (*z*) The goods of foreign merchants were not waifs, as they were not supposed to know English law.

Royal mines.—The King's right in mines of precious metals was ancillary to his prerogative of coining money: to control the product he must control the raw material. By the old common law the King took possession of mines containing gold and silver, whether they contained base metals or not. As people became reluctant to sink mines, it was provided by statutes of William III and George III that no base metals are to be forfeited, but that the King shall have the mine on payment for the base metals (*a*).

Royal Fish, etc.—Whales and sturgeon are royal fish, though the Crown can only claim them if they are caught in territorial waters. It is said that the King is entitled to the whale's head and the Queen to its tail. We are told that in the reign of Edward II a whale reached Greenwich and was duly dispatched to the King by the Constable (*b*),

(*x*) *Att.-Gen.* v. *Moore*, [1893] 1 Ch. 676; *Att.-Gen.* v. *British Museum*, [1903] 2 Ch. 598.

(*y*) *Anon.* (1612), 12 Co. Rep 101.

(*z*) *Foxley's Case* (1600), 5 Co. Rep 109 a

(*a*) By the Petroleum (Production) Act, 1934, the property in petroleum existing in its natural state in strata in Great Britain is vested in the Crown, which has the exclusive right of searching for and getting it.

(*b*) Keith, *The King and the Imperial Crown*, p. 390.

and a sturgeon was recently caught at Hull and sent to the King in accordance with custom (*c*).

White swans, if wild and unmarked, swimming in open and common rivers, belong to the King, and the annual "upping of the swans" on the Thames is one of the more picturesque ceremonies featured by the Press in peace-time.

The prerogative right of fishery in navigable rivers, if exercised in a given river before Magna Carta (*d*), has arisen as a practical issue in Ireland in recent years (*e*)

Escheat.—Escheat was formerly of two kinds, *per defectum sanguinis* and *per delictum tenentis.*

Escheat *per defectum sanguinis* existed in the case of land when a man died without heirs, and by analogy the Crown came to take the personal property of those who died without next of kin in many cases. Both the real and personal property of one who dies intestate without next of kin now go to the Crown as *bona vacantia* under the Administration of Estates Act, 1925.

The Crown similarly takes the personal property of dissolved corporations (*e.g.*, the assets of a Russian company dissolved by the operation of Soviet law) (*f*), and friendly societies (*g*).

Escheat *per delictum tenentis* ensued when a man was convicted or attainted of treason or felony. Forfeiture and corruption of blood have now been abolished in cases of conviction for treason or felony (Forfeiture Act, 1870), but a right of forfeiture to the Crown or its grantee still applies in theory to all cases of criminal outlawry (*h*) and misprision of treason.

The Civil List.—The foregoing items, constituting the "ordinary" revenue of the Crown, were collected by prerogative and paid to the Sovereign until the Civil List Acts, the first of which was passed in 1715. Thenceforward, by virtue of similar Acts passed at the beginning of each reign, these hereditary revenues were paid into the

(*c*) *The Daily Telegraph*, 21st April, 1944

(*d*) Magna Carta, c. 33, required all "kydells" (fish-weirs) to be removed from rivers, but the intention was to prevent obstruction to navigation, see McKechnie, *Magna Carta* (2nd ed.), pp. 343—346

(*e*) See *Moore* v. *Att.-Gen. for the Irish Free State*, [1934] I. R. 34.

(*f*) *In re Wells, Swinburne-Hanham* v. *Howard* (1932), 101 L. J. Ch. 346, Companies Acts, 1928—29. (*g*) *Braithwaite* v. *Att.-Gen.* (1909), 25 T. L. R. 333.

(*h*) An outlaw is a person who has escaped from criminal process, and cannot be found at the time when final steps in outlawry have been taken against him.

Consolidated Fund. In consideration of assigning them the Royal Family were endowed by the Acts with a regular annual charge upon the Consolidated Fund, called the "Civil List."

Formerly the payment of certain official salaries, *e.g.*, those of the Judges, and also certain pensions, were charged on the Civil List; but since the reign of William IV it only includes the sum allowed to the King and certain members of his family.

The Civil List Act, 1937, provides for the payment of £410,000 a year to King George VI. Of this sum £110,000 is appropriated to His Majesty's Privy Purse; £134,000 to salaries of His Majesty's Household and Retired Allowances; £152,000 to expenses of His Majesty's Household; and £13,200 to Royal bounty and alms. Provision is also made for the Queen in the event of her surviving His Majesty; for Princess Elizabeth and His Majesty's younger children; and (in addition to that made in 1910) for the Duke of Gloucester. Payments for the Civil List and for Princess Elizabeth and the Duke of Gloucester are, however, reduced so long as the revenues of the Duchy of Cornwall are vested in the King (there being no Prince of Wales). Queen Mary is provided for by the Civil List Act, 1910. No provision is made by Parliament for the Duke of Windsor, formerly King Edward VIII, who was until recently Governor of the Bahamas. The "Civil List" pensions, payable out of the Consolidated Fund under the Civil List Act, 1837, are increased to £2,500 a year.

(b) "Extraordinary" Revenue.—The total revenue of the country, less the hereditary revenues dealt with above, constitutes, in Blackstone's paradoxical nomenclature, the "extraordinary revenue." No portion of this revenue is raised by prerogative: it can, since the Bill of Rights, 1689, only be levied by virtue of statutes, though in theory it is supplied by Parliament to the King to pay the cost of government. Moreover the "extraordinary" revenue has for long comprised by far the larger part of the national revenue.

The bulk of the "extraordinary" revenue can be ranged under one or other of the following heads: (a) customs; (b) excise; (c) death duties; (d) stamp duties; (e) land tax; (f) income tax; (g) surtax; and (h) Post Office receipts.

All these taxes are paid into the "Consolidated Fund," that is, to the credit of the Government's account with the Bank of England,

and cannot be paid out without statutory authority (*h*). As a matter of historical interest something should be said about customs duties.

Customs are duties leviable on exports and imports. Originally, it was sought to justify the King's claim to impose customs by prerogative on the grounds: (a) that the King permitted the subject to leave the realm, taking his goods with him; (*b*) that the King needed compensation for the expense incurred by him in the upkeep of his ports and the protection of merchants against pirates. The decision in *Bates's Case* (1606) (*i*), that the King could impose a duty on imported currants if the purpose was to regulate foreign trade and not to raise revenue, was probably good law at the time.

According to Coke, many of the customs in very early times were not the King's heritage, as he quotes an Act of Edward III—not extant—to the effect that customs, certain hereditary ones probably excepted, were granted to the King by Parliament (*k*). At quite an early date, as we learn from Magna Carta, the nation was concerned about customs duties. By a statute of 1297 Edward I promised to take no customs "saving to us and our heirs the customs on wool, wool skins and leather formerly granted to us by the Commonalty aforesaid." These probably were in early days considered hereditary customs, and were due on the exportation only of the commodities above mentioned; they became known as "staple" commodities of the kingdom, because they were obliged to be brought to those ports where the King's staple was established.

The following duties were early annexed to the Crown in perpetuity by the nation:—

(i) *Prisage*, or the King's right to take two tuns of wine from every ship (English or foreign). By a charter of Edward I, prisage was exchanged for a duty of 2s. for every tun imported by merchant strangers, and called "butlerage," because it was paid to the King's butler. From 1453 an increase known as "tunnage and poundage" was voted by Parliament to the King for life at the beginning of his reign.

(ii) *Tunnage* was a duty imposed on all wines imported over and above prisage and butlerage.

(*h*) *Ante*, Chapter XII
(*i*) 2 St. Tr. 371; Holdsworth, *History of English Law*, vol. VI, pp. 42—48.
(*k*) 2 Inst. 58, 59.

(iii) *Poundage* was an *ad valorem* duty of 1s. in the £ on all other merchandise.

In course of time customs duties became more numerous and confusing. Pitt in 1787 consolidated the customs and brought about their payment into the Consolidated Fund. Between 1840 and 1860 Peel and Gladstone abolished a number of customs duties, the tendency under Free Trade legislation being to confine them to commodities which could not be produced in England; but in recent times the policy of Protection has led Parliament to impose customs duties on the bulk of our imports.

(5) Ecclesiastical Prerogatives.—See below, Chapter XXIII.

II. FOREIGN PREROGATIVES.

Issue of letters of marque and reprisal.—The law of nations vests in every Power a *right to make reprisals for acts of aggression* by its neighbours. Where a nation manifests general hostility towards another by unwarranted attacks, and satisfaction is denied, it is for the King alone to authorise his subjects to retaliate.

Such authority was in the old days conferred upon English subjects aggrieved by foreign aggression, by means of "letters of marque and reprisal," which were commissions to fit out privateers. Letters of marque have been obsolete since England subscribed to the Declaration of Paris, 1856, whereby privateering was abolished.

Right to make war and peace.—As representative of his people and as executive magistrate the King possesses the exclusive right to make war and peace, and the law of the Constitution leaves it to the King's discretion to grant or refuse a capitulation or truce to an enemy. By convention, of course, this prerogative is exercised through the Cabinet in general, and the Prime Minister and Foreign Secretary in particular; and the events of 1914, 1919 and 1939 are precedents for a convention that Parliament should be frequently consulted and kept as fully informed of the steps being taken as diplomatic expediency allows.

As incident to the prerogative of declaring war the King has assigned to him the management of the war. As head of the Army, Navy and Air Force he can order their movements, regulate their internal arrangements, and diminish or increase their numbers, though nowadays these powers are very greatly restricted by the practical necessity

of going to Parliament for money. The King is also solely entitled to erect forts and other places of strength. Unless Parliament permits it, the maintenance of a standing army in the Kingdom in time of peace is forbidden by the Bill of Rights, 1689. The Army and the Air Force are kept in being by annual legislation (*l*).

Seamen and seafaring men may even in time of peace be compelled by the Crown to enter the Navy by what is known as "impressment." This prerogative is only exercisable over individuals who have voluntarily chosen a seafaring life, and it does not extend to landsmen or fishermen except in certain cases

In 1743 one Broadfoot was indicted for murdering Calahan, a sailor, in a man-of-war. Broadfoot was being impressed for naval service and he shot Calahan. The Judge directed a verdict of manslaughter, and held that "pressing for sea service is legal provided the persons impressed are proper objects of the law and those employed in the service are armed with a proper warrant" (*R.* v. *Broadfoot* (*m*))

As being responsible for the conduct of war the King can also adopt measures to prevent the egress or ingress of his enemies out of or into His Majesty's dominions. Thus, His Majesty may proclaim blockades, and may, during war or threatened hostilities and on occasions of emergency, lay an embargo on all shipping, and thereby prevent anyone from leaving the kingdom. The King may, on the other hand, permit an enemy to come into the country by granting to him letters of safe conduct, though passports granted by the Foreign Secretary are now more usually obtained. The King can prevent any alien from coming into the country, whether in time of war or peace (*Musgrove* v. *Chun Teeong Toy* (1891) (*n*)). The King in an emergency can enter on his subjects' lands to make fortifications (*o*); has a prerogative right in saltpetre and gunpowder (*o*); and may prohibit the exportation from the Kingdom of arms or ammunition or other articles of that nature useful in war.

What is termed the war prerogative of the King is called into activity by the perils and exigencies of war, and by those perils and exigencies is limited.

(*l*) See *post*, Chapter XXII.
(*m*) (1743), 18 St. Tr. 1323, Foster, 154. (*n*) [1891] A. C. 272.
(*o*) *Case of the King's Prerogative in Saltpetre* (1606), 12 Co. Rep. 12; *In re A Petition of Right*, [1915] 3 K. B. 649, cf. *Att.-Gen.* v. *De Keyser's Royal Hotel*, [1920] A. C. 508.

The Treaty-making power of the Crown.—Blackstone says: "It is the Sovereign's prerogative to make treaties, leagues and alliances with foreign States. It is essential to the goodness of a league that it should be made by the sovereign power, and this power is vested in the King. Whatever contracts he engages in, no other power in the kingdom can annul." It would seem that a treaty made by the Crown, though binding on the State in public international law, has no effect in British constitutional law on the rights of British subjects unless and until it is implemented by Parliament In support of this doctrine Maitland instances the Extradition Acts, the existence of which implies that the King is precluded from surrendering persons accused of crime committed abroad without the aid of a statute. If a treaty of extradition were enough, no statute would be needed (*p*).

In the case of *The Parlement Belge* (1880) (*q*), Sir R. Phillimore quoted Blackstone's *dictum*, and then said "Blackstone must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the Legislature," and then says that a treaty affecting private rights requires the sanction of the Legislature The Court of Appeal reversed his judgment on a question of fact, and decided that question of fact in such a way as to make it unnecessary for the Court to pronounce upon the legal principle underlying Sir Robert Phillimore's judgment. They did not, however, question that principle, as to the soundness of which there can be little doubt.

By the making of a treaty the Crown may morally bind Parliament to pass any legislation needed to give full effect to it "Treaties of peace when made by the competent power are binding on the whole nation. If a treaty requires money to carry it into effect, and the money cannot be raised but by an Act of the Legislature," it is morally obligatory on the Legislature to pass the necessary law; "to refuse it would be a breach of public faith" (*r*).

In *Walker* v. *Baird* (1892) (*s*), Lord Herschell said: "The learned Attorney-General . . . conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary to compel

(*p*) Maitland, *Constitutional History*, pp 424—425 (*q*) 5 P. D. 197
(*r*) Kent, *Commentaries* (1873 ed.), p. 166; see also *Re California Fig Syrup Co.'s Trademark* (1884), 40 Ch. D 620, at p 627.
(*s*) [1892] A C 491.

obedience to a treaty." The Attorney-General had argued that the Crown can compel its subjects to obey the provisions of a treaty putting an end to a war and that its power could be no less in the case of a treaty the object of which was to avert war. Lord Herschell decided the case on the footing that it had not been pleaded that the treaty in question was of this character, and declined to decide whether a treaty either of peace or for the avoidance of war differed from other treaties in being enforceable in the municipal Courts without being enacted.

The Hague Conventions, resulting from the international conferences of 1899 and 1907 relating to the conduct of warfare on land and sea and the rights and duties of neutrals, were agreed to and in many respects carried into effect without parliamentary sanction. On the other hand it was found necessary to pass the Geneva Convention Act, 1937, to prohibit the use of the Red Cross symbol for mercantile purposes inconsistently with the Geneva Convention, 1929, relating to the treatment of wounded and sick soldiers in the field.

Doubt has been expressed whether the Crown can by virtue of the prerogative cede territory, so as to deprive British subjects of their nationality. Since the cession of Heligoland to Germany in 1890 was made subject to the approval of Parliament, it has been the practice for Parliament to be asked to confirm cessions, as in the case of the Anglo-Italian Treaty (East African Territories) Act, 1925, and the Dindings Agreement Approval Act, 1934 (*t*). The recognition of a State by the Crown may indirectly legalise the confiscation by that State of the property of British subjects (*u*).

Treaties are often entered into by foreign ministers "subject to ratification." This means subject to ratification by the treating-making power of a State, which in the case of this country is the Crown. Ratification (approval or confirmation) by Parliament is a matter of British constitutional law only, unless this particular form is provided for in the treaty.

We can probably discern the development of a constitutional convention that Parliament should be consulted in principle *before* important treaties are concluded, especially where—as is so often the case—legislation will subsequently be required to implement its

(*t*) See further, *post*, p. 416

(*u*) *Akcionairnoye Obschestro A. M. Luther* v. *Sagor & Co*, [1921] 3 K. B. 532.

provisions. This seems to be the gist of some of the criticisms made in the House of Commons in the debate on the Diplomatic Privileges (Extension) Bill, 1944.

Ambassadors.—The Sovereign possesses the right to receive and send ambassadors from and to foreign States. He can probably refuse an ambassador who is objectionable to him personally or otherwise. The accrediting of envoys to foreign countries and the request for the withdrawal of unwelcome foreign ambassadors is in practice a matter for the Cabinet, acting usually on the advice of the Foreign Secretary.

The right to receive foreign ambassadors is more important than it at first sight appears, as no ambassador or other superior diplomatic agent or any member of his train or any member of his family is liable to civil process. Probably also he is not liable to criminal process, though Oliver Cromwell is reported to have sanctioned the execution of an ambassador found guilty of murder. But modern practice is in favour of the complete exterritoriality of diplomatic agents.

In Queen Anne's reign the ambassador of Peter the Great was arrested for debt. He gave bail in the action and communicated with the Russian Court, and Peter demanded the instant execution of all parties concerned. This modest request was not complied with by the Queen (*x*), but an Act was passed which provided that all writs and process whereby the person of any ambassador or his domestics may be arrested or his goods distrained or seized shall be void; that the persons prosecuting and their solicitors, and those who execute such process, shall suffer such penalties and corporal punishment as the Lord Chancellor or the Chief Justices or any two of them shall think fit; but that no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, is to be protected by the Act, nor is anyone to be punished for arresting an ambassador's servant unless the name of such servant be registered with the Secretary of State (Diplomatic Privileges Act, 1708).

As to the extent of this privilege some doubt exists; and it may not include detention for *mala in se*.

It has been held that where an appearance to an action has been entered by a person diplomatically privileged, such action cannot be set aside, provided that no interference with liberty or personal

(*x*) *Gyllenborg's Case* (1707), De Marten's Causes Célèbres, i, 97.

property has taken place (*Taylor* v. *Best* (1854) (*y*)). Since *Taylor* v. *Best* was decided two cases have come before the Courts which possibly affect, in whole or in part, its validity. In *Re Bolivia Exploration Syndicate* (1914) (*z*), it was held by Astbury, J., that both under the common law and the Diplomatic Privileges Act, 1708, a foreign ambassador cannot be sued in an English Court, and that service of process on him is void. "This privilege can be waived, if at all, only with the full knowledge of the party's rights in the case of the ambassador himself, and also with the consent of his Sovereign; or if the diplomatic official is of inferior grade, with the consent of his superior." In *Re Suarez* (1918) (*a*) it was held by Swinfen Eady and Warrington, L.JJ., that an ambassador can, with his Sovereign's consent, waive his privilege.

It is contrary to law to charge ambassadors with customs duty, and they cannot be rated in respect of premises they occupy (*Parkinson* v. *Potter* (1886) (*b*)). This rule applies even to a British subject who is accredited to Great Britain by a foreign Government as a member of its embassy (*McCartney* v. *Garbutt* (1890) (*c*)).

A servant residing outside the embassy is not within the privilege where the comfort of the ambassador does not depend on such servant (*Novello* v *Toogood* (1823) (*d*)), and a servant who has no actual duties can be proceeded against, *e g*, a chaplain who does not perform divine service (*Seacombe* v. *Bowmley* (1818) (*e*)) An English servant is within the privilege (*Novello* v. *Toogood*, *supra*). All the officers of the embassy (*e g.*, attachés) enjoy the same immunities as the ambassador (*Parkinson* v *Potter*, *supra*)

Right to take the Subject's Property in an Emergency.—The common law rights of the Crown to take the subject's property were, and in theory at any rate still remain, extensive.

The Crown in time of war can enter upon and use the lands of the subject to repel invasion, but cannot dispossess the subject "Since Magna Charta the subject's estate in lands or buildings has been protected against the prerogative of the Crown" (*per* Lord Parmoor

(*y*) 14 C B 487
(*z*) [1914] 1 Ch. 134, and see *Dickinson* v. *Del Solar*, [1930] 1 K B 376.
(*a*) *In re Suarez*, *Suarez* v. *Suarez*, [1918] 1 Ch. 176.
(*b*) 16 Q. B D 152
(*c*) 24 Q. B. D. 368.
(*d*) 1 B. & C. 562.
(*e*) 1 Wils. 20.

in *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.* (1920) (*f*)). The land must be required for strictly military, and not administrative, purposes.

In the *Saltpetre Case* (1606) (*g*), the Court held that "when enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining the same coast to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it, and therefore by the common law every man [including, of course, the King and those under him] may come on my land for the defence of the realm . . and in this case the rule is true, *princeps et res publica ex justa causa possunt rem meam auferre.* But after the danger is over, the trenches and bulwarks ought to be removed so that the owner shall not have prejudice to his inheritance." In Dyer (*h*) there is the following *dictum*, "Yet we will agree that in some cases a man may justify the commission of a tort, and that is so, when it sounds for the public good, as in time of war making fortifications on another's land without licence" (*i*)

St John, the defender of Hampden in the *Ship Money Case* (1637) (*k*)), made the following admission: "In times of war not only His Majesty, but every man that hath power in his hands, may take the goods of any within the realm . . . and do all other things that conduce to the safety of the kingdom." In the same case, Buller, J., said: "I do agree that in time of war when there is an enemy in the field the King may take goods from the subject, where there is such a danger as tends to the overthrow of the kingdom"

Dicey, speaking generally of political emergencies, states that, by a constitutional convention, in times of danger it may be the duty of Ministers to break the law, trusting to Parliament for an Act of Indemnity (*l*) What Dicey calls convention Darling, J., appears in one case to treat as law: "*Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it" (*per* Darling, J., in *Shipton, Anderson & Co.* v. *Harrison Brothers* (1915) (*m*)). The unbiased

(*f*) [1920] A. C. 508
(*g*) 12 Co. Rep. 12.
(*h*) Dyer, 36 b.
(*i*) Privileges which the Crown shares with its subjects are not prerogatives, but those authorities are inserted for convenience.
(*k*) *R* v *Hampden*, 3 St. Tr. 825.
(*l*) Dicey, *Law of the Constitution* (9th ed.), pp. 412—413.
(*m*) [1915] 3 K. B. 684

dictum of Darling, J., appears to tally with the so-called corrupt judgment in *Bates's Case* (1606): "The power of the King is both ordinary and absolute. Ordinary power, which exists for the purpose of civil justice, is unalterable save by consent of Parliament. Absolute power, existing for the nation's safety, varies with the royal wisdom" (*n*).

In the *Petition of Right Case* (1915) (*o*), where land was taken from the suppliant for the purpose of an aerodrome, the Court of Appeal, upholding the judgment of Avory, J., held that naval and military authorities acting under orders from the Crown, both under the prerogative and the Defence of the Realm Consolidation Act, 1914, and regulations made thereunder, might enter into possession of and occupy the lands of the suppliant to defend the realm without paying compensation, and that the prerogative was not limited to a case of actual invasion rendering immediate occupation necessary.

This decision was in effect overruled by the important case of *Att.-Gen.* v. *De Keyser's Royal Hotel, Ltd.* (1920) (*p*), where the facts were as follows: The company at the beginning of the war got into difficulties and Mr Whinney was appointed receiver and manager by the debenture-holders. In the spring of 1916 there were negotiations between the War Office and Mr. Whinney for the hotel to be taken over by the Government at a rental; but the parties failed to come to terms, and in the end the Crown took possession of the hotel under the Defence of the Realm Act, 1914. Mr. Whinney protested against the entry of the Government upon the premises. A petition was presented claiming a rent for use and occupation of the hotel, and was, at the hearing, dismissed by Peterson, J., who followed the *Petition of Right Case*. On appeal, a majority of the Court of Appeal ruled that the respondent was entitled to a fair rent for use and occupation under the Defence Act, 1842. The House of Lords, however, held that the suppliants were not entitled to a rent for the use of the hotel as there was no consensus on which to found an implied contract; that the regulations under the Defence of the Realm Act, 1914, gave no power generally to take the land, but merely authorised the taking under the Defence Act, 1842; that the Crown could not take under

(*n*) 2 St. Tr. 371.
(*o*) *In re Petition of Right*, [1915] 3 K. B. 649; compromised on appeal (1916), 32 T. L. R. 699
(*p*) [1920] A. C 508.

its prerogative: but suppliants could, if they chose, claim compensation under the Defence Act, 1842. Their lordships were also of opinion that the Crown could not take the land under the prerogative or by any statute for administrative purposes.

At the hearing a suggestion was made that the alleged prerogative on which the appellant (the Attorney-General) relied had merged in the statute. Perhaps it would be more accurate to say that the prerogative is in these circumstances restricted within the limits defined in the statute. As Lord Atkinson put it: "It was suggested that when a statute was passed empowering the Crown to do a certain thing, which it might theretofore have done by virtue of its prerogative, the prerogative was merged in the statute. I do not think that the word 'merged' was happily chosen. I would prefer to say that when such a statute, expressing the will of the King and the estates of the realm, is passed, it abridges the royal prerogative *while it is in force* to this extent, that the Crown can only do that particular thing under and in accordance with the statutory provisions and that its prerogative to do that thing is in abeyance" (*q*). Lord Sumner said: "The Legislature, by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it" (at least so long as the statute operates). He goes on to say: ". . . I think that the Executive did not take possession under the prerogative, for the Defence Acts had superseded it; that the Act of 1914 and Regulation 2 did not in themselves enable possession to be taken; that the taking of possession must be referred to the powers given by the Defence Acts, and that, in consequence, the suppliants are entitled to be compensated in accordance therewith" (*r*) Lord Dunedin alluded to the alleged powers of the King as defender of the realm as follows: "The most that could be taken from them" [opinions of Judges in the *Saltpetre Case*, etc.] "was that the King, as *suprema potestas* endowed with the right and duty of protecting the realm, was for the purpose of the defence of the realm entitled to take any man's property, and that the texts gave no certain sound whether this right to take was accompanied by an obligation to make compensation to him whose property was taken." He also stated further on that if the whole

(*q*) *Ibid.*, at pp. 539—540. (*r*) *Ibid.*, at pp. 561—562.

ground of something which could be done by the prerogative was covered by a statute it was the statute that ruled. Their lordships laid stress on what Sir Swinfen Eady, M.R., said at the hearing in the Court of Appeal: "Those powers which the Executive exercises without parliamentary authority are comprised under the comprehensive term of prerogative. Where, however, Parliament has intervened, and has provided by statute for powers previously within the prerogative being exercised in a particular manner, then, subject to the limitations and provisos, they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could disregard them at its pleasure?"

Assuming that a statute appears only by implication to permit the Crown to seize the subject's property, the Courts will lean towards the protection of the subject unless the intent that the subject's property may be taken is sufficiently clear (*s*) In *Robinson & Co.* v. *The King* (1921) (*t*) the Food Controller, acting under a Regulation made by virtue of the Defence of the Realm Act, seized the subject's property, and the remedy provided was the assessment of compensation by a commission set up under the Act For some reason the Commissioners refused a hearing, and the Court held that the establishment of a tribunal to assess compensation did not preclude the suppliant from seeking the protection of the ordinary Courts if justice was refused by the Commissioners.

(*s*) *Central Board of Control* v. *Cannon Brewery*, [1919] A. C. 744, *per* Lord Atkinson, at p. 752

(*t*) [1921] 3 K. B. 183.

CHAPTER XV.

THE PRIVY COUNCIL.

I. THE COUNCIL AS AN INSTRUMENT OF GOVERNMENT.

(1) The History of the Privy Council.—*Origins in the Curia Regis.*—It may be supposed that the King, like any other great administrator, has always sought the advice of counsellors. The King's counsellors would be his household and clerical staff, the holders of high offices in Church and State, and the territorial magnates. In early times the King was in a real sense the ruler, and it would depend very much on his own ability and personality whom he chose as advisers, how often he consulted them, and whether he would follow their advice. The Norman Kings in their *Curia Regis*—which was derived partly from the Anglo-Saxon witenagemot or assembly of great men, and partly from the *Curia Ducis* or feudal council of the Dukes of Normandy (*a*)—exercised supreme legislative, executive and judicial powers, subject to general feudal customs which the strength of their barons forced them to observe. From the *Curia Regis* there developed in course of time the most important institutions of English central government, namely, the Exchequer and the Treasury, the Courts of Common Law and Chancery, the House of Lords (*i.e.*, the King's Council in Parliament), the Privy Council, and finally, the Cabinet. It is not possible to fix definite dates for these earlier developments, but we may say that the Exchequer and the Treasury acquired a separate existence in the twelfth century (*b*), the Common Law Courts in the thirteenth and fourteenth centuries (*c*), the Court of Chancery late in the fourteenth or early in the fifteenth century (*d*), and the House of Lords by the end of the fourteenth century (*e*).

Thirteenth to Fifteenth Centuries.—The Privy Council is generally regarded as a continuation of the *Curia Regis* after these other bodies

(*a*) Holdsworth, *History of English Law*, vol I (5th ed.), pp 32—33.
(*b*) *Post*, p. 214. (*c*) *Post*, Chapters XXIV and XXV.
(*d*) *Post*, Chapter XXVI
(*e*) *Ante*, Chapter VI. The House of Lords was not so called until Henry VII's reign.

had separated. "The Council," says Holdsworth (*f*), "is in the direct line of descent from the *Curia Regis* of the Norman and Angevin kings." But it has been suggested that it would be more precise to say that the *Curia Regis* ceased to exist, and that the Council which emerged in the thirteenth and fourteenth centuries "was something more than what was left over when the other separate 'departments' had appeared; as a distinct body it was something new" (*g*). It was for a time dependent on the King and independent of the barons, until the barons came to dominate it at the end of the fourteenth century (*h*). A distinction was sometimes drawn between the *Magnum Concilium* or meeting of the estates less formal than a Parliament, and summoned only on special occasions, and the Continual or Privy Council, which was always available for consultation and the conduct of affairs. During the Wars of the Roses, in the fifteenth century, the Council lost its influence, but was revived as a powerful instrument of government by the Tudors, to whom it was subservient

Work of the Mediæval Council.—As has been indicated, the King in Council exercised all three kinds of governmental powers. "The time of the Council was occupied," says Dicey (*i*), "with an infinite number of trivial cases. It had at one moment to settle questions of policy; at another to provide funds, by which the administration could be carried on; at another to review minute accounts, to communicate with aliens or merchants, or to interfere for the preservation of the King's peace." For a time there was a separate Council of Wales and the Marches and another Council of the North (*k*)

The Council under the Tudors.—The dearth of information about the administrative activities of the Council between the years 1460 and 1540 may be due to loss of records, but it is equally likely that it reflects the partial eclipse during this period of the Council as an executive body (*l*). The "Council at Court," however, was re-organised as a more or less separate entity from the Court of Star Chamber (*m*); and the modern Privy Council, says Baldwin (*n*), "is to be regarded not

(*f*) Holdsworth, *op. cit.*, p. 477.
(*g*) Williamson, *Studies in the Constitutional History of the Thirteenth and Fourteenth Centuries*, p 113
(*h*) Williamson, *op cit*, ch. 6
(*i*) *The Privy Council*, p. 50.
(*k*) See Holdsworth, *op. cit.*, pp 502—503, 507, 510—516.
(*l*) Baldwin, *The King's Council during the Middle Ages*, pp. 419—421.
(*m*) *Post*, p 187.
(*n*) Baldwin, *op cit.*, p. 450.

as a direct continuation of the mediæval council, but as the special development of a branch which during the middle ages had never advanced beyond a rudimentary stage." In Henry VIII's reign the distinction was first drawn between "ordinary councillors" and "privy councillors." The former comprised a large number of "men of lower rank, who were needed for their knowledge of law and abilities in administration": they were appointed and sworn of the Council, but not given the full rank of Privy Councillors The latter formed "a strong body of nobles, who were capable of filling the highest offices and of acting regularly as the King's advisers" (*o*), and as the Tudor period progressed the tendency was for Privy Councillors to be drawn from humbler ranks of society. The existence of Ordinary Councillors exhibits one of the steps by which originated the custom of appointing Privy Councillors who hold the title without performing the duties of the office, that is to say, who are not consulted on matters of general policy (*p*).

Coke's Description.—Coke, in his treatment of the Courts, deals with "The Councell Board or Table" after the High Court of Parliament, and says: "This is a most noble, honourable, and reverend assembly of the King and his privy councell in the King's court or palace; with this councell the King himself doth sit at pleasure. These councellors, like good centinels and watchmen, consult of and for the publique good, and the honour, defence, safety and profit of the realm . .; private causes, lest they should hinder the publique, they leave to the justices of the King's courts of justice, and meddle not with them: they are called *concilium regis privatum, concilium secretum, et continuum concilium regis*" (*q*).

The Committee System.—Committees composed of some only of the members of the Council were sometimes used by the Tudors for particular purposes or occasions, and temporary or permanent Committees were used frequently in the seventeenth century (*r*). For various reasons, committees of the whole Council came to be employed in the eighteenth century, and, indeed, most of the Council's work was then carried on in committee (*s*). Some of these committees

(*o*) *Ibid.*
(*p*) Dicey, *The Privy Council*, p. 84. (*q*) 4 Inst. 53.
(*r*) Turner, *The Privy Council, 1603—1784*, vol. II, pp. 179 *et seq.*
(*s*) *Ibid.*, pp. 367 *et seq.*

in their turn became, or transferred their administrative functions to, separate government departments such as the Board of Trade (*t*), the Board of Agriculture (*u*) and the Board of Education (*v*).

For practical purposes, the extinction of the Privy Council as an instrument of government came with the development in the eighteenth century of the Cabinet as the policy-making organ and advisory body of the Crown (*x*)

(2) The Privy Council at the Present Day.—The Composition of the Privy Council.—"The Lords and others of His Majesty's most Honourable Privy Council," now about three hundred in number, consist of persons who hold or have held high political or legal office—Peers, Church dignitaries and persons distinguished in their professions. They are appointed by letters patent, and include the Lord President of the Council (*y*), all Cabinet Ministers by convention (*z*), the two Archbishops by prescription, and customarily the leading Dominion statesmen, British Ambassadors, the Speaker of the House of Commons (*a*), the Lords of Appeal in Ordinary, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division, and the Lords Justices of Appeal.

A new member of the Privy Council must take the oath of allegiance and the special Privy Councillor's oath, which binds him to keep secret all matters committed and revealed to him or that are treated of secretly in Council (*b*). An affirmation may be made in lieu of oath (Oaths Act, 1888). Privy Councillors are addressed as "Right Honourable," and (if of no higher rank) take precedence next after Knights of the Garter who are commoners. A Privy Councillor must be a British subject. The Act of Settlement disqualified a person born outside the British dominions unless he was born of English (*sic*) parents, but it was held in *R.* v. *Speyer* (*c*) that the Naturalization Act, 1870, relieved naturalized aliens of this disability. Privy Councillors are by custom on the commission of the peace for every county in England (*d*).

(*t*) See *post*, p 225.
(*u*) See *post*, p 233.
(*v*) See *post*, p. 230.
(*x*) *Post*, Chapter XVI
(*y*) *Post*, p 218.
(*z*) *Post*, p. 197.
(*a*) *Ante*, p. 80.
(*b*) For the modern form of Privy Councillor's oath, see Anson, *Law and Custom of the Constitution*, vol II (4th ed.). Pt. I, p. 153
(*c*) [1916] 2 K. B. 858
(*d*) Cf. *Seven Bishops' Case* (1688), 12 St Tr. 183

The King may dismiss a Privy Councillor by erasing his name from the roll, though this is now rarely done. In 1921, however, Sir Edgar Speyer was removed by Order in Council for his anti-British attitude during the war of 1914—19. Otherwise, in earlier times a Privy Councillor retained his office during the King's life and, after the Succession to the Crown Act, 1707, for six months thereafter. Since the Demise of the Crown Act, 1901, membership of the Privy Council is apparently not affected by the demise of the Crown.

The Functions of the Privy Council.—The Privy Council became too unwieldy as an instrument of government. Owing to the development of the Cabinet and the Government Departments, described in the next three chapters, the Council lost most of its advisory and administrative functions and is to-day little more than an organ for giving formal effect to certain acts of the Crown done under prerogative or statutory powers

Proclamations and Orders in Council.—The most important acts done by His Majesty "by and with the advice of his Privy Council" take the form of Proclamations or Orders in Council, the former normally being authorised by the latter Proclamations are employed for such matters as proroguing, dissolving and summoning Parliament (*e*) and declaring war or peace—solemn occasions requiring the widest publicity. Orders in Council are used when changes in the law are made, and are mostly issued under statutory powers (*f*). The nature of an Order in Council may be legislative, *e.g.*, making laws for certain overseas territories; executive, *e.g.*, setting up a new Government department, issuing regulations for the armed forces, or declaring a state of emergency to exist or to be at an end; or judicial, *e.g.*, giving effect to a judgment of the Privy Council. The existence of a power to issue Orders in Council without the immediate control of Parliament may sometimes be very important; for example, it enabled the Crown (on the advice of the Government, of course) to abolish the purchase of army commissions in 1870 and to grant responsible government to the Transvaal in 1906, both being occasions on which the opposition of the House of Lords would have made it difficult to pass an Act of Parliament (*g*).

(*e*) For a specimen, see Anson, *op cit.*, vol. I (5th ed., Gwyer), pp. 55—56.
(*f*) For the form, see Anson, *op. cit.*, vol. II (4th ed., Keith), Pt. I, p. 62.
(*g*) See Keith, *The British Cabinet System, 1830—1938*, p. 206.

Miscellaneous Functions.—A Privy Council is also summoned for certain special occasions, such as the acceptance of office by newly appointed Ministers, the annual selection of sheriffs (*h*), and the payment of homage by newly elected bishops for the temporalities of their sees.

Meetings of the Privy Council.—Privy Councillors are summoned to attend at Buckingham Palace, or wherever else the King may be. Only those who are summoned attend, and the quorum is three. Usually four are summoned, being Ministers concerned with the business in hand (*i*). The King presides and indicates his assent (*k*) to the various measures, which are then authenticated by the signature of the Clerk to the Council (*l*). The Clerk also records the names of the Councillors present, who are responsible for what is transacted.

Committees of the Council.—Any meeting of Councillors at which the King, or perhaps a royal deputy, is not present can only be a Committee (*m*). Apart from the Judicial Committee, which is discussed later in this chapter, there are still a few standing Committees of the Council with advisory functions relating, for example, to the Universities of Oxford and Cambridge and Scottish Universities, constitutional issues affecting the Channel Islands, and the grant of charters to municipal corporations (*n*)

II. THE JUDICIAL FUNCTIONS OF THE PRIVY COUNCIL.

(1) **Historical Introduction.**—*The Middle Ages.*—Even after the separation of the Courts of Common Law and the Court of Chancery, the King's Council retained some jurisdiction (i) in cases which in some way concerned the State, and (ii) in private cases where the ordinary Courts could not provide a remedy (*o*). This jurisdiction, especially the latter element,-represented the residue of justice which always lay with the King (*p*). In the early middle ages the Council

(*h*) For sheriffs, see *post*, pp. 240 and 388
(*i*) For the Accession Council, see *ante*, p 143
(*k*) A nod is apparently sufficient (*l*) *Post*, p. 218.
(*m*) This idea dates from the middle of the eighteenth century, see *post*, p. 191
(*n*) See *post*, p. 246
(*o*) Holdsworth, *op. cit.*, p. 504.
(*p*) Potter, *Historical Introduction to English Law* (2nd ed.), pp. 123—125.

was not a Court of record; it had no seal, and indeed it was not called a "court" at all (*q*).

The Tudor Period.—In the Tudor period most of the Council's jurisdiction relating to State offences and cases in which great men were involved was exercised by the Court of Star Chamber. Although the latter became more or less a separate Court, whose existence was recognised and whose powers were extended by the Star Chamber Act, 1487, it was strictly the Council sitting for certain judicial purposes, as is shown by its full title of "the Lords of the Council sitting in the Star Chamber" In this period the Court of High Commission was set up to deal with important ecclesiastical causes (*r*), and the Court of Requests as a "minor Court of equity" to hear the suits of poor persons (*s*).

Parliament and the Stuarts.—It was part of the struggle between Parliament and the King in the early part of the seventeenth century that these Courts of an "arbitrary" jurisdiction should be attacked as being closely associated with the royal prerogative. The Long Parliament, in the same year in which it abolished the Court of High Commission, also passed a statute commonly known as the Act for the Abolition of the Star Chamber, 1641. All jurisdiction of the Star Chamber was "clearly and absolutely dissolved, taken away, and determined." Certain other prerogative jurisdictions, such as those of the Councils of Wales and the Marches and of the North, were also expressly abolished The Act further declared and enacted "that neither His Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands, tenements, hereditaments, goods, or chattels of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." Although the Court of Requests was not mentioned, it ceased to function almost immediately afterwards.

The Early Nineteenth Century—The ancient judicial powers of the Privy Council survived only in the form of an appellate jurisdiction

(*q*) Leadam and Baldwin, Introduction to *Select Cases before the King's Council* (Selden Society Publications).
(*r*) Holdsworth, *op. cit.*, pp. 605 *et seq.* (*s*) *Ibid*, pp 412 *et seq.*

from the King's overseas dominions, namely, the Channel Islands, the Isle of Man, the Colonies (or "foreign plantations," as they were at first called) (*t*), and later India (*u*). In the eighteenth century the judicial committees formed for this purpose acquired many of the characteristics of Courts; they usually sat in public, and reports began to be published in 1829.

Appeals from the Ecclesiatical Courts, the Court of Admiralty and the Vice-Admiralty Courts of the Colonies were given to the Privy Council by statute in 1832. This statutory extension of the Privy Council's jurisdiction necessitated a re-organisation of its constitution.

(2) The Judicial Committee.—Composition.—The Judicial Committee Act, 1833, passed "for the better administration of justice in His Majesty's Privy Council," constituted a Judicial Committee which, as a result of various later statutes, is now composed of: (1) the President of the Council (who does not sit), the Lord Chancellor, and Privy Councillors who hold or have held certain high judicial offices; (2) certain Judges of the superior Courts of India (two paid) and of the Dominions who are Privy Councillors, and (3) the Lords of Appeal in Ordinary appointed under the Appellate Jurisdiction Acts (*x*), these last replacing the four paid members for which provision was made in the Judicial Committee Act, 1871. The quorum is three.

It will be seen that the composition of the Judicial Committee is wider than that of the House of Lords sitting as a final court of appeal. It is the general practice for Indian Judges to sit in hearing appeals from India, and Dominion Judges may be invited to sit in hearing appeals from their Dominion. The Judicial Committee often sits in two Divisions, one of which hears Indian appeals.

Every archbishop or bishop being a Privy Councillor was made a member of the Judicial Committee by the Act of 1833; but since the Appellate Jurisdiction Act, 1876, they merely serve as assessors in certain ecclesiastical cases, for example, appeals under the Public Worship Regulation Act, 1874, and the Clergy Discipline Act, 1892 (*y*).

English, Scottish and Irish barristers, and also certain Indian, Dominion and Colonial practitioners, have the right of audience before

(*t*) *Fryer* v *Bernard* (1724), 2 P W. 262.

(*u*) Ireland was a separate kingdom of the English Crown; appeals from Irish Courts lay at various times to the English or Irish House of Lords, and were transferred to the United Kingdom House of Lords by the Act of Union, 1800

(*x*) *Ante*, p. 66 (*y*) *Post*, p. 325.

the Committee. Privy Council agents consist of English solicitors, Scottish writers to the signet, and Irish solicitors, provided that their names are on the Privy Council roll.

Jurisdiction.—The Judicial Committee was given the jurisdiction of the Privy Council set out above, namely, appeals from the Courts of the Channel Islands, the Isle of Man, the Colonies and British India, and from the Ecclesiastical Courts and the Admiralty Court, to which were added appeals from Prize Courts.

Appeals in probate, divorce and admiralty cases (other than prize) have since been transferred to the House of Lords (*z*). Several of the former Colonies have now become self-governing Dominions, and in some cases the right of appeal from Dominion Courts to the Judicial Committee of the Privy Council has been abolished (*a*).

Procedure.—Appeals are commenced by petition to the Crown. Only one "judgment" is given by the Board in each case. This is in theory a report made to His Majesty of the reasons why judgment should be given in favour of a particular party, but the Committee is regarded for practical purposes as a Court, and the King is bound by convention to give effect to its advice (*b*).

The Judicial Committee is not bound by its previous decisions where a decision was given *ex parte* (*c*) or in certain ecclesiastical cases (*d*), and, perhaps, it is not strictly bound in other cases It would seem that where a decision of the House of Lords conflicts with a decision of the Judicial Committee, a Court which is subject to the appellate jurisdiction of the Judicial Committee would be bound to follow the decision of the latter (*e*).

Special Reference.—While most of the Judicial Committee's work consists of hearing appeals arising in the ordinary course of litigation, section 4 of the Judicial Committee Act, 1833, provides that the King may refer to the Committee any matter he may think fit. Thus in 1927 the Committee was asked to give an opinion on the Labrador

(*z*) *Post*, Chapter XXVI.
(*a*) *Post*, p. 607 For the right of appeal generally, see *post*, Chapter XXXVIII.
(*b*) *Per* Sankey, L.C., in *British Coal Corporation* v *The King*, [1935] A C. 500
(*c*) *Tooth* v *Power*, [1891] A. C. at p 292.
(*d*) *Ridsdale* v. *Clifton* (1887), 2 P. D at pp. 306—307
(*e*) Cowen, *The Binding Effect of English Decisions upon Australian Courts* (1944), 60 Law Quarterly Review, 378, at p 382.

boundary dispute between Canada and Newfoundland (*f*), and in 1924 on the interpretation of the provisions of the Anglo-Irish Treaty of 1921 relating to the settlement of the boundary between Northern Ireland and the Irish Free State (*g*). It has been called upon to advise on the elements of the international crime of piracy for guidance in future cases, following the erroneous acquittal of certain Chinese by the Supreme Court of Hong Kong, there being no appeal from an acquittal (*h*). The opinion of the Committee may be required on the validity of legislation of the Northern Ireland Parliament under the Government of Ireland Act, 1920. Most of the Committee's opinions have been given on questions arising in the overseas Empire.

(*f*) (1927), 43 T. L. R. 289
(*g*) (1924), Cmd 2214
(*h*) *Re Piracy Jure Gentium*, [1934] A. C. 584.

CHAPTER XVI.

THE CABINET.

I THE DEVELOPMENT OF THE CABINET.

Origins in the Privy Council.—Some elements in the early history, or pre-history, of the Cabinet have been mentioned in the preceding chapter: in particular, the distinction discernible in Henry VIII's reign between "Ordinary" and "Privy" Councillors, the increasing delegation in the seventeenth century of the preliminary consideration of State business to Committees formed of limited numbers of Councillors, and the displacement of most of these Committees in the eighteenth century by Committees of the whole Council, though not by any means all members attended or were expected to do so. That process concerned rather what we should now call administration, and was superseded by the creation of separate Government departments. The same period witnessed the growth of the practice of withdrawing the discussion and direction of government policy into the hands of a few of the King's confidential advisers. The history of this subject is very obscure, owing to the secrecy of the proceedings and the lack of official and connected records, and the fact that during most of this period the practice was unpopular with Parliament and in the country, and was not openly avowed. The historian's difficulty is further increased by the confusing terminology employed by seventeenth and eighteenth century writers

The better opinion probably is that the body which we now know as the Cabinet should never at any stage in its history be actually identified with a Committee of the Privy Council, but the question whether it had its origin in a Committee seems to be largely a matter of words. A distinguished American scholar has suggested that the origin of the Cabinet is to be found in the Committee for Foreign Affairs (*a*). It is true that from the middle of the eighteenth century, "Committee" means a committee of the Council at which the King is not present, as distinct from a "Cabinet" or meeting of the King's principal advisers at which the King might or might not be present;

(*a*) Turner, *The Cabinet Council, 1622—1784*, vol. I, chh. 9 and 12.

but he points out that in the seventeenth century the use of the word "committee" did not imply that the sovereign was not present (*b*). While the Committee for Foreign Affairs was sometimes called a "Cabinet Council," however, it is not certain that the two were in all respects identical, though the theory that the Cabinet was a Committee may be supported by the rule that Cabinet Ministers should be Privy Councillors.

James I and Charles I, like Elizabeth before them, conducted foreign affairs in the main themselves through their Secretaries of State and with the help of a few chosen advisers, regarding the whole Council as too large for diplomatic purposes. The work of the Committee for Foreign Affairs under the first two Stuarts was not confined to diplomacy, for it concerned itself also with other general and more or less related matters, such as the Spanish marriage. Valued by the King for the secrecy and speed with which it enabled decisions to be made and carried out, it gained considerable power and survived most of the other committees of limited membership. Although, after the impeachments of Clarendon and Danby, Charles II had to promise to discontinue the use of a Committee for Foreign Affairs, he appointed in 1679 a Committee of Intelligence which was virtually the same thing under another name. Later, its members were called "the Lords of the Committee" or simply "the Committee."

No doubt this use of Committees helped to crystallise the form which the Cabinet was to take. The process was further assisted by the appointment of regency councils, known as "the Lords Justices," during the frequent absence abroad of William III, George I and George II. In this case the absence of the King made it necessary to commit resolutions to writing, and even to frame rules of procedure (*c*).

Names of the Cabinet.—The names which were given to Charles II's groups of confidential advisers were intended as terms of reproach. *Cabinet* was a French word then in vogue for a private room set apart for interviews, and the "Cabinet Council" or "Cabinet" was so called because it met literally or metaphorically in the King's cabinet or closet (*d*). Other names, which fairly soon died out, were "Junto," from the Spanish *junta* (meeting, council, committee); and "Cabal,"

(*b*) Turner, *The Cabinet Council, 1622—1784*, vol. I, ch. 14.
(*c*) Turner, *op. cit*, vol. II, ch. 21. (*d*) Turner, *op cit.*, vol. I, pp. 218—246.

a French word for a secret meeting of advisers. It was merely a coincidence that the latter name comprised the initials of Clifford, Arlington, Buckingham, Ashley and Lauderdale, who formed the inner Council in 1671 (*d*). Perhaps the modern "clique" suggests the sense in which these words were used. In the eighteenth century the members of the Cabinet came to call themselves "His Majesty's servants" or "His Majesty's confidential servants"

Abstention of the Sovereign.—Charles II and William and Mary were sometimes absent from meetings of the Committee for Foreign Affairs and the "Committee of the Council," which have been identified with the inchoate Cabinet (*e*). George I attended Cabinet meetings at the beginning of his reign, but very seldom after 1717. The main reasons for his abstention were that he was little interested in English affairs, ignorant of the English language and institutions, and unable to influence policy owing to his dependence for support on the Whig leaders. Both George II and George III seem occasionally to have been present for some special reason at Cabinet meetings. The absence of the Sovereign marks a definite epoch in the development of the power of the principal Ministers, though the decline of the royal power was gradual. Kings in the eighteenth century still exercised influence from their closet, and were "sometimes near, if not present" (*f*).

Size of Cabinets.—A further process of division took place in the reign of George II, when a distinction was drawn between the "inner," "efficient," or "effective" Cabinet and the "outer" or "nominal" Cabinet. The former, also known as the "conciliabulum," had special access to important State papers, while the latter disclaimed responsibility for acts of the Ministry on which they had not been consulted. Lord Mansfield, Chief Justice of the King's Bench, made a speech in the House of Lords in 1775 strongly criticising the Government's tax policy in relation to the American colonies in 1767, explaining that he was only a "nominal" member then. The line of demarcation between the efficient and the nominal Cabinet was not clear cut, and they should not be regarded as separate bodies (*g*). This phase is interesting as the inner Cabinet is in some respects

(*d*) Turner, *op. cit.*, vol. I, pp. 218—246. (*e*) Turner, *op. cit*, vol. I, pp 423—427.
(*f*) Turner, *op. cit.*, vol. II, pp. 92—100. (*g*) *Ibid*, ch. 26

similar to the War Cabinets of the present century, though the Ministers "of Cabinet rank" excluded from the latter are not Cabinet Ministers (*h*).

The size of the Cabinet had increased from five to about twenty in George III's reign, because there were more administrative offices, and the First Lord of the Treasury and the Secretaries of State were too important to omit, while functionaries like the Archbishop of Canterbury were still retained. Indeed, the Cabinet had become considerably larger than Elizabeth's Privy Council, which numbered only twelve. George III later reduced the size of his Cabinet somewhat, and the distinction between the outer and inner Cabinet disappeared in about 1783.

The Opposition of Parliament.—The practice of consulting confidentially a small group of Ministers, which had been intermittent in the reign of Charles I, was habitual in the reign of Charles II, and Parliament objected strongly to the secrecy of the deliberations, for it was difficult to know who were the responsible Ministers and how to enforce that responsibility.

In order to put a stop to the practice, and to keep the House of Commons from contamination by the King's influence, Parliament inserted two clauses in the Act of Settlement, 1701, to the effect that (1) matters theretofore discussed in the Privy Council must be dealt with there and not elsewhere, and all resolutions must be signed by the members present, and (2) no person holding a place of profit under the Crown was to sit in the House of Commons The operation of these provisions was postponed till the death of Queen Anne, by which time they had been repealed, though the second emerged in a modified form in the Succession to the Crown Act, 1707 (*i*)

The Growth of Political Ideas relating to the Cabinet.—The party system and the principle of the dependence of the government on the confidence of Parliament, and especially of the House of Commons, were developing in the eighteenth century. The Cabinet often had political unity: thus the Ministry formed in 1705 was Whig, and that formed in 1710 was Tory. Walpole, during his long period of office from 1721 to 1742, was skilful both in holding the favour of the King, partly through his friendship with Queen Caroline, and also

(*h*) *Post*, p. 202. (*i*) *Ante*, p. 73.

in controlling the Commons, largely through bribery. Political ideas grow gradually. In 1761, when Pitt's proposal to declare war on Spain was turned down, the Lord President (Earl of Granville) said: "When he talks of being responsible to the people, he talks the language of the house of commons, and forgets that at this board he is only responsible to the King" (*k*)

The Choice of Ministers.—At first the King chose as members of his Cabinet persons whom he liked and could trust. Eventually he had imposed upon him such advisers as Parliament, or the chief Ministers, or the Prime Minister, wanted. There was an intermediate stage when the King no longer chose but could obstruct; when he was cajoled into accepting Ministers whom he did not like but to whom he did not profoundly object. This stage is illustrated by the long opposition of George II to the elder Pitt.

Decline of the King's Influence —It was still possible for George III to hold a personal ascendancy during a great part of his reign by trading on the lack of political unity among his Ministers, manipulating the two Houses, and making use of "honorary" members of the Cabinet. The decline of the King's influence after the fall of the North Ministry in 1782 was accentuated by "the mental derangement which afflicted George III, the contemptible personal character of George IV, and the negligible qualities of William IV" (*l*).

The Nineteenth Century.—Pitt (the younger) asserted the necessity of having the King's confidence, and resigned in 1801 owing to the King's opposition to his plan for Catholic emancipation. In 1803, in reply to a suggestion that he and Addington should be Secretaries of State with no Prime Minister, he insisted that it was essential that there should be "an avowed and real minister, possessing the chief weight in the Council and the principal place in the confidence of the King" (*m*). The passing of the Catholic Emancipation Act, 1829, and the appointment of Grey in 1830 went against the King's personal wishes, but these and others were merely isolated events indicating a tendency.

The turning-point came with the Reform Act, 1832, which soon had the effect of showing that henceforth a Ministry would depend

(*k*) Quoted, Turner, *op. cit.*, vol. II, pp. 38—39.
(*l*) Keir, *Constitutional History of Modern Britain* (2nd ed.), pp. 381—382.
(*m*) Quoted, Keith, *The British Cabinet System, 1830—1938*, p 19.

on the support of a majority in the House of Commons (*n*), and ultimately on the electorate (*o*). Peel accepted responsibility for the King's action in forcing Melbourne to resign in 1834. The King granted Peel a dissolution, but he was returned with a minority, and remained out of office until 1841. In the latter year the Whig Ministry was defeated in the Commons on the budget, but preferred to retain office. Peel moved a resolution that their continuance in office in such circumstances was at variance with the spirit of the Constitution; this was carried by one vote, and a dissolution followed.

The choice of Prime Minister by the Sovereign has come to be automatic in most cases owing to the party system. Thus in 1855 Queen Victoria, who preferred Lord Derby, was constrained to appoint Lord Palmerston, while in 1880 she appointed Gladstone though she would have preferred Lord Hartington.

II. THE CABINET AT THE PRESENT DAY.

Composition of the Cabinet.—The Cabinet consists of a group of Ministers—most of them heads of great Departments of State—who are agreed to pursue a common policy under a common chief, the Prime Minister. Not all heads of great Departments, however, are in the Cabinet, nor are all members of the Cabinet heads of great departments. The Ministers of the Crown Act, 1937, in addition to allowing a salary of £10,000 a year to the Prime Minister, provides that the holders of certain offices of State, which are assumed to carry Cabinet rank, shall receive a salary of £5,000 a year each, namely, the Chancellor of the Exchequer, the eight Secretaries of State, the First Lord of the Admiralty, the President of the Board of Trade, the Minister of Agriculture and Fisheries, the President of the Board (now Minister) of Education, the Minister of Health, the Minister of Labour, the Minister of Transport, and the Minister for the Co-ordination of Defence (*p*). The Lord President of the Council, the Lord Privy Seal, the Postmaster-General and the First Commissioner of Works are to receive £3,000 a year, and the Minister of Pensions £2,000 a year, except that they will receive £5,000 a year if they are in the

(*n*) Keir, *op. cit.*, p. 405.

(*o*) See Emden, *The People and the Constitution*, pp. 149—167.

(*p*) The office of Minister for the Co-ordination of Defence was instituted in 1936 but fell into abeyance in 1940 as being redundant in war-time.

Cabinet—the first mention of the Cabinet in a statute. The Lord Chancellor receives a salary of £10,000, and is always in the Cabinet. The Chancellor of the Duchy of Lancaster is usually, and the Attorney-General sometimes, included. Heads of departments who are not in the Cabinet, and Under-Secretaries of all the departments, are nevertheless members of "the Government."

All Cabinet Ministers are made Privy Councillors, if they are not such already. This binds them to a special oath of secrecy (*q*).

Ministerial Responsibility.—This expression, as Dicey has pointed out, means two different things (*r*). First, it means that as a matter of law some Minister is responsible for every executive act of the Crown. Orders in Council, royal warrants, proclamations, etc., whereby the royal will is expressed must be countersigned by one or more Ministers, who thereupon become answerable in the Courts of law for any illegality to which these instruments may seek to give effect. Ministerial responsibility in this sense is a corollary of the maxim "The King can do no wrong": it implies that for every exercise of the prerogative the King is not, but some Minister is, answerable.

Secondly and more frequently the phrase is used to denote the collective responsibility of the Cabinet to Parliament for all political action of Ministers and for the policy of the Government as a whole. Here we are in the sphere not of law but of convention, and convention prescribes that the Cabinet must in all circumstances agree. If disagreement manifests itself on any except insignificant points of policy, either the Cabinet as a whole, or the dissentient Ministers, must resign. In no case may a Minister disavow, either expressly or by implication, the policy of his colleagues so long as he remains their colleague. Such at least was the accepted doctrine until 1932. The National Government in power in that year introduced fiscal protection, a measure to which a Liberal group of the Government strongly objected. In this instance the national "crisis" was thought to justify a departure from the rule that the Cabinet must agree or dissentient Ministers resign; and these last continued for some time members of the Government though repudiating its tariff policy. It is too early to predict whether this anomalous procedure will be treated as a precedent (*s*).

(*q*) The form of oath is given by Anson, *op. cit.*, vol. II (4th ed.), Pt. 1, p. 153.
(*r*) Dicey, *Law of the Constitution* (9th ed.), p. 325. (*s*) *Ante*, p. 40.

In this sense, then, the Cabinet is "collectively" responsible. When it is said to be responsible to Parliament, what is meant is the convention that when their policy—which, as we have seen, must be joint and unanimous—is condemned by the House of Commons, they must resign. Such condemnation may be expressed in two ways: either a measure of substantial importance, introduced or adopted by the Government, may be rejected, or a vote of censure may be carried against the Government. Resignation in the latter case is now invariable. When a Government Bill is defeated, the modern tendency is to consider, before resigning, first whether the Bill is important or trivial, and secondly whether the defeat registers a considered judgment of the Commons or is a mere accident. Where the measure is insignificant or, though important, is defeated on a "snap" division, modern practice has to some extent relaxed the rigour of the old rule which required resignation to follow upon the defeat of any Government measure whatever.

The Functions of the Cabinet.—The main functions of the Cabinet have been authoritatively summarised in the following way: "(a) the final determination of the policy to be submitted to Parliament; (b) the supreme control of the national executive in accordance with the policy prescribed by Parliament; and (c) the continuous co-ordination and delimitation of the interests of the several Departments of State" (*t*). The Cabinet exercises under Parliament supreme control over all the Departments of State; it is the body which co-ordinates the work on the one hand of the Executive and the Legislature and on the other hand of the organs of the Executive among themselves.

All the most important matters of policy are discussed at Cabinet meetings, though for reasons of secrecy the Budget speech is only disclosed orally to the Cabinet a few days before it is to be made in the Commons, and for diplomatic reasons it is not always possible to consult the Cabinet before taking action in foreign affairs. Among the matters which are not usually discussed by the Cabinet are the exercise of the prerogative of mercy by the Home Secretary, the personnel of the Cabinet itself, the making of appointments and the conferment of honours, which matters are within the "patronage" of the Prime Minister (*u*). The dissolution of Parliament was always

(*t*) *Report of the Machinery of Government Committee* (1918), Cmd. 9230, p. 5.
(*u*) Jennings, *Cabinet Government*, pp. 179—184.

a matter for Cabinet decision from 1841 to 1918 or 1923, but during the last twenty years the Prime Minister seems to have kept the decision in his own hands (*x*).

Cabinet Committees.—The Prime Minister and the Chancellor of the Exchequer have to concern themselves with all branches of government, but the work involved in present-day administration is so great that other members of the Cabinet tend to specialise in matters more directly related to their own departments. Advisory Committees are set up to study special services and particular problems. This is an interesting development, for the Cabinet itself originated in a sense as a committee of the Privy Council. Some of these committees consist entirely of Cabinet Ministers, others include outside experts as well: some are standing committees while others are set up *ad hoc*. The chief standing committee, which was set up in 1918, is the Home Affairs Committee, which considers the technical aspects of all government Bills, assisted by Parliamentary Counsel to the Treasury, and recommends at the beginning of the session what government business shall be taken during the session and when (*y*).

Relations between the Cabinet, the Prime Minister and the Crown.—The Sovereign acts exclusively on the advice of the Cabinet, tendered as a rule through the Prime Minister By a convention of the Constitution, not only must the King act on that advice, but he may accept no other

The Cabinet on their side are bound to keep the Sovereign informed of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet, which may not be disclosed to anyone else.

This duty, again, is generally performed through the instrumentality of the Prime Minister, who until quite recently had to write, after each Cabinet meeting, a letter to the King recording the topics it had considered and the decisions it had taken. Until the War of 1914—18 this was the only written record of the Cabinet's deliberations. During that War a Secretary was appointed, agenda were circulated, and the decisions recorded in formal minutes (*z*). On all important matters of State the Prime Minister has the exclusive right to approach the

(*x*) Jennings, *op. cit.*, pp. 311—313; cf. Keith, *op. cit.*, p. 398.
(*y*) Jennings, *op cit.*, pp. 198—202.
(*z*) Jennings, *op. cit.*, pp. 208—216.

Sovereign, though other Ministers have a right to discuss with him matters which are merely departmental.

As a matter of law the King is entitled at any time to dismiss his Ministers and to dissolve Parliament. This power was exercised in 1783 by George III. The action of the Sovereign was endorsed by the electors at the ensuing General Election. It was however by many protested against as unconstitutional Unconstitutional it would, in all probability, be considered to-day (*a*).

The Prime Minister.—We have seen that the Prime Minister was until recently hardly known to the law. Like the Cabinet, he was the creature of convention. He is mentioned in the Treaty of Berlin, 1878; in a Royal Warrant dated 2nd December, 1905, which gives him precedence immediately after the Archbishop of York (*b*); in the schedule to the Chequers Estate Act, 1917, in which Parliament gave effect to the gift by Lord Lee of the Chequers estate as the country residence of the Prime Minister (*c*); and in the Ministers of the Crown Act, 1937.

At the present time the Prime Minister is selected in form by the King, in fact by the majority of the House of Commons (representing the electorate), which will not maintain in office any Premier who does not possess its confidence. Circumstances can, however, arise in which the King's choice is no mere formality, for example, where, on a Prime Minister's death or resignation on personal grounds, either of two party leaders would be able to form a Government and command the support of the Commons. Such a case furnishes an illustration of one of the few powers left in the King which are exercisable otherwise than on the advice of Ministers. For though the King may ask an outgoing Prime Minister's advice as to his successor, and if he does so may be bound by the advice tendered, he is not bound to invite advice at all (*d*); thus, Queen Victoria did not in 1894 invite Gladstone, nor in 1923 did George V invite Bonar Law, to recommend their successors (*e*).

The Prime Minister superintends and co-ordinates the work of all the Departments, though departmental matters must in the first instance

(*a*) See Jennings, *op. cit.*, pp. 299—318, 436—443.
(*b*) This warrant is set out in Anson, *Law and Custom of the Constitution*, vol. II (4th ed., Keith), Pt. II, at pp. 354—355.
(*c*) See also *ante*, p. 34.
(*d*) Lowell, *Government of England*, vol. I, p. 134.
(*e*) See Jennings, *op. cit.*, ch. 2.

be submitted to the heads of the Departments themselves. He assumes responsibility for all the activities of his colleagues. He advises the King to appoint these colleagues and can require their resignation, though in the exercise of both powers he is, of course, controlled by the opinion of his party, of the House of Commons, and ultimately of the country. He presides in the Cabinet, and is the regular (though not the only) organ of communication between Ministers and the Sovereign. He now invariably combines with the position of Prime Minister the office of First Lord of the Treasury (*f*), and occasionally some other office as well, *e.g.*, that of Chancellor of the Exchequer (Gladstone), Foreign Secretary (Ramsay MacDonald), or Minister of Defence (Mr. Churchill). The office of First Lord of the Treasury provided the Prime Minister with a salary of £5,000 a year. It also places him at the head of the most important Government department, the Treasury, yet with departmental duties which (apart from patronage) are only nominal as the working head of that department is the Chancellor of the Exchequer. In the eighteenth and early nineteenth centuries, before the reform of the Civil Service and the Parliamentary franchise, the fact that the First Lord of the Treasury exercised a very extensive patronage over all kinds of official appointments meant that the Prime Minister could control Departmental appointments and was also thereby assisted in obtaining a Parliamentary majority for his party. The Ministers of the Crown Act, 1937, provides that a salary of £10,000 a year shall be paid to "the person who is Prime Minister and First Lord of the Treasury." The Act also provides that every former Prime Minister out of office is to receive a pension of £2,000 a year payable out of the Consolidated Fund.

If the Prime Minister is in the House of Commons—and it seems likely that no future Prime Minister will be in the House of Lords—he is generally, but not without exception (*g*), Leader of the House. As such he is responsible for the apportionment of Parliamentary time between the measures and other business which compete for it.

(*f*) In Lord Salisbury's last Administration, Balfour was First Lord of the Treasury.

(*g*) *E.g.*, in Mr. Lloyd George's Coalition Government, Bonar Law (the Conservative leader) was for a time Leader of the House of Commons. Similarly, during Mr. Churchill's National Administration, Sir Stafford Cripps (Independent Socialist) and Mr. Eden (Conservative) have been Leaders of the House; while Mr. Attlee (Leader of the Labour Party) has acted as "Deputy Prime Minister" during Mr. Churchill's travels to overseas conferences.

War Cabinets.—The Cabinet is too large, and its members too busy, to supervise the carrying on of a modern war. In 1914—15 Mr. Asquith set up a War Council, consisting of himself, the Secretaries of State for War, India and Foreign Affairs, the Chancellor of the Exchequer, the First Lord of the Admiralty, and Lord Balfour (elder statesman), advised by experts. Mr. Lloyd George in 1916 displaced the War Council by a War Cabinet of five members, none of whom—except the Chancellor of the Exchequer—had departmental duties. Many outside experts, as well as Ministers, were summoned to advise or report to the Cabinet, though, of course, no one who is not a Privy Councillor can attend as a member of the Cabinet. Later General Smuts sat with the War Cabinet, though he was not member of either House of Parliament. Several meetings were held with Dominion Prime Ministers, and these were called meetings of the "Imperial War Cabinet" (*h*).

In 1939 Mr. Neville Chamberlain selected a War Cabinet of nine, consisting of the Prime Minister, the Chancellor of the Exchequer, the Foreign Secretary, the Minister for the Co-ordination of Defence, the First Lord of the Admiralty, the Secretaries of State for War and Air, the Lord Privy Seal and Lord Hankey (Minister without Portfolio (*i*)). The Committee of Imperial Defence was merged with the War Cabinet organisation, as in the previous war, and their secretariats were merged in the Offices of the War Cabinet, with a Permanent Secretary, who was also Secretary of the War Cabinet.

When Mr. Churchill became Prime Minister of a National Government in May, 1940, he at first reduced the War Cabinet to five, namely, himself; Mr. Neville Chamberlain (Lord President of the Council); Mr. Attlee, Leader of the Labour Party (Lord Privy Seal); Lord Halifax (Foreign Secretary); and Mr. Greenwood, a Labour leader (Minister without Portfolio). During the next eighteen months the number of members increased to nine, most of whom had Departmental duties, but in February, 1942, in response to criticisms it was reduced to seven (*k*). At the end of 1943 the War Cabinet was constituted as

(*h*) *Report of the Machinery of Government Committee* (1918), ch. 9230, pp. 4—6; D. Lloyd George, *War Memoirs*, chh. 38 and 55, Jennings, *op. cit.*, pp. 232—240

(*i*) Lord Hankey (as Sir Maurice Hankey) had been Secretary to the War Cabinet and to the Committee of Imperial Defence in the previous war.

(*k*) For the period ending July, 1942, see Keith, *The Constitution under Strain*, ch. 4.

follows: Mr. Churchill (Prime Minister, First Lord of the Treasury and Minister of Defence); Mr. Attlee (Lord President of the Council and Deputy Prime Minister); Sir John Anderson (Chancellor of the Exchequer); Mr. Eden (Foreign Secretary and Leader of the House of Commons); Mr. Herbert Morrison (Home Secretary and Minister of Home Security); Mr. Oliver Lyttelton (Minister of Production); Mr. Ernest Bevin (Minister of Labour and National Service); Lord Woolton (Minister of Reconstruction); Mr. Casey (Minister of State resident in the Middle East); with Lord Halifax (Ambassador to U.S.A.) available for consultation when in the United Kingdom.

Some peculiar features which may be noted are that Lord Beaverbrook was for a short time Minister of State without any Department; the appointment of Ministers of State resident outside the United Kingdom; the fact that Mr. Casey was not a Member of Parliament (*l*); the continued "availability" of Lord Halifax after he became Ambassador to the United States; and the invitation to the Dominions and India to send representatives to join in discussions of the War Cabinet on Dominion and Indian affairs. The Prime Ministers of Canada, Australia, South Africa and New Zealand attended from time to time. In the spring of 1944 two Indian representatives, the Maharaja of Kashmir and Sir Firoz Khan Noon, arrived in this country. The holders of thirty senior Ministerial posts, apart from the Law Officers, were excluded from the Cabinet, though, of course, they were consulted on matters specially affecting their Departments. The Prime Ministers of Canada, Australia, New Zealand, South Africa and Southern Rhodesia, with the two Indian Representatives, attended meetings of the War Cabinet in May, 1944, at the time of the Commonwealth Prime Ministers' Conference.

(*l*) Mr. Casey had previously been Australian Minister at Washington, and was not a member of the Australian Parliament. He subsequently became Governor of Bengal.

CHAPTER XVII.

THE CENTRAL GOVERNMENT DEPARTMENTS (I).

I. POLITICAL OFFICES.

Offices of State.—The origin of the great offices of State is to be found in the Royal Household of the Saxon and Norman Kings. The Saxon King had his chamberlain, steward, marshall and cupbearer, and the Norman King his Lord High Steward, Lord Great Chamberlain, constable and marshall. In the process of time, these offices became hereditary and honorary, and their public—as distinct from purely personal—services came to be performed by others who duplicated the offices and were appointed from time to time on merit and received a salary. Some of the original offices survive as non-political appointments, for example, the hereditary Earl Marshall (Duke of Norfolk) in charge of styles and precedence, the Lord Great Chamberlain, who supervises the King's Palace at Westminster (including the buildings of the Houses of Parliament when the Houses are not sitting), and the Lord High Steward, who presides over the trial of peers for treason or felony (*a*). Their "doubles," the Master of the Horse, the Lord Chamberlain (censor of plays), and the Lord Steward, were political officers in the sense that they changed with the Government down to 1924 and were Cabinet Ministers in the eighteenth century (*b*), while the offices of Treasurer, Comptroller and Vice-Chamberlain of the Household are still given to members of the House of Commons who, together with the Joint Parliamentary Secretaries and the Junior Lords of the Treasury, act as "Government whips."

As the work of Government grew, it became necessary for the King to employ secretaries and other officers to transact State business as distinct from the administration of the affairs of the Royal Household. The earliest and most important of these was the Chancellor, who, as the King's chaplain, was both an educated "clerk" and the Keeper of the King's conscience. His name is derived, says Holdsworth (*c*),

(*a*) *Ante*, p. 45.
(*b*) Anson, *Law and Custom of the Constitution*, vol. II. (4th ed., Keith), Pt. I, pp. 157—168.
(*c*) Holdsworth, *History of English Law*, vol. I (5th ed.), p. 37.

from "the *cancelli* or screen behind which the secretarial work of the royal household was carried on." To him was entrusted the custody of the Great Seal, under which the most important State documents were issued (*d*). For more than four hundred years the use of the Privy Seal, held by the Lord Privy Seal, was a necessary prerequisite before Letters Patent under the Great Seal could be passed. Other Secretaries were appointed in Plantagenet times, and they also held royal seals for affixing to appropriate documents.

There is strictly only one office of "His Majesty's Principal Secretary of State," though it may be held by several persons whose powers are, with certain statutory exceptions (*e*), equal and interchangeable. The number of Secretaries of State is now eight. They are appointed by the delivery of three seals, namely, the signet, a lesser seal and a small seal called the *cachet* (*f*).

For the functions of finance and defence the great officers of State were the Lord High Treasurer, the Lord High Admiral, the Lord High Constable, and the Earl Marshall. The first two offices have for a long time been in commission, that is to say, no one is actually appointed to the offices, but the functions pertaining to them are performed by several persons commissioned by Letters Patent for that purpose: hence we have the Lords Commissioners of the Treasury or Treasury Board, and the Lords Commissioners of the Admiralty or Admiralty Board. The Constable and the Earl Marshall issued regulations for the army, but the regular appointment of the Constable ceased in the reign of Henry VIII; the joint Court in which they enforced military discipline disappeared soon after the Bill of Rights, and was replaced by Courts Martial which now function under statutory authority. A Lord High Constable is still appointed for the Coronation ceremony.

For a considerable period in our history the Privy Council took an active part in government, and Committees of the Council were set up from time to time—either *ad hoc* or permanently—to supervise particular branches of the administration. At the time of the Restoration (1660) there were three standing Committees—the

(*d*) In early times also a Justiciar was appointed *ad hoc* to deputise for the King when he was abroad; see *ante*, p. 148.

(*e*) Only the Home Secretary has power to allow an amendment to a petition of right under the Petition of Right Act, 1860.

(*f*) For an account of these seals and their use, see Anson, *op. cit.*, pp. 182—184.

Treasury, the Committee for Irish Affairs and the Committee for Foreign Plantations (*i.e.*, Colonies). In 1667 Committees for Foreign Affairs, Admiralty, Trade and Plantations, and Petitions were constituted. The Committee system largely disappeared with the development of the Cabinet, though the Judicial Committee is a modern statutory example.

In recent times some of our Government Departments were Boards " which once were Committees of the Council, and which still, by their statutory composition, though not in practice, consist of a number of great officers of State with a President who is, for all purposes of administration, the Board " (*g*). Such still is the Board of Trade, which dates from the seventeenth century. From the Board of Trade itself emerged the Ministry of Labour and the Ministry of Transport.

Most modern Government Departments are Ministries created under or by virtue of recent statutes and presided over by Ministers, though some of them, *e.g.*, the Ministry of Agriculture and Fisheries and the Ministry of Education, grew out of Boards or Committees actually or theoretically connected with the Privy Council. The Post Office is, and the Office of Works until recently was, anomalous. The Lord Privy Seal and the Chancellor of the Duchy of Lancaster are interesting survivals from the remote past.

The King can create Ministers by virtue of the prerogative, but statutory authority is requisite in most cases, firstly, because it will usually be necessary for him and his staff to be paid out of money voted by Parliament, and secondly because of the statutory restrictions on the number of Ministers who may sit in the House of Commons. It will further be requisite if existing statutory powers are to be transferred to the new Minister

Convention demands that generally a Minister should sit in one or other of the Houses of Parliament in order that his activities may be subject to the supervision of Parliament. A temporary exception to this convention was the appointment of Mr. R. G. Casey as Minister of State in 1942 (*h*), which was presumably made under the Re-election of Ministers Act, 1919, s. 2 (*i*).

(*g*) Anson, *op. cit.*, p. 160.
(*h*) *Ante*, p. 203. (*i*) *Ante*, p 75

Classification of Government Departments.—Government Departments might be classified according to the form of their constitution. It follows from what has been said that this would give us (i) the Secretariat, viz. the Lord Chancellor, the Lord Privy Seal, and the Departments presided over by the eight Secretaries of State; (ii) the high offices of State in permanent commission, viz. the Treasury and the Admiralty; (iii) attentuated Committees of the Privy Council, *e.g.*, the Board of Trade; perhaps the Lord President of the Council would fit in here; (iv) spurious Boards, *e.g.* (until recently) the Board of Education, and Ministries It would, however, be rather academic to adhere rigidly to this classification in describing the various Government departments, for it would give undue prominence to historical survivals and even fictions Defence would come partly under the Secretariat (Army and Air Force) and partly under the permanent Commissions (Navy), while there is no practical difference between the position of the President of the Board of Trade and the Ministers of Health and Transport

On the other hand, a completely functional classification, having regard only to the kind of services administered, is not possible, since there is a considerable amount of overlapping. The Health and Education Departments, for example, are both concerned with the provision of school buildings and the medical attendance of school children. The most convenient method of treatment is therefore a combination of the historical and the functional (*j*). Mention should also be made of "non-political" Departments, such as the Charity Commissioners, which are not directly represented in Parliament, and of the temporary Departments which have been called into existence to meet the exigencies of war.

The Organisation of Government Departments.—*Ministers.*—At the head of each Department—except the "non-political" Departments, which are of no importance for present purposes—is the Minister, whether he be called Minister or Secretary of State or President of the Board. He is a member of the Government and changes with the Ministry of the day; if his Department is one of the twenty or so which entitle him to that position he is also a member of the Cabinet.

(*j*) For a discussion of the problem of the distribution of functions among Departments, see the *Report of the Machinery of Government Committee* (1918), Cmd. 9230, Pt. I.

Parliamentary Secretaries.—Under the Minister will be a Parliamentary Secretary, or Parliamentary Under-Secretary if the Minister himself is a Secretary of State. As their name implies, Parliamentary Secretaries are members of one or other of the Houses of Parliament; they are junior Ministers who change with the Government of the day. They assist their chief in the Parliamentary or political side of his work, as well as in the administration of their Department, and are usually chosen from the House in which he does not sit (*k*).

Parliamentary Private Secretaries.—It has become the practice in recent years for Ministers to appoint Parliamentary Private Secretaries (*l*). They are usually young members of Parliament who show promise of becoming useful members of the party in office, and by taking some of the burden of the routine work of Parliamentary life off the shoulders of their chiefs they acquire valuable experience of ministerial duties. They are unpaid, and, indeed, their office is from a legal point of view unofficial. The practice of appointing Parliamentary Private Secretaries has been criticised on the ground that, though they are unpaid, they have a particular interest in keeping the Government in office, and that their increasing number swells the ranks of "place-men" in Parliament. They are no doubt useful in keeping the Minister informed of what goes on in Parliament when he is unable to be present. (For routine work on the administrative side the Minister is provided with one or more junior civil servants as Private Secretaries.) The Select Committee on Offices or Places of Profit under the Crown recommended in 1941 the establishment of a convention that there should not be more than one Parliamentary Private Secretary for each Department.

Councils.—Apart from the fact that some offices, such as the Treasury and the Admiralty, may be committed with varying degrees of responsibility to the members of a Board, a Minister may share executive authority with a statutory Council, as is the case in the War Office and the Air Ministry.

(*k*) A Minister has not the right—as he has in some constitutions, *e.g.*, Eire—to address both Houses of the Legislature.

(*l*) A Minister sometimes has two Parliamentary Private Secretaries, *e.g.*, the Minister of Pensions in 1943. The Parliamentary Secretary of the same Department also had a Parliamentary Private Secretary.

Civil Servants.—The detailed administration of the work of a Government department is carried out by "permanent" civil servants. Although, like Ministers, they are servants of the Crown, civil servants are called "permanent," since their appointment is non-political and lasts during good behaviour, as opposed to Ministers, Parliamentary Secretaries, etc., who are responsible to Parliament and change office with the Government. The present system, which dates from the middle of the last century, is in contrast to the "spoils system," which still obtains to some extent in the United States

The backbone of the Department is the secretariat under the "Permanent" Secretary (or "Permanent" Under-Secretary if the Minister is a Secretary of State). This has a hierarchy of administrative, executive and clerical officers. Departments with technical functions will also require a number of inspectors, accountants, contract officers, production officers, etc., with professional or technical qualifications (*m*).

II. THE CIVIL SERVICE.

The term "civil servant" is not one of general legal application. A civil servant is one kind of Crown servant, and whether or not a person is a Crown servant depends on the facts of the case (*n*). There is no formal definition of "Crown servant" (*o*), though we may say that generally he is appointed by or on behalf of the Crown to perform public duties which are ascribable to the Crown; usually, but not necessarily, he is paid by the Crown out of the Consolidated Fund, or out of moneys voted by Parliament He may serve without pay, and modifications must be made for servants of the Crown in Dominions and Colonies.

All civil servants are Crown servants, but not all Crown servants are civil servants, for the term is not applied to Ministers, their Parliamentary Secretaries and Parliamentary Private Secretaries, or other

(*m*) The personnel of the King's Household and of the Government Departments is given in *The British Imperial Calendar and Civil Service List*, published annually by H.M Stationery Office.

(*n*) See further, *post*, p 270.

(*o*) See, for example, *Lane* v *Cotton* (1701), 1 Ld. Raym. 646 (Postmaster-General); *Bainbridge* v. *The Postmaster General*, [1906] 1 K. B. 178 (engineer employed in the Post Office); *R.* v *Glover* (1864), 9 Cox, C C. 500 (County Court bailiff), *R.* v. *Graham* (1875), 13 Cox, C. C. 57 (member of borough police force acting as agent for inspector of reformatories), *Fisher* v. *Corporation of Oldham*, [1930] 2 K. B 364, and *Lewis* v *Cattle*, [1938] 2 K. B. 454 (police officers acting as constables).

holders of political offices, nor to members of the armed forces. The expression "established civil servant" is significant for certain particular purposes such as superannuation (Superannuation Acts, 1834—1919) and trade union membership (Trade Disputes and Trade Unions Act, 1927, s. 5), but otherwise "civil servant" is merely a non-legal expression covering Crown servants employed in the central Government Departments. Local Government officers and the employees of independent statutory corporations, such as the British Broadcasting Corporation, the London Passenger Transport Board, the Assistance Board, the Central Electricity Board and the British Overseas Airways Corporation, are thus not civil servants, though the nature of their work and their conditions of employment bear many similarities (*p*). The following definition of the civil service has been suggested for general purposes: "the body of officials in the service of the Crown, who discharge duties belonging to the exercise of the King's executive powers, but not being members of His Majesty's naval, military or air forces, and not being the holders of political offices" (*q*). It is admittedly difficult to draw the line and to say whether, for example, industrial workers employed by Government Departments are civil servants. In *Mulvenna* v. *The Admiralty* (*r*) it was held by a Scottish Court that a civilian telephone attendant employed at a naval dockyard had the same immunity from arrestment of wages as a Crown servant.

The Superannuation Act, 1887, s. 12, applies to a person who has served in an established capacity in the permanent Civil Service of the State within the meaning of section 17 of the Superannuation Act, 1859. The latter declares that "no person shall be deemed to have served in the permanent Civil Service of the State unless such person holds his appointment directly from the Crown or has been admitted into the Civil Service with a certificate from the Civil Service Commissioners," and that "no person shall be entitled to any superannuation allowance under this Act unless his salary or remuneration has been provided out of the Consolidated Fund of the United Kingdom . . . or out of moneys voted by Parliament." Section 4 of the Act of 1887 also provides that gratuities may be paid to any person

(*p*) See *The British Civil Servant*, ed. Robson.
(*q*) Mustoe, *Law and Organisation of the British Civil Service*, p. 26.
(*r*) [1926] S. C. 842.

employed whole time in any public department if his remuneration was paid entirely out of moneys voted by Parliament (*s*).

The Trade Disputes and Trade Unions Act, 1927, s. 5, provides that " Amongst the regulations as to the conditions of service in His Majesty's civil establishments there shall be included regulations prohibiting established civil servants from being members, delegates or representatives of any organisation of which the primary object is to influence or affect the remuneration and conditions of employment of its members, unless the organisation is an organisation of which the membership is confined to persons employed by or under the Crown."

The legal and other rules regulating the civil service are contained in statutes, law reports, prerogative Orders in Council, Regulations, Treasury minutes and circulars.

The *Civil Service Commission*, consisting of three Commissioners holding office at pleasure, was established by Order in Council in 1855 to conduct the examination of entrants to the civil service. Before that time public offices were in the gift of the political party in power. It was largely through Macaulay's efforts that the competitive examination system, which had recently been introduced into the Indian Civil Service, was extended to the home Civil Service, though some years previously Bentham had championed the cause of Utility against Patronage in a series of papers characteristically entitled *Official Aptitude Maximized, Expense Minimized.* For the administrative grade what is required is a liberal education reaching University honours standard; for the executive grade the higher school certificate standard, and for the clerical grade the school-leaving certificate standard, are sufficient. The main branches of the Civil Service are the Home, Northern Ireland, Indian, Burma, Colonial, and Foreign (including diplomatic and consular) services Professional and technical appointments, such as those of medical officers, legal assistants and consulting engineers, are outside the examination system.

On taking up their appointment civil servants are required to sign a declaration that they have read extracts from, and will observe, the Official Secrets Acts. They are legally in the same position as other

(*s*) And see *In re Mirams*, [1891] 1 Q. B. 594.

Crown servants as regards security of tenure and recovery of salary due (*t*).

The National "Whitley" Council was formed in 1919 on analogy to the joint councils of workers and employers recommended by the Whitley Commission in 1918 to adjust disputes in private industries. The Council is composed equally of senior departmental officers acting in their official capacity and on behalf of the Treasury (the Official Side), and representatives of the civil servants who are not necessarily civil servants themselves but who must be appointed by recognised Civil Service Associations (the Staff Side) The Chairman is the head of the Establishments Branch of the Treasury, who is, as it were, on both sides The general principle in industrial conciliation, *e.g.*, under the Trade Boards Act, is to have an independent chairman, but in the case of the civil service it is impracticable for the matter to be out of the hands of the Crown. The main objects of the Council are: (i) to provide for co-operation and conference between the State in its capacity as employer and civil servants in matters relating to the civil service; (ii) to provide for conciliation and the settlement of grievances, and (iii) to bring together the experience and different points of view of the administrative, clerical and manipulative services. A few local Whitley Councils have also been set up.

Civil Service regulations issued in consequence of section 5 of the Trade Disputes and Trade Unions Act, 1927, provide that the Treasury may approve an organisation whose primary object is to influence or affect the remuneration and conditions of employment of its members if it fulfills the following conditions: (i) its membership is confined to persons employed by or under the Crown; (ii) it is independent of, and not affiliated to, any organisation with the same primary object, the membership of which is not so confined, and of any federation which comprises any such organisation; (iii) its objects do not include political objects; and (iv) it is not associated directly or indirectly with any political party or organisation. The most vocal civil service "trade unions" are the Civil Service Clerical Association and the Union of Post Office Workers, which are agitating for permission to affiliate to the Trade Union Congress.

It is an important principle of our constitution that civil servants, whose duty it is to carry out the orders and administer the policy of

(*t*) See *post*, p. 269.

the Government of the day, should remain outside party politics. Most of them are disqualified from membership of the House of Commons by the Succession to the Crown Act, 1707 (*u*), and the House of Commons Disqualification Act, 1741. Section 1 of the latter Act disqualifies deputies and clerks in the Treasury, Exchequer and Audit Departments, the Admiralty and the Departments of the Secretaries of State from being elected or from sitting and voting as members of the House of Commons. If there are any gaps in the statute law they are filled in by the Servants of the Crown (Parliamentary Candidature) Order, 1927, which provides that: "1. No person employed by or under the Crown to whom this Order applies shall issue an address to electors or in any other manner publicly announce himself or allow himself to be publicly announced as a candidate or a prospective candidate for election to Parliament for any constituency until he has retired or resigned from such employment" The Order does not apply (a) to persons holding "political offices," *i.e.*, any office which is usually held by a member of one or other of the Houses of Parliament, or (b) to persons employed (otherwise than in supervisory grades) in an industrial capacity in naval, military or air force establishments of an industrial character, though Departmental rules may require a candidate in the latter category to resign if he is elected Otherwise the Order applies to "all persons in the . civil service of the Crown, or otherwise employed by or under the Crown, whether such employment is of a permanent or temporary nature, and whether established or unestablished" Civil servants who are peers are forbidden by Order in Council to speak or vote in the House of Lords, though they may attend when their official duties permit

Civil servants are not disfranchised, but service etiquette prohibits them from publicly indulging in political controversy. They may, however, participate in municipal elections unless prevented from doing so by departmental regulations.

Many "temporary," *i.e.*, non-established, civil servants are employed in wartime. Some of them serve part-time, and some without pay.

(*u*) *Ante*, p. 78.

CHAPTER XVII.

THE CENTRAL GOVERNMENT DEPARTMENTS (II).

The Treasury.—The Treasury is the Department entrusted by the Crown and by Parliament with the supervision and control of national finance. In that capacity and because it regulates conditions of employment in the civil service, it is *primus inter pares* among Government Departments Historically the Treasury is an offshoot of the Exchequer, which was constituted by Henry I sometime before the year 1118. The Exchequer was the *Curia Regis* sitting for revenue purposes The Upper Exchequer, which audited and managed the King's accounts, developed into the Court of Exchequer; while the Lower Exchequer, from which the Treasury emerged, was concerned with the receipt of the royal revenue. The office of Treasurer, which is described in the *Dialogus de Scaccario* (1177), has been in commission since 1714 (*a*).

The Treasury Board consists of the First Lord of the Treasury (usually, and after the Ministers of the Crown Act, 1937, probably always, the Prime Minister), the Chancellor of the Exchequer (whose office dates from Henry III) and five Junior Lords (*b*). In the early part of the eighteenth century the Board met frequently, with the Sovereign in the chair After the surrender of the royal revenues by George III in exchange for the Civil List, the King ceased to attend. By the beginning of the nineteenth century meetings became more formal and less frequent as the business became too much for the Board as such, and meetings were discontinued altogether in 1856. The Junior Lords still have certain formal functions, such as signing Treasury Warrants. The general control of the Department is in the hands of the Chancellor of the Exchequer, who is also Under-Treasurer, assisted by the Financial Secretary to the Treasury. The Parliamentary Secretary to the Treasury acts as Chief Government whip.

The functions of the Treasury have been summarised as follows: "(a) Subject to Parliament it is responsible for the imposition and regula-

(*a*) See Holdsworth, *History of English Law*, vol. I (5th ed.), pp. 42—44

(*b*) There was a sixth Junior Lord (unpaid) in 1943.

tion of taxation and the collection of revenue, for which purpose it has the assistance of the Revenue Departments. (b) It controls public expenditure through the preparation or supervision of the estimates for Parliament. (c) It arranges for the provision of the funds required from day to day to meet the necessities of the public service, for which purpose it is entrusted with extensive borrowing powers. (d) It initiates and carries out measures affecting the public debt, currency and banking. (e) It prescribes the manner in which the public accounts should be kept" (*c*).

The Permanent Secretary to the Treasury is now known as the head of the Civil Service.

The "Revenue" Departments referred to above are controlled by the *Board of Inland Revenue*, which collects direct taxes, such as income tax, excess profits tax, estate duties and stamp duties; and by the *Board of Customs and Excise* which collects indirect taxes; and the Commissioners of Crown Lands mentioned below. These Departments are subordinate to the Treasury and are not directly represented in Parliament. The Post Office is also in a sense a revenue-receiving Department, but it is no longer subordinate to the Treasury (*d*)

The Commissioners of Crown Lands are responsible for the collection and administration of the revenues from Crown lands under the Crown Lands Acts, 1829—1943. The Commissioners are the Minister of Agriculture and Fisheries and the Secretary of State for Scotland (both *ex officio* and unpaid), together with a Permanent Commissioner, who is also the Secretary of the small Department. The Commissioners were incorporated by the Act of 1927, and the Secretary of State for Scotland was added to the Commission by the Act of 1943. The revenues from Crown lands in England and Wales (except the Duchies of Lancaster and Cornwall) have been surrendered to Parliament since 1760 in exchange for the Civil List (*e*), and the revenues in Scotland were transferred to the Commissioners in 1833. Although this Department is subordinate to the Treasury its work is most closely connected with that of the Ministry of Agriculture and Fisheries.

Subordinate to the Treasury also is the small staff of *Parliamentary Counsel*, barristers whose work it is to draft nearly all Government Bills, and to advise on amendments which may be proposed during

(*c*) *Report of the Machinery of Government Committee* (1918), Cmd. 9230, pp. 18—19. See further, Heath, *The Treasury*. (*d*) *Post*, p. 234. (*e*) *Ante*, p. 168.

their passage through Parliament. This Office was constituted by Treasury minute in 1869 (*e*).

The *Treasury Solicitor's Office*, which is staffed by barristers and solicitors, is available to the Departments for legal advice and conveyancing, etc. The senior official of this Department is H.M. Procurator-General and Treasury Solicitor, who in the latter capacity acts as solicitor to Government Departments in litigation. He is also appointed *King's Proctor* in connection with proceedings for Admiralty droits (*f*) and matrimonial causes. The general practice is that Departments whose work is primarily the administration of detailed legal rules have their own Solicitor's departments, while Departments whose legal problems are likely to be involved with policy rely on the Treasury Solicitor, whose position is independent of departmental policy.

The Pay Office appears in the Treasury estimates. The post of *Paymaster-General* is a political one and unpaid, it is also practically a sinecure, as his powers are delegated to the permanent staff of the Pay Office.

Among the other subordinate departments are *H M. Stationery Office* and the *Civil Service Commissioners* (*g*).

The existence of the Offices of the Cabinet and of the Committee of Imperial Defence (*h*) (or the Offices of the War Cabinet) seems to suggest that the Prime Minister is in the process of evolving a separate Department of his own.

The Lord Chancellor.—The Lord High Chancellor of Great Britain is the Keeper of the Great Seal, the principal legal and constitutional adviser of the Government, invariably a member of the Cabinet in peacetime, *ex officio* speaker of the House of Lords, and president of the House of Lords sitting as the final court of appeal and of the Judicial Committee of the Privy Council. He therefore performs legislative, executive and judicial functions of great importance. His salary is £10,000 a year (£4,000 as Speaker of the House of Lords) and payable out of the Consolidated Fund He is also president of the Court of Appeal, the High Court and the Chancery Division (Judicature (Consolidation) Act, 1925); he does not in practice sit in

(*e*) Ilbert, *Mechanics of Law Making*, ch. 4; *Legislative Methods and Forms*, pp. 84—86.
(*f*) *Ante*, p. 166.
(*g*) *Ante*, p. 211
(*h*) *Post*, p. 237.

these Courts, but he is responsible for regulating their business through the Rules Committee.

The Lord Chancellor's Department has a Permanent Secretary, and also includes the Clerk of the Crown, who is in charge of the Crown Office in Chancery, which seals and issues writs and other documents.

The Lord Chancellor selects the puisne Judges of the High Court and recommends the appointment and removal of all County Court Judges and Justices of the Peace in England, except within the Duchy of Lancaster. He is the patron of at least 700 benefices of the Church of England. The *Land Registry* and the *Public Trustee Office* are under his control by virtue of the Land Registration Act, 1925, and the Public Trustee Act, 1906.

As the Lord Chancellor was historically the keeper of the King's conscience, it would probably be regarded as unconstitutional—if not illegal—to appoint a Roman Catholic or a Jew to the office

The Law Officers.— These officers are the heads of the Bar in their respective countries, and they change with the Government, and as a rule are not in the Cabinet They consist of the Attorney-General and Solicitor-General for England, and the Lord Advocate and Solicitor-General for Scotland

The English *Attorney-General* is appointed by Letters Patent under the Great Seal, and usually is a member of the House of Commons. His salary is £4,500 a year, plus fees. In civil work he represents the Crown, and in criminal proceedings he or the Solicitor-General, or their deputies, prosecute in cases of importance. As head of the Bar he is the general referee on points of professional etiquette. He advises the Government Departments on legal points, and has certain judicial functions connected with committees of privilege in the Lords. His fiat is necessary in certain legal proceedings where the public are concerned. In certain other cases he can intervene on behalf of the public personally or by deputy. He deals with certain matters relating to patents.

The *Solicitor-General*, whose salary is £4,000 a year, plus fees, is a subordinate of the Attorney-General, and frequently gives a joint opinion with the latter on legal matters when required so to do by the Government Departments. He need not, strictly, be in the House of Commons. He usually succeeds to the post of Attorney-General

when it is vacant. He changes with the Ministry. His duties are in general similar to those of the Attorney-General. Both the law officers are now precluded from private practice during tenure of office.

The Scottish law officers have analogous functions with regard to Scotland.

The Law Officers Act, 1944, provides that (unless the contrary is stated in any subsequent Act) functions which are required to be discharged by the Attorney-General may be discharged by the Solicitor-General if (a) the office of Attorney-General is vacant; or (b) the Attorney-General cannot act owing to absence or illness, or (c) the Attorney-General authorises the Solicitor-General to act in a particular matter (*e.g.*, where the former has a personal interest).

The Lord President of the Council.—The Lord President of the Council is in charge of the Privy Council Office, but his departmental duties are slight and he is usually entrusted by the Prime Minister with special tasks.

The *Privy Council Office*, an ancient prerogative Department, consists of the Clerk of the Council and a small staff The Office deals with such matters as the granting of charters to municipal boroughs, Universities and other bodies, and is in contact with the medical and other professional Councils. It also provides the administrative staff for the Judicial Committee of the Privy Council.

The chief subordinate Department is the *Department of Scientific and Industrial Research*, which was constituted by Order in Council in 1915 to direct the application of money provided by Parliament for the organisation and development of scientific and industrial research. This Department has an Advisory Council, a Secretary and staff of scientific officers, and it controls various research stations.

The Lord Privy Seal.—The Lord Privy Seal is appointed by Letters Patent and the delivery of the Privy Seal. The office was regarded as an important one from the beginning of the fourteenth century. In mediæval times the authority of the Privy Seal was regarded as necessary for the issue of money from the Exchequer and for the affixing of the Great Seal to Letters Patent, the latter requirement being confirmed by a statute of 1535 (*i*). The office was held by Chatham when Prime Minister in 1766.

(*i*) 27 Hen. VIII, c. 11.

The Great Seal Act, 1884, however, provided that "it shall not be necessary that any instrument shall after the passing of this Act be passed under the Privy Seal," and modern statutes provide other methods for using the Great Seal and for issuing public money (*j*). The Lord Privy Seal at the present day, therefore, has no departmental duties, but is employed by the Prime Minister on special tasks, such as unemployment and reconstruction. He has no staff beyond private secretaries.

The Home Office.—The work of the two Secretaries of State then existing was divided in 1782 into Home Affairs and Foreign Affairs. The Secretary of State for Home Affairs was also responsible for Ireland and the Colonies until additional Secretaries were appointed for those purposes. Nearly all matters connected with the administration of justice which are not dealt with by the Lord Chancellor come within the sphere of the Home Secretary, and the Home Office—being the *residuary* Department of State—is concerned with many other miscellaneous matters as well (*k*). The Home Secretary is assisted by a Parliamentary Under-Secretary of State and there is a large staff of civil servants under the Permanent Under-Secretary of State.

The Home Secretary exercises the prerogative of the King's Pleasure in many ways. He is the channel of communication between the subject and the King for addresses and petitions, including Petitions of Right, and he authorises many of the Royal Commissions which are set up from time to time to examine into various matters. He is also the medium of communication between the Church of England and the King, its Governor. He is ultimately responsible for the maintenance of the King's Peace, and in this capacity he is in direct control of the Metropolitan Police and indirectly supervises the local police forces, and provides for co-operation between magistrates, the police, special constables and the armed forces He advises on the appointment of recorders and stipendiary and metropolitan police magistrates, and confirms the appointment of clerks to the justices. He also appoints the Director of Public Prosecutions, who, subject to the control of the Lord Chancellor and the instructions of the Attorney-General, initiates

(*j*) Anson, *op. cit.*, pp 170—172
(*k*) See Troup, *The Home Office*, also *Report of the Committee on the Machinery of Government* (1918), Cmd. 9230, pp. 63—78.

prosecutions for murder and other crimes at public cost. He issues advice to the Justices, and has a general supervision over coroners. He administers the Foreign Enlistment Act, 1870, the Extradition Acts, and the immigration, registration, supervision, deportation and naturalisation of aliens under the British Nationality and Status of Aliens Acts and the Aliens Orders made thereunder. He exercises the prerogative of mercy, *i.e.*, pardon, commutation or remission of sentence. He is responsible for prisons and similar institutions and for the system of probation of offenders. He collaborates with the Secretary of State for Scotland in certain matters affecting that country.

The Home Secretary is the medium of communication between the British Government and Northern Ireland, the Channel Islands and the Isle of Man.

The Home Office has miscellaneous duties imposed on it by various statutes, including the Factory Acts (transferred to the Ministry of Labour and National Service during the war), the Shop Acts, the Workmen's Compensation Acts and the Children and Young Persons Act, 1933. It is concerned with safety in picture-houses and theatres, the storing of explosives and the use of firearms, the preparation of registers for Parliamentary and local government elections, betting and lotteries, burials and cremations, fairs and open spaces, the killing of wild birds and the bringing into operation of summer time. The Department also controls the recently created National Fire Service.

A *Ministry of Home Security* was set up in 1939, with a Parliamentary Secretary, Permanent Secretary and a large staff to deal with air-raid precautions, camouflage and civil defence generally. The post of Minister has so far been held by the Home Secretary, but the staff of the Ministry is distinct from that of the Home Office. The Department, which is a temporary one, co-ordinates the work of the Regional Commissioners (*l*), and issues regulations with regard to the training, equipment and duties of civil defence workers and fireguards.

The Foreign Office.—On the re-allocation of the work of the two then existing Secretaries of State in 1782, the Secretary for the Northern Department of Europe became the Secretary of State for Foreign Affairs. He has two Parliamentary Under-Secretaries of State, of

(*l*) See *post*, p. 515.

whom one is the head of the Department of Overseas Trade (Development and Intelligence). In 1943 a Minister of State, with a salary of £3,000 a year, was appointed to assist the Foreign Secretary, presumably on the complex political problems expected to arise at the end of the war. There are a Permanent Under-Secretary of State, various other Under-Secretaries, Legal Advisers, an administrative staff of "Counsellors" and "Clerks," and the usual clerical staff The Foreign Office, diplomatic and consular services were amalgamated into the Foreign Service in 1943.

The Foreign Office is concerned with the formulation and conduct of foreign policy, and controls the Foreign Service

The Foreign Secretary maintains direct contact with the diplomatic representatives of foreign States, with foreign Governments, and with the British diplomatic representatives accredited to foreign States. He is in constant communication with the King, the Prime Minister and the Cabinet on all important matters relating to foreign affairs and policy. He is also responsible for the government of the Anglo-Egyptian Sudan. The Passport Office is a subordinate directorate.

The Scottish Office.—Scottish affairs were formerly conducted by the Home Secretary and various other Departments In 1885 a Secretary for Scotland, with a Scottish Office, was created by statute, and by the Secretaries of State Act, 1926, he was made a Secretary of State. There are two Parliamentary Under-Secretaries of State, and there is a Permanent Under-Secretary of State at the London office

The Secretary of State for Scotland is the keeper of the Great Seal of Scotland, which the Act of Union requires to be used for Scottish matters, and he exercises in Scotland the powers of a Secretary of State, except in certain matters, such as aliens. He is also one of the Commissioners of Crown Lands.

There used to be several Scottish Departments under the control of the Secretary of State, but by the Re-organisation of Offices (Scotland) Act, 1939, they became branches of the Scottish Office. These branches, which are at St. Andrew's House, Edinburgh, are the Departments of Agriculture, Education, and Health, and the Home Department (prisons, sea fisheries, etc.).

The Dominions Office.—The Secretaryship of State for Dominion Affairs was created in 1925, Dominion affairs having been conducted

previously by the Colonial Secretary. For a time the two offices were then held together. There is a Parliamentary Under-Secretary of State, a Permanent Under-Secretary of State and the usual staff.

The Dominions Secretary conducts the relations between the United Kingdom Government and the Dominions, though the Dominion Governments are also in direct communication with the King. For this purpose he maintains contact with the Dominions Governments themselves, the Dominion High Commissioners in London and the United Kingdom High Commissioners in some of the Dominions. Though connected historically with the Colonial Office, much of the work of the Dominions Office is closely related to that of the Foreign Office, as it concerns itself with the foreign relations of the Dominions.

The Dominions Office is also concerned with the self-governing colony of Southern Rhodesia and the South African territories of Basutoland (colony), Bechuanaland and Swaziland (protectorates). It is responsible for the business of Imperial Conferences.

The Colonial Office.—Colonial affairs were transferred in 1801 from the Home Secretary to the newly-created Secretary of State for War, but owing to the work involved by the Crimean War a Secretary of State for the Colonies was appointed in 1854. There is now a Parliamentary Under-Secretary of State, a Permanent Under-Secretary of State, and the usual staff, which is considerably larger than that of the Dominions Office

The Colonial Secretary is ultimately responsible for the government of the British Colonies, Protectorates and Mandated Territories, with the exception of Southern Rhodesia, Basutoland, Bechuanaland, Swaziland (Dominions Office) and the Anglo-Egyptian Sudan (Foreign Office). He has power under the Colonial Development and Welfare Act, 1940, to make provision for promoting the development of the resources and the welfare of the peoples of these territories.

The Crown Agents for the Colonies, a subordinate Department, are the business and financial agents for the Governments of the Colonies and Protectorates.

The India Office.—By the Government of India Act, 1858, passed after the Indian Mutiny of 1857, the government of India was transferred from the East India Company, which was supervised by a Government Board of Control, to the Crown, acting on the advice of the Secretary

of State for India in Council. Under the Government of India Act, 1935, which (except for the federal part) came into force in 1937, the Secretary of State for India is responsible to the United Kingdom Parliament for the central government of British India, and for the relations between the Crown and the Indian States, while his responsibility for Provincial government in British India is more remote. The Council has been abolished, and the Secretary of State has appointed eight Advisers under the Act, though he need not follow their advice or even consult them, except on certain matters relating to officials

There is a Parliamentary Under-Secretary of State, a Permanent Under-Secretary of State, and the usual staff.

The Burma Office.—The political separation of British Burma from the Indian Empire by the Government of India Act, 1935, which came into force in 1937, involved the creation of a Secretary of State for Burma and a Burma Office. So far the Secretary of State, the Parliamentary Under-Secretary of State, and the Permanent Under-Secretary of State for India have also acted for Burma, but the Burma Office has a Deputy Under-Secretary and a small administrative staff of its own. Two Advisers have been appointed under the Act.

The Admiralty.—The Admiralty Board is commissioned by Letters Patent to execute the duties of the Lord High Admiral of the United Kingdom. A separate patent is issued on every change of personnel. The composition of the Board changes from time to time, especially during war, and in 1943 it consisted of the First Lord of the Admiralty (a Cabinet Minister who receives a salary of £5,000 a year and the use of a house), the First Sea Lord and Chief of the Naval Staff, the Deputy First Sea Lord, the Second Sea Lord and Chief of Naval Personnel, the Third Sea Lord and Controller, the Fourth Sea Lord and Chief of Supplies and Transport, the Vice-Chief of Naval Staff, five Assistant Chiefs of Naval Staff, the Financial Secretary (a member of Parliament with a salary of £1,500 a year), the Parliamentary Secretary, the Civil Lord (a member of Parliament with a salary of £1,500 a year), the Controller of Merchant Shipbuilding and Repairs (an unpaid civilian), and the Permanent Secretary. In normal times, either the Deputy First Sea Lord or the Vice-Chief of Naval Staff, at least four Assistant Chiefs of Staff and the Controller of Merchant Shipbuilding and Repairs

may be expected to disappear. It should be noted that, while the First Lord is a civilian and the political head of the Department, the *Sea* Lords and their Assistants are Admirals.

The political responsibility for the Department rests on the First Lord. Two members may sign on behalf of the Board.

In addition to the Secretary's department, there is a technical staff to deal with such matters as hydrography, scientific research and development, naval construction, electrical engineering, armament supply, dockyards, naval stores, victualling and (during the war) merchant shipbuilding.

The War Office.—The office of Secretary-at-War can be traced back to 1642 and that of Secretary of State for War to 1794. When colonial affairs were taken away from the Secretary of State for War in 1854, his office was combined with that of Secretary-at-War until the latter was abolished by statute in 1863 (*m*). Responsibility for the Army continued to be divided with the Commander-in-Chief and various other authorities, until the administration was re-organised in 1904. In that year the office of Commander-in-Chief was abolished, and the Secretary of State for War took over the whole responsibility, acting with the advice of the Army Council, which was constituted by Letters Patent.

The composition of the *Army Council* has varied from time to time. In 1943 it consisted of the Secretary of State for War (President), the Parliamentary Under-Secretary of State (Vice-President), the Chief of the Imperial General Staff, the Adjutant-General to the Forces, the Quartermaster-General to the Forces, the Vice-Chief of the Imperial General Staff, the Deputy Chief of the Imperial General Staff, the Financial Secretary of the War Office (Finance Member) (a junior Minister with a salary of £1,500 a year), and two Joint Permanent Under-Secretaries of State (Secretaries of the Army Council).

Of these the Vice-chief and Deputy Chief of the Imperial General Staff and the second Permanent Under-Secretary were wartime additions. The others are heads of the various departments of the War Office, which also includes the Office of the Judge Advocate-General. There are large civil and military staffs.

(*m*) A full account is given in Clode, *Military Forces of the Crown*, chh. 21, 25, 26 and 29.

The Air Ministry.—The Air Force (Constitution) Act, 1917, created a Secretary of State for Air and an Air Council on the model of the Army Council, with a Department known as the Air Ministry, to administer the Royal Air Force, which then became a separate force superseding the Royal Flying Corps and the Royal Naval Air Service (*n*). Civil aviation was assigned to the Air Ministry by the Air Navigation Acts, 1920—36.

The *Air Council* in 1943 consisted of the Secretary of State for Air (President), two Parliamentary Under-Secretaries (of whom one was Vice-President), the Chief of the Air Staff, the Air Member for Personnel, the Air Member for Supply and Organisation, the Air Member for Training, the Vice-Chief of the Air Staff, the Deputy Chief of the Air Staff, two additional Air Members (one of whom was a member of the Aircraft Supply Council of the Ministry of Aircraft Production), and the Permanent Under-Secretary of State. The Air Council may sue and be sued by that name (*o*). Two members may sign on behalf of the Council. The Secretary of State is politically responsible for the Department

The Permanent Under-Secretary, the Chief of the Air Staff and the Air Members are the heads of departments of the Air Ministry, which has large civil and Air Force staffs. The Air Ministry controls the Royal Air Force Regiment and the Air Training Corps. It has wide powers for the compulsory acquisition of land for airfields, etc., even in peacetime. It supervises (in wartime, controls) the *British Overseas Airways Corporation* created by the British Overseas Airways Act, 1939. Civil aviation is in the process of being transferred to a separate Department (Civil Aviation Act, 1945).

The Board of Trade.—In former times it was the task of the Privy Council to hear complaints from merchants and to protect the interests of British overseas trade. Councils to advise on trade and "foreign plantations" (*i.e.*, colonies) were set up in 1660, and in 1696 a committee of Privy Councillors and Members of Parliament was created, called the Board of Trade and Plantations. The latter was abolished by statute in 1782, and provision made for the transaction of such business by a committee of the Privy Council, which by a statute of 1862 is

(*n*) *Manual of Air Force Law* (1939), pp. 12—14.
(*o*) Air Force (Constitution) Act, 1917, s. 10 (1); cf. *post*, p. 274.

called the Board of Trade. It ceased to be concerned with colonial affairs when a Secretary of State for the Colonies was appointed in 1854. The theoretical composition of the Board is contained in an Order in Council of 1786, and includes the holders of various public offices, such as the Archbishop of Canterbury and the Speaker of the House of Commons. The Board, however, rarely acted as a body, and no one can remember when it last met (*p*) In practice its business was transacted by the President and Vice-President of the Board, and modern statutes and Orders in Council empower the President (who is a Cabinet Minister), or one of the junior Ministers (the Parliamentary Secretary, the Secretary of the Department of Overseas Trade and, until recently, the Secretary of the Mines Department) to act on its behalf. A proposal made in 1904 to change the Board into a Ministry of Commerce and Industry has not so far been acted upon (*q*) The Department has an Advisory Council composed of representatives of industry, commerce, finance and labour; the usual staff under the Permanent Secretary, and its own Solicitor's Department.

The Board of Trade is concerned with commercial intelligence and statistics, trade returns and census of production; export credits; special import duties under the Import Duties Act, 1932; commercial relations and treaties; promoting the arts and sciences underlying industry, enforcing uniform standards of weights and measures by means of inspection; patents, designs and trade marks, the formation, registration and winding-up of companies, the non-legal aspects of bankruptcy proceedings; lighthouses, and (in wartime) trading with the enemy, insurance of goods and commodities against war damage, clothes rationing and price control The Board of Trade appoints the Cotton Industry Board and an Advisory Committee under the Cotton Industry (Reorganisation) Act, 1939. The *Bankruptcy Department*, the *Companies (Winding-up) Department* and the *Patent Office* are subordinate Departments without political heads.

The Board of Trade was also concerned with the registration of ships, the administration of merchant shipping under the Merchant Shipping Acts and the safety of life at sea until these matters were transferred to the newly reconstituted Ministry of War Transport.

(*p*) Llewelyn-Smith, *The Board of Trade.*

(*q*) The proposal has recently been made again, this time as the expression of a desire that it shall take a more active part in encouraging British trade (especially exports), a function for which its restrictive activities during the war may not altogether have made it suited.

The Department of Overseas Trade (*Development and Intelligence*) is a subordinate Department of both the Board of Trade and the Foreign Office. Its Secretary, a junior Minister who ranks as a Parliamentary Secretary, is appointed jointly by the Board of Trade and the Foreign Secretary under the Overseas Trade Department (Secretary) Act, 1918. Its permanent head is the Comptroller-General.

The Mines Department, represented in Parliament by a Parliamentary Secretary (the Secretary for Mines), had extensive powers in relation to gas and water undertakings, petroleum, and—under the Mining Industry Act, 1920, the Coal Mines Act, 1930, and the Coal Act, 1938—the rationalisation of the coal-mining industry. The Act of 1938 (since amended by the Coal Act, 1943) vested all coal in the Coal Commission, and the Department was to appoint Valuation Boards to allocate compensation to the owners. A *Petroleum Department* under a Parliamentary Secretary (the Secretary for Petroleum) was established in 1940 to exercise all the powers and duties of the Board in relation to petroleum and petroleum products. These matters were recently assigned to the **Ministry of Fuel and Power,** which has now been put on a permanent basis by the Ministry of Fuel and Power Act, 1945.

The Ministry of Health.—This Department was created by the Ministry of Health Act, 1919. The Minister is in peacetime a member of the Cabinet, and he is assisted by a Parliamentary Secretary and a very large staff under the Permanent Secretary. Besides the usual administrative, executive and clerical staff, the Department has a large number of accountants, medical officers, inspectors and auditors, as well as its own legal branch. Welsh matters are assigned to the *Board of Health for Wales*, which has its head office in Cardiff under a permanent Chairman.

The chief functions of the Ministry of Health are (1) to consider all questions affecting the health of the nation, (2) to administer approved National Health Insurance schemes and Widows', Orphans' and Old Age Contributory Pension Schemes as successor to the Insurance Commission, and (3) to supervise generally the work of local authorities as successor to the Local Government Board which was created in

(*r*) See further, *post*, p. 239.

1871, especially as regards public health, housing, slum clearance, public assistance and district audit (*s*).

The public health service which has expanded so much in the last hundred years emerged from poor relief, for, as the Report of the Royal Commission in 1834 disclosed, destitution is usually the direct or indirect effect of ill-health. The powers and duties of the Ministry as defined in the Act of 1919 cover the preparation, carrying out and co-ordination of measures conducive to the health of the people, including the prevention and cure of diseases, the treatment of physical and mental defects, the treatment and care of the blind, national health insurance, the initiation and direction of research, the publication of information and statistics relating thereto, and the training of persons for health services. Other Departments are concerned with specific topics, for example, the Ministry of Education with the medical inspection and treatment of school-children, and the Home Office (or the Ministry of Labour and National Service in wartime) with the welfare of industrial workers. The Departments mentioned, and the Ministry of Agriculture and Fisheries, are also concerned to a certain extent with local government, but, in the absence of a special Department for that purpose, the Ministry of Health on grounds of history and convenience is the residuary authority for supervising and co-ordinating local government. It collaborates with the Scottish Office in matters affecting Scotland.

Subordinate Departments without political heads are the *General Register Office* at Somerset House (*t*) which keeps registers of all births, marriages, deaths, legitimations and adoptions and is responsible for the preparation of the Census of Population and the National Register, and the *Board of Control* which is concerned with the care of persons of unsound mind and mental defectives.

The Ministry of Labour.—As the result of a motion by Charles Bradlaugh in the House of Commons, the Board of Trade in 1886 began to collect labour statistics. A Labour Department of the Board of Trade was set up in 1893 for collecting information concerning conditions of employment. Owing to the prevalence of strikes and

(*s*) Newsholme, *The Ministry of Health*

(*t*) The Principal Probate Registry at Somerset House is under the control of the Probate Divorce and Admiralty Division of the High Court. This is also the home of the Board of Inland Revenue

lockouts and persistent unemployment the Board extended its activities and for twenty years it worked on a voluntary basis at the settlement of trade disputes, though its chief motive was not so much the improvement of the conditions of workers as the loss caused to industry by labour disputes (*u*). The setting up of Labour or Employment Exchanges in 1909 to deal with unemployment and the institution of unemployment insurance in 1911 meant a great increase in the work of the Labour Department, and so the Ministry of Labour was created in 1917 under the authority of the New Ministries and Secretaries Act, 1916.

The main functions of the Ministry of Labour are the administration of the national system of Employment Exchanges and Appointments Offices, the prevention or settlement of industrial disputes, the administration of the Trade Boards Acts, the collection and publication of information and statistics relating to labour, the administration of the national scheme of Unemployment Insurance, and the consideration of international labour questions.

At the beginning of the war in 1939 the name of the Department was changed by Order in Council to the *Ministry of Labour and National Service*, the Minister of Labour being also Minister of National Service at a salary of £5,000 a year. The administration of the Factory Acts was taken over for the war period from the Home Office. Other new functions assigned to the reconstituted Department were the apportionment of available manpower between the Armed Forces, the Civil Defence Services and industry; the organisation and control of the supply of labour for war industry; and the administration of the National Service Acts

The Ministry has two Joint Parliamentary Secretaries and a large staff under the Permanent Secretary. Two of its largest Departments are the Factory Inspectorate and the staff attached to the Regional Organisation. It has its own Solicitor's Department. It is assisted by the Unemployment Insurance Statutory Committee (Unemployment Insurance Acts, 1935—1939) and the Catering Wages Commission (Catering Wages Act, 1943), and it exercises some control over the *Unemployment Assistance Board*—an "independent" authority set up by the Act of 1934.

(*u*) Llewellyn-Smith, *The Board of Trade.*

The Department has close relations with several quasi-judicial authorities Among these are the Courts of Referees and the Umpire concerned with the grant of unemployment assistance (*x*); the Industrial Court created by the Industrial Courts Act, 1919, to deal with trade disputes in accordance with the Act; the National Arbitration Tribunal set up by the Department under the Conditions of Employment and National Arbitration Order, 1940, to settle trade disputes which cannot be determined in any other way; and the various Trade Boards set up under the Trade Boards Acts, 1909—1918, to regulate wages in particular trades.

The Ministry of Education.– The provision of education in England was for centuries in the hands of the Church In the fifteenth and sixteenth centuries there were—apart from monastic schools—grammar schools for poor scholars of the district established by philanthropists, and guild schools founded by merchant guilds and livery companies. Then came the "public schools," which are really private secondary schools run under trusts for the public benefit, the older ones being descended from the mediæval grammar, monastic and guild schools. From the year 1833 small Government grants began to be made towards education, and an Education Committee of the Privy Council was appointed in 1839; but in the first half of the nineteenth century all schools were still private, and most of them were run by religious or other charitable bodies. Provision was made by a statute of 1856 for a Vice-President of the Committee to sit in Parliament.

The Education Act, 1870, made education compulsory for all children up to a certain age, and for the first time local authorities were given power to spend money on elementary education. The Board of Education Act, 1899, displaced the Education Committee of the Privy Council by a new Department called the Board of Education. The Board theoretically consisted of a President, the Lord President of the Council, the Secretaries of State, the First Lord of the Treasury and the Chancellor of the Exchequer, but in fact the Board never met and the work was always done by the President (a Cabinet Minister), the Parliamentary Secretary (junior Minister) and their staff, aided by a Consultative Committee. The function of the new

(*x*) The Umpire also hears appeals under the National Service (Armed Forces) Acts.

Department was to supervise the English local education authorities in their administration of the Education Acts, of which the most important were those of 1902 ("Balfour's Act") and 1918 ("Fisher's Act") and the consolidating Act of 1921. To this end the Department prepared legislation for Parliament, submitted schemes showing how the statutory duties and powers of local education authorities should be performed and provided inspection (*y*)

By the Education Act, 1944, the name of the Department is changed to the Ministry of Education and the President of the Board becomes the Minister of Education It is the Minister's duty "to promote the education of the people of England and Wales and the progressive development of institutions devoted to that purpose, and to secure the effective execution by local authorities, under his control and direction, of the national policy for providing a varied and comprehensive educational service in every area" (s 1)

Not only are the functions and duties of local education authorities greatly extended by the Act, but the Minister has power to direct them in many cases where formerly he could only advise and guide. The Minister is to appoint two Central Advisory Councils, one for England and the other for Wales and Monmouthshire, to advise the Minister, not merely (as formerly) on any questions referred to them by him, but also on such matters connected with educational theory and practice as they think fit

The Minister has power to register and inspect all schools which are independent of the national system, and to serve notice of complaint on any which do not satisfy him as coming up to standard, requiring the matter to be remedied. An Independent School may appeal to an Independent Schools Tribunal appointed by the Lord Chancellor and the Lord President of the Council.

The Ministry of Transport.—This Department was created by the Ministry of Transport Act, 1919, to take over certain of the functions formerly exercised by the Board of Trade and generally to improve the means of and facilities for transport (*z*). The Minister is now usually of Cabinet rank, and he is assisted by a Parliamentary

(*y*) Selby-Bigge, *The Board of Education*.

(*z*) The control of air transport is vested in the Ministry of Civil Aviation Ministry of Civil Aviation Act, 1945).

Secretary (*a*), a staff under the Permanent Secretary, and a number of Advisory Committees.

The Ministry of Transport has powers relating to railways, tramways, canals, roads, bridges and ferries, and vehicles and traffic thereon, being especially concerned in the case of railways with freight charges, passenger fares and railwaymen's wages. Under the Road and Rail Traffic Act, 1933, and the Road Traffic Acts, 1930—1937, the Minister issues regulations concerning licences and compulsory insurance He exercises some control over the *London Passenger Transport Board* constituted by the London Passenger Transport Act, 1933, and a number of statutory authorities whose functions are quasi-judicial, for example, the Traffic Commissioners and the Railway Rates Tribunal. He supervises the local highway authorities, and became himself the highway authority for trunk roads in 1937 Powers were conferred on him by the Restriction of Ribbon Development Act, 1935, with regard to the restriction of building along certain roads if such "development" was likely to interfere with traffic. The Electricity Commission constituted in 1919 to supervise the supply of electricity in larger areas than those operated by local authorities, and the *Central Electricity Board*—an independent corporation created by the Electricity (Supply) Act, 1926, to supply electricity in bulk to electricity undertakers and railway companies—are subject to some control by the Minister of Transport

By section 26 (1) of the Ministry of Transport Act, 1919, the Minister can be sued in contract, tort and other matters arising out of the Department (*b*).

The name of the Department was changed in 1941 to the *Ministry of War Transport* when it took over the control of merchant shipping from the Ministry of Shipping which had been created as a war measure in 1939.

The Ministry of Works.—The Department of the Commissioners of Works and Public Buildings was created by statute in 1851 to take over the charge of royal palaces and parks and public buildings from the former Commissioners of Woods, Forests and Land Revenues. The Board consisted of a First Commissioner appointed by sign manual

(*a*) During the war the Ministry of War Transport had a second Parliamentary Secretary resident in the United States.

(*b*) See *post*, p 274.

warrant, the Secretaries of State and the President of the Board of Trade. It was somewhat analogous to the Board of Education, for its functions were exercised by the First Commissioner, a Minister sometimes in the Cabinet. It did not represent any ancient high office of State, nor, on the other hand, did it originate as a Committee of the Privy Council.

The Office of Works became the Ministry of Works and Planning when most of the functions of the Ministry of Health under the Town and Country Planning Act, 1932, were transferred to it. (Minister of Works and Planning Act, 1942.) The First Commissioner became the Minister. The planning functions were soon afterwards assigned to the new Ministry of Town and Country Planning (*c*), and the Department is now called the Ministry of Works. (Minister of Town and Country Planning Act, 1943.) The Minister is a corporation sole for all purposes.

There is a Permanent Secretary and a large staff including architects, surveyors and engineers. The work of the Department greatly increased during the war, for besides taking charge of the fabric and furniture of Government buildings, it had to control the construction of aircraft and munition factories and, under the direction of the Ministry of Reconstruction, to plan post-war building. The Department also has charge of royal parks and palaces, diplomatic and consular offices, certain art and science buildings and the preservation of ancient monuments.

The Ministry of Agriculture and Fisheries.—Until fairly recently, much of the work—research, education, statistics, etc.—relating to the two oldest and most fundamental industries, agriculture and fishing, was done by private enterprise, notably the Royal Agricultural Society. In 1889 the Board of Agriculture Act set up a Board of Agriculture consisting of the Lord President of the Council, the Secretaries of State, the First Lord of the Treasury, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster and the Secretary for Scotland, to take over the functions of a Committee of the Privy Council in relation to diseases of animals, and of the former Land Commissioners in relation to tithe commutation, copyholds, inclosures, allotments, land drainage and improvement. It was also to collect and publish information and statistics and generally to

(*c*) *Post*, p. 238.

promote the welfare of agriculture. Under the Board of Agriculture and Fisheries Act, 1903, the functions of the Board of Trade in relation to fisheries were assigned to the Board, which became the Board of Agriculture and Fisheries.

The Board became a Ministry by the Ministry of Agriculture and Fisheries Act, 1919 The Minister is usually a member of the Cabinet, and is assisted by one ot two Parliamentary Secretaries, a Permanent Secretary and a staff which includes a large number of inspectors and a legal branch.

The most important function of the Ministry in peacetime is the control and eradication of the diseases of animals, though in wartime its work consists largely in promoting the increase of home-grown agricultural produce so as to save shipping by the reduction of imports. The Department is further concerned with the teaching of and research in agriculture, plant diseases and agricultural economics in various Universities, Colleges and Institutes; the improvement of livestock, milk and poultry; the encouragement of grants of small-holdings and allotments; the management of horticulture; the encouragement of market co-operation; the supervision of land drainage and improvement, and of the growing of special crops such as sugar beet and flax; the regulation of the wages of agricultural workers; the administration of the law relating to tithes, inclosures and commons, and University and College Estates (*d*). The Minister supervises the work of the Agricultural Committees of County Councils, and even has some control over the appointment of their members. He collaborates with the Scottish Office in matters affecting Scotland

The Minister has the advice and assistance of a number of semi-independent Boards such as the Agriculture Advisory Committee of England and Wales, the Wheat Commission, the Agricultural Wages Board, the Herring Industry Board and various Marketing Boards, some of which are of an elective nature. The Ministry includes a Welsh Department at Aberystwyth and a Fisheries Department. It also manages the Royal Botanic Gardens, Kew, as a research centre and public park, and directs the Ordnance Survey

The Post Office.—Henry VIII appointed a Master of the Posts in 1516 to carry letters to members of his Court. Charles I and Charles II collected a large revenue by putting their postal organisation

(*d*) Floud, *The Ministry of Agriculture and Fisheries.*

at the disposal of the public. The office of Postmaster-General became statutory in 1710 and has been regarded as a political office since 1837, though it was not until 1866 that the Postmaster-General was allowed to sit in the House of Commons. He is appointed by letters patent and, by virtue of a series of statutes from 1837 onwards, he exercises the royal monopoly of carrying letters for reward and also (as the result of a process of purchase or licensing) the monopoly of the telegraph and telephone services (*e*). He also controls wireless services and experimentation by the licensing system established by the Wireless Telegraphy Act, 1904 (*f*).

The Postmaster-General, who is not usually a member of the Cabinet, has an Assistant Postmaster-General, a junior Minister with a salary of £1,200 a year. An Advisory Council was set up in 1933. There is a Post Office Board, of which the Postmaster-General is chairman, consisting of the Assistant Postmaster-General and some of the chief officers of the Department, which shares in the formation of policy. The head permanent official is the Director-General, and the staff—which is the largest of any Government Department—includes many engineers, accountants and clerks The Post Office was formerly subordinate to the Treasury, but in 1933 it became a separate Department, having a wider control of the surplus of revenue over expenditure and greater freedom to expand on commercial lines.

Besides collecting dues for postage and wireless licences and administering the Post Office Savings Bank, the Post Office both collects and pays money on behalf of other authorities. Thus it receives money for certain taxes, duties, insurances and licenses on behalf of the Board of Inland Revenue, the Board of Customs and Excise, the National Health Insurance Commissioners, the Board of Trade, and County Councils, and it pays out money for Widows', Orphans', Old Age, Army, Navy and Air Force pensions. It is also concerned with international conventions relating to such matters as postal rates and radio-telegraphy.

The Postmaster-General has a slight control over the ***British Broadcasting Corporation***, an independent authority created by royal charter under an Act of Parliament in 1926 in succession to the British Broadcasting Company. The Corporation administers the

(*e*) *Att.-Gen.* v. *Edison* (1880), 6 Q. B. D. 244.
(*f*) Evelyn Murray, *The Post Office.*

safeguarded monopoly of wireless broadcasting. Its seven Governors are appointed by the Crown on the advice of the Prime Minister. The Postmaster-General has power to forbid the transmission of any matter and in an emergency to take over complete control of transmission; but he does not control the policy and programmes of the Corporation and he is only answerable to Parliament for a limited range of its activities.

The Ministry of Pensions.—This Department was created by the Ministry of Pensions Act, 1916, to take over the duties of the Admiralty, the Army Council and the Commissioners of Chelsea Hospital in relation to war pensions. Its duties have been increased by the creation of the Royal Air Force and the outbreak of another war. Pensions Appeals Tribunals were set up by the War Pensions Acts, 1919—1921.

The Minister receives a salary of £2,000 a year, or £5,000 a year in the unlikely event of his being a member of the Cabinet. He is assisted by a Parliamentary Secretary with a salary of £1,200 a year, and there is an appropriate staff under the Permanent Secretary.

The Chancellor of the Duchy of Lancaster.—The Chancellor of the Duchy of Lancaster is appointed by letters patent and delivery of the seal of the Duchy to administer the estates of the Duchy of Lancaster and to control the Courts of the County Palatine of Lancaster. The estates belong to the King as Duke of Lancaster, but the succession is assimilated to that of the Crown by a charter of Henry VII. The Palatinate of Lancaster created as a separate franchise by Edward III in 1351 and revived in 1377 for his son, John of Gaunt, has been held with the Crown since 1399 (*g*). The office is now practically a sinecure as all but certain formal matters are dealt with by a small staff under the Vice-Chancellor. The only Court which survived the Judicature Act, 1873, is the Chancery Court, and the Chancellor is no longer a judicial officer. He appoints and dismisses County Court Judges within the Duchy. The Chancellor (£2,000 a year) and his staff are paid out of the funds of the Duchy.

This post, practically free from departmental duties, is given to a Minister usually either because his age or state of health renders this a convenient way of retaining his counsel or in order that he may

(*g*) See Holdsworth, *History of English Law*, vol. I (5th ed.), pp. 114—117

concentrate on research and planning in some more or less non-controversial field of government. The Ministers of the Crown Act, 1937, provides that the Chancellor of the Duchy of Lancaster shall receive a salary of £5,000 a year if he is a member of the Cabinet.

A **Minister for the Co-Ordination of Defence** was appointed in 1936 as a member of the Cabinet to act on behalf of the Prime Minister as Deputy-Chairman of the *Committee of Imperial Defence* and of the Defence Policy and Requirements Committee of the Cabinet. The Ministers of the Crown Act, 1937, assigned him a salary of £5,000 a year. The office has been in abeyance since Mr. Churchill assumed the title of Minister of Defence when he became Prime Minister in 1940, and the Secretariat of the Committee of Imperial Defence is at present merged in the Offices of the War Cabinet. The Committee will probably be revived after the war, as it was after the last war, since the recommendation frequently made to create a Ministry of Defence has not been acceptable to Prime Ministers, and a Minister for the Co-Ordination of Defence will probably be appointed again (*h*).

The Ministry of Supply was created shortly before the war by the Ministry of Supply Act, 1939. The general powers of the Minister are to buy, manufacture and sell articles required for the public service, and the Act applies to him certain statutes relating to the Secretary of State for War with regard to the holding and disposing of land, etc (*i*). The Minister may in certain circumstances authorise a controller to carry on another person's business, and he may require the taking of security precautions. The Act amends the Ministers of the Crown Act, 1937, by adding the Minister of Supply at a salary of £5,000 a year and a Parliamentary Secretary with a salary of £1,500 a year, and increases the number of Ministers and Parliamentary Secretaries who may sit in the House of Commons. A second (unpaid) Parliamentary Secretary was later appointed.

The work of this Ministry greatly increased after the outbreak of war since, besides being the supply department of the War Office, it controlled many branches of war production affecting all Departments, for example, machine tools, ball bearings and various kinds of

(*h*) For the Committee of Imperial Defence, see Jennings, *Cabinet Government*, ch. 10.

(*i*) For the liability of the Minister of Supply to be sued, see *Minister of Supply* v. *British Thomson-Houston Co.*, [1943] K. B. 478; *post*, p. 275.

ammunition, and materials. Consequently it formed a very large staff.

The Ministry of Town and Country Planning was created under the Minister of Town and Country Planning Act, 1943. Its duty is to secure consistency and continuity in the framing and execution of a national policy with regard to the use and development of land throughout England and Wales. To this Department have been assigned (*inter alia*) all the functions exercisable previously by the Ministry of Works and formerly by the Ministry of Health under the Town and Country Planning Act, 1932, except under section 32 (the application of sums received by a responsible authority by way of betterment). The Act also provides for the establishment of statutory Commissions for the purpose of exercising certain of the statutory functions. The Town and Country (Interim Development) Act, 1943, makes provision for bringing under planning control land in England and Wales which is not subject to a scheme or resolution under the Act of 1932, and gives the Minister certain powers over development pending the coming into operation of planning schemes.

The Minister, who receives a salary of £5,000 a year, and one Parliamentary Secretary, may sit and vote in the House of Commons. The Minister is a corporation sole for all purposes.

Temporary Departments.—The Ministers of the Crown (Emergency Appointments) Act, 1939, passed at the beginning of the war, made provision for the appointment of Ministers by Order in Council to exercise functions connected with the prosecution of the war, and for the transfer to such Ministers of functions and property from other Departments. The Minister and not more than one Parliamentary Secretary of a Department so created may sit in the House of Commons. The continuance of the Act was confined to the war period by the Ministers of the Crown and House of Commons Disqualification Act, 1942.

Among the temporary Departments set up under the Ministers of the Crown (Emergency Appointments) Act were the *Ministry of Information* (1939); the *Ministry of Food* (1939); the *Ministry of Economic Warfare* (1939); the *Ministry of Aircraft Production* (1940), to which were assigned the functions and property of the Air Ministry relating to the production of aircraft, and which bore a relation to the

Air Ministry similar to that of the Ministry of Supply to the War Office, besides controlling certain branches of production—*e.g.*, radio—affecting all departments (*k*); and the *Ministry of Production* (1942), whose function was to co-ordinate the production activities of the three Supply Departments. These Ministers received a salary of £5,000 a year. The Minister of Production was a member of the War Cabinet, but the other Ministers were not, save when Lord Beaverbrook was Minister of Aircraft Production and later Minister of Supply. Mention has already been made of the Ministries of National Service, Home Security, and Shipping, all created in 1939 (*l*).

The Ministry of Fuel and Power was created in 1942 under the 1939 Act to deal with the production and consumption of power. It incorporates the Mines and Petroleum Departments of the Board of Trade, and to it are assigned all the functions exercisable by the Board of Trade in relation to (a) coal, minerals, mines and the mining industry, quarries and petroleum, except as regards weights and measures; (b) gas undertakings and the supply of gas, (c) electricity undertakings and the supply of electricity, including the functions of the Electricity Commissioners (*m*); and (d) hydraulic power undertakings and the supply of hydraulic power.

A *Ministry of Reconstruction* was created in 1943 to initiate and co-ordinate policy for the reconstruction of the civil life of the country after the war. The Minister was a member of the War Cabinet.

A *Ministry of National Insurance* was created in 1944 to administer the comprehensive scheme of social insurance introduced by the Government and based largely on the famous "Beveridge Report." This Department will also take over much of the work relating to insurance hitherto administered by the Ministry of Health, the Ministry of Labour, the Home Office and the Scottish Office.

A *Ministry of Civil Aviation* was created in 1944 to relieve the Air Ministry of the administration of civil aviation. For operational reasons, however, production of civil aircraft must remain for the time being under the control of the Ministry of Aircraft Production in co-operation with the Air Ministry.

(*k*) The Admiralty continued to [illegible] generally as its own supply department, subject to the functions exercised in certain matters by the Ministries of Supply, Aircraft Production and Works

(*l*) *Ante*, pp. 220, 229, and 232.

(*m*) *Ante*, p. 232

CHAPTER XIX.

LOCAL GOVERNMENT AUTHORITIES.

THIS account of Local Government Authorities is confined to England and Wales. Local government in Scotland at the present day bears some resemblance to the English system, but it has quite a different history and is under the supervision not of the Minister of Health but of the Secretary of State for Scotland. The organisation of local government in Northern Ireland is based on the Local Government Act, 1898, as modified by subsequent legislation: its main peculiarities are that the county councils are rating authorities, there are no civil parishes, and the central supervision is exercised by the Northern Ireland Minister for Home Affairs.

I. THE HISTORY OF LOCAL GOVERNMENT ORGANISATION.

Most of the present Local Government Authorities date from nineteenth century statutes and most of their powers from nineteenth and twentieth century statutes, though counties, boroughs and parishes as units for various purposes are ancient. The present organisation appears to be very modern, yet it can only be properly understood if something is known of its history. "A fundamental antithesis between centralisation and 'autonomous' decentralisation," it has been said, "runs through the whole history of English government and its organisation . . . From the very beginning of English history the contrast finds expression in the conflict between a powerful unifying monarchy, with the whole force of the executive behind it, and a strong local feeling which clung to what remained of a territorial organisation corresponding partly to the Saxon earldoms, partly to the counties into which they were split under pressure of the Kingly power" (*a*).

The Sheriff.—In the early Middle Ages, both before and after the Norman Conquest, the chief royal officer for the control of local government was the sheriff of the county or shire. His executive

(*a*) Redlich and Hirst, *Local Government in England*, vol. I, pp 10—11.

and judicial functions were not distinguished, and he was to a greater or less degree subject to the control of the King's Council. The general administration was carried on in the County Court, the assembly of the freeholders of the county over which the sheriff presided. The county was divided into districts called hundreds, wapentakes or wards, and they were administered in the Hundred Courts, the assemblies of the freeholders of the hundreds presided over by the bailiffs as deputies of the sheriffs. For the maintenance of the peace the hundred was divided into vills, townships or tythings, each of which elected a head called the tything man, headborough or borsholder. The organisation of the vill was not well defined, and it had no Court or assembly; but it is interesting as it corresponded more or less to the feudal unit of the manor and the ecclesiastical unit of the parish. In the shire, hundred and vill is found the key to the modern organisation of rural areas for local government purposes—the county, the district and the parish.

The Justices of the Peace.—Over a period of centuries the sheriff gradually lost nearly all his functions, so that Maitland could say that the whole history of English justice and police might be described as "The Decline and Fall of the Sheriff" (*b*). After various experiments, the local administration of justice was given in the middle of the fourteenth century to Justices of the Peace, county gentlemen commissioned by the Crown to keep the peace. "That such justice should not be in the hands of the sheriff—a resident provincial viceroy," says Maitland, "had been an object of national striving; that it should not be in the hands of the feudal lords, the King was determined" (*c*). For nearly five hundred years, that is, until the year 1834, the control of local government was mainly in the hands of these Justices of the Peace, for besides the judicial functions in which they displaced the sheriffs and the Communal Courts, a long series of statutes cast on them numerous administrative duties, beginning with the regulation of wages under the Ordinances of Labourers and the granting of all kinds of licences From the Tudor period the Justices supervised the maintenance of highways (Statute of Highways, 1555) and the relief of the poor (Poor Relief Act, 1601) by the parishes and their elected officers. The Justices themselves were controlled by the

(*b*) *Justice and Police*, p. 69. (*c*) *Op. cit.*, p. 79

King's Council until the Star Chamber was abolished in 1641. For the next two hundred years local government was, subject to the legislative power of Parliament, almost autonomous: practically the only control was exercised by the Courts in applying the doctrine of *ultra vires* and issuing prerogative writs.

Boroughs.—This period also saw a great growth in the size and number of towns, and to the Justices of the Peace as local government authorities we must add the boroughs. These were corporations of burgesses standing for many purposes outside the sphere of the administrative county and the parish officers. They supervised the upkeep of highways, the relief of the poor, the discouragement of vagrants and the carrying on of trade and industry in their areas.

Towards the end of the eighteenth century miscellaneous *ad hoc* bodies were set up by statute for specific purposes such as poor law, turnpike roads and urban sanitation.

Nineteenth century Reform.—Modern local government is characterised by *locally elected councils*, and was inaugurated by the Poor Law Amendment Act, 1834, and the Municipal Corporations Act, 1835. The former Act reorganised the administration of the poor law which, apart from police, had always been the most important function of local government. Since the Poor Relief Act, 1601, poor law had been administered by unpaid "overseers of the poor" appointed by the Justices. The Act of 1834 displaced the overseers by "guardians of the poor," *ad hoc* authorities elected by the ratepayers, and provision was made for central control from which the overseers had been free. The Municipal Corporations Act abolished a number of small municipal boroughs and set about reforming the rest, which were mostly inefficient and corrupt. Its most important contribution was that it provided for borough councils to be elected by the owners or occupiers of property, for borough government was previously in the hands of an obligarchy of burgesses who co-opted their friends from time to time. The process of creating elected councils was continued by the Local Government Act, 1888, which introduced county councils and county borough councils, and the Local Government Act, 1894, which introduced urban district councils, rural district councils and parish councils.

Although local *ad hoc* authorities continued to be created in the

nineteenth century, for example, highway boards in 1835, boards of health in 1845, school boards in 1870 and sanitary districts in 1875, they gradually disappeared. The general principle in recent times was to have one local authority for all services in its area, and this was eventually brought about to a great extent by the Local Government Act, 1929, and the Poor Law Act, 1930.

Central Control.—With regard to central control the experiment in 1834 of appointing Poor Law Commissioners who were neither in Parliament nor responsible to Parliament was not successful and was superseded by other methods. In 1871 the Local Government Board with a President in Parliament displaced the existing Poor Law Board, and to the new Board were also given the powers of the Public Health Department of the Privy Council The Local Government Board as the central department responsible for the general supervision of local government was itself superseded by the Ministry of Health in 1919 (*d*).

Consolidation of the Law.—The Local Government Act, 1933, consolidated with amendments the enactments relating to Local Authorities outside London. Its 308 sections and eleven schedules cover the constitution of local authorities, the local franchise and elections, qualifications and disqualifications for office, committees, officers, alteration of areas, the voluntary and compulsory acquisition of land, finance, accounts and audit, and the power to make by-laws.

The government of London has always stood apart from the general system owing to the maintenance of the ancient privileges of the City of London and the enormous size and population of Greater London. The organisation outside the City was greatly simplified by the creation of the London County Council and the Metropolitan Borough Councils by the London Government Act, 1899 Until recently the law relating to London was contained in about seventy statutes passed in the last four hundred years, besides special Acts and customs, but the statute law has now been largely consolidated with amendments by the London Government Act, 1939. This Act of 208 sections and eight schedules does for the London County Councils and Metropolitan Borough Councils what the Local Government Act, 1933, did for the

(*d*) For the Ministry of Health, see *ante*, p. 227.

extra-Metropolitan authorities, and follows the latter Act so far as the different nature of the London authorities permits. The Act of 1933 applies to London so far as joint committees, district audit and financial returns are concerned.

Some progress has also been made in consolidating, again with amendments, the mass of statute law relating to particular services. Noteworthy examples are the Poor Law Act, 1930, the Town and Country Planning Act, 1932, the Public Health Act, 1936, the Housing Act, 1936, and the Food and Drugs Act, 1938. The consolidation of the law of public health, however, is not yet complete, and the law of highways is one of the branches in which consolidation is still awaited. The Education Act, 1944, displaces previous consolidating Acts besides introducing extensive reforms. In this process London has to have separate treatment, either in the form of special legislation such as the Public Health (London) Act, 1936, or of special provisions applying the Act to London with modifications.

The tendency in recent years has been to transfer functions, *e.g.*, public assistance, education and highways, from the smaller to the larger authorities, namely, the county councils and county boroughs. A concurrent tendency has been to vest greater powers of control and direction in the Ministry of Health or other appropriate central department. What has been described as "the irresistible drift towards larger authorities" (*e*) is also shown in the Government's recent proposals with regard to the reorganisation of public health. It has been further suggested that for certain kinds of services some sort of regional organisation is required (*f*), though not of the non-elective kind set up for temporary war purposes.

II. THE LOCAL AUTHORITIES (EXCLUDING LONDON).

"Local authority" is defined by section 305 of the Local Government Act, 1933, as "the council of a county, county borough, county district or rural parish," and "county district" is defined as "a non-county borough, urban district or rural district." Each borough authority, *i.e.*, council, is a corporation (*g*).

(*e*) Robson, *The Development of Local Government* (2nd ed.), p. 58.

(*f*) See *e.g.*, *Report of the Royal Commission on Local Government in the Tyneside Area* (1937), Cmd. 5402.

(*g*) Cf. *post*, p. 246, as to Boroughs, and *post*, p. 249, as to Parish Councils.

1. County Councils.—County councils were created by the Local Government Act, 1888, which vested in them most of the administrative functions of the justices. Their constitution is now contained in the Local Government Act, 1933. The sixty-one administrative counties are set out in the First Schedule to the Act. Their areas do not necessarily coincide with the ancient geographical counties or with what are county areas for other purposes such as police or the commission of the peace

The council consists of the chairman, aldermen and councillors (*h*). The *chairman* is elected annually by the whole council, and he must himself be either a councillor or alderman or eligible to be a councillor. He is *ex officio* a justice of the peace for the county (*i*). The *aldermen* are elected by the councillors and must either themselves be councillors or be eligible for election as councillors. There is one alderman to every three councillors Half the aldermen are elected every three years for a period of six years (*k*) They do not form a second chamber, but they provide an element of continuity and width of experience to the council. The *councillors* are elected together for three years in every third March by the local government electors (*l*).

For some services, *e.g*, public assistance, education (primary, secondary and further) and main roads (other than trunk roads, for which the Minister of Transport is the authority), the county council is the sole authority within its area· in other services, *e.g.*, public health and planning, it supervises the administration by the other authorities within the county. It is also concerned with agriculture, but not housing nor usually trading undertakings.

The county police force (save in Middlesex, which is entirely within the Metropolitan Police district) is supervised by a Standing Joint Committee of Quarter Sessions and the county council. This exception to the transfer of powers from the justices to county councils was deemed desirable by the Local Government Act, 1888, owing to the close connection between the police system and the administration of justice.

2. Borough Councils.—A *borough* is a municipal corporation created by royal charter and consisting of the Mayor (or Lord Mayor), aldermen

(*h*) Local Government Act, 1933, s. 2.
(*i*) *Ibid.*, s. 3.
(*k*) *Ibid.*, s. 6.
(*l*) *Ibid.*, s. 8.

and burgesses (or citizens). The Crown's power to create boroughs can now only be exercised in accordance with the terms of the Municipal Corporations Act, 1882 (replacing the Municipal Corporations Act, 1835), as extended by the Local Government Act, 1933, s. 129. A borough is a corporation at common law, and as such it has theoretically the powers of a common law corporation, which extend to the performance of any act which an individual may do and of which it is physically capable. (*Case of Sutton's Hospital* (1612) (*m*).) This means that an act which is not within the powers conferred by the charter or incidental to the purpose of incorporation is not void as being *ultra vires*, but merely renders the charter liable to be rescinded. This is not of practical importance, however, as the administration of local government involves the expenditure of public money and that requires statutory permission. Further, a borough is only capable of exercising its statutory powers as a local authority through its council (*n*).

A borough *council* consists of the mayor, aldermen and councillors The rules for the election of the *mayor* and *aldermen* are similar to those for the chairman and aldermen of a county council (*o*). The mayor is *ex-officio* a justice of the peace for the borough. On the other hand, one-third of the *councillors* are elected annually in November for three years by the local government electors (*p*), who are now identical with the burgesses or citizens (*q*).

The difference between a borough and an urban district is one of organisation and status rather than function. One of the chief privileges of the ancient borough was exemption to a greater or less degree from the jurisdiction of the sheriff. Later, this meant that a borough might be granted a separate commission of the peace and even a separate Court of Quarter Sessions, and this is so still. When an urban district has developed a certain homogeneity and local pride its council may petition the Privy Council for a borough charter, which will not be granted without enquiry and notice to other interested authorities.

The functions of a borough council include public health, housing, town planning, the maintenance of non-county roads, municipal trading in, *e.g.*, gas, water, electricity and transport, the valuation

(*m*) 10 Co. Rep. 23 a.
(*n*) Local Government Act, 1933, s. 17
(*o*) *Ibid.*, ss. 18 and 21.
(*p*) *Ibid.*, s 23.
(*q*) Representation of the People Act, 1918, 6th Sched., § 2.

of property and the making and levying of rates. After the passing of the Education Act, 1902, the council of a borough having a population of more than 10,000 might be the authority for elementary (now called "primary") education, but under the Education Act, 1944, the county council is the sole education authority. The county council may, however, partition the county into convenient areas and delegate specified functions relating to primary and secondary education to the "divisional executives" of such areas: functions relating to further (formerly called "higher") education may also be delegated with the Minister's approval. A borough council may, before a certain date, claim to be excepted from such a scheme and to form its own divisional executive, and the claim must be allowed if the population of the borough is not less than 60,000 or the number of its public elementary school pupils is not less than 7,000.

A borough with a population of more than 10,000 (Local Government Act, 1888), or a new borough with a population of more than 20,000 (Municipal Corporations Act, 1882), may have a separate police force, in which case the Act of 1882 requires the council to appoint a Watch Committee to supervise the administration of the force. A Watch Committee consists of the mayor and not more than one-third of the members of the council, and, unlike the committee which controls the county police, is not a joint committee with the justices. In other boroughs the police are either the county force or the consolidated forces of the county and borough under the chief constable of the county.

3. Urban District Councils.—The urbanised areas of an administrative county which are not boroughs are now called Urban Districts. Urban district councils were created by the Local Government Act, 1894, in place of the urban sanitary authorities which existed under the Public Health Acts, 1872—1875.

The council consists of a chairman and councillors (*r*). The *councillors* are elected for three years by the local government electors of the district. Normally one-third of their number are elected every year, but provision may be made for the election of the whole council every three years (*s*). The *chairman* is elected annually by the councillors, and he must either be a councillor or eligible for election as a councillor (*t*).

(*r*) Local Government Act, 1933, s. 31.
(*s*) *Ibid.*, s. 35.
(*t*) *Ibid.*, s. 33.

The functions of urban district councils relate chiefly to public health, valuation of property and the making and levying of rates, housing, town planning and the maintenance of non-county roads. After the passing of the Education Act, 1902, the council of an urban district having a population of more than 20,000 might be the authority for elementary education, but under the Education Act, 1944, the county council is the sole education authority and an urban district council is in the same position as a borough council.

Urban districts, including boroughs, are divided into parishes, but urban parishes have no civil councils (*u*) and do not function as local authorities.

4. Rural District Councils.—The areas of an administrative county which are not urbanised are now called rural districts. Rural district councils were created by the Local Government Act, 1894, in place of the rural sanitary authorities which existed under the Public Health Acts, 1872—1875.

The composition and method of election of the council are the same as for an urban district council (*x*).

The functions of a rural district council are similar to those of an urban district council, *e.g.*, public health, valuation of property and the making and levying of rates, housing, planning and the protection of rights of way and rights of common, but its powers are rather less extensive as such problems as sanitation and housing are not so important as in urban areas. Further, a rural district council is no longer a highway authority, though the county council may delegate some of its work on the maintenance of county roads; and it cannot claim to be an "excepted district" for education purposes.

5. Parish Councils and Meetings.—A rural district is divided into parishes. These are civil (formerly poor law) parishes, and do not in most cases coincide with the ancient civil parishes or with ecclesiastical parishes. The Local Government Act, 1894, which provided for parish meetings and in some cases parish councils, was amended and partly superseded by the Local Government Act, 1933.

A rural parish must have a *parish meeting*. This is an assembly of

(*u*) Parochial Church Councils deal only with ecclesiastical matters. Parochial Church Councils (Powers) Measure, 1921.

(*x*) Local Government Act, 1933, ss. 31—35

all the local government electors of the parish, with a chairman. The meeting is not a corporate body, but if the parish has no council, the parochial property is vested in the "representative body"—a body corporate consisting of the chairman of the parish meeting and the members elected by the parish to the rural district council (*y*). There must be at least an "annual assembly" in March, and at least one other assembly must be held each year if there is no parish council (*z*).

If a parish has a population of 300 or more it *must* also have a parish council, and it *may* have a parish council if its population is less than 300 (*a*). A *parish council* is elected triennially for three years, and elects its chairman annually; he must either be a councillor or qualified to be elected as a councillor (*b*). The councillors are usually elected by the parish meeting, but provision may be made for the holding of an election by the local government electors (*c*). The parish council is a corporate body, but neither it nor the representative body has a common seal (*d*)

A decision of the parish council may, in some cases, be referred to the parish meeting, and a decision of the latter may be referred to a poll of the local government electors (*e*).

The functions of rural parishes are few and relatively unimportant —a council having rather wider powers than a meeting—for most of the administration of a parish is in the hands of the county and rural district councils. They refer chiefly to management of the parish property such as village greens and recreation grounds, water supply, allotments, and the maintenance of public footpaths. Additional functions relating to lighting, baths and libraries may be assumed under Adoptive Acts, and a parish council may be employed as agent of the rural district council.

6. County Borough Councils.—The county borough was an innovation introduced by the Local Government Act, 1888. It is a large borough which is taken out of the administrative county altogether. Its organisation is the same as that of a borough, and it also acts by an elected council which is the local authority; but a county borough

(*y*) *Ibid.*, s. 47.
(*a*) *Ibid.*, s. 43.
(*c*) *Ibid.*, s. 51.
(*e*) *Ibid.*, s. 193.
(*z*) *Ibid.*, s. 77.
(*b*) *Ibid.*, s. 49
(*d*) *Ibid.*, ss. 47 and 48.

council has within its area all the functions and powers of a county council as well as of a borough council.

The Local Government Act, 1888, besides creating certain county boroughs, provided that other boroughs with a population of 50,000 or more might be made county boroughs by order of the Minister of Health Later it was thought undesirable that administrative areas should be unduly narrowed by taking too many large towns out of the jurisdiction of county councils, and so the Local Government Act, 1933, raises the minimum population required for this purpose to 75,000 and imposes the more cumbersome and expensive procedure of a private Act of Parliament (*f*). The names of eighty-three county boroughs are set out in the First Schedule to the Act.

It follows from what has been said that a county borough council is the exclusive local authority within its area for finance, public health, public assistance, housing, education, highways, town planning and municipal trading.

Committees and Local Government Officers.—Parliament does not delegate its own functions to the Central Departments; it approves or disapproves of their acts after they are done. Since the Central Government Departments and civil servants are the agents of the Crown and not of Parliament, their acts are the acts of the King or of a Minister and not of Parliament The responsibility of the heads of Departments to Parliament is a political or conventional, and not a legal, responsibility. In local government, on the other hand, the actual routine administration, as distinct from the formulation of policy, is carried out by paid permanent officials who are the servants of, and therefore legally responsible to, the local authorities which appoint them. Further, local authorities set up committees for specific purposes. A committee is composed wholly or mostly of members of the council, and, therefore, it does not correspond to a Central Government Department, which—except for the Ministerial heads—does not consist of members of Parliament.

Committees.—The Local Government Act, 1933, allows every local authority to set up such committees as it thinks fit (*g*), though by various statutes there are certain services for which a council *must*

(*f*) Local Government Act, 1933, s. 139. (*g*) *Ibid.*, ss. 85 and 90.

appoint a committee. A county council, for example, must appoint committees for finance, public health, education, public assistance and agriculture, and a Standing Joint Committee for police. A Finance Committee must consist entirely of members of the council, but the Local Government Act, 1933, provides that any other committee whose composition is not governed by special statutes may be composed of not more than one-third of other persons, called "non-elected" or "co-opted" members, who must be qualified to be councillors. The chairman of a county council or the mayor of a borough is *ex-officio* chairman of all committees, though he usually presides only over key committees such as the Finance Committee.

A committee is not always merely the ministerial agent of the council, for in many cases the council delegates its powers (except to borrow money or raise a rate) to a committee, and in other cases the committee itself may have powers conferred directly on it by Parliament. Consequently, some juristic acts may be performed by the council, some by a committee subject to the approval of the council, and some by a committee itself. A county council need only meet four times a year and it nearly always approves the work of its committees, so that at a meeting of the full council the time is largely taken up with formal ratification (where that is necessary) of what has been done. Other councils usually meet more frequently than county councils, and rely less on committees.

Officers.—The Local Government Act, 1933, empowers a local authority to appoint, with a reasonable salary, such officers as it thinks fit (*h*). There are certain officers which a local authority *must* appoint: for example, a county council must appoint a clerk, a treasurer, a medical officer of health, a surveyor, and a chief education officer (*i*).

The senior paid officer in a county or borough is usually the Clerk to the County Council or Town Clerk. He is generally a qualified lawyer who is head of the legal department, acts as secretary at council meetings and supervises the officers of the other departments.

In theory, policy is initiated by the committees, but in practice the higher expert officials such as the medical officer of health or the chief education officer tend more and more to take the initiative, though

(*h*) *Ibid.*, ss. 105—107.
(*i*) *Ibid.*, ss. 98—104; Education Act, 1944, s. 88

their plans are informal and do not by any means always obtain the necessary approval of the committee concerned.

III. LOCAL GOVERNMENT ELECTIONS.

1. The Local Government Franchise.—The local government franchise is not the same as the Parliamentary franchise, but it is governed by the same statutes, namely, the Representation of the People Act, 1918, and the Representation of the People (Equal Franchise) Act, 1928 (*k*). The right to vote is given to those whose names are on the register of local government electors for a given area, which comes into force on 15th October in each year

A British subject, whether male or female, of full age and not subject to any legal incapacity such as conviction for felony, is entitled to be put on the register if he or she *is in occupation as owner or tenant of land or premises in the area* on 1st June, and has been in occupation of *any* land or premises in the area throughout the preceding three months; or if he or she is the *husband or wife* of a person with the premises qualification, provided that they both reside in the premises. Infants, aliens, and persons convicted of felony are not entitled to vote, but peers are.

It will be noticed that while *residence* is sufficient for the Parliamentary franchise (*l*), *occupation* as owner or tenant is necessary for the local franchise. Thus, a lodger in *furnished* rooms, not being a "tenant" as he has not exclusive possession, is not qualified as a local government elector, though he may vote at Parliamentary elections. The requirement of ownership or occupation as tenant of land or premises more or less restricts the local franchise to the ratepayers (*m*), because they are considered to be primarily interested in local affairs since local government is largely financed out of rates. It is also said that "birds of passage" are not usually interested in purely local affairs, while national affairs concern everyone of mature judgment. Against this, it may be argued that half the expenditure on local government is now provided by the taxpayer in the form of grants from the Central Government, that this proportion is tending to increase, and further, that the widening of the local franchise might

(*k*) This page and the following refer to the law as it was before 1945; cf. *Addenda.*
(*l*) *Ante*, p 86. (*m*) *Post*, p 254.

infuse some much-needed new spirit into the conduct of local affairs. Incidentally, a lodger in furnished rooms does pay rates indirectly through his rent.

Owing to war conditions the preparation of registers and the holding of local elections were suspended by a series of annual Local Elections and Register of Electors (Temporary Provisions) Acts from 1939 onwards. Before a new register is prepared it must be decided whether to assimilate the local government franchise to the Parliamentary franchise and to apply to local elections the continuous registration system introduced for Parliamentary purposes by the Parliament (Elections and Meeting) Act, 1943. A Speaker's Conference in 1944 recommended such assimilation: Parliamentary and local government elections to be held on the same register, with the proviso that Peers should not lose their right to vote in local elections (*n*).

2. Qualifications and Disqualifications for election.—The qualifications for election as councillor are narrower than those sufficient for a Member of Parliament, but wider than those required of a local government elector. On the one hand a councillor must have some connection with the area for which he seeks election, while a Member of Parliament need not; on the other hand, mere residence in the area is sufficient for a councillor, but not for a local government elector. The qualifications for election as a councillor are full age, British nationality, and *either* ownership of land (including leaseholds) within the area *or* being registered as a local government elector for the area *or* residence within the area for twelve months preceding the election. (Local Government Act, 1933, s. 57.) Local councillors are not paid, except that the chairman of a county council and the mayor of a borough may receive reasonable remuneration (*o*).

The disqualifications for election as councillor were also made uniform for all authorities by the Local Government Act, 1933, s. 59. The most important disqualifications are: being an undischarged bankrupt; being in receipt of public assistance; conviction in certain cases for offences under the Corrupt and Illegal Practices Acts; being surcharged by a district auditor for a sum exceeding £500 (*p*); or holding a paid office under the local authority in question. The last

(*n*) Cmd. 6534. See now Representation of the People Act, 1945.
(*o*) Local Government Act, 1933, ss. 3 and 18. (*p*) *Post*, p. 256.

disqualification includes local government officers, teachers in council schools, recorders and coroners. A person is no longer disqualified from membership of a local authority with which he has commercial relations, but he must not take part in the discussion of, or vote upon, matters in which he has a pecuniary interest (*q*).

IV. LOCAL GOVERNMENT FINANCE.

Every local authority is required to make an annual return of its income and expenditure to the Minister of Health The returns are made up to 31st March, and a summary must be laid by the Minister before Parliament.

1. The Income of Local Authorities.—Local authorities derive their income mainly from rates and grants-in-aid from the Central Government. A part of the income of some local authorities—especially county boroughs, boroughs and urban districts—is derived from rents on the authority's property and profits on gas, electricity, water supply, transport and similar trading undertakings; but profits derived from these sources are generally applied towards the expenses and improvement of these services and to reduction of rates Local authorities also raise money for capital expenditure by way of loans.

(a) *Rates.*—Rates are taxes which Parliament empowers local authorities to levy (*r*). There is no legal maximum, and the responsibility is owed only to the local government electors. The "rating authorities" are the councils of county boroughs, boroughs, urban districts and rural districts A county council does not itself levy rates, but is a "precepting authority," that is, it issues demands ("precepts") for its needs to the rating authorities in its area. (Rating and Valuation Act, 1925; Local Government Acts, 1929—1933) Each rating authority, after considering the annual estimates of its various departments, "makes" a rate sufficient to meet its own needs and also the precepts it receives

Rates are levied on the *occupiers* of real property ("hereditaments") in the area, according to its "rateable value." The rateable value of property is the amount of rent which a hypothetical yearly tenant might reasonably be expected to pay. It is assessed by the rating

(*q*) Local Government Act, 1933, *ss.* 76 and 95; *cf. Lapish* v. *Braithwaite*, [1926] A. C. 275.

(*r*) See *Re A Reference under the Government of Ireland Act, 1920*, [1936] A. C. 352.

authority subject to the confirmation of the Assessment Committee of the assessment area, which is usually a county borough or part of an administrative county. Assessment Committees are appointed for a fixed term by the local authorities, but are not responsible to them. Their function is quasi-judicial and is to decide disputes between occupiers or other aggrieved persons and the rating authorities which draw up quinquennial valuation lists.

By a process known as "de-rating," the occupiers of agricultural hereditaments have been entirely relieved of the obligation to pay rates, and the occupiers of industrial hereditaments (*e.g.*, mines, factories and workshops) and freight-transport hereditaments (*e.g.*, railways, canals and docks) have been relieved of three-quarters of the amount which they would otherwise have to pay. (Local Government Act, 1929.) This device for encouraging agriculture and industry in a period of depression necessitates an increase in grants to local authorities from the Central Government to compensate them for their loss of income. Various bodies such as churches and scientific and literary societies are exempted from rates. No rates are leviable on property occupied by the Crown for public purposes, but the Government pays a "contribution in lieu of rates" which is assessed by the Treasury Valuer (*s*). On the other hand, a person in the occupation of Crown property for private purposes is liable to pay rates.

(b) *Grants-in-Aid.*—Special grants are made by the Government to local authorities for education, housing, highways and police, but otherwise since the Local Government Act, 1929, Government contributions for current expenditure take the form of block grants. Parliament decides each year according to a prescribed formula how much shall be contributed to local authorities, and places this amount in a notional fund called the General Exchequer Contribution. The General Exchequer Grants paid out of this fund are apportioned between the counties and the county boroughs according to the prescribed formula. Each county council is then responsible for dividing the sum so apportioned between itself and the councils of the boroughs, urban districts and rural districts in its area.

(c) *Loans.*—The capital expenditure of local authorities is mostly met out of loans. Apart from special statutes authorising loans to

(*s*) This official is the head of the Rating of Government Property Department of the Treasury.

be raised for specific purposes, the Local Government Act, 1933, s. 195, gives a general borrowing power to all local authorities for the purpose of acquiring land, erecting buildings or undertaking other permanent works in pursuance of an object which is itself within the authority's powers. No limit is set by the Act on the amount which may be borrowed, but the consent of some central authority —usually the Minister of Health—must first be obtained. The borrowing power is carefully safeguarded by Parliament, and loans are charged on all the revenues of the authority concerned.

2. The Expenditure of Local Authorities.—The current expenditure of local authorities goes mostly towards the administration of the following services: education, housing, highways and bridges, public assistance, public health and police. The income and expenditure on trading undertakings more or less balance. Capital expenditure is accounted for largely by housing, trading undertakings and the construction of public works by county boroughs and boroughs.

District Auditors.—The expenditure of local authorities is controlled by a system of audit The regulations were codified by the Local Government Act, 1933, but they are not yet uniform for all authorities. The general rule is that all accounts are audited by "district auditors," who are civil servants appointed by the Minister of Health They are not the servants of the local authorities, nor are they properly agents of the Minister of Health. They perform quasi-judicial functions, and consequently tend to become more and more independent of the Minister.

District auditors disallow any expenditure which is unlawful or unreasonably excessive (*t*), and they surcharge any expenditure disallowed on the persons responsible for incurring or authorising such expenditure, *e.g.*, the members of the council who passed the resolution. They also surcharge any sum not duly accounted for on the person by whom it should have been brought into account, and the amount of any loss or deficiency on the person by whose negligence or misconduct it has been incurred, *e.g.*, a rate collector. District auditors may not, however, disallow or surcharge any expenditure which has been sanctioned by the Minister of Health (*u*), although such sanction cannot legalise expenditure which is unlawful (*x*).

(*t*) *Roberts* v. *Hopwood*, [1925] A. C. 578.
(*u*) Local Government Act, 1933, s 228.
(*x*) *R* v. *Grain, Ex p. Wandsworth Guardians*, [1929] 2 K. B. 205.

A person who is aggrieved by a disallowance or surcharge or who has unsuccessfully challenged an item before the district auditor, may appeal either to the High Court or to the Minister of Health; but if the amount involved exceeds £500, appeal lies to the High Court only. Further, any person who has been surcharged may apply to the High Court or the Minister for a declaration that he acted reasonably or in the belief that his action was authorised by law, and that he ought fairly to be excused (*y*).

Borough Audit.—Boroughs have never been brought completely under the district audit system. With regard to the audit of education and public assistance accounts, the Education Act and the Poor Law Act, 1930, put boroughs on the same position as other local authorities, but otherwise boroughs may choose whether to submit their accounts to the district auditors or to borough auditors in accordance with the system introduced by the Municipal Corporations Acts. Generally they choose the latter, viz., either (a) a professional auditor appointed by the council, or (b) three amateur borough auditors of whom two ("elective auditors") are elected annually by the local government electors and the other ("mayor's auditor") is appointed annually by the mayor from among the members of the council Elective auditors must not be members or officers of the Council, but must be qualified to be elected as councillors (*z*).

v LONDON GOVERNMENT AUTHORITIES.

The London Government Act, 1939, consolidates with amendments a large number of statutes relating to local government in London. The "Administrative County of London" is defined as the area consisting of (a) the City of London, (b) the twenty-eight Metropolitan boroughs specified in the First Schedule, and (c) "the places known respectively as the Inner Temple and the Middle Temple" (*a*). The Act is principally concerned with the county council and the Metropolitan borough councils.

In the earlier part of the nineteenth century the government of London outside the City was somewhat chaotic owing to the way

(*y*) Local Government Act, 1933, ss 229—231. (*z*) *Ibid.*, ss. 237—240

(*a*) London Government Act, 1939, s. 1 (1) For the purposes of the Act the "County of London" means the county exclusive of the City of London and "the county" means the administrative county of London.

in which the town had grown outwards from what we should now regard as a small nucleus. Its government was mainly in the hands of the justices and parish vestries, though some parishes had select vestries (*b*) and others were administered jointly by district boards. There were also the Metropolitan Police under the Home Secretary, and the poor law guardians. Some attempt at co-ordination was made in 1855 by the creation of the Metropolitan Board of Works, which was elected by the vestries and the district boards. The Local Government Act, 1888, abolished the Metropolitan Board of Works and created the London County Council, while the London Government Act, 1899, displaced the vestries and district boards by Metropolitan borough councils which it incorporated into the administrative county of London outside the City (*c*).

1. The London County Council.—The county council consists of a chairman, county aldermen and county councillors, and is a body corporate with a common seal (*d*). The *chairman* is elected annually by the council from among the county aldermen, county councillors or persons qualified to be councillors, and may receive a reasonable remuneration (*e*). He is *ex-officio* a justice of the peace for the county. The *aldermen* are elected by the council from among the councillors or persons qualified to be councillors. They number one-sixth of the number of councillors, and one-half of them are elected every three years (*f*). The *councillors* are elected every three years by the local government electors, and retire together every third year on 8th March (*g*). Each Parliamentary borough or Parliamentary division is an electoral division and elects twice the number of councillors as it has members of Parliament (*h*).

The London County Council is in many ways analogous to other county councils, though the county is peculiar in that it is entirely urban. But on the one hand the council has more extensive powers within the Metropolitan boroughs than an ordinary county council has within the non-county boroughs in its area, and on the other hand it does not control some matters—such as police and main roads—

(*b*) A vestry was originally a meeting of all the parishioners, and later of all the ratepayers of the parish. A select vestry was elected or co-opted.
(*c*) See Robson, *The Government and Misgovernment of London*, Part I.
(*d*) London Government Act, 1939, s. 2.
(*e*) *Ibid.*, s. 3.
(*f*) *Ibid.*, s. 7.
(*g*) *Ibid.*, ss. 9, 10 and 12.
(*h*) *Ibid.*, s. 11.

with which an ordinary county council deals. The council has extensive original and supervisory powers relating to public health, hospitals, main drainage, building and housing, town planning, fire brigades, parks and non-City bridges. It is the education and public assistance authority for the county. It sanctions (*i*) loans made by the Metropolitan borough councils, while its own borrowing powers are restricted. The council is not a rating authority, but issues precepts on the Metropolitan borough councils and the City Corporation (*j*). Its accounts are audited by the district auditors of the Minister of Health. (Local Government Act, 1933.) General Exchequer Grants for the government of London are apportioned to the county council, which divides them between itself, each of the Metropolitan borough councils and the City Corporation in accordance with the provisions of the Local Government Act, 1929.

2. Metropolitan Borough Councils.—A Metropolitan borough council consists of the mayor, aldermen and councillors, and it is a body corporate with a common seal (*k*). The *mayor* is elected annually by the borough council from among the aldermen or councillors of the borough or persons qualified to be borough councillors. He is *ex-officio* a justice of the peace for the county (*l*). The *aldermen* are elected by the borough council from among the borough councillors or persons qualified to be borough councillors The number of aldermen is one-sixth of the number of councillors, and half of them retire every third year (*m*). The *councillors* are elected together on 1st November for three years by the local government electors (*n*).

The functions of the Metropolitan borough councils are similar to those of other borough councils, except in so far as the London County Council has peculiar transcending powers and the Metropolitan Police are under the control of the Home Secretary. They relate in particular to sanitation and nuisances; the lighting and cleansing of streets; the provision of libraries, baths and burial grounds; the valuation and assessment of property, and the making and collection of rates (*o*). The by-laws of a Metropolitan borough council must not be inconsistent

(*i*) Subject to appeal to the Minister of Health; *ibid.*, s. 124.
(*j*) *Ibid.*, s. 117.
(*k*) *Ibid.*, s 17 Westminster is a "City" and Kensington a "Royal Borough" by royal charter, but this makes no practical difference.
(*l*) *Ibid.*, s. 18.
(*m*) *Ibid.*, ss. 21 and 22.
(*n*) *Ibid.*, ss. 23—26.
(*o*) *Ibid.*, s. 120.

with any by-laws of the county council in force in the borough (*p*). Their accounts are audited by the district auditors of the Minister of Health. (Local Government Act, 1933.)

Elections.—The qualifications and disqualifications for election to the London County Council or to a Metropolitan borough council are similar to those which apply to local authorities outside London (*q*), but it is an additional disqualification from being a member of the London County Council if a person has any share or interest in any contract or employment with the council. This does not include a contract for the sale, etc of land, or being tenant of a council house, but a member with such an interest must not vote or take part in a discussion thereon (*r*). The franchise is the same as for local authorities outside London (*s*).

Committees.—The London County Council and the Metropolitan borough councils have a general power to appoint committees consisting of at least two-thirds of members of the council and not more than one-third of persons qualified to be members. The finance committee must be composed entirely of members of the council. The county council must appoint a mental hospitals committee (*t*). The provisions of the Local Government Act, 1933, apply to the setting up of joint committees.

Officers.—The London County Council must appoint a clerk, a treasurer, one or more medical officers of health and a surveyor, and a Metropolitan borough council must appoint a town clerk, a treasurer, a surveyor, one or more medical officers of health, and sanitary inspectors The councils may appoint such other officers as they think fit, and in either case the remuneration must be reasonable (*u*).

3. The Temple.—It has been noted that the London Government Act, 1939, specifies "the places known respectively as the Inner Temple and the Middle Temple" as being within the administrative county of London, but not within the City. The Temple has always claimed to be outside the jurisdiction of the City of London, mainly on the ground that it was so excluded when it was ecclesiastical property belonging to the Knights Templars and was not among the

(*p*) London Government Act 1939, s. 146.
(*q*) *Ibid.*, ss. 31, 33 and 46.
(*r*) *Ibid.*, ss. 34 and 51.
(*s*) *Ibid*, ss. 12 and 26.
(*t*) *Ibid.*, ss. 59, 60 and 62.
(*u*) *Ibid.*, ss. 70—78

formerly monastic properties over which the City was given jurisdiction by charter (*v*). Pepys, in his Diary for 3rd March, 1668, gives a vivid account of how the Lord Mayor attempted to assert his privileges by keeping up his sword within the precincts of the Temple against the opposition of the students, and how he stealthily retired preserving some of his dignity at the cost of losing his dinner. Next month the Lord Mayor brought a complaint before the Privy Council for the treatment he had received at the hands of the students. The King—not wishing to antagonise the lawyers—said that the Council could not pronounce upon the matter until the privileges of the Temple had been tried in a Court of law; but the City did not venture to put it to that test and has never done so since (*w*). The Benchers of the Inner and Middle Temples still discharge within their area certain minor functions which belong to local authorities outside, although, says Mr. Herbert Morrison, "it is doubtful whether in the world of local government the Temples have any precise legal position" (*x*).

4. The City of London Corporation.—The City of London Corporation is a body corporate by prescription, its full style according to a statute of 1690 being "The Mayor and Commonalty and Citizens of the City of London." It is one of the ancient "counties of Cities" and elects two City sheriffs. The Corporation was not affected by the Municipal Corporations Acts, 1835—1882, but it is governed—mostly in accordance with royal charters granted from time to time—by three Courts.

(i) *The Court of Common Council* consists of the Lord Mayor, twenty-five aldermen elected for life for the various wards, and 206 common councilmen (men only) elected annually (*y*). The functions of the Court of Common Council are, in some respects, like those of a county borough council. It controls the property of the Corporation; elects the judicial officers of the Mayor's and City of London Court (other than the Recorder), the City Solicitor and the Town Clerk; and is responsible for housing and town planning within its area.

(*v*) Other curious arguments put forward in 1668 by Sir Heneage Finch, Treasurer of the Inner Temple, are summarised in Williamson, *The History of the Temple, London*, at p. 480.

(*w*) Williamson, *op. cit.*, pp. 478—481. The members of the Court would presumably have to be drawn from the other Inns.

(*x*) Morrison, *How Greater London is Governed*, p. 3.

(*y*) The franchise is restricted and in fact there is seldom a contest, see Robson, *Government and Misgovernment of London*, p. 30. For the qualifications of an alderman or common councilman, see *ibid.*, p. 31.

and for certain Thames bridges: it is the sanitary authority for the Port of London, of which the Lord Mayor is Admiral, and the market authority within a seven-mile radius. It also controls the City of London Police Force. Otherwise, in such matters as public assistance, main drainage, hospitals and fire brigades its powers are, like those of a Metropolitan borough council, subordinate to the County Council.

(ii) *The Court of Common Hall* consists of the Lord Mayor, sheriffs, not less than four aldermen, and those liverymen of the City Companies who are freemen of the City. This is the body which annually elects the City sheriffs and nominates two aldermen who have been sheriffs for the office of Lord Mayor. It also elects the chamberlain (treasurer) and the City auditors

(iii) *The Court of Aldermen* consists of the Lord Mayor and the twenty-five aldermen. Some time before 9th November it elects the Lord Mayor for the coming year from among the two aldermen nominated by the Court of Common Hall. It also elects the Recorder, the Clerk to the Lord Mayor, the Clerk to the Guildhall magistrates and the district surveyors.

The Lord Mayor and each alderman is *ex-officio* a justice of the peace. It may be mentioned here that the City police courts sit in the Mansion House and the Guildhall. The Lord Mayor, aldermen and Recorder constitute Quarter Sessions, but indictable offences are tried by the Central Criminal Court The Lord Mayor's and City of London Court (the "Mayor's Court") has a certain amalgamated civil jurisdiction.

5. Authorities in Greater London.—Owing to the great growth of population outside the perimeter of the county of London, as well as for reasons of technical and administrative convenience, a number of *ad hoc* authorities have been constituted by statute for the provision and regulation of certain services over an area even wider than the administrative county. Although they are not necessarily "local authorities," it is convenient to include them here. Mention may be made of the Metropolitan Water Board (1902), the Thames Conservancy Board (1854), the Lee Conservancy Board (1930), the Port of London Authority (1908), the London and Home Counties Joint Electricity Authority (1925), and the London Passenger Transport Board (1933).

VI. THE ACQUISITION OF POWERS BY LOCAL AUTHORITIES.

Local authorities acquire their powers, which are all statutory (*s*), in various ways.

Public General Acts may confer general powers on all local authorities or on all local authorities of a certain kind, *e.g.*, the Local Government Acts, Municipal Corporations Acts and London Government Acts. The Local Government Act, 1933, s. 266, for example, states that "a local authority may enter into contracts necessary for the discharge of any of their functions"; sections 276—278 permit a local authority to "prosecute or defend any legal proceedings" which it deems expedient for the promotion or protection of the interests of the inhabitants of the area; and section 249 gives a general power to county councils and borough councils to make by-laws "for the good rule and government" of their areas and for the prevention and suppression of nuisances therein. Powers relating to specific services are also granted by such statutes as Public Health Acts, Poor Law Acts, Housing Acts, Town and Country Planning Acts and Education Acts; some are obligatory and others permissive.

Adoptive Acts are Public General Acts which come into force for a particular authority only if and when the latter adopts it. Thus, parish meetings may adopt certain powers relating to lighting and recreation grounds to be exercised by the parish council.

Local Acts.—A particular local authority may acquire powers by procuring the passing of a private Act, known in this case as a local Act (*a*). This, however, is an expensive procedure, and its place has largely been taken in recent years by the Provisional Order method where that is applicable.

Clauses Acts are local Acts which incorporate by reference certain clauses set out in Public General Acts for that purpose, *e.g.*, the Lands Clauses Consolidation Act, 1845 (for the compulsory acquisition of land), and the Waterworks Clauses Act, 1897. Some of these have now been incorporated by general legislation, in some cases by reference.

Provisional Order Confirmation Acts.—Many of the particular powers of local authorities are conferred by these Acts, which confirm

(*z*) Cf. *ante*, p. 246, as to municipal corporations
(*a*) For the procedure, see *ante*, p. 127

Provisional Orders made under statutory powers by the Minister concerned, especially the Minister of Health under the Local Government Act, 1933 (*b*).

VII. CENTRAL GOVERNMENT CONTROL.

The Central Government exercises a considerable degree of administrative control over local authorities in the interests of the community as a whole This supervision is closer in respect of some services than of others. Since the Poor Law Amendment Act, 1834, it has been most complete in respect of the poor law, now called public assistance; while the most effective agency is the control exercised by the Minister of Health over finance. The various methods are only mentioned here very briefly and by way of illustration. It should be noticed that the main significance of these supervisory powers lies in their cumulative effect, for their mere existence often leads local authorities to consult the Central Government Departments—particularly the Ministry of Health—before taking action.

Orders and Regulations.—An extensive power to issue orders and regulations is that given to the Minister of Health in the administration of public assistance by the Poor Law Act, 1930. The Education Act, 1944, s 99, provides that if the Minister is satisfied that a local education authority has failed to discharge any duty imposed on it by the Act, he may make an order and give directions for its execution, and may enforce such directions by *mandamus*.

The Sanctioning of Schemes.—Often it is the duty of a local authority to prepare schemes for the administration of a particular service within its area, and to submit such scheme to the appropriate Minister for approval. Thus, the Minister of Town and Country Planning sanctions schemes put forward by planning authorities under the Town and Country Planning Act, 1932, and local education authorities are required, by the Education Act, 1944, to submit plans to the Minister of Education for the development of primary and secondary schools in their area.

Control over Officials is chiefly exemplified by the power given to the Minister of Health to regulate the appointment, salaries and duties of public assistance officers. The Home Secretary issues regulations

(*b*) For the procedure on Provisional Order Confirmation Acts, see *ante*, p. 122.

concerning the salaries, duties and uniforms of local police forces, and the Minister of Education may veto the appointment of a chief education officer.

Inspection.—The Minister of Health appoints public assistance inspectors to visit the areas, to attend meetings of the council and committees at which public assistance is being discussed, and to report to the Ministry He also appoints public health inspectors who conduct the temporary survey of the areas. Inspection by Home Office and Ministry of Education inspectors is also the chief means for securing that local police forces and education authorities, half of whose expenses are derived from special Government grants, are performing their duties and complying with regulations.

Confirmation of By-laws is required in most cases, either by the Home Secretary or the Minister of Health according to the subject-matter of the by-law. This check on the law-making powers of local authorities is in addition to the limits imposed by Parliament and enforced by the Courts (*c*).

Audit.—It has been seen that all accounts of local authorities, except some of the accounts of borough councils, are audited by district auditors appointed by the Minister of Health, though district auditors when appointed act in a quasi-judicial capacity and so tend to be independent authorities rather than subordinate officials of the Ministry.

Acting in Default.—The Minister of Health may take over certain functions relating to public health and housing if it appears after investigation that the authority has failed to discharge its functions, and a similar power is vested in the Minister of Town and Country Planning. In practice, this power is not often exercised, as the mere threat is usually sufficient to induce the local authority to discharge its functions; where it is exercised, it usually takes the form of transferring the functions to another authority.

Control over Loans.—As has been mentioned, the consent of the Minister of Health to the raising of loans by local authorities is required in most cases.

(*c*) *Post*, p. 277.

Control over Grants.—This is the most important kind of financial control exercised by the Central Government over local authorities. The Local Government Act, 1929, entitles the Minister of Health to reduce the General Exchequer grant payable to a local authority if the latter has "failed to achieve or maintain a reasonable standard of efficiency and progress" in its public health services, or its expenditure has been "excessive and unreasonable," or it has failed to maintain its roads to the satisfaction of the Minister of Transport. There is a proviso that whenever the Minister makes such a reduction he must lay before Parliament a report stating the amount of the reduction and the reason therefor.

Similarly, the Home Secretary, the Minister of Education or the Minister of Health may withhold any portion of the grant for police, education or housing from any authority whose administration of such service falls below the minimum standard required or is not in accordance with statutory duties or ministerial regulations.

CHAPTER XX.

LEGAL LIABILITY OF PUBLIC AUTHORITIES.

Introduction.—We have seen that the central government is carried on for the most part in the name of the King, and local government by elected councils. The King does not perform many acts personally, except for ceremonies like the opening of Parliament and formalities like assenting to Acts of Parliament (which is usually done by commission) and Orders in Council: he acts through servants, such as Ministers and their staffs of civil servants, Judges, military and Colonial officers. Local authorities, except Parish Meetings, are corporations, *i.e.*, legal entities which are not physical persons, and therefore can only act through servants and agents. There are also a few statutory corporations which are neither Departments of the central government nor Local Authorities, *e.g.*, the British Broadcasting Corporation, the London Passenger Transport Board, the Central Electricity Board, the Assistance Board and the British Overseas Airways Corporation (*a*). If a citizen is injured by the tort or breach of contract of a public authority, this will be the act of a servant or agent of the Crown or of a Local Authority or Independent Statutory Corporation, and the question is whether, and if so how, he can pursue a remedy against the Crown or the Local Authority or Independent Statutory Corporation or whether, and if so how, he can pursue a remedy against the individual who actually committed the tort or breach of contract.

For the purposes of the following discussion, the reader will be presumed to be acquainted with the general principles of vicarious liability for torts and breaches of contract (*b*) committed by servants and agents, which is part of the law of torts and contracts (including agency) (*c*).

(*a*) For a discussion of the nature and purpose of semi-independent public authorities, see Greaves, *Public Service Boards* (1944), 7 *Modern Law Review*, pp. 25—42.

(*b*) The discussion does not cover criminal offences. There is no general vicarious liability for criminal acts, but statutes may impose vicarious liability in particular cases, *e.g.*, Licensing Acts and Road Traffic Acts.

(*c*) For those who have not studied the law of torts and contracts, a brief outline, including vicarious liability, is given in Hood Phillips, *Principles of English Law and the Constitution*, pp. 173—199.

There is no *system* of administrative law in England. If there were, we might have a logical and consistent scheme of rights and remedies against Government authorities, both central and local, and possibly—but not necessarily—a special system of Courts to enforce them. As it is, we have to deal with the matter empirically. We propose, therefore, to treat first of the immunity of the Crown in litigation; and then of the liability of public authorities and officials to be sued by the private citizen, and, in the next chapter, of the various remedies appropriate to the different kinds of cases.

1. IMMUNITY OF THE CROWN IN LITIGATION.

It has long been settled in English law that no action can be brought against the King personally. Perhaps this was not the case in early days, and it was rumoured that there was a writ found in the days of Henry III or Edward I whereby the King was made a defendant, but the genuineness of this writ is doubted by high authorities of the present day (*d*) The reason for the principle which has existed at least from Edward I's time is that writs are issued in the name of the King ordering persons to appear in the King's Courts, and it would be absurd for the King to issue a command to himself The principle precludes the *bringing* of an action against the King, not only for his own private (*e*) or public acts, but also—contrary to the law of agency and of master and servant—for torts and breaches of contract committed by Ministers and other officials and Departments acting as his servants or agents In certain cases, however, a petition of right will lie: in such cases the act complained of would in practice be the act of a Crown servant

1. Immunity in Tort.—The maxim that "the King can do no wrong" means, firstly, that the King cannot be made liable by action, and, secondly, that as wrong cannot be imputed to the King he cannot be said to have authorised another to commit a wrong. In *Tobin* v. *The Queen* (1864) (*f*) the Court held that "the notion of holding the Sovereign responsible for a supposed wrong tends to consequences which are clearly inconsistent with the duties of the Sovereign." This rules out the maxim *qui facit per alium facit per se*

(*d*) See *ante*, p. 155.
(*e*) The statute 39 & 40 Geo. III made the property of a deceased King (as distinct from Crown property) liable in certain events for his debts.
(*f*) 16 C. B (N S.) 310; *post*, p 271

where the Crown is the employer. It follows that an official who commits a tort cannot plead that he acted under the King's orders, express or implied. This does not mean that the injured person is entirely remediless, for the Common Law holds the actual wrongdoer liable for torts committed by himself; but it means that, as there is no conception of the State in English law, and Government Departments are in general merely emanations of the Crown, the citizen cannot claim satisfaction out of public funds (*g*). Further, in the case of a few acts, which in a subject would be torts, a petition of right will lie (*h*).

2. **Immunity in Contract.**—Not only is an *action* not available against the King for breach of contract, but no action lies against a servant of the Crown for a breach of contract entered into by him *in that capacity* The latter rule is an application of the law of agency, whereby in general the agent acts merely as an intermediary to bring his principal and the third party together, the agent dropping out and incurring liabilities only towards the principal under his contract of agency. Here again the citizen is not remediless, for he may address to the Home Secretary a Petition of Right asking that His Majesty should let right be done, and this is in practice granted in proper cases; but the citizen is faced with a number of procedural difficulties, and even if he establishes the justice of his case he has no legal means of enforcing the decision by execution against public property (*i*).

The Crown cannot bind itself in such a way as to fetter its future executive action. This is one of the principles underlying a series of cases which establish that at Common Law civil servants and military and colonial officers and others employed by or on behalf of the Crown, have no security of tenure but may be dismissed at any time for any cause, even if they have been engaged for a definite period. In the absence of legislation to the contrary, all Crown servants, both civil and military, hold office during the royal pleasure No engagement between the Crown and any of its military or naval officers in respect of services present or past can be enforced in a Court of law (*Kynaston* v *Attorney-General* (1933) (*j*). Their salaries are not recoverable as debts (*k*) In *Grant* v. *Secretary of State for*

(*g*) Cf. *Report of Crown Proceedings Committee* (1927), Cmd 2842, *post*, p. 272.
(*h*) *Post*, p. 286.
(*i*) See further, *post*, p. 283 *et seq.* (*j*) 49 T. L. R. 300
(*k*) *Mulvenna* v. *The Admiralty*, [1926] S. C. 842, *Lucas* v. *Lucas and The High Commissioner for India*, [1943] P. 68

India (1877) (*l*), it was held that the King could dismiss his servants at pleasure, that publication of dismissal in the Gazette was not a libel, and that no official of the Executive could make a contract binding on the Crown in this respect (as to this last point, see to the contrary *Graham* v. *The Commissioners of Public Works* (1901) (*m*)). Two other important cases on this subject are *Dunn* v. *The Queen* and *Dunn* v. *MacDonald* *Dunn* v. *The Queen* (1896) (*n*) was a petition of right, where the suppliant sued the Queen for dismissing him from his post. He alleged that Sir Claud MacDonald had engaged him as consular agent for three years, and he claimed damages for dismissal before the expiration of that period. The Court decided that the suppliant held his appointment during pleasure. Dunn afterwards sued Sir Claud MacDonald, and the Court held that where a public servant acting on behalf of the Crown makes a contract with a person he is not responsible for a breach of such contract (*Dunn* v *MacDonald* (1896) (*o*). The case is also an authority for the proposition that a public servant professing to contract on behalf of the Crown cannot be sued for breach of warranty of authority. In *Gould* v *Stuart* (1896) (*p*), it was held that the Crown has by law power to dismiss at pleasure officers, both civil and military, a condition, unless it is otherwise provided by law, to that effect being implied in every contract of service.

In practice, however, established civil servants at least, after a short period of probation, enjoy greater security of tenure than almost any other members of the community.

II. POSITION OF CROWN SERVANTS.

In considering the liability of public authorities, other than the Sovereign, to be sued by the private citizen, the first distinction to be drawn is that between authorities which are servants of the Crown, *e.g.*, Ministers, Central Government Departments and their staffs, military and colonial officers, and those which are not servants of the Crown, *e.g.*, Local Authorities, Independent Statutory Corporations and their employees.

It is not as easy as it might appear to draw this distinction precisely, but the general principles have been summarised as follows: " . . . an

(*l*) 2 C. P. D. 445 (*m*) [1901] 2 K. B. 781. (*n*) [1896] 1 Q. B. 116.
(*o*) [1896] 1 Q. B. 555; see also *Riach* v. *Lord Advocate*, [1932] S. C. 138.
(*p*) [1896] A. C. 575.

authority or corporation must be regarded as outside the exemption of the Crown unless it can substantiate a claim to exemption by statute, or on the ground that it is by its origin or history closely associated with the Crown, so that it may be regarded as having emanated from the Crown in a similar manner to the great Departments of State; or apparently unless it were created for the purpose of dealing with or controlling Crown property, or for the purpose of discharging duties previously performed by another exempted Department. . . . In the case of a new authority created by Statute, if the Statute is silent as to the liability of the authority, we must ask what is the purpose for which it is created. Some corporations established by Statute for public purposes may share the immunity of the Crown as regards actions for torts committed by their servants, but when they contract may perhaps be presumed, by reason of the purposes for which they were constituted, to contract on their own behalf and to be liable in actions for breach of contract" (*q*)

1. Torts committed by Crown Servants.—If a servant of the Crown commits a tort, it is not possible, as we have seen, to bring an action against the Crown, nor will a Petition of Right lie for a pure tort, such as trespass or negligence. In *Tobin* v. *The Queen* (1864) (*r*), the owners of a ship which had been wrongfully destroyed by a naval captain in the erroneous belief that it was engaged in the slave trade, were unsuccessful in their attempt to proceed by Petition of Right. So was the Speaker who brought a Petition of Right for the negligence of certain Crown servants in causing a fire at the Parliament buildings which spread to the Speaker's house (*Viscount Canterbury* v. *Att.-Gen.* (1842) (*s*).

A petition of right has lain since the middle ages for the recovery from the Crown of land or chattels to which the claimant is entitled, and this includes cases where the taking or retention of such property by a subject would now be regarded as tortious. In what other cases connected with property a petition of right lies is doubtful, but it was held in the fourteenth century that a petition lay in certain cases of damage caused through undue user of Crown property (*t*). The

(*q*) Robinson, *Public Authorities and Legal Liability*, pp. 16—17
(*r*) 16 C. B (N S) 310. (*s*) 1 Ph 306.
(*t*) *Robert de Clifton's Case* (1325), R. P. i, 416—417 (18 Edw. II, no. 3), and *Gervase de Clifton's Case* (1349), Y. B. 22 Edw. III, Pasch. pl. 12, see *per* Erle, J., in *Tobin* v. *The Queen* (1864), 16 C. B. (N.S) 310, at pp 303—365

theory of the petition of right is that as the King is the fountain of justice, he will cause justice to be done as soon as the matter is brought to his attention.

Holdsworth suggests that the rule that no action lies against the Crown is procedural rather than substantive, and that, as the petition of right provides a general form of remedy, there is no reason why a petition should not be held to lie in any case where the petitioner would have a legal claim against a subject He admits, however, that such a doctrine is in practice only imperfectly realised, a fact which may be attributed partly to the seventeenth century theory of perfection implicit in the maxim "the King can do no wrong," and partly to the misunderstanding by nineteenth century Judges of the reason why this remedy in earlier times was mostly confined to the sphere of property (*u*).

The injured party cannot as a general rule sue a Government Department for the tort of the Minister or of an official of the Department. Departments of the central government, with certain limited exceptions, are not legal entities, but consist merely of a number of individual servants of the Crown. Moreover, he cannot as a general rule sue the head of the Department or other superior officer of the person who committed the tort, because the common law regards them as being fellow servants of the Crown and not as standing in the relation of master and servant. It would be otherwise, however, if the superior officer had expressly directed the commission of the wrong or so specifically authorised it as to make it substantially his own act (*x*).

Consequently, the general rule is that the action should be brought against the actual wrongdoer or wrongdoers, and it should be brought against them personally and not as servants or agents of the Crown or of the Department, nor as a Department. Thus in *Raleigh* v. *Goschen* (1898) (*y*), where certain persons purporting to act on behalf of the Admiralty committed trespass to land, the owners were unsuccessful in their claim for damages against the Lords Commissioners of the Admiralty in their official capacity. On the other hand, in *Madrazo* v. *Willes* (1820) (*z*) a naval captain was held responsible for

(*u*) Holdsworth, *History of English Law*, vol. IX, pp. 7—44, and see further, *post*, p. 286.
(*x*) *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646.
(*y*) [1898] 1 Ch 73. (*z*) 3 B. & Ald. 353.

the unlawful destruction of a merchant vessel, though he was acting, as he believed, in accordance with his duty. Again, in *Walker* v. *Baird* (1892) (*a*) a naval captain was held liable for the destruction of a lobster factory off the coast of Newfoundland; the Court holding the defendant responsible because, without the authority of the legislature, he had interfered with a subject's private rights, and that he could not justify his conduct by showing that he was acting under the provisions of a treaty made between France and England (*b*).

In appropriate cases another remedy, the scope of which does not seem to have been fully worked out, is to bring an action against the Attorney-General for a declaration that some threatened act of the executive is illegal. (*Dyson* v. *Att.-Gen.* (1911) (*c*).)

2. Breach of Contract by Crown Servants.—A Minister, Colonial Governor or other servant of the Crown is not liable at Common Law for the breach of a contract made by him *in his official capacity* Thus it was held in *Macbeath* v. *Haldimand* (1786) (*d*) that the Governor of Quebec was not liable to pay for stores ordered by him for the Fort of Michilimakinac. The plaintiff knew that the goods were for Government use, and that the defendant was not contracting personally. Therefore, said Lord Mansfield, C.J., "There is no colour to say that he is liable in his character of Commander-in-Chief." Thus stated, it is merely an illustration of the general law of agency in contract; but Ashhurst, J., based the defendant's immunity partly on the ground of public policy and convenience, as no one would accept any Government office if he were liable to be held personally responsible for his official contracts.

The remedy in such cases, then, is by way of Petition of Right (*e*).

3. Statutory Exceptions.—Parliament occasionally in a rather haphazard and often cryptic manner uses language referring to the bringing of actions by or against a Government Department or Minister in his official capacity, with or without incorporating such Department or Minister. The effect of such language and the extent (if any) of such liability depends on the interpretation of the words used in each particular case.

(*a*) [1892] A. C. 491.
(*b*) A treaty needs the confirmation of Parliament in so far as it affects the rights of the subject.
(*c*) [1911] 1 K. B. 410; *post*, p. 294.
(*d*) 1 Term Rep., 172
(*e*) *Post*, p. 283, *et seq.*

In *Williams* v. *Lords Commissioners of the Admiralty* (1851) (*f*), the Court of Common Pleas held the Admiralty liable on the construction of section 9 of the Admiralty Lands Act, 1821, by which the Lords Commissioners were "authorised . . to bring any action . . . and also . to defend any action" of a specified kind. In *Graham* v *Commissioners of Public Works* (*g*), Lord Phillimore decided that the Commissioners of Public Works were corporately liable under the Works and Public Buildings Act, 1874, in respect of contracts for the erection of public buildings. The Merchant Shipping Act, 1894, s. 460, allows the Board of Trade to be sued for unlawful detainer of a ship (*h*), though it was held, in *Grech* v. *The Board of Trade* (1923) (*i*), that the Board is not bound by an arbitration award. The Public Trustee Act, 1906, s. 7, gives a remedy against the Consolidated Fund for the negligence and certain other torts of the Public Trustee.

The most remarkable and the most explicit example is section 26 (1) of the Ministry of Transport Act, 1919, which states that: "The Minister may sue and be sued in respect of matters, whether relating to contract tort or otherwise arising in connexion with his office, by the name of the Minister of Transport, and . shall be responsible for the acts and defaults of the officers and servants and agents of the Ministry in like manner and to the like extent as if they were his servants."

The Air Force (Constitution) Act, 1917, s. 8 (1), which provided for the constitution of an Air Council, said nothing about incorporation, liability or proceedings. Sub-section (3) stated that "on the establishment of the Air Council, the Air Board constituted under the New Ministers and Secretaries Act, 1916, shall cease to exist, and all the powers, duties, rights, liabilities and property of that Board shall be transferred to the Air Council," and section 10 (1), that "the Air Council may sue and be sued, and may for all purposes be described by that name." It was held, in *Rowland* v. *Air Council* (*k*) and *Mackenzie-Kennedy* v. *Air Council* (*l*), that although the Act said the Air Council might "be sued . . . by that name" this did not *create*

(*f*) 11 C B 420.
(*g*) [1901] 2 K. B 781, see also *Roper* v. *Commissioners of Public Works*, [1915] 1 K. B. 45.
(*h*) Cf. *Marshall Shipping Co.* v. *Board of Trade*, [1923] 2 K. B. 343
(*i*) 130 L. T. 15.
(*k*) (1923), 39 T. L. R. 228; (1927), 96 L. J. Ch. 470.
(*l*) [1927] 2 K B 517

any right of action against the Council, but was merely intended for the sake of convenience to allow the ordinary procedure to be used by and against the Council in those cases (if any) where a right of action existed. The decisions rest on the failure to show that there were any liabilities on the Air Board to be transferred to the Air Council or that the Air Council were themselves party to any contract (*m*).

This topic was recently reviewed by the Court of Appeal in *The Minister of Supply* v. *British Thomson-Houston Co.* (*n*) The War Department Stores Act, 1867, s. 20, provided that the Secretary of State for War under that description might institute any civil or criminal proceedings concerning military stores and defend any action or proceeding concerning such stores, with the proviso that nothing therein should take away or abridge any legal right, privilege or prerogative of the Crown, and in all such proceedings the Secretary of State for War might exercise and enjoy all rights, privileges and prerogatives of the Crown as if the Crown were actually a party. In this case the Minister of Supply, as successor in this respect to the Secretary of State for War under the Ministry of Supply Act, 1939, brought an action of contract against a company under the section above quoted, and it was held that the company was entitled to prosecute a counterclaim against him The principle was stated by Goddard, L.J., as follows: "(1) Where a statute says that a minister or a department of State may sue and defend any action, that is equivalent to saying that he or it may sue or be sued (2) These words mean what they say and make the minister liable to be sued as such. The statute, in effect, changes his position from that of an agent to a principal, the object being to simplify process [*i.e.*, to substitute an ordinary action for information or petition of right], but the minister is not personally liable to satisfy the judgment because it is clear that the action is against his office and not against the individual. . . . It must be presumed that the minister will satisfy the judgment out of moneys provided by Parliament for his office" (*o*). The preservation in the Act of 1867 of rights, privileges and prerogatives

(*m*) *Per* MacKinnon, L.J., in *Minister of Supply* v. *British Thomson-Houston Co.*, [1943] K. B. 478, at p. 485

(*n*) [1943] K. B. 478. (*o*) *Ibid.*, at p 492

of the Crown as if the Crown were actually a party, MacKinnon, L.J., explained, "clearly has in view the rights of the Crown in the course and conduct of the action (*e.g.*, as to discovery). It cannot refer to a right to put an end to the action under a rule of the common law" (*p*). On the other hand, words such as those used in section 20 of the War Department Stores Act, 1867, would not render a Minister liable to be sued for torts committed by subordinates, firstly because they are not his servants, and secondly because there is nothing to show that Parliament intended to alter the law in this respect (*q*). Although this case was argued on the right to bring a counterclaim, the same principles govern the right to bring an action.

The Minister of Supply v *British Thomson-Houston Co.* must be regarded as overruling *Gilleghan* v. *The Minister of Health* (*r*), a decision which had caused considerable misgivings. The Ministry of Health Act, 1919, s. 7 (1), provides that the Minister "may sue and be sued by the name of the Minister of Health," and section 7 (3) declares that for the purpose of acquiring and holding land the Minister for the time being shall be a corporation sole. In an action against the Minister for a breach of contract relating to land, Farwell, J., held that on sub-section (1) he was bound by *Rowland* v. *Air Council* and *Mackenzie-Kennedy* v *Air Council* (*supra*), and on sub-section (3) he distinguished *Graham* v. *Commissioners of Public Works* and *Roper* v. *Commissioners of Public Works* (*supra*) on the ground that here the Minister of Health was only created a corporation sole for a limited purpose, *i.e.*, for the purpose of acquiring and holding land.

III. LIABILITY OF OTHER PUBLIC AUTHORITIES.

Where a tort or breach of contract is committed by a public authority which is not clothed with the immunity of a Crown servant, the liability of the authority may be said to be the same as that of a private individual. The authority is, moreover, responsible for the torts and contracts of its employees and agents in the same way as an ordinary individual or corporation. When we have said this, however, we must make several important qualifications.

(*p*) *Ibid.*, at p. 483.

(*q*) *Per* Goddard, L.J.; *ibid.*, at p 492; cf. Ministry of Transport Act, 1919, s. 26 (1), *supra*.

(*r*) [1932] 1 Ch. 86.

1. Special position of Public Authorities.—These public authorities, *e.g.*, Local Authorities and Independent Statutory Corporations and Boards, will in most cases be creations of statute and have only such powers as are expressly conferred by statute. The citizen may therefore find that a contract which he thought he had entered into is void as being beyond the power of the authority to make. (*Ashbury Railway Carriage Co.* v. *Riche* (1875) (*s*).) It follows that a servant of the public authority would be unable to bind the authority by such a contract made on its behalf.

On the other hand, public authorities have extensive statutory powers—legislative, administrative and judicial or quasi-judicial—which ordinary individuals or corporations do not possess, and which may cause harm to private citizens but the proper exercise of which does not entitle an injured person to a right of action. Local Authorities, for example, have power to order houses to be demolished, to acquire land compulsorily, and to do works—such as the making of sewage farms—which would ordinarily constitute nuisances. These powers, of course, are given because the authority is a public authority acting on behalf of the public or a considerable section of it, and where public and private interests conflict the former must prevail.

Further, the citizen may sometimes find that, when he has a remedy, it does not lie against the public authority, but only against the person who appeared to be acting as the servant of that authority. Thus it has been held that a police officer, appointed and paid by a Borough Council, in making an arrest exercises an independent power (*Fisher* v *Corporation of Oldham* (1930) (*t*)), and that the control exercised by the Ministry of Health over public assistance officers paid by a Local Authority is such that they cannot be regarded for this purpose as servants of the Authority. (*Toveland* v. *West Ham Guardians* (1907) (*u*).)

2. Doctrine of ultra vires.—The exercise of statutory powers by Public Authorities is controlled by the doctrine of *ultra vires*, so that if they exceed their powers the act will be void, and in appropriate cases the injured party will have his remedy in the Courts (*x*). The Courts

(*s*) L. R. 7 H. L. 653. See also *Stanbury* v. *Corporation of Exeter*, [1905] 2 K. B 838
(*t*) [1930] 2 K. B. 364. (*u*) [1907] 1 K. B. 920.
(*x*) This doctrine also applies to the exercise of statutory powers by servants of the Crown; see *e.g.*, *Chester* v. *Bateson*, [1920] 1 K. B. 829; *Minister of Health* v. *The King, Ex p. Yaffé*, [1931] A. C. 494.

tend to interpret statutory powers so far as possible on the assumption that an interference with private rights, especially property rights, is not intended (*y*).

The exercise of the power to make bye-laws must not only be *intra vires*, but also reasonable, though in the case of Local Authorities, as opposed to public utilities, there is a strong presumption that bye-laws are reasonable. (*Kruse* v. *Johnson* (1898) (*z*).)

3. Nuisance and Negligence.—There is a presumption that statutory powers are not intended to be exercised in such a way as to cause a nuisance, *e g*, that the power of a Local Authority to build hospitals does not authorise the erection of a small-pox hospital in a residential area. If the power is *imperative*, *i e.*, imposes a duty to perform some act in a certain manner, so that it appears expressly or by necessary implication that it cannot be performed without causing a nuisance, then a nuisance may be committed (*a*); but if the power is expressly (*b*) or impliedly *permissive*, *i e*, the performance of the act is merely rendered not illegal in itself, then ways and means must be found to prevent its causing a nuisance, and the burden of proving that the power is imperative rests on the party purporting to act thereunder. (*Metropolitan Asylum District* v. *Hill* (1881) (*c*).) Similar considerations arise where fumes from a power station injure neighbouring property. (*Corporation of Manchester* v. *Farnworth* (1930) (*d*).)

Even where a statutory power is bound to interfere with private rights to some extent, the power must be exercised with due care towards those likely to be affected. Parliament never authorises the commission of negligence. Thus the Mersey Docks and Harbour Board was held liable to the owners of a ship and its cargo for damage caused by its negligence in leaving a mud bank at the entrance to the docks (*Mersey Docks and Harbour Board* v. *Gibbs* (1866) (*e*)); and Local Authorities have been held liable for damage caused by negligence due to leaving a heap of stones unlighted on the highway (*Foreman* v. *Corporation of Canterbury* (1871) (*f*)), failing to detect a leak in the

(*y*) See *Metropolitan Asylum District* v. *Hill*, *infra*. (*z*) [1898] 2 Q. B. 91.
(*a*) See *Dormer* v. *Newcastle-upon-Tyne Corporation*, [1940] 2 K. B. 204.
(*b*) *E.g.*, Public Health Act, 1936, s. 31
(*c*) 6 App Cas. 193 (*d*) [1930] A. C. 171.
(*e*) L. R 1 H. L. 93. This case is also of interest in that the House of Lords exercised their right of summoning the Judges to give their opinion, and adopted the opinion given on their behalf by Blackburn, J.
(*f*) L. R. 6 Q. B. 214

water supply system (*Corporation of Manchester* v. *Markland* (1934) (*g*)), and carelessly inserting or failing to maintain a traffic stud. (*Skilton* v. *Epsom and Ewell Urban District Council* (1937) (*h*).) In *Gold* v. *Essex County Council* (1942) (*i*) a County Council carrying on a hospital under the Public Health Act, 1936, was held liable to a patient for the negligence of a radiographer employed by the hospital

4. Failure to perform duties.—Whether a public authority is liable to a private individual for injury caused by the failure to perform a statutory duty, as opposed to the exercise of a discretionary power, depends on the facts of the case and the interpretation of the statute imposing the duty. The plaintiff has to show that the duty was owed to himself and not merely to the public generally, that the damage he suffered was directly caused by the breach of duty, and that the damage was of the kind contemplated by the statute (*k*). Usually the duty is owed to the public only and not to individuals, as in the case of a Local Authority whose failure to remove snow from the street caused a woman to fall and hurt herself (*Saunders* v. *Holborn District Board of Works* (1895) (*l*).) The provision of some other remedy, *e.g.*, complaint to the Minister of Health or some other Authority or an action for a penalty, will often be held to exclude an action for damages.

Highway authorities.—The position of highway authorities is for historical reasons peculiar. In *Russell* v. *The Men of Devon* (1780) (*m*) it was held that a highway authority is never liable for damages for failure to keep the highway in repair, and this was confirmed by *Cowley* v. *Newmarket Local Board* (1892) (*n*) The former case was decided largely on the ground that it would be impracticable to sue the inhabitants of Devon, the appropriate procedure at common law being in the criminal form of indictment. The House of Lords in the latter case applied the rule to County Councils, who succeeded by nineteenth century legislation to the duties of the inhabitants at large, even though the state of disrepair and insufficient lighting were in fact due to negligence. It should be noticed that this particular rule is confined to the highway itself (*i.e.*, a way which has been dedicated

(*g*) [1934] 2 K. B. 101.
(*h*) [1937] 1 K. B. 112.
(*i*) [1942] 2 K. B. 293.
(*k*) Jennings, *Principles of Local Government Law* (2nd ed.), p. 266, and authorities there cited.
(*l*) [1895] 1 Q. B. 64.
(*m*) 2 T. R. 667.
(*n*) [1892] A. C. 345.

in perpetuity to the use of the public) as opposed to bridges, etc., which may not be part of the highway (*o*) Further, it only applies to highway authorities acting as such. Where, for example, the same Authority is both highway authority and sewerage authority, and places a manhole in the highway, it is liable as sewerage authority if damage is caused by the manhole cover's becoming defective (*p*), though as highway authority it is not liable if the damage was due to the manhole's obtruding above the surface because the road has worn down. (*Thompson* v *Brighton Corporation* (1894) (*q*)) The rule is now somewhat anomalous and the Courts will not extend its scope Thus the Court of Appeal in *Simon* v *Islington Borough Council* (1943) (*r*) held the Borough Council liable to the plaintiff whose son was killed when his bicycle struck some disused tramlines, which the Council had taken over from the London Passenger Transport Board, since, although the accident was due to the surface of the road wearing down, the tramlines should have been removed.

Special importance attaches to cases in this section during war-time, when injuries may be caused in the blackout to people walking or riding into bomb-craters, sandbins, or air-raid shelters constructed in area basements or on the surface, though the matter is complicated by Defence Regulations with regard to lighting (*s*)

5. Denial of natural justice.— Judicial or quasi-judicial powers must, subject to any express provisions in the statute conferring the powers, be exercised in accordance with the principles of natural justice, *i.e*, such elementary notions of fairness as have been incorporated into the Common Law. These may be summarised as follows:—

(i) A person must not be Judge in his own cause. The Court of Appeal in *R.* v. *Sunderland Justices* (1901) (*t*) set aside an order made by the Borough Justices on the ground that they had previously, as Councillors, spoken in the Council on the matter out of which the case arose.

(*o*) *Guilfoyle* v. *Port of London Authority*, [1932] 1 K. B 336; *Swain* v. *Southern Railway Company*, [1939] 2 K B. 560.
(*p*) *White* v. *Hindley Local Board* (1875), L R 10 Q B 219; *Blackmore* v. *Mile End Vestry* (1882), 9 Q. B D. 451.
(*q*) [1894] 1 Q. B. 332
(*r*) [1943] K. B. 188; see also *Browne* v. *De Luxe Car Services*, [1941] 1 K. B. 549
(*s*) See, for example, *Lyus* v. *Stepney Borough Council*, [1941] 1 K. B. 134 (sand bin). *Fox* v. *Newcastle-upon-Tyne Corporation*, [1941] 2 K B. 120 (surface shelter).
(*t*) [1901] 2 K. B. 357

(ii) A person must not be condemned unheard. He must have reasonable notice of the case he has to meet, and he must be given an opportunity of stating his case. But this does not necessarily mean that he is entitled to be heard orally. (*Board of Education* v. *Rice*, 1911) (*u*).)

(iii) The decision must be made in good faith. It must not be arrived at for an improper motive, that is to say, in order to achieve some end other than that for which the judicial or quasi-judicial power is given. (*Marshall* v. *Corporation of Blackpool*, 1933) (*x*).)

(iv) A person is probably entitled to know the reason for a judicial decision, at least if he has a right of appeal (*y*).

It should be noted that the principles of natural justice are substantive principles, and do not prescribe even the most general rules of procedure. Thus in the leading case on the subject, *Local Government Board* v. *Arlidge* (1915) (*z*), the House of Lords dismissed the appeal of a house-owner against a decision of the Local Government Board (*a*) confirming a closing order made by a Borough Council, because the grounds of his appeal—namely, that he was not told which members of the Board gave the decision, and that he was not allowed to see the report of their inspector or given an oral hearing—were procedural, and the substantive principles of natural justice as outlined above had been observed.

(*u*) [1911] A. C. 179. (*x*) [1935] A. C. 16.

(*y*) See *Report of the Committee on Ministers' Powers* (1932), Cmd. 4060, pp. 75—80. These principles, of course, apply to the ordinary Courts as well as to administrative tribunals.

(*z*) [1915] A. C. 120

(*a*) The Local Government Board was a central Government Department, the predecessor of the Ministry of Health; see *ante*, p. 227.

CHAPTER XXI.

REMEDIES AGAINST PUBLIC AUTHORITIES.

SUBJECT to the common law immunity of the Crown (*a*) and the statutory limitations on the substantive liability of other public authorities towards private citizens (*b*), the ordinary remedies are in general available against public authorities unless Parliament expressly or impliedly indicates otherwise. In many cases where ordinary remedies are not appropriate, the procedure will be by way of petition of right or the issue of a prerogative writ or order Before discussing these remedies it is convenient to mention certain procedural privileges of the Crown.

Procedural Privileges of the Crown.—If a petition of right is successful, the methods of execution available between subject and subject are not applicable, although in practice the Treasury invariably satisfies such judgments.

A subject cannot compel discovery against the Crown, and obstacles may be put in the way of obtaining particulars. A Government Department may object to the production of documents even where the Minister concerned is not a party to the action. The objection may be because of the contents of a particular document or because the document belongs to a class which on grounds of public interest must as such be withheld from production; but it must be made by the Minister himself, who must have seen and considered the contents (*c*) It appears that the Court has the right to look at such document, but in practice the right is rarely exercised (*d*).

The general rule was that the Crown neither pays nor receives costs, though it was held in *Re Carbonit Aktiengesellschaft* (1923) (*e*), where a patent had been infringed by the Crown, that costs were in the discretion of the Court. The Administration of Justice (Miscellaneous Provisions) Act, 1933, however, put the Crown in the

(*a*) *Ante*, pp 268—276 (*b*) *Ante*, pp. 276—280.
(*c*) *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 624, *Beatson* v. *Skene* (1860) 5 H. & N. 838.
(*d*) *Robinson* v. *State of South Australia* [No. 2], [1931] A. C. 704.
(*e*) [1923] 2 Ch. 504.

same position as an ordinary litigant in a wide field of civil cases, other than revenue cases

Proposals for reform of the law relating to Crown Proceedings.— In 1921 the Lord Chancellor appointed a Committee, including the Lord Chief Justice, the Master of the Rolls and the Attorney-General, to examine the whole question of proceedings by and against the Crown. After consulting more than twenty Government Departments they drafted a Crown Proceedings Bill, the purposes of which were to assimilate the procedure in certain Crown proceedings in the High Court to the procedure in actions between subjects, to authorise certain Crown proceedings to be brought in County Courts, to make the Crown liable to be sued in tort, to amend the law with respect to limitation of liability and salvage in the case of Crown ships, and to make other provision with respect to the enforcement of rights by or against the Crown The draft Bill was published by H.M. Stationery Office in 1927 (*f*), but no attempt to introduce such a comprehensive reform in Parliament has yet been made (*g*), though the Administration of Justice (Miscellaneous Provisions) Act 1933, made a few minor reforms (*h*).

I PETITION OF RIGHT.

A petition of right, an ancient common law remedy, is not an action but, as the name shows, a petition. On the other hand, strictly it is not—as the name might imply—a remedy obtainable as of right, but a request that justice be done. There were in the fourteenth century the following groups of petitions, namely, those presented (i) to Parliament, which if assented to by the King, Lords and Commons, became Acts of Parliament (*i*); (ii) to the Council and/or the Chancellor, leading to various kinds of legal or equitable relief (*k*); and (iii) to the King, these last being matters (a) of right, where the petitioner would have a legal claim against a subject, and (b) of grace, where the petitioner had no legal claim but asked for some redress as a matter of royal favour. In group (iii) the King had an absolute discretion whether or not to grant the request, though in class (a),

(*f*) *Report of Crown Proceedings Committee* (1927), Cmd. 2842.
(*g*) See Port, *Administrative Law*, p. 189. The text of the draft Bill is given *op. cit.*, at pp. 230—256
(*h*) *Supra*, pp. 163, 282.
(*i*) *Ante*, p. 121.
(*k*) *Ante*, p. 186, and *post*, p. 353.

to which the petition of right belonged, the King had a moral obligation to do so (*l*). The common law procedure on petition of right was settled in outline in the reign of Edward I; but as it was closely related to the real actions, which largely went out of use during the seventeenth and eighteenth centuries (*m*), it eventually became necessary for the procedure to be overhauled, and this was done by the Petition of Right Act, 1860, which substantially assimilated it to the procedure of an ordinary modern action (*n*).

Scope of Petition of Right.—In the middle ages the law of property covered much of the ground which we should now call contract or tort; hence the petition of right was most commonly used in cases where a real action would be brought against a subject, for example, where the Crown took possession of land to which the petitioner was entitled, where the right to incidents of tenure was abused, and where a grantee from the King sought compensation for eviction by a third party (*o*). A petition of right also lay for the recovery of chattels real, and probably for chattels personal, and apparently it also lay for certain cases of damage caused by undue user of Crown property, *e.g.*, the wrongful assertion of an easement causing damage (*p*). Other examples of early petitions of right were claims to an annuity, franchise or rent, which were then regarded as incorporeal property. If the petitioner was successful the usual judgment was "*amoveas manus*" ("take your hands off the property," directed to the person who held it for the Crown); if he was unsuccessful, it was "*nil capiat*" ("let the claimant take nothing under his petition").

Equitable relief against the King was granted in the seventeenth century. Thus *Pawlett* v. *Att.-Gen.* (1668) (*q*) was a case of redemption of a mortgage on land which had been forfeited to the King owing to

(*l*) Holdsworth, *History of English Law*, vol. IX, pp. 13—14.

(*m*) For the real actions, see Potter, *Historical Introduction to English Law* (2nd ed.), pp. 430—440.

(*n*) Holdsworth, *op. cit.*, pp. 8—9.

(*o*) For a time the procedural difficulties of the petition of right were to some extent avoided by the use of the remedies of *traverse of office* and *monstrans de droit*, especially in cases where, if the King had not been a party, the matter would have been the subject of a real action and in disputes regarding rights to incidents of tenure. Where these remedies were not appropriate, the ancient and more general remedy of petition of right was used. Traverse of office and *monstrans de droit* tended to die out with the real actions. (Holdsworth, *op. cit.*, pp. 22—29.)

(*p*) *Tobin* v. *The Queen* (1864), 16 C. B. (N. S.) 310, *per* Erle, J., at pp. 363—365, commenting on *Robert de Clifton's Case* (1325), R. P. i, 416—417 (18 Edw. II, no. 3), and *Gervais de Clifton's Case* (1349), Y. B. 22 Edw. III, Pasch. pl. 12.

(*q*) Hardres, 465.

the treason of the mortgagee. In that case Atkyns, B., laid down the following general principle, which may have been rather in advance of its time: "The party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed that he will be defective in either. And it would derogate from the King's honour to imagine that what is equity against a common person, should not be equity against him" (*r*). At first equitable relief against the King was only granted by the Court of Exchequer Chamber on a bill filed against the Attorney-General, but in the eighteenth century it was allowed on a petition of right in the Court of Chancery (*s*).

When the law of contract developed, a petition of right was granted for breach of contract, first for liquidated damages (*e.g.*, on a contract for goods supplied) and then for unliquidated damages. Charles II was in the habit of borrowing money from the bankers, and he granted the bankers annuities charged on the hereditary excise. The annuities fell into arrear during his reign and that of James II, and in 1690 (after the Revolution) the bankers petitioned the barons of the Exchequer for payment. The House of Lords on appeal decided in favour of the bankers. (*The Bankers' Case* (1690—1700) (*t*).) As mentioned above, an annuity was regarded in the middle ages as property which could be recovered in a real action, and the judges in this case thought that for that reason a petition of right would lie, or perhaps *monstrans de droit*. Holdsworth, however, thinks that the principles expounded in the *Bankers' Case* may be said to have extended the remedy of petition of right to contract (*u*).

A petition of right will lie to enforce a statutory duty (*Att.-Gen.* v. *De Keyser's Royal Hotel* (*x*)), and a duty to provide compensation imposed by international law as incorporated into the common law. (*Commercial and Estates Co. of Egypt* v. *Board of Trade.*) In the latter case a neutral citizen recovered compensation for property taken by right of angary (*y*).

(*r*) Hardres, 465, at p. 469.
(*s*) See *Penn* v. *Lord Baltimore* (1750), 1 Ves. 444, at p. 453. (*t*) 14 St. Tr. 1.
(*u*) Holdsworth, *op. cit.*, pp. 32—39; and see *Macbeath* v. *Haldimand* (1786), 1 T. R. 172, at p. 176. (*x*) [1920] A. C. 508; *ante*, p. 178.
(*y*) [1935] 1 K. B. 271. By international law a belligerent has the right, subject to payment of compensation, to seize or destroy, under stress of military necessity, property of neutrals found within the jurisdiction. In English law this right is a royal prerogative.

A suppliant cannot expect relief when he is himself to blame. Thus, as Parke, B., said in *Morgan* v. *Seward* (1837) (*z*), "a false suggestion of the grantee avoids a grant of land from the Crown." A Crown servant cannot bring a petition of right for wrongful dismissal, for the Crown cannot fetter its future executive action; nor, apart from statute, can he recover arrears of salary, for that is regarded as an *ex gratia* payment (*a*). In some cases where restitution or compensation is sought for property which has found its way into the possession of the Crown, Parliament provides special remedies, *e.g.*, under the Crown Private Estates Acts and Crown Lands Acts.

It is often said that a petition of right does not lie for a tort, for the King can do no wrong (*Viscount Canterbury* v. *Att.-Gen.* (1842) (*b*); *Tobin* v. *The Queen* (1864) (*c*)). This is true in that no petition would lie for a tort committed by the King personally, and the Crown is not liable vicariously for "pure" torts committed by its servants. But it has been seen that there are torts connected with property (wrongful seizure or retention of land, goods or money and wrongful assertion of easement), which formerly fell within the law of property (real actions and actions of detinue and debt), for which a petition of right has lain from early times. Holdsworth goes further and asserts that the true principle is, and always has been, that a petition of right would lie in any case in which the subject would be entitled to succeed in an action against another subject. He reminds us that the circumstances in which a subject can show a good legal claim change in the course of time with changes in the law, and says that the law relating to remedies against the Crown should not be wedded to fixated notions of property law. The burden of proof, however, is more onerous where the claim is against the Crown. If this is the true principle—and historically it seems to be right—there is no reason why a petition of right should not lie for trespass to land, nuisance, conversion, and breach of quasi-contract (*d*). Holdsworth doubts, however, whether in view of nineteenth century precedents the Courts would go all the way with him (*e*). Further extensions

(*z*) 2 M. & W. 544.
(*a*) *Ante*, p. 269.
(*b*) 1 Ph. 306.
(*c*) 16 C. B. (N. S.) 310.
(*d*) Cf. *Brocklebank* v. *The King*, [1925] 1 K. B. 52 (illegal exaction of money). Here the question was whether, on the interpretation of the Indemnity Act, 1920 a subject could waive the tort and sue on a quasi-contract.
(*e*) Holdsworth, *op. cit.*, pp. 7—44.

of the scope of the petition of right or other remedies against the Crown will probably have to await legislation (*f*).

Procedure on a Petition of Right.—The procedure is now regulated by the Petition of Right Act, 1860. The petition is prepared by the suppliant and deposited with the Home Secretary (sect. 2) as the channel of communication between the King and his subjects. The Home Secretary, after consulting—if he so wishes—the Attorney-General, then decides in his absolute discretion whether or not to grant his *fiat*: "let right be done." The subject has no redress if the *fiat* is refused. (*Irwin* v. *Grey* (1862) (*g*).) In practice this formal permission to proceed is always granted if the petitioner makes out a *prima facie* case. As Bowen, L.J., said in *Re Nathan* (1884) (*h*): "Everybody knows that that *fiat* is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the *fiat* unless the claim is frivolous" And in *Ryves* v. *The Duke of Wellington* (1846) (*i*) Lord Langdale said. "I am far from thinking it is competent to the King or his advisers to refuse capriciously to allow investigation of any proper question raised on a petition of right" (*j*).

When the *fiat* has been obtained, a copy of the petition and *fiat* endorsed with the prescribed prayer is lodged at the Treasury. The Crown has then twenty-eight days to plead or demur to the petition (section 3). The procedure thenceforth resembles that in an ordinary High Court action (sections 1, 7). The subject, however, is in certain respects in a disadvantageous position owing to the privileges of the Crown mentioned above (*k*). Further, a petition of right, unlike an ordinary pleading, is somewhat difficult to amend (*l*).

Section 14 of the Act requires the Treasury to pay to the successful suppliant in a public matter any money found due, with costs, out of the public funds (*m*); in any matter affecting the King in his private capacity the money is payable out of the Civil List

(*f*) See *Ante*, p. 283.
(*g*) 3 F. & F. 635.
(*h*) 12 Q. B. D. 461, at p. 479
(*i*) 9 Beav. 579, at p. 600
(*j*) Cf. Magna Carta, Art. 40, "*Nulli negabimus justitiam et rectum.*"
(*k*) *Ante*, p. 282
(*l*) *Badman Brothers* v. *The King*, [1924] 1 K. B. 64.
(*m*) Previously a writ of execution was directed to the Treasurer and Chamberlains, who are said to have been personally liable if they did not satisfy the demand out of the first moneys that came to their hands by virtue of their office; Chitty, *Prerogatives of the Crown*, pp 348—349.

II. PREROGATIVE WRITS AND ORDERS.

"Prerogative writs" were writs brought by the King against his officers to compel them to exercise their functions properly or to prevent them from abusing their powers. They could be issued at various periods of their history either out of the Court of King's Bench or the Court of Chancery, or both. At the present day any private individual may apply to the High Court for the issue of a prerogative writ or order, but this kind of remedy has two peculiar characteristics, *viz.* (1) it will be issued on behalf of a citizen only if there is no other remedy available, and (2) it is not obtainable, as are ordinary writs, merely on payment of a fee, but only if cause is shown why it should be issued. The chief prerogative writs were *habeas corpus*, prohibition, *certiorari*, *mandamus* and *quo warranto*, but of these only the first remains as a writ, the last has been abolished, and the others are now displaced by a modified procedure.

(1) **Habeas corpus.**—In origin this writ, which is found in Edward I's time, was no more than a command by the Court to someone to bring before itself persons whose presence was necessary to some proceeding before it. Such a writ, however, had obvious further possibilities. From the fifteenth century it was employed by the King's Bench and Common Pleas to assert their jurisdiction against other Courts *e.g.*, those of the Lord High Admiral or of the Chancery. In the seventeenth century the King was in the habit of imprisoning leading members of the Parliamentary opposition, and these availed themselves of the writ to seek release. It is from this application that its constitutional importance originated as the classical British guarantee of personal liberty. By Statutes of 1679 and 1816 it came to be issuable by the Chancery and all of the Common Law Courts (*n*).

The Habeas Corpus Acts, 1679—1816, were designed to prevent evasion of the effects of the writ, which is often a necessary preliminary to other remedies for interference with personal freedom. Any one may apply for a writ of *habeas corpus* commanding the person to whom it is addressed to have the body of the person specified (whether the applicant himself or another) before the Court on a certain day, stating the day and cause of his being taken and detained, and to abide

(*n*) For the history of this writ, see Holdsworth, *History of English Law*, vol. IX, pp. 108—125.

by the decision there made. The decision will be either that the prisoner be released forthwith, or, if the detention is lawful, that he be speedily brought to trial.

It should be noticed that the writ is available against any person who is suspected of detaining another unlawfully, and not merely against prison governors, the police, the Serjeant-at-Arms, or other public officers whose duties normally include arrest and detention. It can be brought, for example, to test the legality of the custody of a child by a relative or the detention in a lunatic asylum of one who is believed to be sane. For constitutional purposes the special significance of the writ is that it is available against the King's servants acting in his name, as in *Secretary of State for Home Affairs* v *O'Brien* (1923) (*o*) where the Home Secretary was detaining an Irishman in England during the Irish "troubles," and in *Eshugbayi Eleko* v. *The Governor of Nigeria* (1928) (*p*), where a Colonial Governor was keeping an African Chief in protective custody outside the Chief's territory On the other hand it was held in *Re Ning Yi-Ching* (1939) (*q*) that *habeas corpus* would not lie for Chinese subjects on foreign territory, and that in any event the writ would not issue against the Foreign Secretary acting merely in an advisory capacity (*r*)

(2) Prohibition.—According to Blackstone, this writ issued "properly only out of the Court of King's Bench," but since his time also out of the Chancery, Common Pleas and Exchequer Courts. It was directed to the Judge and parties to a suit in any inferior Court, "commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction" (*s*). It was mainly by this writ that the Common Law Courts contested the jurisdiction of the Admiralty and Ecclesiastical Courts in matters which the former claimed not to be cognisable by the latter The Ecclesiastical Courts established a right of appeal against its issue by "writ of consultation."

The usual course was to apply for a rule *nisi* calling on the respondent to show cause why the order should not be made absolute, and the

(*o*) [1923] A C 603. See also *post*, p 464.
(*p*) [1928] A. C 459, cf. [1931] A C 662 (*q*) 56 T L. R. 3
(*r*) See further as to procedure in *habeas corpus*, *post*, p 462 *et seq*
(*s*) Blackstone, Comm. iii, 105.

case was really fought on this issue The penalty for disobedience was attachment and committal for contempt. The Administration of Justice (Miscellaneous Provisions) Act, 1933, made provision by section 5 for the simplification of procedure by the abolition of the motion for an order *nisi*, and required leave to be obtained before application was made for an order absolute for the issue of the writ. The Administration of Justice (Miscellaneous Provisions) Act, 1938, abolished the writ altogether, and provided for the issue of a corresponding order.

The order of prohibition is issued by the High Court to prohibit an inferior Court—using that term in its widest sense to include any body exercising statutory quasi-judicial powers—from exceeding its jurisdiction. The order, or the previous writ, has been used, for example, against Income Tax Commissioners (*Kensington Income Tax Commissioners* v. *Aramayo* (*t*)), an assessment committee (*R* v *North Worcestershire Assessment Committee, Ex parte Hadley* (*u*)), and the Electricity Commissioners to prevent them from holding an enquiry with a view to bringing into force an *ultra vires* scheme for the supply of electricity. (*R* v *Electricity Commissioners* (*v*))

(3) Certiorari.—This was a writ which issued when the Court of King's Bench or Chancery wanted to be "certified" of any record made by any Court of record or by certain other judicial officers, *e.g.*, the coroner or sheriff. It enabled indictments to be removed from the itinerant justices to the King's Bench. The chief grounds on which judicial proceedings might be transferred to the King's Bench were that an impartial trial could not be expected locally, that an important question of law was involved, or that a special jury was necessary. In criminal cases it could be demanded as of right only by the Crown.

The Administration of Justice (Miscellaneous Provisions) Acts, 1933 and 1938, made the same changes in *certiorari* as in prohibition (*x*). The order of *certiorari* is issued by the High Court to an inferior Court such as the Justices, or any body exercising statutory quasi-judicial powers, ordering the record of the proceedings to be removed into the High Court. It issues in similar circumstances to prohibition, but the Court has a discretion to refuse the application if there has

(*t*) [1916] 1 A. C. 215.
(*u*) [1929] 2 K. B. 397.
(*v*) [1924] 1 K. B. 171.
(*x*) *Supra.*

been undue delay in bringing it (*y*). Where a final decision has been made by the inferior Court prohibition is obviously useless, but *certiorari* is available to enable the High Court to quash the decision. Thus prohibition is the appropriate remedy to prevent the Minister of Health from proceeding to confirm an *ultra vires* housing scheme (*R.* v. *Minister of Health, Ex parte Davis* (*z*)), and *certiorari* when an *ultra vires* scheme has already been approved by the Minister. (*Minister of Health* v. *R., Ex parte Yaffé* (*a*).) *Certiorari* is the appropriate remedy if there has been a denial of justice by a Court of summary jurisdiction (*b*).

(4) Mandamus.—Blackstone describes this writ as "a command issuing in the King's name from the King's Bench and directed to any person, corporation or inferior Court of jurisdiction, requiring them to do some particular thing therein specified, which appertains to their duty or office" (*c*), for example, to compel the holding of a Court, or the restoration of an evicted public officer to his office or the performance by any public officer of his duties "A writ of *mandamus*," said Bowen, L.J., in *R* v. *Commissioners of Inland Revenue, Re Nathan* (*d*), "is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done." The writ was issued by the King's Courts to order a person or body to carry out some public duty other than a common law duty owed exclusively to the Crown (*e*). The penalty for disobedience was attachment and committal for contempt

The Administration of Justice (Miscellaneous Provisions) Acts, 1933 and 1938, made the same changes in *mandamus* as in prohibition and *certiorari* (*f*). The issue of the order is at the discretion of the Court, unless there is no other remedy available. An order will not be issued if an action in tort would lie, or if a more convenient

(*y*) *R.* v. *Stafford Justices, Ex p. Stafford Corporation*, [1940] 2 K. B. 33, *per* Greene, M.R., at p. 43.
(*z*) [1929] 1 K. B. 619. (*a*) [1931] A. C. 494
(*b*) *R* v. *Wandsworth Justices, Ex p. Reade*, [1942] 1 K. B. 281
(*c*) 3 Comm. iii, 110
(*d*) (1884), 12 Q. B. D. 461, at p. 478.
(*e*) *R* v. *Secretary of State for War*, [1891] 2 Q. B. 326. (*f*) *Ante*, p. 290

procedure is available. (*R.* v. *Charity Commissioners* (*g*).) This remedy has been used, for example, to compel the hearing of an appeal by a ministerial tribunal, the holding of local government elections (*h*) and the appointment of municipal officers The Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 8, prescribes this procedure for requiring Justices of the Peace and County Court officers to perform their duties, and Courts of summary jurisdiction and Quarter Sessions to state a case.

(5) Quo Warranto.—This was a writ directed by the King to persons who "claimed or usurped any office, franchise, liberty, or privilege belonging to the Crown, to enquire by what authority they maintained their claim" (*i*) The classic example of its use on a large scale was in the reign of Edward I (*k*) Informations in the nature of *quo warranto*, which had already superseded the earlier writ, were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, and the High Court may now grant an injunction restraining a person from acting in a public office to which he is not entitled A special procedure with regard to local government offices was laid down by the Local Government Act, 1933.

III. ACTION FOR DAMAGES.

Where an injury is done to a citizen's person or property by a public authority (other than the Crown, but including servants of the Crown) acting without power or in the wrongful exercise of a power, the actions most commonly brought are for false imprisonment, trespass, negligence, and nuisance Where such a public authority is under a duty to do or to refrain from doing some act, and an individual suffers a particular injury peculiar to himself owing to the breach of that duty, he may bring an action unless this is expressly or impliedly excluded by statute, though in some cases he must join the Attorney-General as plaintiff The duties of public authorities, however, are generally owed to the public only (*l*); Parliament often specifies a particular remedy, and the proper person to take proceedings on behalf of the public is the Attorney-General.

(*g*) [1897] 1 Q B 407 See also *R* v *Bedwellty Urban District Council*, [1934] 1 K. B. 333
(*h*) Before the Local Government Act, 1933.
(*i*) Selwyn, *Nisi Prius* (ed 1842), 1143
(*k*) Holdsworth, *History of English Law*, vol. I, p. 88.
(*l*) *Ante*, pp 277—280

If the authority (other than the Crown or a servant acting on behalf of the Crown) commits a breach of contract which it was within the powers of the authority to make, an action for damages will lie (*m*); but it must be remembered that many of these authorities, notably Local Government Authorities and the great public utilities, are corporations, and therefore certain requirements as to the use of the common seal may have to be observed (*n*).

IV. INJUNCTION AND SPECIFIC PERFORMANCE OF CONTRACT.

Where a public authority (other than the Crown, but including servants of the Crown) threatens to do or to continue to do some unlawful act, an action may be brought for an injunction restraining the authority from so doing or continuing to do. The breach of an injunction amounts to contempt of Court and is punishable by fine or imprisonment. An injunction was originally an equitable remedy. It may be sought in addition to or instead of damages, but will only be granted at the discretion of the Court exercised judicially and in the type of cases in which it would lie against a private individual. In *Bilston Corporation* v *Wolverhampton Corporation* (*o*) the Court refused to grant an injunction to restrain a Local Authority from committing a breach of a contractual or statutory obligation not to oppose another Local Authority's application to Parliament for certain powers, as this was a matter more properly within the cognisance of Parliament.

An act done by a public authority generally affects the public, and the person to sue for an injunction on behalf of the public is the Attorney-General. In some cases he may allow his name to be used at the request (" on the relation ") of some individual (" the relator ") who is substantially the party affected. This is called a " relator action " (*p*). A citizen can claim an injunction against a public authority in his own name only where, in addition to the threatened breach of a public right, either some private right of his is affected or he will suffer some damage peculiar to himself Examples are usually cases of nuisance.

(*m*) Cf. *ante*, p 277.
(*n*) For the contracts of Local Authorities, see Local Government Act, 1933, s. 266, Hart & Hart, *Local Government and Administration* (2nd ed), pp. 438—445.
(*o*) [1942] 1 Ch. 391.
(*p*) See *Att.-Gen.* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34.

Subject to what is said above as to the enforceability of their contracts, an action for specific performance of a contract may be brought against public authorities (other than the Crown or servants acting on behalf of the Crown) in similar circumstances to those in which specific performance would be granted against an ordinary corporation or private individual, as the case may be (*q*).

V. ACTION FOR A DECLARATION.

An action may be brought against the Attorney-General asking the Court to declare what the law is on a given point where the Crown or servants of the Crown threaten to do something which is thought to be illegal In the leading case, *Dyson* v. *Att.-Gen* (*r*), the Court of Appeal held that this was a proper procedure where the plaintiff contended that a threat by the Inland Revenue Commissioners to impose a pecuniary penalty for neglecting to make certain returns within a specified time was illegal, unauthorised and *ultra vires* the Finance Act, 1910 Such an action must be brought before the alleged wrong has been committed, and it cannot be used where a petition of right is available. (*Bombay and Persia Steam Navigation Co.* v *Maclay* (*s*).)

An action for a declaration may be brought against other public authorities by the Attorney-General on the relation of interested parties, for example, a declaration that the proposed expenditure of public money for the relief of strikers is *ultra vires*. (*Att.-Gen.* v. *Merthyr Tydfil Union* (*t*).) An individual may bring the action in his own name under conditions similar to those applicable to an injunction, and both actions are often brought together. In the case of Local Authorities, however, further relief is not usually necessary as the Authority can be relied upon to observe the law when it knows what it is.

VI. LIMITATION OF ACTIONS AGAINST PUBLIC AUTHORITIES.

The Public Authorities Protection Act, 1893, s 1, provided that where after the commencement of the Act "any action, prosecution, or other proceeding is commenced in the United Kingdom against any

(*q*) *Crook* v. *Corporation of Seaford* (1871), L. R. 6 Ch. 551; cf. *Crampton* v. *Varna Railway Co.* (1872), 7 Ch. App 562
(*r*) [1911] 1 K. B. 410.
(*s*) [1920] 3 K. B. 402.
(*t*) [1900] 1 Ch. 516.

person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority," the proceedings must be commenced " within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

The Act further states that where judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client, and makes certain provisions as regards tender of amends.

The period.—The Public Authorities Protection Act was intended to generalise and amend various statutes which existed to discourage the bringing of frivolous actions against certain public authorities and prevent the delaying of such proceedings for so long as to render them vexatious In the case of an omission, or of a continuing wrong, such as trespass to land, the period prescribed by the Act may have been long enough, but in many torts, such as the negligence of municipal 'bus drivers, six months from the act, neglect or default complained of was widely criticised as being too short, for the damage might not accrue or be ascertained within that time (see *Freeborn* v. *Leeming* (*u*)), and an action by a deceased's representatives under the Fatal Accidents Act, 1846, might be barred altogether if death did not ensue within six months from the date of the injury which caused it (*x*). The Limitation Act, 1939, therefore repealed that part of the Public Authorities Protection Act, 1893, quoted in the first paragraph of this section, extended the period during which such actions might be brought to one year and made it run from the accrual of the cause of action.

Section 21 of the Limitation Act, 1939, reads as follows:—

" (1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued·

" Provided that where the act, neglect or default is a continuing one,

(*u*) [1926] 1 K. B. 160.
(*x*) *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K B. 804.

no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this subsection, until the act, neglect or default has ceased.

"(2) The foregoing provisions of this section shall not apply to any action to which the Public Authorities Protection Act, 1893, does not apply, or to any criminal proceeding."

Proceedings covered.—The Acts apply to ordinary actions for damages, and also apparently for an injunction (*y*) or declaration (*z*) even if the threatened wrong has not yet been committed. On the other hand, the Act of 1893 excludes proceedings brought by a Government Department against a Local Authority or local government officer, and the Act of 1939 excludes criminal proceedings. The Public Authorities Protection Act has been held not to apply to an action for negligent breach of a contract entered into under statutory powers for the sale and delivery of coke to a consumer (*Corporation of Bradford* v *Myers* (*a*)) or to an action for the recovery of land (*Scammell and Nephew* v *Hurley* (*b*)). The period of limitation does not apply to proceedings for an order of *certiorari* (*R* v. *London County Council, Ex parte Swan and Edgar* (*c*)), nor probably for orders replacing the other prerogative writs (*d*)

Persons covered.—The Acts extend to Crown servants (*e*) and to any other public authority or any person exercising a statutory power or performing a public duty under the direct mandate or as an officer of a public authority, but the purpose of the Acts -namely, the protection of public authorities—would not permit the expression "any person" to mean any person whatsoever (*f*). The managers of a non-provided elementary school (*g*) and assistant medical officers at a County Hospital (*h*) have been held entitled to the benefit of

(*y*) *Grangola Merthyr Co* v *Corporation of Swansea*, [1929] A C 344.
(*z*) *Grand Junction Waterworks Co* v *Hampton Urban District Council* (1899), 63 J. P. 503
(*a*) [1916] 1 A. C. 242 (*b*) [1929] 1 K B 419.
(*c*) (1929), 45 T. L R. 512
(*d*) Hart and Hart, *op cit*, p 448, and authorities there cited
(*e*) For the application of the Limitation Act, 1939, to the Crown, see *ante*, p. 157.
(*f*) *Corporation of Bradford* v. *Myers*, [1916] 1 A C. 242, at p. 247.
(*g*) *Griffiths* v *Smith*, [1941] A. C 170.
(*h*) *Nelson* v. *Cookson*, [1940] 1 K B. 100.

section 21 of the Limitation Act, 1939 On the other hand it has been decided that "public authority" for this purpose does not include a railway company which, though a public utility, is run on a commercial basis (*i*), or a County Council repairing a trunk road as agent of the Minister of Transport since in that capacity it is not a highway authority but a contractor (*k*).

(*i*) *Swain* v. *Southern Railway Co*, [1939] 2 K B 560
(*k*) *Drake* v. *Bedfordshire County Council*, [1944] 1 K. B. 620.

CHAPTER XXII.

THE ARMED FORCES.

I. MILITARY LAW.

History of the Armed Forces.—Before the Norman Conquest all freemen between the ages of 15 and 60 who were capable of bearing arms had to serve in the fyrd or general levy, and those who evaded service had to pay fyrd-wite, a penalty which might extend to entire forfeiture of land. There was a levy for each county, presided over by the earldorman or earl. The general levy was a civil as well as a military force, and in its civil capacity it was used to suppress riots and known as the sheriff's *posse comitatus*. As a military force it could be used to resist insurrections or foreign invasion It was not bound to serve outside England—Scotland and Wales perhaps excepted. In the reign of Edward VI we find the lord lieutenant of each county commanding the fyrd, or the militia as it was afterwards called, instead of the earldorman

After the Conquest came the feudal levy, which could be called upon to fight out of England for forty days. All military tenants served at their own expense. Service in the feudal levy was supposed to be personal, but the clerical baron, *e.g*, the bishop, paid a composition in lieu of personal service.

Henry I is reported to have invented scutage (shield money), also called escuage, whereby personal service was dispensed with and the military tenant, instead of serving forty days, had to equip and maintain a knight to serve for longer than forty days. Scutage was a subject of grievance in Magna Carta, and after 1215 it was supposed not to be levied without the consent of the Great Council and afterwards of Parliament.

In the reign of Edward I we hear of commissions of array, which were a form of compulsory military service for wars, both foreign and domestic. Compulsory service was much resorted to during the Wars of the Roses, and also in Tudor times. Impressment for military service was declared illegal by 16 Car. 1, c. 28 (1640).

At the Restoration in 1660 military tenures were abolished and,

with them, scutage. The militia was retained, and the King had also a bodyguard. Charles II raised a certain number of regiments by voluntary enlistment, and James II raised an army in the same way, which caused such apprehension that a standing army in time of peace was forbidden by the Bill of Rights. It was, however, soon found that a standing army was necessary, and this force was kept up by annual Mutiny Acts. These statutes were called Mutiny Acts till 1881, when the Army Act -forming to a large extent a military code—was passed. This Act, as noted above, is annually renewed with amendments by a short statute known as the Army (Annual) Act (*a*)

The maintenance of the Royal Navy is within the prerogative, though this has to be supplemented by statutes relating to finance and discipline

The Royal Air Force was established as a separate force by Parliament in 1917, in succession to the Royal Flying Corps and the Royal Naval Air Service (*b*)

Enlistment. - A man enlists as a soldier in peace-time by subscribing to a declaration in the presence of a justice of the peace and taking the statutory oath; and a man becomes an officer by acceptance of His Majesty's commission. When an officer has accepted a commission he holds it at the royal pleasure, but cannot resign it without leave of the proper authorities (*c*). The terms for enlistment in the ranks vary, and in times of danger the services of a soldier may be retained although the period for which he enlisted has expired. Ordinary seamen join the Navy by enlistment, impressment of seamen being now an obsolete prerogative, though never formally abolished (*d*).

Conscription.—The Military Service Acts, 1916, made every able-bodied male British subject between certain ages resident in Great Britain liable to be called up for service in one of the fighting forces for the duration of the war. This was after the supply of volunteers had been exhausted. For political reasons the Acts were not applied to Ireland, the whole of which was then part of the United Kingdom.

(*a*) *Manual of Military Law* (1929), pp 165—175, see further, Clode, *Military Forces of the Crown* (1869)
(*b*) *Manual of Air Force Law* (1939), pp 12—14.
(*c*) *Hearson* v. *Churchill*, [1892] 2 Q. B. 144
(*d*) *R.* v. *Broadfoot* (1743), 18 St. Tr. 1323, see *ante*, p. 172.

Similar provisions were made by the National Service (Armed Forces) Act, 1939, which was not extended to Northern Ireland out of deference to Mr. De Valera's susceptibilities on the subject of partition. The Military Training Act, 1939, a temporary measure, provided for the compulsory military training of young men in their twenty-first year. The scheme came to an end on the outbreak of war, but will probably be revived after the war.

Legal position of members of the Armed Forces.—*Subject to Ordinary Law.*—A soldier, sailor or airman retains all the rights and duties of an ordinary citizen, except in so far as they may be modified by statute. "It is, therefore, highly important," said Mansfield, C.J., in *Burdett* v *Abbott* (*e*), "that the mistake should be corrected which supposes that an Englishman by taking upon him the additional character of a soldier puts off any of the rights or duties of an Englishman." "In this country," said Lord Loughborough in *Grant* v. *Gould* (*f*), "all the delinquencies of soldiers are not triable as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law Courts" This applies both to civil (*g*) and criminal law

A soldier—which term is often conveniently used in this chapter to include sailors and airmen, officers and privates is primarily bound to obey the civil (*g*) law, even though such obedience may render him liable to be tried by court-martial He may therefore sometimes find himself in a dilemma if he is ordered by a superior officer to do something which is unlawful, and the question has arisen how far, if at all, he can plead obedience to superior orders—one of the first duties of a soldier —as a defence. In *Reg.* v *Smith* (1900) (*h*), a case heard in the Supreme Court of the Cape of Good Hope, it was said that "if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officers" (*i*). In that case it was held that the order to shoot an African was not so

(*e*) (1812), 4 Taunt. 401. (*f*) (1792), 2 H. Bl 98

(*g*) In its context the word "civil" may be contrasted with criminal law or with military law Thus "civil law" in the *Manual of Military Law* usually means non-military criminal law

(*h*) 17 Cape Supreme Ct Rep. 561.

(*i*) See also *per* Willes, J , in *Keighley* v *Bell* (1866), 4 F. & F , at p. 790

plainly illegal that the accused would have been justified in the circumstances in refusing to obey it, and it was therefore not necessary to decide whether in the circumstances the order was unreasonable or unnecessary The same principle presumably applies to an officer acting under superior orders, though he would be expected to exercise more discretion than a private soldier.

Exceptions to the general principle.—The following are the most important exceptions to the principle that the legal position of a member of the armed forces is the same as that of an ordinary citizen.

(i) In order that the Crown may not be deprived of his services for trifling causes, a soldier cannot be arrested or compelled to appear before a civil Court on account of any debt, damages or sum of money under £30. A creditor may, however, in such cases sue and execute judgment against the soldier's property other than his military pay or equipment (Army Act, s. 144)

(ii) By the Wills Act 1837, s 11, and the Wills (Soldiers, Sailors and Airmen) Acts, 1918—41, members of the armed forces on actual military service (*k*), and sailors (including merchant seamen) at sea, whether on actual military service or not, may make informal wills, even if they are under age There are also certain exemptions from tax, *e.g.*, estate duty on the estate of one killed in action Concessions during the war period with regard to the place of marriage were made by the Marriage (Members of His Majesty's Forces) Act, 1941, amending the Marriage (Naval, Military and Air Force Chapels) Act, 1932.

(iii) A soldier has the same right of voting at Parliamentary elections as a civilian and may be placed on the list of absent voters (*l*), but members of the regular forces on full pay until retirement or resignation are prohibited by regulations similar to those which apply to civil servants (*m*) from taking an active part in public political discussions or standing as candidates for Parliament.

The Servants of the Crown (Parliamentary Candidature) Order, 1927, which forbids Crown servants from issuing an address to electors or in any other manner publicly announcing themselves as candidates

(*k*) See *In the Goods of Hiscock*, [1901] P 78, *Gattward v Anne*, [1902] P 99, *In the Goods of Gordon* (1905), 21 T L R 653, *In re Aitchen* (1919), 35 T L R 612, *In re Lamond*, [1915] 2 Ch 240, *In the Estate of Spark*, [1941] P 115, *In the Estate of Rippon*, [1943] P. 61, Megarry, "*Actual Military Service*" *and Soldiers' Privileged Wills* (1941), 57 L Q R 481.

(*l*) *Ante*, p. 87 (*m*) *Ante*, p. 213.

or prospective candidates at Parliamentary elections until they have retired or resigned from their employment, applies to all persons in the naval, military and air services of the Crown, except officers on the retired or emergency lists of the Royal Navy or Royal Marines or Royal Air Force, and except officers and men of any of the auxiliary and reserve forces, save when embodied or called out on permanent or active service.

A commission in the Navy or Army is an "old" office for the purposes of the Succession to the Crown Act, 1707 (*n*), and section 27 expressly stated that the disqualifying provisions of the Act should not extend to any member of the House of Commons, being an officer in the navy or army, who received any new or other commission. A member of the House of Commons who received a commission for the first time, however, had to vacate his seat, though he was eligible for re-election Members of the House of Commons receiving a commission in the Royal Air Force are exempted from disqualification by section 4 of the Air Force (Constitution) Act, 1917, as were officers of the Territorial force under the Territorial and Reserve Forces Act, 1907. There is no express exemption for officers of the Royal Marines (dating from 1755), or the Royal Naval Reserve, and there is doubt about army units created since 1705. The recent Parliamentary practice, however, has been to treat as exempt from disqualification the holders of commissions in all forces of the Crown, except those on the active list or on active service in time of peace (*o*). In view of this last exception, the House of Commons (Service in His Majesty's Forces) Act, 1939, a wartime measure, provides that a person shall not be incapable of being elected to, or of sitting and voting in, the House of Commons, by reason only that as a member of any of His Majesty's forces he holds any office or place of profit under the Crown.

(iv) All soldiers are exempt from serving on juries (Army Act, s. 147), and an officer on the active list may not be appointed sheriff. (Section 146.)

(v) The Courts hold that a soldier while in the service cannot change his domicil (*p*).

(*n*) *Ante*, p. 73.

(*o*) *Report of the Select Committee on Offices and Places of Profit under the Crown* (1941), H. C. Pap. 120, pp xxi—xxii and pp. 129—130 (Memorandum by the Attorney-General).

(*p*) *Ex parte Cunningham* (1884), L. R. 13 Q. B. D. 418; *In re Macreight* (1885), L. R. 30 Ch D. 165.

(vi) A soldier on enlistment also subjects himself to the system of military law which regulates the relations of officers and soldiers in their military capacity. Questions of military law are decided exclusively by courts-martial composed of military officers without appeal to the civil Courts. Thus in *Re Mansergh* (1861) (*q*) the Court of Queen's Bench refused to grant a writ of *certiorari* to quash the conviction of a major by a court-martial for addressing a superior officer in offensive and insulting language.

Military and Air Force law.—The Army and Air Force (Annual) Act (*r*) describes itself as "an Act to provide, during twelve months, for the discipline and regulation of the Army and the Air Force." The objects of the Act cannot be better described than by setting out the preamble, which runs as follows: "Whereas the raising or keeping of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law (*s*). And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of land forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of . . .(*t*), exclusive of the numbers actually serving in India or Burma: And whereas under the Air Force (Constitution) Act, 1917, His Majesty is entitled to raise and maintain the air force, and it is judged necessary that the whole number of such force should consist of . . . (*t*), exclusive of the numbers serving as aforesaid: And whereas it is also judged necessary for the safety of the United Kingdom and the defence of the possessions of this realm that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service under the direction of the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral aforesaid: And whereas the said marine forces may frequently be quartered or be on shore, or be sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government

(*q*) 1 B. & S. 400.

(*r*) See *ante*, p 40

(*s*) Bill of Rights, 1689.

(*t*) In peace-time the number is stated, but in war-time it is "such number as His Majesty may deem necessary."

of His Majesty's forces by sea: And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm (*u*); yet, nevertheless, it being requisite, for retaining all the before-mentioned forces, and other persons subject to military law or to the Air Force Act, in their duty, that an exact discipline be observed and that persons belonging to the said forces who mutiny, or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offences to the prejudice of good order and military or air force discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow: And whereas the Army Act and the Air Force Act will expire in the year . . . on the following days Be it therefore enacted," etc

The Army and Air Force (Annual) Act then enacts that the Army Act and the Air Force Act shall remain in force for another year " and no longer, unless otherwise provided by Parliament ", that the Army Act and the Air Force Act, while in force, shall apply to persons subject to military law or to the Air Force Act whether within or without His Majesty's dominions; and that persons so subject shall not be exempted from the provisions of those Acts by reason only that the number of the forces for the time being in the service of His Majesty, exclusive of the marine forces, is either greater or less than the numbers specified. The Act schedules amendments to the Army and Air Force Acts, which are printed separately as amended from time to time

The sources of military law are the Army Act, the Acts relating to the Reserve and Auxiliary Forces, and certain other Acts applied to the Army (*e.g.*, the Official Secrets Acts and the Emergency Powers Act, 1920), supplemented by the Rules of Procedure, 1926, by the King's Regulations, by Royal Warrants (*e g*, relating to pay and promotion), and by Army Orders and Army Council Instructions (*v*). The sources of Air Force law are similarly the Air Force Act and certain Acts applied to the Air Force, supplemented by the Rules of Procedure, the King's Regulations for the Royal Air Force and Air

(*u*) Magna Carta (1215), Art 39, Petition of Right, 1628.

(*v*) *Manual of Military Law*, p 1. The King's Regulations for the Army and Army Council Instructions are printed separately by H M Stationery Office

Council Instructions, and by Air Ministry orders and regulations (*x*). The Laws and Usages of War established by international conventions are also required to be observed by members of the forces. The Army Act and the Air Force Act are standing codes dealing with such matters as enlistment, discipline and courts-martial, and the Army Council and Air Council are the sole administrators and interpreters of the orders and regulations made thereunder.

Naval discipline.—Parliament has never been apprehensive over the maintenance of the Navy, which is a royal prerogative, as a navy cannot well be used to oppress the liberties of the subject or to overawe the Legislature. The terms of enlistment are regulated by the Naval Enlistment Acts, 1835—84, and the trial and punishment of offences committed by seamen are regulated by the Naval Discipline Acts, 1866 and 1884, as amended by the Naval Discipline Acts, 1922 and 1941. Conditions of service in the Navy are also contained in King's Regulations and Admiralty Instructions. As in the case of the Army and Air Force, the money is now provided by annual Appropriation Acts.

Generally speaking, the Naval Discipline Acts affect not only the members of the Royal Navy on the books of one of His Majesty's ships in commission, but also Royal Marines when serving on board His Majesty's ships, land and air forces embarked on His Majesty's ships and passengers on board His Majesty's ships (*y*).

The Acts apply to offences committed in any harbours, lakes, rivers, dockyards, arsenals, barracks, etc., within the jurisdiction of the Admiralty, whether within or without the United Kingdom, and also mutiny, desertion and similar offences committed on shore, whether within or without the United Kingdom (*z*). A naval court-martial must be held on board a man-of-war. The power of a naval captain to punish summarily is illustrated by the recent case of *Jenkins* v *Shelley* (*a*).

II. COURTS-MARTIAL.

Introduction.—The King's troops in mediæval times were governed by regulations or articles of war issued by the King and administered

(*x*) *Manual of Air Force Law*, p 1. The King's Regulations for the Royal Air Force and Air Council Instructions are printed separately by H.M. Stationery Office.
(*y*) Naval Discipline Act (1866), ss. 87—90. Army Act, ss. 186, 179; Air Force Act, s. 186.
(*z*) Naval Discipline Act, s. 46
(*a*) [1939] 2 K. B. 136.

in the Court of the Constable and the Marshal, two hereditary officers of State (*b*). The office of Constable became extinct in the reign of Henry VIII, but the Court of the Constable and the Marshal continued to exist, and its jurisdiction was unconstitutionally extended by the Tudors and early Stuarts to cover not only military offences in time of war or outside the realm, but also certain matters, whether affecting soldiers or civilians, in time of peace and within the realm. Hence the complaint in the Petition of Right presented to Charles I in 1628 against the issue of commissions to execute "martial law." The courts-martial which exist to-day, established under the Army Act, Air Force Act and Naval Discipline Acts to enforce military law, air force law and naval discipline, do not administer martial law, though there has inevitably been some confusion on the point. "As a matter of etymology," says Maitland (*c*), "*marshall* has nothing whatever to do with *martial*—the marshall is the master of the horse—he is *marescallus*, *mareschalk*, a stable servant—while of course martial has to do with Mars, the God of war. Still, when first we hear of martial law in England, it is spelt indifferently *marshall* and *martial*, and it is quite clear that the two words were confused in the popular mind. ." (*d*).

Persons subject to military law.—Persons subject to military law under the Army Act are: (i) members of the Regular Forces (*i.e.*, who are liable to render continuous service in any part of the world, including the Royal Marines and the Indian and Burma forces) on the active list or employed on military service; (ii) members of the Reserve Forces (*i.e.*, the Army Reserve and the Special Reserve or Militia) (*e*) when called out on permanent service or for training or in aid of the civil power; (iii) members of the Territorial Army (*f*) when in training or when attached to regular forces or when embodied (*g*); and (iv) under certain conditions, civilians accompanying or employed by forces on active service (*h*). To these should now be added

(*b*) For the history of this Court, see Holdsworth, *History of English Law*, vol I (5th ed.), pp. 573—580; see also Clode, *Military Forces of the Crown*, vol. I, pp. 76—77
(*c*) *Constitutional History*, p. 266.
(*d*) As to martial law, *see post*, pp. 500—504.
(*e*) Reserve Forces Act, 1882, Territorial and Reserve Forces Act, 1907; Territorial Army and Militia Act, 1921; Reserve and Auxiliary Forces Act, 1939.
(*f*) Territorial and Reserve Forces Act, 1907; Territorial Army and Militia Act, 1921.
(*g*) The Armed Forces (Conditions of Service) Act, 1939, gave power to send embodied Territorials abroad. (*h*) Such civilians may not be tried summarily.

(v) members of the Home Guard when on duty or when mustered for the purpose of resisting an actual or threatened invasion (*i*); and, subject to modifications, (vi) women Medical and Dental Officers and women enrolled in the Queen Alexandra's Imperial Military Nursing Service or its Reserve, the Territorial Army Nursing Service or its Reserve and the Auxiliary Territorial Service (*k*), and members of the Voluntary Aid Detachments (*l*).

Jurisdiction of Courts-Martial.—It will be convenient to deal here with Courts-Martial established under the Army Act (*m*). The jurisdiction of Air Force Courts-Martial is substantially similar, and mention has been made of the application of the Naval Discipline Acts.

(i) A Court-Martial has exclusive jurisdiction to try and punish persons subject to military law for any of the military offences created by sections 4—40 and 155 of the Army Act. These include shameful or treacherous conduct in the face of the enemy, mutiny and insubordination, desertion, drunkenness, corrupt dealings with military supplies, conduct prejudicial to military discipline and trafficking in commissions (*n*).

(ii) A Court-Martial may try and punish any person subject to military law for any offence which when committed in England is punishable by the law of England, except (a) treason, murder, manslaughter, treason-felony or rape committed in the United Kingdom (including for this purpose the Channel Islands and the Isle of Man) and except (b) the latter offences committed within His Majesty's dominions (other than the United Kingdom (*o*) and Gibraltar) unless committed while on active service or at a place more than 100 miles from any city or town in which the offender

(*i*) The Local Defence Volunteers were founded on a voluntary basis in May, 1940, by Order in Council under s. 1 of the Emergency Powers (Defence) Act, 1939. Membership did not exempt from conscription (National Service (Armed Forces) Act, 1940.) The name was changed to the Home Guard (under which name it had been popularly known since 1941) by an Order in Council in 1942, which allowed part-time direction into the Home Guard. Absence from duty was made punishable by fine or imprisonment in a civil court of summary jurisdiction. The Home Guard was "stood down" at the end of 1944.

(*k*) Army and Air Force (Annual) Act, 1943 This Act also subjected to the Air Force Act women enrolled in the corresponding Air Force services.

(*l*) Army and Air Force (Annual) Act, 1944.

(*m*) *Manual of Military Law*, ch. 5. (*n*) *Ibid*, ch 3.

(*o*) A British ship on the high seas is not part of the United Kingdom: *R* v. *Gordon-Finlayson*, [1941] 1 K. B. 171.

could be tried for such offence by a competent civil Court. (Army Act, s. 41.)

This does not affect the jurisdiction of the civil Courts to try a person subject to military law for any offence. (Army Act, s. 41A.) Further, while a person acquitted by a civil Court may not be tried by Court-Martial on the same charge, a person who has been sentenced or acquitted by a Court-Martial may afterwards be tried by a civil Court, though in that case any military punishment which may have been imposed must be taken into consideration in awarding punishment (*ibid.* section 162)

Courts-Martial must observe the same rules of evidence as English civil (*i.e.*, non-military) Courts (*ibid.* section 128). The rules of procedure are laid down by Order in Council (*p*).

In contrast to a General Court-Martial consisting of not less than five officers, a District Court-Martial consisting of not less than three officers may not try an officer or punish with death or penal servitude The members of a Court-Martial are Judges both of fact and law Counsel may appear for either side. A Field General Court-Martial consisting of not less than three officers may be convened on active service or overseas where it is not practicable to convene a General Court-Martial. Every Court-Martial depends for its authority on a convening order which must be issued by a person authorised under the Army Act to convene it.

A commanding officer has jurisdiction to try offences and impose minor punishments summarily, but the accused must usually be given the choice of trial by Court-Martial.

The Judge Advocate-General and Provost Marshal.—The Judge Advocate-General, who is now a civil servant attached to the War Office, examines the proceedings of all Courts-Martial held in the United Kingdom and advises on the confirmation of sentences. He also examines and advises on the more serious sentences of Courts-Martial outside the United Kingdom. In this work he is assisted by a legal and military staff.

A Judge Advocate, who is a military officer appointed by the Crown or by the Judge Advocate-General or in certain cases by the convening officer, must be summoned to a General Court-Martial and may be

(*p*) S. R. & O., 1926, No. 989, as subsequently amended.

summoned to a District Court-Martial. The functions of a Judge Advocate are to advise the Court on questions of law, evidence and procedure, and to send a record of the proceedings to the department of the Judge Advocate-General He does not, as formerly, act as prosecutor.

The King may appoint a Provost Marshal and assistants to command the Corps of Military Police. The Army Act allows a general or brigadier to appoint provost marshals for the prompt repression of all offences which may be committed out of the United Kingdom. The powers of provost marshals and their assistants extend to the arrest and detention of offenders against military law and the execution of punishments inflicted by Courts-Martial (section 74).

Control of Courts-Martial by the Civil Courts.—The authorities on the question of the power of the civil Courts to control the activities of Courts-Martial or officers administering military law are rather confused, but the true principles are probably those stated by McCardie, J., in *Heddon* v *Evans* (1919) (*q*), namely: (1) a remedy lies if the Court-Martial or officer commits what would be a wrong at common law while acting without or in excess of jurisdiction (*r*); (2) no remedy lies if the Court-Martial or officer commits what would be a common law wrong while acting within its or his jurisdiction, even if the act was done maliciously (*s*) or without reasonable and probable cause (*t*). In *Heddon* v. *Evans* an action by a private soldier against his commanding officer for false imprisonment failed.

A Court-Martial would act without jurisdiction if it proceeded against a person who was not subject to military law (*u*), or if it was not properly convened or properly constituted in accordance with the Army Act or if it convicted a man of an offence which is not an offence under the Act. It would exceed its jurisdiction if it awarded a heavier punishment than it has authority to award. Criminal proceedings against officers may take the form of a prosecution for murder, manslaughter or assault. The jurisdiction of the Courts is exercised against Courts-Martial in applications for *habeas corpus*, *mandamus*,

(*q*) 35 T. L. R. 642. (*r*) *Grant* v *Gould* (1792), 2 H. Bl. at p. 100.
(*s*) *Dawkins* v. *Lord F. Paulet* (1869), L. R. 5 Q. B. 94.
(*t*) *Sutton* v. *Johnstone* (1786), 1 T. R. 493.
(*u*) *Wolfe Tone's Case* (1798), 27 St. Tr. 614, but there the Court was administering "martial law."

prohibition and *certiorari* (*x*) and in civil actions against individual officers for damages for false imprisonment, assault, libel, etc.

As the Courts will not interfere with the administration of military law by the properly constituted tribunals acting within their jurisdiction, the cases in which a soldier has applied to the civil Courts successfully have been very rare. It does not appear that *mandamus* has ever been issued (*y*). The Supreme Court of New South Wales in 1889 issued a writ of *prohibition* restraining a Court-Martial from proceeding further on the ground that it had not been legally convened (*z*), but other applications have been refused (*a*). A similar lack of success has attended applications for the discretionary writ of *certiorari* (*b*) A writ of *habeas corpus* was granted in *Re Porrett* (1844) (*c*) where the Court-Martial proceedings had been confirmed by an officer who had not authority to do so, and by a Canadian Court in 1867 as the form of the charge and finding of the Court-Martial were bad (*d*). It was also allowed in two early nineteenth-century cases on technical grounds which have since been invalidated by the Army Act (*e*).

A leading case on actions for damages is *Dawkins* v. *Lord F. Paulet* (1869) (*f*) where an officer sued a superior officer for libels contained in letters written by the latter in the course of his duty to the Adjutant-General The majority of the Court of Queen's Bench (Cockburn, C.J., dissenting) held that the civil Courts would not interfere in such cases even if the superior officer acted maliciously (*g*), firstly, because the alleged wrong was done in the course of duty, and motive is

(*x*) These are proceedings in "a criminal cause or matter" within the meaning of s. 31 (1) (a) of the Judicature Act, 1925, so that no appeal lies to the Court of Appeal against a refusal of motion by the Divisional Court: *R.* v. *Army Council, Ex p Sandford*, [1940] 1 K B 719

(*y*) Mandamus was refused in *R.* v. *Secretary of State for War*, [1891] 2 Q. B. 326, and *R.* v. *Army Council, Ex p. Ravenscourt*, [1917] 2 K. B 504, and *R.* v *Army Council, Ex p. Sandford*, [1940] 1 K B 719.

(*z*) *Ex parte Webster* (1889), 10 N. S W. Rep. 79.

(*a*) Prohibition was refused in *Grant* v. *Gould* (1792), 2 H Bl. 69, *Re Poe* (1832), 5 Barn. & Adol. 681, *Re M'Carthy* (1866), 14 W R 918, *Makubedi* v. *Gutsche*, [1917] S A. Supreme Ct. Rep. 632; and *R.* v. *Gordon-Finlayson*, [1941] 1 K. B. 171.

(*b*) *Certiorari* was refused in *Re Manseryh* (1858), 1 B & S 400, *Re Roberts, Times Newspaper*, 11 6.1879, *Ex parte Fogan* (1920), Canadian Crim. Cas., vol. 32, p. 41, and *R* v. *Murphy*, [1921] 2 I. R 190.

(*c*) *Re Porrett* (1844), Perry's Oriental Cases, 414.

(*d*) *Re Moore* (1867), Simmons, p. 165.

(*e*) *Habeas corpus* was refused in *Sudds's Case* (1801), 1 East, 306, *Ex parte Blake* (1814), 2 M. & S 428, and *R.* v. *Murphy*, [1921] 2 I. R. 190.

(*f*) L R. 5 Q. B 94

(*g*) The occasion was privileged; see *Dawkins* v. *Lord Rokeby* (1875), L. R 7 H. L. 744

therefore irrelevant; secondly, on grounds of convenience and public policy, as otherwise a superior officer would be unduly hampered in the performance of his duty, and, thirdly, because the party complaining of injustice has his remedy under military law (*h*). The opinion of Mansfield, C.J., and Loughborough, C.J., in the Court of Exchequer Chamber in *Sutton* v. *Johnstone* (1786) (*i*) may be cited for the same principle where a superior officer abuses his authority without reasonable and probable cause In that case a naval captain sued an admiral for malicious prosecution in having him tried by Court-Martial for disobedience to orders. The opinion, however, was *obiter* as the Exchequer Chamber held that the admiral had reasonable and probable cause.

(*h*) At the present day an officer may complain to his commanding officer and thence upwards to the Army Council (Army Act, s. 42), a soldier may similarly complain to his commanding officer and thence to a general or brigadier (*ibid.*, s. 43). An officer or soldier aggrieved by the finding or sentence of a Court-Martial may petition through "the usual channels" to the confirming or reviewing authority (King's Regulations 695).

(*i*) 1 T R 493

CHAPTER XXIII.

THE CHURCH OF ENGLAND.

I. THE CHURCH AS BY LAW ESTABLISHED.

The meaning of "Establishment."—A religious body may be said to be "established by law" in a wide sense if its existence is recognised and its property and other rights are protected by the law (*a*). In a narrow sense a Church is "established" when the whole system of its organisation is sanctioned by a law which establishes that system throughout the State to the exclusion of any other system (*b*). The Church of England now, if not in Elizabeth's reign, occupies an intermediate position. "The process of establishment," it was said in *Marshall* v. *Graham* (*c*), "means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith and given to it a certain legal position and to its decrees if given under certain legal conditions certain legal sanctions." One consequence is that the alteration of its doctrines thereafter requires the approval of the State legislature (*d*). The legal position of the Church of England as by law established depends mainly on the Acts of Supremacy and Uniformity, which, though indirectly binding on everyone, directly affect only members of the Church of England. The Church itself is not in law a corporate body, but its property is vested in various ecclesiastical corporations, notably the Ecclesiastical Commission.

The Reformation Statutes.—*The Legislation of Henry VIII.*—Though no doubt a considerable body of opinion, not confined to the laity, was becoming hostile during the fifteenth century to the claims and exactions of the Pope and his legates, the motives behind Henry VIII's legislation excluding the papal jurisdiction were mainly political. The series of statutes begins with an Act in restraint of appeals to Rome (1533), which were now forbidden unconditionally

(*a*) *Att.-Gen.* v. *Pearson* (1817), 3 Mer. 353, at p. 376.
(*b*) *Free Church of Scotland (General Assembly)* v. *Lord Overtoun*, [1904] A. C. 515, at p. 726.
(*c*) [1907] 2 K. B. 112, at p. 126.
(*d*) *Free Church of Scotland (General Assembly)* v. *Lord Overtoun*, *supra*, at p. 648.

whereas under the Statutes of Provisions, 1351, and Præmunire, 1353, they were allowed subject to the King's permission. Final appeal in ecclesiastical causes henceforth lay to the King. Following the formal submission by Convocation in 1532, the Act for the Submission of the Clergy, 1534, forbade the enactment of any canons without the King's licence or the meeting of convocations without the authority of the King's writ, and declared that no canons which were contrary or repugnant to the royal prerogative or the customs, laws, or statutes of this realm should be made or enforced Another Act of 1534 gave to the King the exclusive right of appointing archbishops and bishops, and applied the penalties of the Statutes of Provisions and Præmunire to any dean and chapter refusing to elect the royal nominee. The Act of Supremacy of the same year enacted that the King should be accepted as "the only supreme head in earth of the Church of England called *Anglicana Ecclesia*," and should have full power to suppress heresies. Some of the monasteries were "terrified into an ostensibly voluntary surrender" of their property (*e*), and Parliament in 1539 gave the King power to dissolve the remainder. The Statute of the Six Articles (known as "the bloody whip with six strings") of the latter year shows that Henry VIII was not intending drastic doctrinal changes, for it declares in favour of the doctrine of the real presence, communion in one kind, celibacy of priests, private masses and auricular confession.

The Legislation of Edward VI —Edward VI's short reign is chiefly notable for the Act of Uniformity, 1549, which scheduled a Book of Common Prayer (to some extent a translation of the Roman missal) enjoined for the use of the clergy; and the Act of Uniformity, 1552, which revised the prayer book in a Protestant direction, and ordered all persons, having no lawful or reasonable excuse to be absent, to endeavour to resort to their parish Church every Sunday and holy day, on pain of ecclesiastical censures.

In Mary's reign Parliament repealed Edward VI's Acts of Uniformity, and provided that the forms of worship obtaining in the last year of Henry VIII should be observed (1553). It then repealed Henry VIII's legislation relating to the Pope's jurisdiction, but confirmed grants of land made on the dissolution of the monasteries (1554).

(*e*) Keir, *The Constitutional History of Modern Britain, 1485—1937* (2nd ed.), pp. 67—68.

The Legislation of Elizabeth.—On Elizabeth's accession, Parliament passed new Acts of Supremacy and Uniformity (*e*). The *Act of Supremacy, 1559*, repealed the ecclesiastical legislation of Mary and revived that of Henry VIII. It required an oath to be taken by all holders of office in Church and State, and imposed severe penalties on any person who should say, write, or do anything in favour of foreign spiritual or ecclesiastical jurisdictions. The oath contained the declaration "that the Queen's highness is the only supreme governor of this realm and of all other her highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal, and that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm." It will be noticed that while Henry VIII described himself as the supreme "head" of the Church, Elizabeth is called the supreme ecclesiastical and temporal "governor" of the realm, a title which suggests administrative rather than legislative powers. "Conceive it thus," says Selden, "there is in the Kingdom of England a college of physicians· the King is supreme governor of those, but not head of them, nor president of the college, nor the best physician."

The *Act of Uniformity, 1559*, revived with amendments the second Prayer Book of Edward VI, and enjoined its use under penalties. It also imposed a penalty of 12*d.* on non-attendance at Church.

The process of the legislation of 1559 owed nothing to ecclesiastical initiative and little to ecclesiastical support, but after a generation of enforcement the establishment became "a true expression of the prevailing religious sentiment of the nation" (*f*).

Charles II and the Prayer Book.—The Prayer Book was again revised by James I, who introduced the "authorised version" of the Bible in 1611. The Prayer Book was proscribed during the Commonwealth, which was anti-episcopalian, and revived by Charles II in its present form with amendments made by convocation. (Act of Uniformity, 1662.) An attempt by William III in 1681 to introduce a more puritan form of worship was prevented by Convocation, and further alterations proposed by a Church Assembly Measure were

(*e*) It may perhaps be explained that Edward VI was a Protestant of the kind which would now be regarded as "high Church," that Mary was a Roman Catholic, and Elizabeth (in so far as she was interested in religion) was a Protestant.

(*f*) Keir, *op. cit.*, pp. 80 and 93

turned down by the Commons in 1928, largely through the opposition of the non-conformist members.

The Revolution Settlement.—The Bill of Rights, 1689, declared that, "whereas it hath been found by experience that it is inconsistent with the safety and welfare of this Protestant Kingdom to be governed by a popish prince (*g*) or by any king or queen marrying a papist (*h*) . . . all and every person or persons that is, are, or shall be reconciled to, or shall hold communion with, the see or Church of Rome, or shall profess the popish religion, or shall marry a papist shall be excluded and be forever incapable to inherit, possess or enjoy the Crown and government of this realm." This provision was safeguarded by the Coronation Oath Act of the same year The Act of Settlement, 1701, contains provisions in similar terms (*i*).

Effects of the Reformation.—As we have seen, the legislation of Henry VIII and Elizabeth, as subsequently modified, subjects the Church of England to the legislative supremacy of Parliament and to the executive and judicial supremacy of the Crown.

The Sovereign—by constitutional convention on the recommendation of the Prime Minister, who need not be a member of the Church of England—appoints archbishops, bishops, and certain other dignitaries of the Church. He convokes, prorogues and dissolves the two Houses of Convocation (*k*). Final appeal from ecclesiastical Courts lies to the King in Council, *i.e.*, the Judicial Committee.

Under the Act for the Submission of the Clergy, 1534, no existing or future canons contrary or repugnant to statute law or the common law are valid, and no canons subsequently made (though otherwise valid) *bind the laity* unless they receive the consent of the King in Parliament (*l*). Thus the canon law of the Church of England is part of the law of England, and so subject to variation by Parliament, *e.g.*, the Deceased Wife's Sister's Marriage Act, 1907; and the civil Courts can enforce this supremacy (*m*).

(*g*) The reference is to James II, who had "abdicated the government" in 1688.
(*h*) Mary Tudor married Philip II of Spain, one of the chief princes of the Roman Church.
(*i*) For the present accession and coronation oaths, see *ante*, pp. 143—144.
(*k*) Presumably now, by convention, on the advice of the Archbishops In practice the Archbishops are also consulted on the appointment of bishops.
(*l*) *Cox's Case* (1700), 1 P. Wms. 32; *Middleton* v *Croft* (1736), 2 Atk. 650, *Bishop of Exeter* v. *Marshall* (1868), L. R. 3 H L. 17.
(*m*) See *Thomas* v. *Dibdin*, [1912] A. C. 533.

English Ecclesiastical Law.—"Ecclesiastical Law" in the wide sense means the law relating to any matter concerning the Church of England, and what topics are included under that heading is a matter of convenience. Just as it is not necessary to define precisely the scope of English Constitutional Law as long as our constitution remains "unwritten" (*n*), so the necessity for distinguishing English Ecclesiastical Law from the rest of the law of the land does not arise while the Church remains established (*o*)

In the narrow or technical sense "Ecclesiastical Law" means the law declared and administered by Ecclesiastical Courts or persons, in the same way as "equity" contrasted with common law meant the law enforced by the Court of Chancery (*p*) It is a distinguishing characteristic of Ecclesiastical Courts that their sanctions are spiritual —monition, penance, exclusion from church and ex-communication— and they have no power to fine or imprison (*q*).

Among the matters which are within the exclusive cognizance of the Ecclesiastical Courts are the consecration of land or buildings (*r*), the grant of faculties or certificates (*s*) for making alterations to churches; the grant of marriage licences (*t*); vestments (*u*); and indiscipline, immorality and dereliction of duty on the part of the clergy (*x*).

On the other hand, the common law Courts have always claimed jurisdiction, often exclusive, in the definition and protection of real property, whether corporeal or incorporeal. Thus among the matters relating to the Church which come within the sphere of the common law are advowsons or rights of presentation to benefices (*y*); the ownership of the church and churchyard, which is vested in the parson or lay rector, and the parishioners' right of sepulture or burial in the

(*n*) See *ante*, p. 6.
(*o*) Denning, *The Meaning of "Ecclesiastical Law"* (1944), 60 Law Quarterly Review, pp. 235—241.
(*p*) *Mackonochie* v. *Lord Penzance* (1881), 6 App Cas. 424, at p. 446.
(*q*) *Caudrey's Case* (1591), 5 Co Rep. 1, at p. 6; *Mackonochie* v *Lord Penzance*, *supra*, at p 448.
(*r*) *Wood* v. *Headingley-cum-Burley Burial Board*, [1892] 1 Q. B. 713
(*s*) See Faculty Jurisdiction Measure, 1938
(*t*) Matrimonial Causes Act, 1857, cf. the validity of marriage by banns *Chipcase* v. *Chipcase*, [1942] P. 27.
(*u*) *Enraght* v. *Lord Penzance* (1882), 7 App. Cas. 240.
(*x*) Church Discipline, 1840; Public Worship Regulation Act, 1874; Clergy Discipline Act, 1892; Benefices (Ecclesiastical Duties) Measure, 1926.
(*y*) *Bishop of Exeter* v. *Marshall* (1868), L R. 3 H. L. 17; cf. *R.* v. *Archbishop of Canterbury*, [1944] 1 K. B. 282

churchyard (*z*); the ownership of monuments and tombstones, which is vested either in the persons who erected them or in the heirs of the persons in whose memory they were erected (*a*); and the obligation of a lay rector to repair the chancel and of the parishioners to repair the rest of the church (*b*).

Ecclesiastical Law and the Laity.—There is still a statutory obligation on all persons, except those who dissent from the doctrines of the Church of England and who usually attend some non-Anglican place of worship, unless they have some lawful or reasonable excuse, to endeavour to attend divine service of the Church of England every Sunday and holy day, and also to communicate at least three times a year, of which Easter is to be one. (Acts of Uniformity, 1552—1662; Religious Disabilities Act, 1846.) Fines for non-attendance at church are no longer incurred, the only penalties being censure and monition in the Ecclesiastical Courts, and the costs of the proceedings.

Most of the former jurisdiction of the Ecclesiastical Courts over laymen has been abolished by statute, and the remaining penal jurisdiction over laymen is virtually obsolete. "It cannot, I think, be doubted," said Lord Penzance in *Phillimore* v. *Machon* (1876) (*c*), "that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical courts would not be in harmony with modern ideas or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers, where they still exist, if they do exist, is likely to benefit the community."

The sources of Ecclesiastical Law.—*Statute Law.*—(1) Roman Canon Law as it stood before the Reformation. The following are the chief contents of the collection known as the *Corpus Juris Canonici*: (a) "*Decretum Gratiani*," the *Concordia Discordantium Canonum* of the monk Gratian (c. 1150); (b) "*Libri extra*," decretals of Pope Gregory IX (1234); (c) "*Liber sextus*," decretals of Pope Boniface VIII (1298); (d) "*Clementinæ*," decretals of Pope Clement V (1313), re-promulgated by Pope John XXII (1317), (e) "*Extravagantes*," decretals of Pope John XXII; and (f) "*Extravagantes communes*,"

(*z*) *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 7.

(*a*) *Spooner* v. *Brewster* (1825), 3 Bing. 136.

(*b*) *Representative Body of the Church in Wales* v. *Tithe Redemption Commission*, [1944] A. C. 228.

(*c*) 1 P. D. 481, at p. 487

decretals of various Popes from Boniface VIII to Sixtus V (1298—1484). Such parts of the Canon Law as are essential to the laws of England have long ago been incorporated into English law (*d*).

The official theory expressed by Parliament and the Courts since the Reformation is that the Canon Law never had authority as such in England (*e*), and so eminent a constitutional historian as Bishop Stubbs would not concede it to have had more than great persuasive force (*f*). Maitland, however, who attacked the problem as an interested outsider, came to the conclusion that the Roman Canon Law—except, perhaps, the *Decretum Gratiani*—was regarded as binding statute law by English Ecclesiastical Courts during the three centuries before the Reformation, although admittedly the Church Courts were not allowed so wide a jurisdiction as the canonists claimed (*g*). He says that Henry VIII not only made the Ecclesiastical Courts subject to Parliament, but his legislation imposed on them "a new theory about the old law" (*h*). Maitland's view should probably be accepted, without prejudice to the doctrine of the continuity of the Church of England from the sixth century to the present day (*i*), which is outside the scope of this book.

(ii) Constitutions ecclesiastical, especially those promulgated in national synods by the papal legates Otho (1237) and Ottobon (1268), and the provincial constitutions of the synods of Canterbury from Henry III to Henry V.

(iii) Acts of Parliament, both before and after the Reformation, and Measures passed by the Church Assembly and approved by Parliament since 1919.

Custom is also an important source of Ecclesiastical Law. For an old usage to be held a binding custom it must be shown that it "has been the invariable usage in England from the earliest times down to the Reformation, and that it has been continued and uniformly recognised and acted upon in England since the Reformation"

(*d*) *Caudrey's Case* (1591), 5 Co. Rep. 1.
(*e*) See *e.g.*, the preamble to the Act of Exoneration from Exactions paid to the Roman See, 1535; *R.* v. *Millis* (1844), 10 Cl. & Fin 534.
(*f*) *Report of the Ecclesiastical Courts Commission* (1883), I, xviii.
(*g*) *Roman Canon Law in the Church of England*, chh. 1—3, see also *Collected Papers*, III, pp. 137—156.
(*h*) *Roman Canon Law in the Church of England*, p. 91. For the invention of legal history by the Courts in relation to peerage law, see *ante*, p. 64.
(*i*) *Marshall* v. *Graham*, [1907] 2 K. B. 112, at p. 126; cf. *Baker* v. *Lee* (1860), 8 H. L. C. 495, at p. 504.

(*Bishop of Exeter* v. *Marshall* (*j*).) A custom in English Ecclesiastical Law, as in the Roman Civil and Canon Law, may become obsolete though desuetude (*k*).

II. ECCLESIASTICAL LEGISLATURES.

Convocation.—There are two Convocations, those of Canterbury and York. Each Convocation has an Upper and Lower House. In the Upper House are the archbishop (president) and bishops, and in the Lower are the deans, two archdeacons from each diocese, and proctors elected by the clergy. When the Convocations are summoned, an Order in Council is issued, which enjoins the Lord Chancellor to issue writs to the archbishops. The archbishops then, in accordance with the terms of their writs, issue mandates to cite the bishops, deans, etc., to attend Convocation.

In early times the functions of the provincial synods were almost entirely spiritual, but since 1285 they have also been the King's advisers on ecclesiastical matters. They issued canons or constitutions laying down or declaring rules of ecclesiastical law. During the Middle Ages the Convocations voted taxes to the King, but they surrendered this right to Parliament in 1664. Convocation cannot initiate a canon till authorised by the Crown, and a further licence from the Crown is necessary before a canon can be promulgated, and it is not in force till promulgation. (*Case of Convocations* (1610) (*l*).)

Since the Act for the Submission of the Clergy Act, 1534, the power of Convocation has been slight, and the legislative power of Convocation was further restricted by Acts of Uniformity in the reigns of Elizabeth and Charles II. From the reign of Anne to that of Victoria it was customary to dissolve Convocation almost immediately after its summons, but it has been more active since the middle of the last century.

The members of the Lower House are theoretically "constitutional advisers" of the bishops, who alone have power to initiate measures relating to faith and worship. The Lower House elect a prolocutor; they debate separately from the Upper House, and present petitions to

(*j*) (1868), L. R. 3 H. L. 17, at pp. 53—54; cf. *Re Robinson, Wright* v. *Tugwell*, [1897] 1 Ch. 85.

(*k*) *R.* v. *Archbishop of Canterbury*, [1902] 2 K. B. 503; *Kensit* v. *Dean and Chapter of St. Paul's*, [1905] 2 K. B. 249.

(*l*) 12 Co. Rep. 72.

it, including petitions asking the Upper House to initiate measures of the kind mentioned. In particular, the Lower House have power to concur or not to concur, in whole or in part, with all proposed acts of Convocation, and it was this right of veto which prevented the adoption of William III's puritan Prayer Book in 1689.

In the nineteenth century it became the practice for Convocation to consult Houses of Laymen, a practice which is no longer necessary since the institution of the Church Assembly. The latter has also relieved Convocation of most of its administrative and financial duties.

The Church Assembly.—Towards the end of the nineteenth century the clergy, and also the laity, began to desire the creation of a Church legislative body, and in response to the appeals of devout laymen to participate in Church management the Primate in 1885 agreed to a House of Laymen debating with his clergy. In 1892 the province of York had a House of Laymen. The final result of this movement was the passing of the Church of England Assembly (Powers) Act, 1919 This Act established the Church Assembly consisting of three houses, namely, (1) the House of Bishops, containing the bishops of both provinces; (2) the House of Clergy, composed of the Lower Houses of Convocation of Canterbury and York; and (3) the House of Laity.

The House of Laity consists of representatives of the Laity of the Provinces of Canterbury and York. Lay representatives, who may be of either sex, must be actual lay communicant members of the Church of England and not less than twenty-one years of age. They are elected every five years for each diocese by the lay members of the Diocesan Conferences. (Representation of the Laity Measure, 1929.) The House of Laity (Co-opted Members) Measure, 1937, allows the House of Laity to co-opt not more than ten additional members.

The Assembly must meet at least once a year, and usually it meets three times a year The three Houses can meet together or separately (*m*). Meanwhile its work, which includes the co-ordination of the activities of such bodies as the Ecclesiastical Commissioners and Queen Anne's Bounty, is carried on by Committees, Councils and Boards.

By the Act of 1919 the Assembly must appoint a Legislative Com-

(*m*) See *R.* v. *The Legislative Committee of the Church Assembly and the Church Assembly*, [1928] 1 K. B. 411

mittee to consider "Measures." The Legislative Committee, if it approves a Measure, submits it to the Ecclesiastical Committee of Parliament formed by the Act, which consists of fifteen lords and fifteen commoners. This Committee, with the sanction of the Legislative Committee, notifies Parliament, and copies of the text of the Measure are supplied to both Houses If both Houses confirm the Measure by resolution it is sent up to the King for his assent, on receiving which it has the force of a statute. Parliament seldom interferes with Church Measures, which are a remarkable example of delegated legislation.

Measures of the Church Assembly are printed in the annual volumes of Public General Acts

Though Measures may deal with doctrinal matters on the initiative of the House of Bishops, the Assembly may not issue "any statement purporting to define the doctrine of the Church of England on any question of theology." A Measure "may relate to any matter concerning the Church of England and may extend to the amendment or repeal in whole or in part of any Act of Parliament."

Some of the more important Measures which have been passed deal with Parochial Church Councils (*n*), Union of Benefices, the Ecclesiastical Commissioners, Marriage, Cathedrals and Queen Anne's Bounty. A Measure for revising the Prayer Book was rejected by the Commons in 1928 (*o*).

III ECCLESIASTICAL DIGNITARIES AND THE CLERGY.

The Archbishop of Canterbury.—The Primate of all England is the chief officer in the Church. He ranks before the Archbishop of York, though the latter is not subordinate to him. He is a bishop in his own diocese (Canterbury), and the ecclesiastical superior of all the bishops in his province. Like the Pope in olden times, he can grant dispensations to marry at any time or place. He can claim to crown the King or Queen Regnant. It has been said that the Archbishop of York has the right to crown a Queen Consort, but this was done

(*n*) See *Stuart* v. *Haughley Parochial Church Council*, [1936] Ch. 32.

(*o*) Three important Measures were discussed by the Church Assembly in 1944, dealing respectively with the Change, Disability and Discipline of Incumbents.

The Church Assembly also passes Regulations, *e.g.*, House of Laity Regulation, 1923, and The Diocesan Conferences Regulation, 1935, but they have not the force of statute

by the Archbishop of Canterbury at the coronations of George V and George VI.

Both the Archbishops can sit (if they choose) to hear ecclesiastical appeals in the Judicial Committee of the Privy Council.

The Archbishop of Canterbury can grant Lambeth degrees.

The Archbishop of York.—This prelate, the Primate of England, is the ecclesiastical superior of all the bishops in his province, who owe him canonical obedience. His duties are closely analogous to those of the Archbishop of Canterbury. Both archbishops present to livings when the bishop of the diocese omits so to do They are *ex officio* assessors of the Judicial Committee in ecclesiastical appeals.

Bishops.—A bishop ordains priests and deacons He helps the archbishop to consecrate other bishops. He licenses curates. He licenses churches and other buildings for public worship. He consecrates churches and graveyards. He confirms persons as a preliminary to receiving Holy Communion.

The bishop institutes clerks to livings, and collates clerks in cases where he has the right of patronage. Under the Benefices Act, 1898, the bishop may refuse to institute a clerk nominated by the patron in many cases where he was powerless to do so before. He can now insist on a certain amount of pastoral experience, and refuse to institute where the candidate is physically or mentally unfit, of doubtful moral character, or in serious pecuniary embarrassment, or where there has been within twelve months a simoniacal transfer. Irrespective of the Act, it is believed that he can refuse to institute where he has good reason for supposing that doctrinal offences will be committed (*p*).

The bishops sit in rotation in the Judicial Committee of the Privy Council to hear appeals relating to Church matters.

Bishops can visit all the clergy in their dioceses (*q*), and insist on preaching in any diocesan church. With the bishops also rests the decision whether their clergy shall be proceeded against by the Church Courts. They have to examine candidates for orders, or rather to supervise such examinations.

(*p*) *Heywood* v. *Bishop of Manchester* (1888), 12 Q. B. D. 404; cf. *Notley* v. *Bishop of Birmingham*, [1931] 1 Ch. 529.

(*q*) *Dean of York's Case* (1841), 2 Q. B. 1.

The appointment, consecration and enthronement of bishops.—When a bishop dies or retires the Prime Minister advises the King on the appointment of his successor. To qualify for appointment he must, according to the rubric, be over thirty years of age. A document, called a *congé d'élire*, is then sent to the dean and chapter bidding them elect a successor, and the dean and chapter then go through a fictitious form of election, as in point of fact they are bound subject to penalty of *præmunire* to elect the person nominated in the letter missive, a document which accompanies the *congé d'élire*. After this fictitious election, the candidate for office assents to his appointment before a notary public. After election the new bishop must have the election of the dean and chapter confirmed in the Court of an official called the Vicar-General of the province. There, persons who object to the appointment have a right publicly to record their objections before the Vicar-General, but as this official is only nominally a Judge, they gain little by their trouble (*r*). In the newly created bishoprics where there is no dean and chapter, the Crown appoints direct by Letters Patent.

After confirmation the bishop is consecrated, installed in his cathedral, and afterwards, on another day, does homage to the King in respect of his episcopal lands. After all this, he has to wait his turn for a summons to the Lords, unless he becomes an *ex officio* lord of Parliament, *i.e.*, Archbishop of Canterbury or York, or Bishop of London, Durham or Winchester (*s*).

Deans.—Deans are appointed by Letters Patent, the patronage belonging to the Prime Minister. Generally a dean is the president of the "chapter," consisting of canons or prebendaries, which forms the governing body of a cathedral. Some deans have no diocese, being "deans of peculiars" from which the jurisdiction of the Bishop is excluded; but only a few peculiars survive in England and the Channel Islands (*t*). On the other hand, some of the new dioceses have no chapter but are administered by a provost; in these cases the cathedrals—or, more strictly, pro-cathedrals—are also parish churches.

(*r*) *R.* v. *Archbishop of Canterbury*, [1902] 2 K B 520.
(*s*) *Ante*, p. 66.
(*t*) For Westminster Abbey as a royal peculiar, see *Cole* v. *P C.*, [1937] 1 K. B 316.

No person can be appointed a dean till he has been in priest's orders for six years.

Canons and prebendaries.—These are members of the bishop's advisory council. They have few duties beyond assisting the dean in the cathedral services and signing episcopal leases and grants.

Like the dean, they must reside for a prescribed period in the cathedral city. They have certain duties of preaching in the cathedral church, and sometimes elsewhere.

Archdeacons.—This official is the bishop's business man in his archdeaconry His functions are administrative, relating largely to such matters as finance, and these he performs by visitation He is known to ecclesiastics as "*oculus episcopi*," the bishop's eye.

No person can be made an archdeacon till he has been in priest's orders for six years.

Rural Deans are ecclesiastical superiors in respect of their rural-decanal districts. A rural dean has certain functions incident to repair of Church property He has certain duties under the Church Discipline Act, 1840, the operation of which is practically limited to cases of simony and non-residence; but where there is any clerical scandal in his district he should report to the bishop He holds rural-decanal meetings at which his clergy attend.

The Parochial Clergy.—These consist of rectors, vicars, perpetual curates, and curates. A rector took all the tithes of the benefice, both great and small, whilst the vicar was only entitled to the smaller tithes (*u*). Incumbents of district churches in towns and other populous places may now by Act of Parliament style themselves vicars.

Perpetual curates are licensed by the Bishop to perform divine service, and are not removable by the person appointing The right to present to a benefice may be vested in the Crown (*x*)– in which case it is exercised by the Prime Minister (as First Lord of the Treasury) or the Lord Chancellor—or in a private person (commonly an

(*u*) Tithes were originally paid in kind, but were commuted for a rentcharge in 1836 and in some cases suspended or reduced in 1891 The Tithe Act, 1925, transferred tithes to Queen Anne's Bounty to hold for the benefit of incumbents. The Tithe Act, 1936, extinguished all tithe rentcharges and provided for the redemption of all charges over a period of sixty years, setting up the Tithe Redemption Commission for this purpose

(*x*) See *e g*, *R. v Eton College* (1857), 27 L J Q B 132.

ecclesiastical trust), *i.e.*, the owner of an advowson (*y*), or in the bishop or an ecclesiastical corporation such as the Diocesan Board of Patronage.

Privileges and Liabilities of the Clergy.—A clerk in holy orders, *i.e.*, a bishop, priest or deacon, is privileged from civil arrest whilst proceeding to the solemnisation of Divine service, whilst performing Divine service, and on his way home from such performance. He enjoys the like privilege whilst going to, during, and returning from Convocation (8 Hen. 6, c. 1). By a canon of the thirteenth-century papal legate Ottobon, a clergyman cannot be compelled to perform any temporal office. He is exempt from serving on juries (*z*) or in the armed forces (*a*)

A clerk is subject to the Canon Law, whether he holds any preferment or not; he can be ordered to pay the costs of proceedings for immoral conduct, and in default of payment can probably be proceeded against under the writ *de contumace capiendo*. He can be tried for simony and non-residence by the bishop under the Church Discipline Act, 1840; for doctrinal offences under the Public Worship Regulation Act, 1874; and for uncleanness and wickedness of life under the Clergy Discipline Act, 1892 The Bishop can veto the proceedings both under the Clergy Discipline Act and the Public Worship Regulation Act.

No clergyman can be a member of the House of Commons (41 Geo. 3, c. 63), but he may be a local councillor (*b*). He may not farm more than eighty acres of land without the bishop's leave, nor can he engage in any trade for profit where there are more than six partners, or unless he has inherited the business (1 & 2 Vict. c. 106). He may be a company director, buy and sell literary productions or edit periodicals, and may be a schoolmaster, professor, university lecturer, dean, tutor, bursar, etc.

All clergy must use the Book of Common Prayer at their services as directed by the Act of Uniformity, 1662. Before ordination, and

(*y*) An advowson is real property and subject to the jurisdiction of the temporal Courts (Constitutions of Clarendon, 1164, c. 1).

(*z*) *Beecher's Case*, 4 Leon. 190.

(*a*) 2 Co. Inst. 9. Clergy were exempted from conscription by statute in both the Great Wars of the present century.

(*b*) Before the Ministers of Religion (Removal of Disqualification) Act, 1925, a clergyman could not be a Borough Councillor.

on preferment, they must assent to the Thirty-nine Articles, make a declaration against simony (*i.e.*, the buying or selling of ecclesiastical preferment: Clerical Subscription Act, 1865), and take the oath of allegiance. (Promissory Oaths Act, 1868.)

A bishop has the power, which is very seldom exercised, of expelling a man from the ministry. This can be done when the clerk has been found guilty of uncleanness and wickedness of life, and perhaps also in cases of simony and heresy. A recent case of expulsion was that of Mr. H. Davidson, sometime Rector of Stiffkey, in 1932. It rests entirely with the bishop whether he will unfrock a man or not, and it makes no difference whether or not the clerk holds preferment.

A clerk may become a layman by availing himself of the Clerical Disabilities Act, 1870. He must give six months' notice, and conform generally to the directions prescribed by the statute.

IV. ECCLESIASTICAL COURTS.

Mention is made in a later chapter of the separation of the ecclesiastical and the temporal Courts by William I, and the development by the former of a jurisdiction in testamentary and matrimonial causes which was transferred to the temporal Courts by statute in 1857 (*c*). A number of ecclesiastical Courts are now obsolete, for example, the Court of High Commission, the Court of Delegates, the Prerogative Courts of Canterbury and York, Courts of Audience, most of the Peculiar Courts, and Courts of Rural Deans We shall only deal briefly here with the principal Ecclesiastical Courts which still exist (*d*). The following are the principal Church Courts:—

(1) **Consistory Courts** of the Bishop of each diocese, presided over by the bishop's chancellor. The chancellor must be a Master of Arts or Bachelor of Laws "reasonably learned in the civil and ecclesiastical laws" (Canon 127); almost invariably he is a barrister (*e*). This Court has a jurisdiction both civil and criminal, and this jurisdiction extends to laity as well as clergy. It can try clergy for uncleanness and wickedness of life, but not for doctrinal

(*c*) *Post*, p. 359

(*d*) For the history of the Ecclesiastical Courts, see Holdsworth, *History of English Law*, vol I (5th ed.), pp. 598—632: Potter, *Historical Introduction to English Law* (2nd ed.), pp. 186—198.

(*e*) The Consistory Court of the diocese of Canterbury is the Court of the Commissary, and that of the diocese of York is presided over by the Vicar-General.

offences. It can try laymen for fornication, incest, adultery, and other deadly sin, and Maitland thought it still had jurisdiction over laymen guilty of the crime of heresy (*f*). It can punish laymen or clergy for brawling, *i.e.*, gross misbehaviour within the precincts of a church or churchyard. It can punish laymen also by keeping them from entering a church, and by refusing them the Sacrament; and where a clergyman refuses the Sacrament to a parishioner the Court has jurisdiction. It can mulct clergy, and probably laity, in costs, the payment of which can be enforced by the writ *de contumace capiendo*. The bishop can veto the prosecution of a clergyman for uncleanness and wickedness of life. When the trial is of a quasi-criminal character, the chancellor is assisted by five assessors, who act as judges of fact. (Clergy Discipline Act, 1892.)

The criminal jurisdiction over laymen is almost obsolete, save perhaps the offence of brawling. The chancellor can punish laymen by admonition (reprimand only by Judge), penance (obsolete), expulsion from the Church (*ab ingressu ecclesiæ*), and by excommunication. Excommunication is of two kinds, the less and the greater. The less excludes a man from the services and Sacraments, and the greater cuts him off, or is supposed to cut him off, from the fellowship of the faithful (*g*). Formerly, the excommunicated man had not the privilege of serving on a jury, neither could he give evidence in Court, or bring an action to recover property, but by 53 Geo. 3, c. 127, an imprisonment up to six months could be imposed for the greater excommunication, though the excommunicated man is to labour under no civil incapacity.

As regards civil jurisdiction, a great deal depends upon the patent to act as Judge given by the bishop to his chancellor; but, speaking generally, the chancellor grants faculties for alterations in churches and churchyards, including permission to introduce ornaments; he has a supposed jurisdiction as to mortuary fees or corse presents, and deals with questions of repairs of Church fabric and property, and also with disputed rights to pews

(2) The Court of the Bishop sitting in person to try cases under the Church Discipline Act, 1840, *e.g.*, simony (*h*) and non-residence. This Court hardly ever sat, as the bishop had a habit of sending the case

(*f*) Maitland, *Constitutional History*, p. 524.
(*g*) Phillimore, *Ecclesiastical Law* (2nd ed.), vol. II, p. 1087.
(*h*) *See Beneficed Clerk* v. *Lee*, [1897] A C. 226.

for trial before the Dean of Arches by Letters of Request. But the Bishop may remove a case from the Consistory Court to be heard by himself (*s*).

(3) The Court of Arches, whose Judge is the Dean of Arches The name is derived from the fact that the Court sat at St. Mary-le-Bow, which was built on arches.

The Court has cognisance of ecclesiastical appeals from the Consistory Courts of the Bishops in the province of Canterbury, and has taken over the functions of the old Provincial Court of Canterbury. The Dean of Arches has jurisdiction *qua* Dean of Peculiars over the thirteen peculiar parishes in the diocese of London which formerly were within the peculiar jurisdiction of the Archbishop of Canterbury The Dean is also the Judge under the Public Worship Regulation Act, 1874, for the trial of doctrinal offences and practices. He is also usually Master of the Faculties to the Archbishop of Canterbury, and concerned as such with notaries public and special marriage licences.

(4) The Court of the Archdeacon has become practically obsolete owing to the fact that the Consistory Court has original as well as appellate jurisdiction. The Archdeacon's Court still has power to remove parish clerks (not in holy orders) for neglect or misbehaviour. (Lecturers and Parish Clerks Act, 1844.) The Judge is called "the Official."

(5) The Court of Chancery in York.—This is the Provincial Court of York and takes cognisance of appeals from the Consistory Courts in the province, and, as regards the diocese of York, it is also a Court of first instance. The Judge is the Dean of Arches, appointed by the two Archbishops under the Public Worship Regulation Act, 1874.

(6) The Court of the Archbishop, presided over by himself or his Vicar-General, has some jurisdiction over bishops for ecclesiastical offences. The Archbishop, sitting with a Judge of the Supreme Court, hears appeals under the Benefices Act, 1898, against the refusal of a bishop to institute or admit to a benefice, and also appeals under the Benefices (Ecclesiastical Duties) Measure, 1926, from the finding

(*s*) *R.* v. *Tristram*, [1902] 1 K. B. 816.

of a bishop's commission of enquiry into the adequacy of the performance of a clergyman's duties (*k*).

(7) **The Judicial Committee of the Privy Council** is the ultimate Court of Appeal in all ecclesiastical causes. (Judicial Committee Act, 1833; Appellate Jurisdiction Act, 1876 (*l*).)

V. THE LAITY IN CHURCH GOVERNMENT.

The Vestry.—The vestry was formerly an important unit of local government, both civil and ecclesiastical (*m*) We are here only concerned with the vestry for ecclesiastical purposes (*n*). The vestry consists of the incumbent, the ratepayers resident in the parish and occupiers of rated hereditaments in the parish. Before 1921 the vestry usually elected one or more of the churchwardens and the sidesmen, and had power to collect Church rates. Except for its participation in the election of churchwardens, its only remaining powers are concerned with the administration of ecclesiastical charities.

Parochial Church Meetings.—The Rules for the Representation of the Laity are scheduled to the Representation of the Laity Measure, 1929 (*o*). These rules require that there shall be a Church Electoral Roll in every parish. The persons entitled to have their names entered on the Roll are lay members of the Church of England, of either sex, of eighteen years of age or upwards, who (a) are baptised and declare that they are members of the Church of England and that they do not belong to any religious body which is not in communion with the Church of England; (b) are resident in the parish, or (whether or not so resident) have habitually attended public worship in the parish during the previous six months; and (c) have signed the form of application for enrolment. An Annual Parochial Church Meeting of persons whose names are entered on the Roll is to be held annually. The minister convenes the Meeting, and presides.

The Annual Meeting may discuss the annual report and accounts of the Parochial Church Council, and a report on the fabric, goods and ornaments of the churches of the parish. It elects parochial lay

(*k*) Cf *Huntley* v. *The Bishop of Norwich*, [1931] P 210. (*l*) *Ante*, ch. XV.
(*m*) The vestry was so called because it met in the vestry or some other part of the church or in an adjoining building, cf. the star chamber, cabinet, etc.
(*n*) For vestries and select vestries in civil government, see *ante*, p. 258
(*o*) The original Rules were contained in a Schedule to the Constitution of the Church Assembly, which is itself an appendix to the Church of England Assembly (Powers) Act, 1919.

representatives (a) to the Diocesan Conference, unless the latter otherwise determines; (b) to the Ruri-decanal Conference, where it exists; and (c) to the Parochial Church Council. (Rules for the Representation of the Laity.) The Annual Meeting and the Vestry jointly elect the "people's" churchwardens, while the Annual Meeting and the incumbent elect the sidesmen. (The Parochial Church Councils (Powers) Measure, 1921.)

The minister may, and if so required by not less than one-third of the lay members of the Council must, convene a Special Parochial Church Meeting. In certain events the Archdeacon may convene an Extraordinary Parochial Church Meeting. (Rules for the Representation of the Laity.)

Parochial Church Councils.—The Parochial Church Council consists of: (i) the minister of the parish, who is chairman; (ii) an assistant curate, the churchwardens (if communicants), and any lay members of any Ruri-decanal or Diocesan Conference or of the Church Assembly who are on the Roll of the parish; (iii) the lay representatives elected by the Annual Parochial Church Meeting; and (iv) a limited number of co-opted members. The members of the Council, who may be of either sex, must be actual lay communicant members of the Church of England not less than twenty-one years of age. Church Councillors hold office for one year, unless the Annual Meeting decides that one-third should retire in every year. In certain events the Archdeacon may convene an Extraordinary Meeting of the Council. (Rules for the Representation of the Laity.)

The Parochial Church Councils (Powers) Measure, 1921, states that it shall be the primary duty of the Council "to co-operate with the Incumbent in the initiation, conduct, and development of Church work both within the parish and outside." Every Council is a body corporate with perpetual succession. The Measure transfers to the Council: (i) all the powers of the Vestry, except the election of churchwardens and sidesmen and the administration of ecclesiastical charities; and (ii) all the powers of the churchwardens relating to (a) finance, (b) the care and maintenance of the fabric, goods and ornaments of the church, and (c) the care and maintenance of the churchyard (*p*).

(*p*) The property in (*i.e.*, ownership of) the church, churchyard, ornaments, etc. is not, however, vested in the Council; see *ante*, p. 316.

The Measure confers on the Council the power (i) to acquire and administer property; (ii) to collect money; (iii) to levy voluntary Church rates; (iv) jointly with the incumbent, to appoint and dismiss the parish clerk and the sexton (sacristan); (v) jointly with the incumbent to allocate money given to the Church; and (vi) to make representations to the Bishop with regard to any matter affecting the welfare of the Church in the parish.

Later measures have conferred further powers and duties on Parochial Church Councils in connection with such matters as the union of benefices, dilapidations, clergy pensions, the sale of parsonages, the transfer and purchase of advowsons, and presentation to benefices.

Ruri-decanal Conferences.—These Conferences, where they exist, form a link between the parishes and the diocese. The Conference, which meets under the presidency of the Rural Dean, consists of (i) all clergy in the rural deanery (the Ruri-decanal chapter); (ii) all members of the House of Laity on the Roll of any parish in the deanery, and the lay representatives (if any) elected by the Conference to the Diocesan Conference; and (iii) such number of lay representatives of each parish elected by the Parochial Church Meeting as the Conference may determine. (Rules for the Representation of the Laity.) The chief function of the Conference is to discuss matters of general Church interest, especially as affecting the deanery.

Diocesan Conferences.—The bishop of each diocese is required by the Diocesan Conferences Regulation, passed by the Church Assembly in 1935, to convene a Diocesan Conference at least once a year. Its purpose is "to deliberate on all matters concerning the Church of England in the diocese," but it must not issue "any statement purporting to declare the doctrine of the Church on any question of theology." The composition of the three constituent authorities, namely, (1) the Bishop, (2) the Chamber of Clergy, and (3) the Chamber of Laity, is too complicated to set out here. It is sufficient to mention that the Chamber of Laity includes the representative members elected in accordance with the Rules for the Representation of the Laity. They are elected for three years, either by the Annual Parochial Church Meeting, or by the lay representatives in the Ruri-decanal Conference, or partly by each.

As we have said, the lay members of the Diocesan Conferences elect the members of the House of Laity of the Church Assembly.

PART IV.

THE COURTS.

CHAPTER XXIV.

COURTS OF JUSTICE IN THE NORMAN PERIOD.

THE history and evolution of our legal tribunals is the subject of this and the following chapters This outline—for it can be no more (*a*)—falls chronologically into the following sections —

(1) The judicial system at the time of the Norman Conquest and in the period immediately succeeding.

(2) The emergence of the Courts of common law, Chancery, and Admiralty.

(3) The reforms carried through in the nineteenth century, and the Judicature which, as the result of those and more recent reforms, exists to-day.

The subject matter of this chapter is (1).

In treating of the judicial system in the time of William the Conqueror and his immediate successors it will be necessary at times to refer to the pre-Conquest régime. It is, however, no part of our plan to attempt even a summary of the legal institutions of the Anglo-Saxon period, but merely to refer to them so far as they are relevant to what followed it.

At the time of the Conquest there was no central system of justice. Such a system was evolved by the genius of the Norman and Angevin kings; but the process took time, and much of the energy of those monarchs was dedicated to the task of enlarging the sphere of royal justice at the expense, and ultimately to the extinction, of local, feudal and private jurisdictions which obstructed its advance.

(*a*) For a fuller account of the history of the Courts, see Potter, *Historical Introduction to English Law* (2nd ed.), pp. 69—215. The standard work of reference is Holdsworth, *History of English Law*, vol. I.

These last jurisdictions fall broadly into two classes:—

I. That of the communal Courts—public jurisdictions vested in national, though unco-ordinated, Courts.

II. That of the seignorial and franchise Courts—private jurisdictions vested in individuals or corporations by feudal right, royal grant, or usurpation.

I. THE COMMUNAL COURTS.

These Courts were based on geographical units established before the Conquest.

England was then divided into shires; shires were divided into "hundreds," or as they were sometimes called "wapentakes" or "wards"; hundreds were divided into "townships" or "vills." These last were divided into "tithings"—groups of ten persons, or possibly ten families, formed mainly for police purposes; in particular, for the purpose of the "frankpledge" system.

The Courts based on these territorial units were:—

(1) The County Court.

(2) The Hundred Court.

In dealing with the latter something will have to be said about frankpledge and the sheriff's tourn

(1) The County Court.—The County Court (which has nothing to do with modern County Courts (*b*)) was presided over by the sheriff.

In Saxon times the chief officials of the shire were the eaorldorman, the bishop, and the shire-reeve or sheriff. At the Conquest the eaorldorman became the Earl and lost (if he had not lost it before) any but a nominal connection with the shire and its institutions The bishop dropped out when William I set up separate ecclesiastical tribunals. The sheriff (or *vice-comes*) remained. Under the Normans he was indeed the king's local officer in the county, charged with functions fiscal, military, and judicial.

The County Court, over which he presided, was at this time mainly an administrative organ. But it was also a Court of law, the "suitors" of which, subject to his presidency, were its judges. As a Court of law it was, according to Holdsworth, "the most important agent for

(*b*) *Post*, p. 371.

the making and declaring of English law " before the central judicial system developed.

Jurisdiction of the County Court.—A local Court to-day implies a limited jurisdiction. The County Court was local, but its jurisdiction was general, and extended *inter alia* to actions for debt, wrongs, pleas of the Crown (*c*) (which were in part criminal and in part civil (*d*)) and suits for lands between tenants of different lords. It was, and in theory still is, the only Court competent to outlaw a defendant. Before the days of circuits and itinerant justices the King would occasionally send a deputy to try an important case in the County Court: but when the circuit system was firmly established, it did not form part of the County Court system but became an appendage to the central Courts of common law, and helped in no small degree to undermine and supplant the County Courts.

Composition of the County Court.—The County Court, though local, enjoyed a general jurisdiction, as did also the yet more territorially limited Court of the hundred. The distinction between these Courts did not reside in any varying scope of competence, nor in the subordination of the one to the other (for there was no such subordination), but in the quality of their "suitors," *i.e.*, judges. The "suitors" of the County Court were big landowners. Those of the hundred Court were the smaller squires and their tenants (*e*). On some occasions at least the suitors formed a varied and impressive muster—almost a microcosm of Parliament: bishops, earls, aldermen, barons, vavasors, etc. (*f*). The laws of Henry state that the Court met twice a year. This, without qualification, is incredible, and inconsistent with testimony from other sources, which assert that it met once a month (*g*). And there is plausibility in Maitland's conjecture that the two annual meetings were especially solemn occasions and alone involved the attendance of the bishops, earls, etc.; other meetings of the Court, more frequent (perhaps monthly) and less elaborately attended, carrying on its ordinary business (*h*).

(*c*) *Leges Henrici*, vii, 3.

(*d*) Trespass "*vi et armis*" was against the "King's Peace," and therefore a plea of the Crown.

(*e*) Vinogradoff, *English Society*, p. 97.

(*f*) *Leges Henrici*, vii, 2. Pollock and Maitland, i, 532—533.

(*g*) Magna Carta (1217), c. 42. Stubbs, *Constitutional History*, i, 679.

(*h*) Pollock and Maitland, *History of English Law* (2nd ed.), vol. I, p. 525.

(2) **The Hundred Court.**—The hundred, wapentake or ward, was a segment of the shire, and its principal officer was the "hundredor" or "hundred-reeve," commonly a bailiff or understudy of the sheriff. The hundred Court in successive periods met monthly, then fortnightly, then (by statute of 1234) every three weeks. The suitors, as indicated above, were of the same general type as those of the County Court, but "smaller" men. The jurisdiction of the Court was general—criminal and civil—but as time went on, owing partly to the working of the frankpledge system, the criminal and civil jurisdictions diverged and became vested in separate Courts.

The Frankpledge System.—This system may have existed in germ before, but only became fully effective after, the Conquest. It was in substance a system of enforced collective security for the apprehension and trial of offenders. To this end all persons (with some exemptions) were grouped in "tithings"—consisting of ten individuals, or, perhaps, families. If one member of a tithing committed an offence, the other nine must produce him for trial or pay a fine and compensation for his default. Twice a year an extraordinary meeting of the hundred Court was held to ensure that all persons liable to be enrolled in tithings were in fact so enrolled (a "View of Frankpledge") Over these meetings the sheriff presided Their special character, coupled with the provisions of the Assize of Clarendon, marked them off, and ultimately divorced them, from the ordinary business of the hundred Court under the designation of the "Sheriff's Tourn."

II. PRIVATE JURISDICTIONS.

These may be divided into two classes:—

(1) Feudal, baronial or manorial Courts.

(2) Franchisal Courts.

(1) **Feudal, Baronial and Manorial Courts.**—Under the feudal system the tenant held land from his lord: and the lord, besides owing a duty of protection to the tenants, had the right to hold a Court for them. The jurisdiction of these Courts, powerful in the twelfth century, declined from the thirteenth onwards, when the Statute of Marlborough (1267) and the advance of the royal justice

(operating later by writs of "*tolt*" and "*pone*" (*i*)), checked its extension.

Feudalism was a system both of government and of property. The incidents of the first tended in time to be transferred to the second in the form of proprietary rights and burdens running with land. The manorial system inherited—at all events it displayed—a similar dualism. A "manor" in one aspect was an area of land cultivated as a single unit on a specific plan in which the lord, with his demesne, the freeholders, and the villeins or unfree tenants all had their appointed places. In another aspect the manor was a jurisdictional unit, the jurisdiction being a private one, vested in the lord or his steward. In this aspect it possesses, in early times, a Court—the "Court Baron," attended by freemen and villeins alike. Later the jurisdiction of the manor is conceived as twofold: (i) for freeholders; (ii) for copyholders (which the villein tenants have by then become); the first attending the Court Baron, the second the "customary" Court presided over by the lord or his steward (*k*). Whether there were in fact separate Courts, or merely separate jurisdictions, is an open question. The Courts Baron and "customary" were, according to Blackstone, often confounded together (*l*), and perhaps there were merely two jurisdictions of the same Court.

Jurisdiction of the Court Baron — "Petty but varied," is Holdsworth's summary Personal actions not exceeding 40s. could be tried there. The Court, if we are to judge from its rolls, seems to have entertained cases of breach of contract, of trespass, and of the principal torts, including libel and slander, and claims for the recovery of freehold land, begun by writ of right But as regards these last, the royal Courts could and did remove cases to themselves.

Till the end of the fifteenth century questions of copyhold land could only be heard by the "Court customary," which sat every three weeks

The manorial Courts in the seventeenth and eighteenth centuries rapidly decayed, but retained copyhold business till the twentieth century, when the abolition of this form of tenure by the Law of Property Act, 1922, set a term to their labours.

(*i*) See Holdsworth, *op cit.*, p. 178; Potter, *op. cit.*, p. 431.
(*k*) Coke, 1st Institute, 58 (a). (*l*) Bl Com. iii, 33.

(2) Franchisal jurisdiction.—A franchise jurisdiction is one given, or more frequently confirmed, by the King to a private individual or corporation

The most important examples of this type of jurisdiction are those afforded by:—

(a) Courts Leet;
(b) The Counties Palatine,
(c) The Boroughs

(a) Courts Leet.—In many cases feudal lords were granted, or usurped, the jurisdiction which normally belonged to the sheriff in the Hundred Court to take view of frankpledge This franchisal jurisdiction was exercised in the Court Leet, which excluded the sheriff's tourn Edward I's *quo warranto* enquiry of 1274 prevented further extensions of this private criminal jurisdiction by establishing the principle that it depended for its validity on royal grant In fact, the jurisdiction depended in many cases on usage, and the position was regularised by the Statute of Gloucester, 1290, which upheld the validity of those which had been exercised without interruption from the year 1189

(b) The Counties Palatine included Durham, Chester and Lancaster Within these "Palatinates" the feudal chief exercised *jura regalia*, he was for practical purposes an independent sovereign The Palatinate of Durham is excluded from Domesday Book In that of Chester the Earl is the feudal sovereign, as the King was in Normandy (*m*) A Palatinate was an "*imperium in imperio*," an enclave or pocket in the realm, in which a local kinglet governed and judged Within the Palatinate, crimes were against the Earl's peace, not against the "King's peace"

(c) The Boroughs.—It is hard to say precisely what in Saxon times a borough or "burh" signified, beyond an area in respect of which certain persons were designated "burgesses," and which possessed either fortifications or a market of its own Later the borough emerged gradually as a separate governmental or jurisdictional unit by virtue of privileges conferred by the King, generally by charter These privileges, assuming by degrees a specific character, marked off the borough from its geographical context and distinguished it as

(*m*) Stubbs, *Constitutional History*, i, 411.

enjoying a particular sort of "franchise." Its isolation or independence was relative, not absolute. The borough could not shut out the travelling royal justices or withhold the manner of its administration from the scrutiny of the "general eyre."

Boroughs as a matter of course had Courts, criminal and civil

(1) *Criminal Courts of Boroughs.*—The Borough Criminal Court was in early times generally a "Court leet" having jurisdiction over minor offences, felony and treason having been relegated to the sole cognisance of royal justice. The Court leet had, however, by the eighteenth century or earlier, been displaced by the Justices of the Peace. As this process advanced, the jurisdiction of the borough in crime came more and more to be exercised by such justices at petty sessions and at quarter sessions or by the recorder, where the borough was empowered by charter or otherwise to hold a separate Court of quarter sessions.

Commissions of the peace, and therefore membership of petty and quarter sessions, were commonly conferred on the principal officers of the borough Borough quarter sessions accordingly in part coalesced with, in part extruded, Courts leet. The justices in important boroughs, even before the nineteenth century, sometimes co-opted, appointed as their president, and endowed with a salary, a professional lawyer under the title of "Recorder." In 1835 the Municipal Corporations Act extended this practice under statutory sanction by empowering specified boroughs to apply to the Crown for a separate Court of quarter sessions, and, if the application succeeded, to command the services as sole Judge of the Court, of a barrister of five years' standing, whom the borough was bound to remunerate. The same Act divested of criminal jurisdiction all boroughs which had not a separate Court of quarter sessions (*n*).

In relation to petty offences a series of statutes commencing in 1792 have established in the larger towns, beginning with London and later extending to the provinces, paid ("stipendiary") magistrates to perform the work to which the unpaid justices of the peace had proved unequal. To-day such magistrates are invariably, though they were not originally, barristers. In boroughs, justices of the peace and stipendiaries divide the work.

(*n*) See further as to Quarter Sessions, *post*, pp. 381—382.

(ii) *Civil Jurisdiction in Boroughs.*—All boroughs had a civil Court by virtue, as a rule, of their charters. The jurisdiction of these Courts was limited geographically to the borough. In other respects their limits varied widely, both in the amount and the kind of causes they could try. Sometimes they embraced real, personal and mixed actions; sometimes some one or more of these; sometimes actions involving 40s. or more, or less. These Courts were inefficient and by the end of the eighteenth century obsolescent. Their effete condition was attested by a statistical return to Parliament in 1839. They were not galvanised into new life by the Municipal Corporations Act of 1835 Many were abolished (forty-two in 1883); and though many survive in name, few serve any real and living need except the Mayor's and City of London Court, the Liverpool Court of Passage, the Tolzey Court of Bristol, and the Salford Hundred Court.

CHAPTER XXV.

THE COURTS OF COMMON LAW.

Origin in the Curia Regis.—We have seen that the *Curia Regis* exercised legislative, executive and judicial powers, and that no distinction was made in early times between these three functions of government (*a*). The genesis of a centralised judicial system may be traced to the smaller meetings of the technical experts in the *Curia Regis* sitting for judicial purposes.

The judicial side of the Curia generally may be said to have acquired some degree of independence as the result of the legislation of Henry II. It gained criminal jurisdiction as the result of the Assizes of Clarendon (1166) and Northampton (1176), which asserted the competence of royal justice in respect of all important crimes. It acquired, also as the result of laws passed by him, civil jurisdiction overriding the jurisdiction of the lord (*b*) in respect of disputes relating to land held in free tenure The King's jurisdiction was highly elastic.

As a result of Henry II's legislation the Curia not only decided big cases, but claimed to decide all cases. Its turnover was large, though many of the causes litigated before it involved small amounts Most of the actions were "real," *i.e.*, concerned land. Court Rolls begin in the time of this King, though the earliest we have date from Richard I.

In its struggle with local and private jurisdictions, royal justice had many advantages; for example, the ability of the men through whom it was administered, a superior procedure, power to require the attendance of the defendant, power to enforce its judgments, and the machinery of a jury instead of process by battle. Yet its victory was not easy or quick.

The King, as an element in the administration of justice, was in early times no cipher. Edward I and Edward II actually sat and tried cases, and three centuries later Coke had difficulty in restraining James I from following their example. Judges until the early eighteenth century held their office during the royal pleasure and

(*a*) *Ante* p. 4. (*b*) Glanvil, xii, 25.

were sometimes pliant instruments of the royal will. Until a late period Judges vacated office, and suits "abated," on the death of the King ("the demise of the Crown").

But with whatever reservations, the function of justice was at an early stage delegated to regular Courts of common law.

The historic Courts of common law, in the order of their distinct emergence as such, were:—

(1) the Court of Common Pleas;
(2) the Court of King's Bench;
(3) the Court of Exchequer, which, though it emerged earliest of all as a semi-judicial department, did not attain until after the others to the formal dignity of a Court of law

It will be convenient to deal under this head also with

(4) the Court of Exchequer Chamber.

1. THE COURT OF COMMON PLEAS.

The apparatus of justice originally followed the King wherever he went. Justice was done literally "*coram rege*" By the end of John's reign, however, a Court had hived off from the general body and was to be held "*in aliquo certo loco.*" The place was usually Westminster, though not always, for in 1581 it was held at Hertford. This is the Court of Common Pleas to which Britton refers when he says "There be justices remaining constantly at Westminster, or at such other place as we shall be pleased to ordain, to determine Common Pleas" (c).

By 1272 this Court has acquired a Chief Justice of its own and its separation from the residual judicial system is complete

Jurisdiction of the Court of Common Pleas.—1. "*Common pleas*" are proceedings between subject and subject, and of these the Court had an ostensible monopoly. It was the only Court in which real actions, and the older personal actions of debt, detinue, covenant and account, could be begun. Its exclusive competence in respect of these last endured till the reforms of 1833—73. By that time these forms of action were almost obsolete, but in the medieval period many of them, and particularly the "real" actions, were highly

(c) Britton, 1, 5.

important. It is significant that the majority of the decisions in the Year Books are decisions of the Court of Common Pleas.

Encroachments by other Courts.—By the sixteenth century the older forms of action were decaying. Real actions had been displaced by ejectment, which involved "trespass *vi et armis*" and was, therefore, cognisable by the King's Bench. Moreover the action for "trespass on the case," also cognisable by the King's Bench, was extending its tentacles Again, the Court of King's Bench trenched directly on the Common Pleas' jurisdiction between subject and subject by the procedure by "Bill of Middlesex" and Writ of Latitat (*d*), and the Court of Exchequer by writ of "*Quominus*." The Court of Common Pleas itself retaliated by writ of "*quare clausum fregit*" with an "*ac etiam*" clause tacked on to it (*e*) Special legislation had to be passed in 1661 to restore to the Common Pleas part of the ground which it had lost to the usurpers, but it was never fully regained

2. The Court of Common Pleas could by writ of "*Pone*" transfer to itself cases brought in the County Court, the Hundred Court, and the Court baron As these local jurisdictions declined this power lost much of its value The Court, however, had, and exercised as lately as 1841 (*f*), a jurisdiction in error from local Courts of Record

3. In the seventeenth century the Court of Common Pleas acquired a general jurisdiction to issue two of the Prerogative Writs, *viz.*, *habeas corpus* and prohibition Its right to issue prohibition was asserted by a resolution of the King's Bench and Exchequer in 1610. Its right to issue the writ of *habeas corpus* was affirmed in *Bushell's Case* (1670) (*g*), and confirmed by the Habeas Corpus Act, 1679

II. THE COURT OF KING'S BENCH.

Emergence as a separate Court.—This Court emerged as a separate entity a hundred years after the Common Pleas had become a distinct Court. It was not fixed but peripatetic, and held literally *coram rege*.

(*d*) Which was cheaper, in 1829 a writ in the Common Pleas cost £3 5s., and a writ of latitat £1 5s 8d. See *post*, p. 346.

(*e*) One of the main reasons why a Court sought to extend its jurisdiction was that judges formerly received more by way of fees for work done than in salaries Income from fees was not abolished until 1826. See *post*, p. 347.

(*f*) *Bruce* v *Wait*, 1 M. & G. 1. And see *Darlow* v. *Shuttleworth*, [1902] 1 K. B., at 725

(*g*) Vaughan, 135.

Bracton (*h*) (*temp.* Henry III) speaks of three sets of justices:—(i) the Court of Common Pleas, (ii) the itinerant justices, and (iii) the King's justices who sit in his hall, hear suits between great men, and correct errors of the other justices. This is justice "*coram rege.*"

From the time of Henry III, justice *coram rege* split up. In 1239 the Justiciar disappears, and in 1268 Robert de Brus is appointed chief justice—*capitalis justiciarius ad placita coram rege tenenda.* In the reign of Edward I the process continues; Britton says this Court is limited to the "amending of false judgments" and criminal cases (*i*). While the Court still follows the King on his peregrinations, Britton and Fleta both make it clear that the King is no longer physically present at its deliberations (*k*).

The Court, which in the time of Edward I still discharged administrative business, was slow to disengage itself as a Court of law from (a) the King, and (b) the Council.

(a) *The King.*—Coke says that by Henry IV's reign the King's presence in Court is a fiction (*l*), and advised in 1608 (*m*) that James I could not give judgment in the Court of King's Bench.

(b) *The Council.*—Till the fourteenth century the King and his Council are interlocked. The summons to appear was not "*coram rege*" but "*coram rege et concilio.*" When, in 1315, the Despencers are concerned in a case brought by writ of error from the Common Pleas to the King's Bench, the appellate body includes, along with Judges of the King's Bench, those of the Common Pleas, the Barons of the Exchequer, the Chancellor, Treasurer and others. And the "Council" would sometimes interfere with the King's Bench itself (*n*).

It was not till the end of the fourteenth century that the Council and the King's Bench fell apart; just as the Council and Parliament were also falling apart—though both still spoken of as *Courts.*

In 1366 the Council reversed a judgment of the Common Pleas, but the Judges ignored this "because the Council was not a place where judgment could be reversed" (*o*). And in the same century the King's Bench asserted their view that their errors, if any, should be corrected by Parliament and not by the Council.

(*h*) Bracton, f. 105 b; 108 a.
(*i*) Britton Edn. Nichols, I—3—4
(*k*) Fleta, ii, 2, 1.
(*l*) Coke, 2 Inst. 186.
(*m*) 12 Co. Rep. 65.
(*n*) Y. B. 20 Edw. III.
(*o*) Y. B. 39 Edw. III.

The King's Bench thus became an independent law-court—no more and no less—though "trailing clouds of glory" from the time when it was something more.

Jurisdiction of the Court.—The jurisdiction of the King's Bench may be classified as (1) Criminal; (2) Civil; and (3) Supervisory, over officials in respect of their due observance of the law.

(1) **Criminal Jurisdiction of the King's Bench.**—This may be sub-classified as (a) ordinary, (b) transferred, and (c) supervisory, where the decision of an inferior Court was questioned—a quasi-appellate jurisdiction

(a) *Ordinary Criminal Jurisdiction.*—"Ordinary" is a misnomer It was very uncommon for the King's Bench (and is very uncommon for its successor, the King's Bench Division) to try a normal criminal case Exceptions include trials for treasons committed abroad, and for certain offences by Colonial governors, and since the Judicature Act, 1875, the King's Bench Division occasionally conducts criminal trials on informations by the Attorney-General, *e.g.*, the trials of Lynch in 1903 and Casement in 1916 ("trials at bar").

(b) *Transferred Criminal Jurisdiction.*—The King's Bench could by writ of *certiorari* order indictments, etc., to be removed from inferior Courts into the King's Bench and there tried in cases where a fair trial could not be expected elsewhere—a right often exercised in the fifteenth and sixteenth centuries.

(c) *Quasi-appellate Criminal Jurisdiction.*—It would be a mistake to regard this jurisdiction as appellate in the modern sense, although the effect of invoking it might be to get an existing judgment upset. In theory what took place was not a further step in an existing proceeding but an entirely new proceeding begun by a new writ—the *Writ of Error*—and originally exhibiting the nature of a complaint against the integrity either of the Judge or of the jury (*p*). Such a complaint had to be distinctly formulated: the complainant must, to succeed, be able to point to an "error" on the face of the Record (*q*).

Any error on its face, however trivial, would do; no error however gross, not on its face, would suffice. The common law knew nothing of an appeal by way of retrial, such as is now normal. The Court of

(*p*) See Pollock and Maitland, ii, 663—665. (*q*) Blackstone Com. iii, 405.

Chancery did, and the Judicature Act, 1873, borrowed this notion and extended it to all Divisions of the High Court Apart from its other weaknesses the grant of a writ of error was in the discretion of the Crown till 1705, when in *Paty's Case* (*r*) ten out of twelve Judges held that in the case of misdemeanours at least it could not be refused.

The defects of procedure in error were repaired in part, but insufficiently, by *motions for a new trial* These motions had been common in civil cases from the fourteenth century onwards, but the criminal law had to wait till the seventeenth century for them to become established as a regular part of its procedure governed by definite rules. In 1673 (*s*) it was held that in the case of convictions for misdemeanours (*t*) a new trial could be moved for on the ground that evidence had been misreceived, or that the verdict was contrary to the weight of the evidence—matters not necessarily appearing on the face of the record

Again, after a conviction a Judge who was puzzled about the law would occasionally defer judgment and sentence, and confer on matters in doubt with his colleagues, a practice which became statutory with the establishment in 1848 of the Court for Crown Cases Reserved. But the initiative here rested with the Judge, parties could not compel him to raise a point of law. Nor was there any way (other than motion for a new trial, available only in misdemeanours) of questioning the verdict of a jury on the facts.

The country had to wait till 1907 for the introduction of an adequate machinery for criminal appeals (*u*).

(2) Civil Jurisdiction of the King's Bench.—This may be classified as (a) original, (b) in "error," and (c) otherwise quasi-appellate.

(a) *Original Civil Jurisdiction.*—Theoretically the Common Pleas had a monopoly of civil actions between subject and subject, but the King's Bench from the first exercised jurisdiction in cases where force was alleged, *e.g.*, trespass *vi et armis*. It also took cognisance later of trespass on the case which, as it developed, superseded some of the older forms of action which had belonged to the Common Pleas. Much of the civil jurisdiction of the King's Bench was, however, deliberately usurped by it with the help of legal fictions.

(*r*) 1 Salk. 504. (*s*) *R.* v. *Lathan and Collins*, 3 Keb. 143
(*t*) But not in the case of felonies: *R.* v. *Duncan* (1881), 7 Q. B D., at 201.
(*u*) *Post*, p. 380.

The best known of these fictions were the ***Bill of Middlesex*** and ***Writ of Latitat.***

The basis of this device was that anyone brought within the "Marshalsea" of the King's Bench Court (*i.e.*, brought into the custody of the marshal who kept its prison) was subject to the general jurisdiction of that Court, and could be sued in that Court on any personal cause of action. The procedure was designed to bring the defendant at first physically, and later constructively, within the Marshalsea of the King's Bench. To get him there in the first instance trespass *vi et armis* –an offence within the Court's unquestioned cognisance, and justifying detention—had to be alleged against him. In the time of Henry VI the defendant had to be physically caught and gaoled. Later an entry on the rolls of the Court that he had been bailed came to suffice To secure this entry on the rolls the plaintiff filed what was called a "Bill of Middlesex" alleging trespass *vi et armis*. By the Bill the Sheriff of Middlesex was directed to produce the defendant If the defendant was not in Middlesex the sheriff's return to the Bill was "*non est inventus*" ("he is not to be found"), and a writ of "Latitat" was sued out, directed to the sheriff of some other county where the defendant was thought to be, stating that the defendant "*latitat et discurrit*" ("lurks and runs about") in such other county, and commanding the sheriff to apprehend him. When the defendant did not live in Middlesex the writ of latitat was the first step taken, the previous issue of a Bill of Middlesex (which was the real essential to found jurisdiction) being assumed.

As a result of the Bill of Middlesex or Writ of Latitat (or of the two together), either the defendant appeared or he did not. If he did, and gave sureties (John Doe and Richard Roe), he was sufficiently in the marshal's custody to confer on the Court a general jurisdiction over any action brought against him. If he did not, he was liable to arrest for contempt. Actually he was not arrested, but the plaintiff was allowed to enter an appearance and give "common bail" (Doe and Roe) on his behalf. ("Special" bail could be required if the plaintiff swore the cause of action was worth at least £10.) A statute of 1661 enacted that no special bail should be exacted and no one arrested unless the true cause of action were set out in the writ. This temporarily killed the Bill of Middlesex device and restored to the Common Pleas some of the jurisdiction thereby purloined from it.

But the King's Bench circumvented the Act by adding to the Bill of Middlesex, after the words alleging the (fictitious) trespass, a clause beginning "*ac etiam*" ("and also"), which set out the real cause of action. The Court of Common Pleas, thwarted and enraged, retaliated in kind, and recovered some of the lost ground by issuing writs of trespass "*quare clausum fregit*" plus an "*ac etiam*" clause, with results corresponding to those of a Bill of Middlesex plus an "*ac etiam*" clause.

These devices reeked of fiction and circuity, and both of them were swept away by the Uniformity of Process Act, 1832, but until then they constituted normal methods of beginning actions in the King's Bench and in the Common Pleas respectively.

(b) *Civil Jurisdiction in "Error."*—In the thirteenth and fourteenth centuries the King's Bench, though not fully severed from the parent body of the Council as a distinct law Court, was *par excellence* the authority which corrected the errors of the other Courts, and it retained this jurisdiction over the Court of Common Pleas till 1830.

The weakness of the procedure in error has already been mentioned, namely, that as a result of the formalism of primitive law, glaring errors if not "on the record" would not enable the exercise of this jurisdiction, while trivial errors which did appear on its face were sufficient.

Bill of Exceptions.—To remedy this the Statute of Westminster II, 1285, enacted that if a party alleged an "exception" which the Judge refused to allow, such party might write it down and compel the Judge to seal the writing. The Judge's ruling on the "exception" could then be assigned as an "error," though not technically on the record. This sealed writing was called a Bill of Exceptions. The remedy thus afforded was inadequate. In the first place it was as inelastic as the procedure in error itself; the exception might be paltry and immaterial, but this did not prevent it from being legally sufficient. In the second place it was not always available, *e.g.*, in proceedings to which the Crown was a party. It had other shortcomings as well.

(c) *Quasi-appellate Civil Jurisdiction.*—The Court could correct slips due to the carelessness of clerks. In early times it could, and did, along with other common law Courts, administer equity as well

as law, for example, by writ of "*audita querela*"; but this equitable jurisdiction became obsolete later. More important, the King's Bench, like the Common Pleas, from the fourteenth century onwards assumed that it had an inherent jurisdiction to entertain motions for new trials. (See *Slade's Case* (1648) (*x*).) In the seventeenth century the Common Pleas acted on the certificate of the Judge that the verdict was contrary to his opinion. At first the King's Bench, unlike the Common Pleas, required something appearing on the face of the record (*y*), and indicative of irregularity, to justify the grant of a new trial. Later it would accept affidavit evidence of such irregularity.

The motion for a new trial was, however, alternative to the other remedies by error and bill of exceptions, and a litigant who failed on the first could not fall back on the second.

(3) Supervisory Jurisdiction of the King's Bench.—For the supervision by the King's Bench of the observance of the law by officials and others, one weapon ready to its hand was the power to commit for contempt of Court. But another, and a more important, was the power which it enjoyed to issue and adjudicate upon the "prerogative writs." These writs were (a) *Habeas Corpus*, (b) Prohibition, (c) *Certiorari*, (d) *Mandamus*, and (e) *Quo Warranto*. The last could not be issued by the Court of King's Bench, but the first four could, and all of them were returnable in that Court (*z*). The authority of the King's Bench in respect of these writs has in the main survived to the King's Bench Division of to-day. It is in substance an administrative weapon, available to prevent various Courts or persons from exceeding the limits of their legitimate sphere of action.

III. THE COURT OF EXCHEQUER.

Emergence of the Court.—In the twelfth century the Exchequer, until then an indistinguishable element in the Curia, acquired a separate

(*x*) Style, 138. (*y*) Blackstone Com., iii, 388.

(*z*) For a description of these writs, see *ante*, pp. 288—292. The King has a prerogative power to prevent a subject leaving the realm. In the sixteenth and seventeenth centuries the writ *Ne Exeat Regno* issued from the Court of Chancery on the application of a Secretary of State, and from the eighteenth century it issued also at the instance of a private person, to prevent the evasion of the absconder's legal or equitable liabilities. It could not be issued by, nor was it returnable to, the King's Bench.

organisation as a Department of State. It was a fiscal committee of the Council, and until the thirteenth century there was no visible rift between its administrative and judicial sides Bracton does not recognise it as a separate Court.

From Britton (*a*) and Fleta (*b*) it appears that at the end of that century the cleavage is beginning to show. But before this the term "Barons of the Exchequer" ceases to denote merely administrative officers In 1236-7 the series of separate plea rolls for the Exchequer begins, and in the time of Edward I the "Chief Baron" emerges as President. In the early fourteenth century the Barons are frequently drawn from the ranks of professional lawyers, and although the rolls are kept in the name of the Treasurer and Barons, the last are the sole Judges (*c*)

The Exchequer's evolution into a distinct Court was very gradual, and its connection with the Curia endured long. When the Chancellor and Chancery separated from the Exchequer the latter acquired a Chancellor of its own (the Chancellor of the Exchequer), who was chief Judge on the equity side of the fully developed Exchequer Court. Before that development was complete the Barons were inferior in precedence to the Judges of the two other Common Law Courts; they took rank indeed below the Serjeants, and were not, like the other Judges, members of Serjeants' Inn; nor were they summoned to Parliament. In 1579, however, one Robert Shute was appointed Chief Baron. He was placed on the same footing as the other Judges (*d*) as to precedence, rank of Serjeant, riding on circuit, etc. But the expression "Barons of the Coif" recalls a period when the Barons were not, or not necessarily, Serjeants, as the other Judges had to be

Jurisdiction of the Court.—Until the reign of Queen Elizabeth the Court of Exchequer limited its activity in the main to revenue cases —its proper sphere. As regards pleas between subject and subject the Exchequer rolls exhibit about one-tenth of the bulk of those of the Court of Common Pleas, and statutes of the thirteenth and fourteenth centuries helped to prevent its encroachment on the province of that

(*a*) i, 5.

(*b*) ii, 25, 26 "*Habet etiam rex Curiam suam* et justiciarios suos in *Scaccario apud Westmonasterium residentes.* . . ."

(*c*) Coke, 4th Inst., 105. (*d*) Foss, Judges, V, 409—410

Court. But this was not to last. As will be seen, the Exchequer by no means eschewed the judicial craze for usurping jurisdiction.

The jurisdiction of the developed Court fell into three divisions: (a) Revenue, (b) Common Law, and (c) Equity

(a) *Revenue Jurisdiction.*—This jurisdiction covered suits between the Crown and the taxpayer, and between the Crown and its other "accountants," viz., persons who were alleged to owe it money. On this side its procedure had certain peculiarities, including equitable incidents, crystallised in the expression "*Cursus Scaccarii.*" It could remove matters affecting Crown revenues from other Courts to itself.

(b) *Common Law Jurisdiction.*—This was exercised by the Treasurer and the Barons. It extended to (i) officials of the Court, and (ii) private persons who were debtors of Crown debtors, or who were debtors of debtors of Crown debtors, and so on in widening circles.

By the exercise of this power it acquired a measure of general jurisdiction in cases between subject and subject—a process largely extended by the agency of the *Writ of Quominus.* By means of this writ the plaintiff would claim against the defendant for breach of contract, debt, and the like, alleging that by reason of the defendant's default he, the plaintiff, was the less able to pay what he owed to the King (*quo minus sufficiens existit*) (*e*). One advantage of proceeding in this way in the Exchequer was that the defendant could not "wage his law" (*f*).

The Uniformity of Process Act, 1832, abolished this fictitious procedure along with the corresponding devices of Bill of Middlesex and Latitat, and *quare clausum fregit*, with their attendant "*ac etiam*" clauses

(c) *Equitable Jurisdiction.*—This was exercised by the Treasurer, the Chancellor of the Exchequer, and Barons.

Anyone, says Blackstone, could file a bill against another, "upon a bare suggestion that he is the King's accomptant, but whether he is so or not is never controverted" (*g*).

This equitable jurisdiction, dating from the sixteenth century, was extinguished by statute in 1841 (*h*).

(*e*) Blackstone (iii), 286.

(*f*) Y B. 20 Edw. 3, R. S. 1, 116—120. For an account of wager of law or compurgation, see Holdsworth, *History of English Law*, vol. I (5th ed.), pp. 305—308.

(*g*) Com. iii, 45, 46. (*h*) 5 Vict. c. 5.

IV. THE COURT OF EXCHEQUER CHAMBER.

There were at various times four Courts called Courts of Exchequer Chamber.

(1) In the reigns of Edward I and Edward II Judges used to meet together in a chamber in the Exchequer buildings to discuss legal and other points arising in the course of Exchequer business.

(2) From (probably) the thirteenth and fourteenth centuries a difficult case arising in the King's Bench or Common Pleas (or after 1579 in the Exchequer itself) might be adjourned at the discretion of the Court and directed to be re-argued before all the Judges and Barons in the Exchequer Chamber.

(3) The King's Bench claimed a general jurisdiction to correct the errors of other Courts and extended this claim to the Exchequer when it emerged as a Court. In 1338 the Barons drew up a memorial protesting against this pretension in relation to themselves. Their objection prevailed. In 1357 a statute created a special Court to review errors of the Exchequer. Under the procedure which it prescribed, the Chancellor of the Exchequer and the Treasurer, in cases where error was alleged, were to cause the record to be brought before them "in any Chamber of the Council nigh the Exchequer," and, having called into consultation "the justices and other sage persons," they were to correct the error, if any. The necessary officers (*i*) found difficulty in attending, and there were complaints of delay.

(4) Meanwhile, Parliament was the only authority which could correct errors in the King's Bench, and Parliament in the sixteenth century met seldom. In 1585 a new Court of Exchequer Chamber was created by statute. This measure provided that when complaint was made of any judgment given in the King's Bench in detinue, debt, covenant, account, case, *de ejectione firmae*, or trespass (unless the Crown was a party), the plaintiff or defendant might sue out a writ of error directed either to Parliament or to the Court of Exchequer Chamber, and that the Court should consist of the justices of the Common Pleas and the Barons of the Exchequer, or any six of them.

After the Act error still lay from the Common Pleas to the King's Bench and thence direct to the House of Lords; and also from the

(*i*) At first the Chancellor of the Exchequer and the Treasurer. After the office of Treasurer lapsed, the Lord Chancellor and Keeper.

King's Bench to the House of Lords, except in the types of cases named in the statute, as to which error lay to the Exchequer Chamber.

In 1830 the King's Bench was by statute stripped of its jurisdiction in error from the Common Pleas. The Courts of Exchequer Chamber created by the Acts of 1357 and 1585 were amalgamated, and the new Court of Exchequer Chamber resulting from this fusion became a court of appeal intermediate between the three Common Law Courts and the House of Lords.

The Common Law Procedure Act, 1852.—This Act attempted to improve the machinery of appeal without annihilating, as it should have done, the defective procedure in error. It went back on the established theory that proceedings in error were new proceedings, started by a new writ, and substituted a "memorandum of error" which was a mere step in the original proceedings. After the Act, a litigant who complained of a judgment could proceed (a) by memorandum of error, (b) by bill of exceptions, (c) by case stated, or (d) by motion for a new trial.

If a new trial were refused otherwise than unanimously, he could appeal from the refusal to the Exchequer Chamber; and the latter need not, as previously, grant a new trial by reason of misdirection on any point however immaterial. The Exchequer Chamber, further, could give such judgment as ought to have been given by the Court below. But procedure in error was incurably defective, and no real solution was achieved until the Judicature Acts, 1873—75, borrowing from the procedure in Chancery appeals, introduced the appeal by way of rehearing (*k*).

(*k*) *Post*, p. 369.

CHAPTER XXVI.

THE COURTS OF CHANCERY, ADMIRALTY, PROBATE AND DIVORCE.

I. THE HIGH COURT OF CHANCERY.

Origin of the Court of Chancery.—In early times the Chancellor—usually an ecclesiastic—was the King's chief chaplain, his confessor, and the "keeper of his conscience" But the range of his duties outside this spiritual sphere was then immense and still remains impressive (*a*). He has been called the King's Secretary of State for all Departments (*b*) —a "natural prime minister" (*c*). As he was custodian of the Great Seal, all documents to which it must be attached came within his purview. Such documents included treaties with foreign powers, royal grants, and—perhaps most important for the present purpose—the original writs by which actions were initiated.

The writ-issuing power, if discretionary, was obviously capable of being so exercised as to extend or vary remedies and thereby alter the law. The Provisions of Oxford (1258) for a time restrained the tendency to put it to this use, by prohibiting the Chancellor from sealing writs for which the register did not contain an exact precedent. But this led to an excessive rigidity, and the Statute of Westminster II (1285) empowered him within modest limits to vary the forms of existing writs to meet cases similar ("*in consimili casu*") to those covered thereby (*d*).

The germ may here be traced of the doctrine that it is the function of the Chancery to soften the asperities and fill the gaps of the common law, and to dispense moral justice where the common law did not afford it. At first this need was supplied by the King in Council; but the Council was over-burdened, and in the fifteenth century it became clear that a special department was required for the task. For that task, it further appeared, the Chancellor and his staff were peculiarly qualified. As the keeper of the King's conscience he was the appropriate officer to see that no injustice should be done owing

(*a*) See *ante*, p 216. (*b*) Stubbs, *Constitutional History*, I, pp. 398—399.
(*c*) Tout, *Place of Edward II in English History*, p 58.
(*d*) Potter, *Historical Introduction to English Law* (2nd ed.), pp. 263—267.

to legal technicality. He was a prominent member of the Council, and the Council had increasingly delegated to him the petitions of those who complained that the ordinary Courts gave them no remedy. In the hearing of these petitions he had perforce to test the assertions of the complainant and appraise the object of his complaint by methods similar to those employed in legal process. He had an elaborate office and staff, no longer following the King but conveniently moored at Westminster. The writ-issuing side of his work (known as "*the Latin side*," since writs were drafted in Latin) made him intimately familiar with the pedantries and rigidities of the common law. To whom could the task of mitigating them by a supplementary and corrective jurisdiction be more fittingly assigned?

At first he only acts as delegate of the Council and in matters specially referred to him by it. The transition from this to a condition where he is the independent head of an independent Court is gradual and cautious (*e*), and it is not till 1474 (*f*) that he makes a decree on his own authority. But by the end of the century this, in purely equitable matters, has come to be the general rule By the end of it, too, the sphere of the Chancellor's jurisdiction is beginning to be marked off from that of the Council; the Chancery is acquiring a distinct province, a distinctive procedure, the power to grant distinctive forms of relief. This was known as "*the English side*" of the Chancery, since petitions were usually presented in English. In the reign of Henry VI the Chancellor is already granting injunctions, and some of these prevented litigants from enforcing judgments obtained at common law. The Judges of the common law Courts were not slow to protest The breakdown of the Council during the Wars of the Roses enhanced the Chancellor's powers: its rehabilitation by the Tudors (*g*) to some extent reduced, but at the same time helped to define them.

In the sixteenth century the Chancery is a separate Court, exercising an equitable jurisdiction along with a relatively unimportant common law jurisdiction. The Chancellors, originally ecclesiastics or politicians,

(*e*) Not merely in point of speed, but of tact. The Chancellors for centuries courted the good graces of the common law Judges; and Equity still follows the law when it can.

(*f*) *Select Cases in Chancery* (Selden Society), p. xx.

(*g*) The Tudors created a number of new Courts, into which was canalised some of the residue of the legal jurisdiction of the Council: *e.g.*, the Court of Star Chamber. The Star Chamber and other similar tribunals were abolished in 1641 (16 Car. 1, c. 10).

are increasingly drawn from the ranks of professional lawyers. Wolsey, the last of the typical ecclesiastics, was succeeded in 1529 by Thomas More, the first of the typical legal holders of the office. Queen Mary's Chancellors were ecclesiastics and an ecclesiastic sat on the Woolsack as late as 1621—25 (Bishop Williams). All his successors were laymen or lawyers, the last layman being Lord Shaftesbury (1672—73).

Jurisdiction of the Court of Chancery.—(a) Its *common law jurisdiction* was trifling and fragmentary We need say no more than that it included (i) process against officers of the Court itself, and (ii) proceedings against the Crown by petition of right, *monstrans de droit* and traverse of office (*h*).

(b) Its *equitable jurisdiction* was the life blood of the Court. In the *Earl of Oxford's Case* (1615) Lord Ellesmere, L.C., made his oft quoted statement to the effect that "man's actions are so divers and infinite that it is impossible to make any general law which may aptly meet with every particular act and not fail in some circumstances" (*i*). By the "general law" Lord Ellesmere meant that administered by the common law Courts, and his language is a classical formulation of the essential task of equity As his chancellorship registers a turning point in the history of the Court of Chancery, it may be useful here to glance briefly at the scope and limits of equitable jurisdiction, (1) before, (2) during, and (3) after his chancellorship.

(1) Equity before Ellesmere.—Between the fifteenth and the early seventeenth centuries, equity changed its status from that of a purely discretionary jurisdiction, measured by "the length of the Chancellor's foot" (*k*), to redress the shortcomings of the common law, to that of a body of relatively settled principles and remedies These included:—

(a) the enforcement of trusts (and the circumvention of the Statute of Uses) (*l*),

(b) the enforcement of contracts in certain cases, affirmatively, by the special remedy of specific performance, and negatively, by the remedy of injunction, restraining their breach. The only common law remedy in respect of contractual obligations

(*h*) *Ante*, p. 284. (*i*) 1 Ch. Rep., at p. 6.

(*k*) Selden, in a passage beginning "Equity is a roguish thing. . . 'Tis all one as if they should make the standard for the measure a Chancellor's foot."

(*l*) See Potter, *op. cit.*, pp. 535—537.

was by way of damages for breach; the new remedies were and are limited to cases in which damages afford inadequate relief, and were, and are, discretionary—not as of right;

(c) the prevention of fraud, and the avoidance or inhibition of common law judgments procured thereby. (This was the *casus belli* of the Homeric conflict between Coke and Ellesmere, discussed below, in which James I ruled in favour of the latter);

(d) the provision of machinery wanting at common law but essential to the enforcement of justice, *e.g.*, the writ of subpœna, to compel the attendance of necessary persons; and the process of discovery and interrogatories, to compel the disclosure of relevant documents and information; and

(e) the taking of accounts.

(2) The Conflict between Coke and Ellesmere.—The struggle which came to a head here was no new one In 1482 Fairfax, J., had protested against the issue of injunctions restraining the enforcement of common law judgments (*m*). One of the grounds of Wolsey's impeachment had been his excessive use of them, and the controversy between the common lawyers and the Chancellor finds an echo in the *Doctor and Student* (*n*). "You make your bill a conceit" says the serjeant, championing the common law, and complains of the arbitrary and unpredictable character of decisions founded on "conscience."

In the reign of James I, Chief Justice Coke embarked on a crusade against the Chancery practice of restraining by injunction judgments obtained "unconscientiously" in Courts of common law He prayed in aid, *inter alia*, the Statute of Præmunire, 1353 (which probably did not apply), and a statute of 1403 (*o*) which probably did. This statute provided that a party who had obtained a judgment in those Courts should be left in peace, unless the judgment were reversed by attaint or error, instead of being "summoned anew" before the King, his council, or Parliament. The question was whether this statute applied to the Chancery as a Court of equity. Lord Ellesmere argued that it did not.

James, after referring the question to Bacon, who was then

(*m*) Y. B. 22 Edw IV. Mich pl 21.
(*n*) A book published by Christopher St. Germain in 1523. (*o*) 4 Hen. IV. c. 23.

Attorney-General, decided in favour of Ellesmere (*p*). But protest was not wholly silenced. The controversy reverberated throughout the seventeenth century, and a Bill (*q*), introduced in 1690, declaring that the common laws were "subverted and in danger of being wholly destroyed" by the claims of the Chancery, was only dropped because it was shown that equity would be "subverted and wholly destroyed" if the claims of the common law were upheld

(3) Equitable jurisdiction since the seventeenth century. Modern equity.—As the result of its later developments equity came to embrace a vast number of miscellaneous matters, in addition or as subordinate to those mentioned above; *e.g.*, as regards property, in addition to trusts, various methods of settling landed property, married women's separate estate and the restraint on anticipation, the equity of *redemption*, *tacking* and *consolidation of mortgages*; the administration of deceased persons' estates, guardianship of infants, suretyship; partnership matters, bankruptcy and lunacy; and in general, a power to relieve against the effects of fraud, accident, mistake and undue influence. Most of these were humane devices, conceived with the object "*adjuvandi vel supplendi juris civilis.*"

Equity, further, in the seventeenth and eighteenth centuries hardened into a body of fixed rules, and the Chancellor's decisions were reported. Principles were deduced from them and treated as binding, and were in Blackstone's day "a laboured connected system" (*r*), in some respects growing stiff and fossilised Early in the nineteenth century Lord Eldon, L.C., could say of a jurisdiction which had begun by being purely discretionary and owed its *raison d'être* to its elasticity: "The doctrines of this court ought to be as well settled, and made as uniform, *almost*, as those of the common law" (*s*).

II. THE HIGH COURT OF ADMIRALTY.

The word "admiral" is of Arabic origin—*Emir* or *Amir* meant "ruler," and *al* meant "of." *Amir al Bahr* meant a prince of the sea. The first use of the word "admiral" in England was in 1285

(*p*) Reports on Cases in Chancery, 26.
(*q*) Hist. MSS. Comm., 13th Rep., App., pt. V, 128, No 304.
(*r*) Com. iii, 432.
(*s*) *Gee* v. *Pritchard* (1818), 2 Swan., at p. 414.

or thereabouts, and in the reign of Edward I an admiral of the Bayonne (Baion) fleet was appointed.

At the opening of the fourteenth century we hear of an Admiral of the Cinque Ports (*t*). There was no Admiralty Court—except local Courts perhaps—till the middle of the fourteenth century, when, to check piracy, an admiral was appointed by Edward III to deal with maritime crimes. By a statute of Richard II (1389) the admiral or his deputy was not to meddle with anything save such as was done upon the sea, and by a statute of 1391 the admiral was to have no cognisance of contracts or other things done or transpiring inside a country, whether on land or water, nor of any wreck; but he might have jurisdiction over flotsam, jetsam, and ligan The admiral, on the other hand, might inquire into deaths of persons and acts of mayhem in great ships in the main stream of great rivers below the bridges of the same rivers nigh to the sea, but not elsewhere

The admiral in the reign of Edward III took cognisance of certain civil cases as well as criminal, mercantile and maritime cases

Towards the end of the fifteenth century a Judge was appointed to assist the admiral. Henry VIII by statute gave the admiral various civil functions, including a jurisdiction in respect of bills of exchange and contracts made abroad; but he may be said - though other statutes contributed—to have abolished the criminal jurisdiction by providing that treason, murder and felonies within the purview of the admiral be tried before the admiral or his deputy and three or four other substantial persons, who were invariably common law Judges This work was completed by the Central Criminal Court Act, 1834, whereby crimes committed at sea were made triable in the Central Criminal Court, while by a more recent statute these offences can be tried at the Assize Courts therein mentioned.

In the reign of Elizabeth there were disputes between the admiral and the common law Judges over prohibitions and an agreement was reached. The Judges considered that they could issue these prohibitions as the Admiralty, in their opinion, was not a Court of record.

According to Blackstone, the common law Judges encroached on the

(*t*) The Cinque Ports are (or were) Dover, Hastings, Hythe, Romney and Sandwich, with which were associated Rye and Winchelsea. The jurisdiction extended to "the narrow seas," i. e., the Straits of Dover

Admiralty jurisdiction over contracts made abroad by conniving at a fiction that these contracts were made at the Royal Exchange (*u*).

By the combined effects of various Admiralty Courts Acts the Court gained control of all necessary jurisdiction, its procedure was rendered more rapid and effective, and machinery was provided for transferring certain admiralty business to certain convenient county courts.

Admiralty business relates to such topics as bottomry and respondentia bonds, flotsam, jetsam, ligan, towage, salvage, collisions and negligent navigation, transactions giving rights *in rem* against a ship, and other maritime matters. By the Vice-Admiralty Courts Act, 1863, and the Colonial Courts of Admiralty Act, 1890, Colonial Courts of Admiralty were created with full civil powers

Appeals.—Henry VIII constituted the **Court of Delegates** to take over appeals from the Courts Christian and Admiralty Commissioners, which appeals were afterwards transferred to the Privy Council. This accounts for the grouping together of probate, divorce, and admiralty in the present High Court of Justice

At the time of the Judicature Acts, 1873—75, appeals from the British Admiralty Court and the secular Courts of Probate and Divorce established in 1857 lay to the Privy Council. By virtue of the Judicature Acts, the Courts of Admiralty, Probate and Divorce, have been merged in the Probate Divorce and Admiralty Division of the High Court, and appeals lie from that Division first to the Court of Appeal and ultimately to the House of Lords.

III. THE COURTS OF PROBATE AND DIVORCE.

William I, by severing the lay and clerical jurisdictions, urged into activity clerical Courts with special jurisdiction over clergy and laity and a special procedure. The clerical Courts took cognisance of wills of personalty, a control which continued till 1857, when a secular **Court of Probate** was created with jurisdiction to grant and revoke probates and letters of administration and to decide all questions in matters testamentary.

The Ecclesiastics also assumed jurisdiction over lay immorality, punishing adultery, fornication and other deadly sin criminally; as

(*u*) Blackstone, Comm. iii, 107.

they are still theoretically able to do, though such jurisdiction is in practice obsolete. Up to 1857 they gave decrees of judicial separation and administered relief in other matrimonial cases. After the creation of the secular **Divorce Court** in 1857 divorce *a vinculo matrimonii* became obtainable by a decree of the Court, an Act of Parliament having until then been the only means of obtaining it.

By the Judicature Act, 1873, these Courts of Probate and Divorce were amalgamated so as to form the Probate Divorce and Admiralty Division of the High Court of Justice. In recent years High Court Judges have acquired a jurisdiction to hear divorce petitions at Assizes.

CHAPTER XXVII.

NINETEENTH CENTURY REFORMS AND THE PRESENT CIVIL COURTS.

Need for Reform in the Nineteenth Century.—In or about the year 1832, the Courts of Justice—common law (King's Bench, Common Pleas and Exchequer), Chancery, Admiralty, and Ecclesiastical—each administered a different body of legal principles, each applied a different procedure, and each employed a different terminology (*a*). The system exhibited a mass of uncertain, overlapping or conflicting jurisdictions. Legal fictions ran riot, many of them designed by particular Courts in days when they were paid by piece-work to filch jurisdiction from others. John Doe and Richard Roe worked overtime. Archaism, formalism and technicality abounded, and the system of so-called justice promised rewards to anyone except the litigant, to serve whom it ostensibly existed. He might reach the House of Lords, footsore, after ten or more years of litigation, only to find his pilgrimage wasted because he had started proceedings in the wrong Court or by the wrong form of action (*b*). Worst of all, two limbs of the judicial system—common law and equity—abjured co-operation and were in actual or potential conflict with each other. A man might win his case at law after years of effort, and have the cup dashed from his lips by an injunction of the Court of Chancery forbidding him to enforce it.

Commissions sitting between 1825—41 tinkered with the problem, but produced no comprehensive solution, none in particular which grappled seriously with the last mentioned element in it.

In 1852—53 a second commission reported. It declared that the common law Courts were not equal even to the work which fell within their own province. The litigant had to resort to equity, for instance, to obtain "discovery." It expressed the view that every Court ought to be self-sufficient, and proposed to confer on common law Courts power to grant the equivalent of specific performance by an extension of the writ of mandamus, and the equivalent of injunction

(*a*) Judicature Commission, Parl. Papers, 1868—69, vol. xxv, p. 10.
(*b*) Cf. the case of *Knight* v. *Mayor of Waterford* (1844), 11 Cl & F. 653—interval 14 years

by an extension of the writ of prohibition; and to extend to the Chancery certain powers until then monopolised by common law Courts.

The Common Law Procedure Act, 1854.—By this Act the Court of Chancery was empowered and directed to decide all questions of common law incidental to its proceedings without recourse to a common law Court; was authorised to award damages; and even to sit with a jury. A Court of common law, on the other hand, was given power to grant injunctions, to allow equitable defences, and to grant relief from forfeiture in some cases, *e.g.*, non-payment of rent.

This fell short of a "fusion" of law and equity. For example, the common law jurisdiction conferred by the Act was limited to the grant of perpetual, as opposed to temporary or conditional, injunctions, and the Act did not preclude a Court of equity from staying common law proceedings in cases where it gave the two Courts concurrent jurisdiction. And for overlapping jurisdiction it left a wide field, for example, in respect of the directors of limited companies (then a novelty) who were amenable as trustees to the Chancery and as agents to the common law.

The Judicature Commission reported in 1868 in favour of complete fusion, both of jurisdiction and procedure.

The Judicature Acts, 1873-75.—The Judicature Act, which was enacted in 1873 with effect from 1875, though followed by many amending statutes (*c*), supplies the basis of the existing system of Courts, jurisdiction, and procedure. By its provisions, as amended later, there was established a single **Supreme Court of Judicature** in England, consisting of: (1) The High Court of Justice, and (2) The Court of Appeal.

A Uniform Code of Procedure.—In the early nineteenth century procedure was archaic, cumbrous and dilatory. Fictions abounded. Mediæval remedies and incidents, *e.g.*, trial by battle, compurgation and deodands, were not yet legally dead. A Bill in Chancery was, according to Lord Bowen (*d*), "a marvellous document which stated the plaintiff's case at full length—three times over"; and the answer

(*c*) These and subsequent amending statutes are now consolidated in the Judicature (Consolidation) Act, 1925, which has also been amended, *e.g.*, in relation to the number of puisne Judges.

(*d*) Paper on *Administration of the Law in the Reign of Queen Victoria.*

to it was impossible to compose without legal aid. There were scandalous delays, which Dickens's description of the interminable proceedings of *Jarndyce* v. *Jarndyce* in *Bleak House* did not exaggerate. A technical step could, and again and again did, defeat justice. In point of procedure, little was common to all actions. "One could say next to nothing about actions in general, while one might discourse at great length about the mode in which an action of this or that sort was to be pursued and defended" (*e*).

The Judicature Acts did much to introduce a simplified and uniform procedural code, common to all branches of the Supreme Court, with power (and this was an extremely important reform) to the Judges to make such new rules as should from time to time be required.

I THE HIGH COURT OF JUSTICE.

Jurisdiction of the Court.—To the High Court of Justice were transferred the consolidated jurisdictions of the old Courts of Chancery, King's Bench, Common Pleas, Exchequer, Probate, Divorce and Admiralty, together with that of certain others, *e.g.*, the Assize Courts created by the Commissions of Assize, Oyer and Terminer, and Gaol Delivery, and the Court for Crown Cases Reserved. In the High Court the rules of common law and equity were to be administered concurrently, *the rules of equity prevailing* "in all cases not hereinbefore particularly mentioned, in which there is any variance" between such rules "and rules of the common law with reference to the same matter". Any Judge was to be competent to sit anywhere in the High Court, but for convenience it was divided into five Divisions: the Chancery Division, King's Bench Division, Common Pleas Division, Exchequer Division, and Probate Divorce and Admiralty Division.

Between these the work was to be distributed in accordance with rules of Court, but subject thereto certain matters were assigned to the Chancery Division, *e.g.*:—

(1) all causes and matters which by any Act of Parliament were assigned to the old Court of Chancery;
(2) administration of estates of deceased persons;
(3) dissolution and accounts of partnerships;

(*e*) Pollock and Maitland, *History of English Law*, II. p. 560

(4) redemption and foreclosure of mortgages;
(5) raising of portions and charges on land;
(6) execution of trusts;
(7) rectification and cancellation of contracts;
(8) specific performance of contracts for the sale or lease of land; and
(9) the wardship of infants.

In 1881, in pursuance of the power given by section 32 of the Judicature Act, 1873, to alter the Divisions by Order in Council on the recommendation of the council of Judges, the King's Bench, Common Pleas, and Exchequer Divisions of the High Court were merged in the present King's Bench Division; and by a statute of the same year the powers of the respective Presidents (*i e*, Chief Justices) of these Divisions merged in the officer who is now "Lord Chief Justice of England."

The jurisdiction of the High Court can by this legislation be exercised by a single Judge, except for certain cases which must come before a "Divisional Court."

The special leave of the High Court is required (*inter alia*) for an appeal to the Court of Appeal on a question of law in election cases, whether Parliamentary or municipal (Judicature (Consolidation) Act, 1925, s 31 (1).)

Present Composition of the Court.— Under the Judicature (Consolidation) Act, 1925, as amended by the Supreme Court of Judicature (Amendment) Acts, 1935 and 1938, the High Court was composed of: (1) *The Chancery Division*, with the Lord Chancellor as President (*f*) and six puisne Judges ("Justices of the High Court"); (2) *The King's Bench Division*, with the Lord Chief Justice as President and nineteen puisne Judges; and (3) *The Probate Divorce and Admiralty Division*, consisting of the President and four puisne Judges. Further, an ordinary Judge of the Court of Appeal may, and if appointed after 1938 must, sit in the High Court if requested to do so by the Lord Chancellor with the consent of the Lord Chief Justice or the President of the Probate Divorce and Admiralty Division.

The Supreme Court of Judicature (Amendment) Act, 1944, raises the maximum number of puisne Judges from twenty-nine to thirty-two, with a minimum of twenty-five. Within these limits vacancies may

(*f*) The Lord Chancellor seldom sits in the High Court unless through illness or otherwise an insufficient number of Judges are available, but he issues Rules of Court with the concurrence of the Presidents of the other Divisions.

be filled by the Crown if the Lord Chancellor, with the concurrence of the Treasury, is satisfied that the state of business requires it. The Lord Chancellor is given authority to attach puisne Judges to the various Divisions, provided that not less than five are attached to the Chancery Division, not less than seventeen to the King's Bench Division, and not less than three to the Probate Divorce and Admiralty Division The Act further provides that a puisne Judge may with his consent be transferred by the Lord Chancellor from one Division to another, but the concurrence of the Lord Chief Justice or the President is required if he is transferred from the King's Bench Division or the Probate Divorce and Admiralty Division.

The three additional Judges authorised by the Supreme Court of Judicature (Amendment) Act, 1944, were in fact intended to be assigned to the Probate Divorce and Admiralty Division to hear divorce cases. Defended divorce petitions may now for the first time be heard at the chief assizes, and Judges of the Probate Divorce and Admiralty Division go on circuit for this purpose

A puisne Judge of the High Court must be a barrister of not less than ten years' standing. . The salary is £5,000, with a pension of £3,500.

Divisional Courts.—A Divisional Court is a tribunal consisting of two or more Judges of the High Court with a jurisdiction partly appellate and partly original. The judgment of a Divisional Court on an appeal from an inferior Court is final, unless leave is given either by the Divisional Court or by the Court of Appeal to appeal to the Court of Appeal.

The jurisdiction of a Divisional Court of the King's Bench Division includes the following:—

(i) issue of writ of *habeas corpus* and orders of *certiorari*, *mandamus* and prohibition,

(ii) determination of questions of law on cases stated by Quarter or Petty Sessions;

(iii) appeals from inferior Courts, other than from County Courts. (Appeals from County Courts since the Administration of Justice (Appeals) Act, 1934, and the County Courts Act, 1934, go direct to the Court of Appeal);

(iv) appeals relating to parliamentary and municipal election petitions; and

(v) appeals in certain cases from a Judge or Master in Chambers.

It will be seen that since 1934 the work of a Divisional Court of the King's Bench Division is mainly of a criminal or administrative nature.

Divisional Courts are not confined to the King's Bench Division Appeals from County Courts in bankruptcy matters are assigned by the present Rules to a Divisional Court of the Chancery Division; and a Divisional Court of the Probate Divorce and Admiralty Division hears appeals from Courts of summary jurisdiction against separation and protection orders, and from the Wreck Commissioner against the cancellation or suspension of master's, engineer's and mate's certificates.

The rule that two or more Judges may decide appeals in a Divisional Court has led to some complications in cases where a Court has consisted of two Judges and they took opposite views The older practice in such cases was for the junior Judge to withdraw his judgment, so that the judgment of the senior Judge became the judgment of the Court The modern tendency, however, is against withdrawal, with the result that the decision appealed against stands (*g*), though it seems that the junior Judge still has a discretion to withdraw or not (*h*)

Proposed Reforms.—The grouping together of "wills, wives and wrecks" in a separate Division is thought by many to be an inconvenient historical anomaly. It has therefore been suggested that the Probate Divorce and Admiralty Division should be abolished, probate being transferred to the Chancery Division, which already interprets wills and deals with the administration of estates, and divorce and Admiralty to the King's Bench Division. King's Bench Judges already hear divorce causes at Assizes, and Admiralty work would be grouped with commercial cases (*i*).

It has further been suggested that all appeals from inferior Courts

(*g*) *Metropolitan Water Board* v. *Johnson*, [1913] 3 K. B. 900.
(*h*) *Paddon* v. *Morris*, [1913] W N. 360.
(*i*) The present "Commercial Court" is not a separate Court or Division, but a Judge of the King's Bench Division specially assigned to hear commercial causes under a simplified procedure (R. S. C., Ord. XXX).

to Divisional Courts should be abolished, direct appeal to the Court of Appeal being substituted. This has so far been carried out in the case of appeals from County Courts. A consequential proposal is that no new Lords Justices of Appeal should be created, but that High Court Judges (whose number would be increased for the purpose) should be eligible to sit as members of the Court of Appeal, in the same way as Judges of the King's Bench Division sit in the Court of Criminal Appeal (*k*).

II. THE COURT OF APPEAL.

Composition of the Court.—Under the Judicature (Consolidation) Act, 1925, as amended by the Supreme Court of Judicature (Amendment) Act, 1938, the Court of Appeal consists of (a) *ex officio* Judges, viz., the Lord Chancellor (President), any ex-Lord Chancellor and any Lord of Appeal in Ordinary who consents to act, the Lord Chief Justice, the Master of the Rolls and the President of the Probate Divorce and Admiralty Division; and (b) eight Lords Justices of Appeal. A Lord Justice of Appeal must be a barrister of not less than fifteen years' standing, unless he is promoted from the High Court. The salary and pension of a Lord Justice are the same as for a High Court Judge, viz., £5,000 and £3,500 respectively. The Lord Chancellor may also require a High Court Judge to assist in the Court of Appeal. In practice the Court normally consists of the Lords Justices under the presidency of the Master of the Rolls, sitting in two or three divisions of three Judges each

Jurisdiction of the Court.—This includes:—

(1) The appellate jurisdiction formerly exercised by the Lord Chancellor and the Court of Appeal in Chancery

(2) The jurisdiction formerly exercised by the Court of Exchequer Chamber.

(3) The former jurisdiction of the Lord Chancellor in lunacy appeals.

(4) The former appellate jurisdiction of the Privy Council in Admiralty matters, except in prize cases (*l*).

(*k*) *Second Interim Report of the Business of the Courts Committee* (1934), Cmd. 4471, *Report of the Royal Commission on the Dispatch of Business at Common Law* (1936), Cmd. 5065.

(*l*) *Ante*, p. 189

(5) Appeals from the County Courts (Administration of Justice (Appeals) Act, 1934; County Courts Act, 1934) (*l*).

(6) The former jurisdiction of the Court of Appeal in Chancery of the County Palatine of Lancaster and of the Chancellor of the Duchy of Lancaster (*m*), and the jurisdiction of the Lord Warden of the Stannaries (*n*).

In practice the work of the Court consists chiefly in hearing appeals from the High Court and from the County Courts Appeals from the Probate Divorce and Admiralty Division sitting as a Prize Court (*o*), however, go to the Judicial Committee of the Privy Council.

There was some doubt whether the Court of Appeal was bound by its own previous decisions (*p*). The question was recently settled in *Young* v *The Bristol Aeroplane Company, Ltd.* (*q*), where a Full Court of Appeal consisting of the Master of the Rolls and five Lords Justices held that the Court is so bound, except that (i) it must decide which of two conflicting decisions of its own it will follow, (ii) it must refuse to follow a decision of its own which in its opinion is inconsistent with a decision of the House of Lords, and (iii) it need not follow a decision of its own which it is satisfied was given *per incuriam*.

The Court of Appeal is of co-ordinate authority with the Court of Criminal Appeal, so that where the Court of Appeal held that it was lawful to exact money from a member of a trade association on penalty of being put on the " black list " (*r*) and the Court of Criminal Appeal held that such conduct was criminal (*s*), the point could only be settled by a decision of the House of Lords, which is binding on both Courts. In *Thorne* v. *Motor Trade Association* (*t*) the House of Lords decided the question in favour of the Court of Appeal.

(*l*) *Post*, p. 371. (*m*) See Holdsworth, H. E. L., I, pp. 116—117.

(*n*) The Stannary Courts were local Courts which dealt with matters arising among the mining communities of South-West England, especially among the tin mines of Cornwall. (Latin *Stannum* = tin) In effect this now means appellate jurisdiction from the County Courts in such matters (see Holdsworth, *op. cit*, pp. 151—165).

(*o*) A Prize Court determines, in accordance with the principles of International Law, such matters as the validity of the capture of ships and cargo by belligerent warships: see *The Zamora*, [1916] 2 A. C 77. Prize law was applied to aircraft by the Prize Act, 1939

(*p*) See *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K. B 356, Allen, *Law in the Making* (3rd ed.), p 226.

(*q*) [1944] 1 K. B. 718.

(*r*) *Hardie and Lane* v *Chilton* (No. 2), [1928] 2 K. B 306.

(*s*) *R* v. *Denyer*, [1926] 2 K. B. 258. (*t*) [1937] A. C. 797.

Procedure on appeal.—The Act substitutes an appeal by way of rehearing for the methods previously obtaining, viz., writ of error on the record or memorandum of error, bill of exceptions, and motion to the Court in banc for a new trial.

A final appeal must be heard by at least three Judges; an interlocutory appeal by at least two. Leave of the Judge or of the Court of Appeal is usually necessary in the case of interlocutory orders.

III. THE HOUSE OF LORDS.

It was intended by the Judicature Act, 1873, to abolish the House of Lords as the final Court of Appeal. The operation of the Act, however, was suspended till 1875, and it then took effect without the clauses affecting the House of Lords, to which clauses the Scottish members of that body in particular had been opposed.

The Appellate Jurisdiction Acts, 1876—1929.—The Appellate Jurisdiction Act, 1876, preserved and reformed the appellate jurisdictions both of the House of Lords and of the Judicial Committee of the Privy Council, and planned that these two bodies—the Supreme Courts of Appeal from the United Kingdom and the Crown's oversea possessions respectively—should be staffed in the main by the same Judges. The Crown, under these provisions, was given power to appoint two persons to act as Lords of Appeal in Ordinary (sometimes called "Law Lords") who were to be entitled to sit in the House of Lords during their tenure of office. In 1887 this right was conferred on them for life. They must be barristers or advocates of fifteen years' standing, or persons who had for two years held "high judicial office." "High judicial office" was defined so as to cover the Lord Chancellors of Great Britain and Ireland, paid Judges of the Judicial Committee, and Judges of any of the superior Courts of Great Britain or Ireland. To hear appeals a quorum of three Judges is necessary, drawn from among the Law Lords, the Lord Chancellor, and Peers who hold or have held "high judicial office."

Under the Judicial Committee Act, 1871, the Crown had appointed four "paid Judges of the Judicial Committee." The Appellate Jurisdiction Act, 1876, by section 14 provided that whenever any two of the paid Judges of the Judicial Committee died or resigned His Majesty might appoint a third Lord of Appeal, and on the death or

resignation of the remaining two paid Judges of the Judicial Committee the King might appoint a fourth Lord of Appeal. Lords of Appeal in Ordinary, if Privy Councillors, were to be members of the Judicial Committee.

As the result of this the personnel of the House of Lords and of the Judicial Committee tends to overlap (*u*). The Appellate Jurisdiction Act, 1929, raised the number of the Lords of Appeal in Ordinary to seven. Their salary is £6,000 a year. It is worth observing that while the legal business of the House of Lords is in practice discharged by the Lords of Appeal, it is only constitutional convention which debars ordinary peers from attending. No such peer has, however, asserted the right since 1882.

Civil Jurisdiction of the House of Lords.—By the Act of 1876 appeals lay to the House of Lords from the Court of Appeal in England, and from any Court in Scotland or Ireland (now Northern Ireland only) from which error or appeal lay to the House of Lords before 1876.

Every appeal is brought by way of petition for the reversal, variation or alteration of the order or judgment appealed against, or that the petitioner may have such other relief "as to His Majesty the King in His High Court of Parliament may seem meet." Since the Administration of Justice (Appeals) Act, 1934, no appeal lies from the Court of Appeal to the House of Lords save by leave of the one or the other.

The question whether the House of Lords is bound by its own previous decisions was raised as late as the year 1898 in the *London Street Tramways Co.* v. *London County Council* (*x*), when it was held to be so bound, Lord Halsbury (Lord Chancellor) considering the answer so clear that he gave his opinion in a few lines and without citing authority. The result of this auto-limitation in favour of the certainty of the law is that legislation is necessary to avoid the results of a bad decision of the House of Lords, though decisions may to a certain extent be evaded by "distinguishing" the facts.

IV. THE COUNTY COURTS.

The notion of a Court for poor men is not a novelty. In old days there was a Committee of the Privy Council known as the Court of

(*u*) For the Judicial Committee of the Privy Council, see *ante*, pp. 188—189.
(*x*) [1898] A. C. 375.

Requests which gave relief to the indigent and members of the royal household. It was associated at first with royal progresses, but in the time of Henry VIII fixed its habitat in Whitehall, and its Judges became known as Masters of Requests. It gave equitable relief and incurred the odium of the common law Judges. It came to an end during the Long Parliament, and is not to be confused with the Courts of Conscience or Courts of Request established in the eighteenth century in numerous towns at the desire of the inhabitants for trying actions for small debts.

The Courts of Request were abolished by the County Courts Act, 1846, which established a system of inexpensive local Courts with civil jurisdiction. Each County was divided into districts in which the new County Courts were to be held, generally once a month. A series of statutes, of which the County Courts Acts, 1888 and 1919, may be specially mentioned, increased their jurisdiction, which now rests mainly on the consolidating County Courts Act of 1934, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938.

This jurisdiction may be summarised as follows, the amounts stated forming the limit unless both parties agree to the case being heard in the County Court instead of in the High Court:—

(1) **Contract and Tort.**—Actions founded on contract or tort where the claim does not exceed £200; but the defendant may have the action transferred to the High Court if the claim exceeds £100. Actions for libel, slander, malicious prosecution, seduction or breach of promise of marriage, however, may only be tried in a County Court if the defendant consents.

(2) **Equitable Jurisdiction.**—Actions of an equitable nature, such as administration of estates, execution of trusts, foreclosure and redemption of mortgages, specific performance of contracts relating to land, maintenance and advancement of infants and dissolution of partnerships, where the value of the property, etc., concerned does not exceed £500.

(3) **Land.**—Actions for the recovery of land and questions of title to land, where neither the value nor the rent exceeds £100.

(4) **Probate.**—Probate in relation to real property (£300) and personal property (£200).

Various other statutes add:—

(5) Admiralty.—Some County Courts near the sea have a limited Admiralty jurisdiction in relation to such matters as salvage, towage, seamen's wages, hiring of ships and damage to cargo.

(6) Bankruptcy.—Some County Courts outside London have jurisdiction in bankruptcy and the winding-up of companies, the latter being limited by nominal capital.

(7) Disputes under "Social" Legislation.—A very important part of the work of the County Courts at the present day consists in the exercise of their original—and in some cases, exclusive—jurisdiction to decide disputes under various "social" statutes, *e.g.*, Agricultural Holdings, Employers' Liability, Housing, Increase of Rent and Mortgage Interest (Restrictions), Landlord and Tenant, and Workmen's Compensation Acts. Under the last-named the County Court Judge acts as arbitrator (*y*).

The County Courts have no criminal or divorce jurisdiction.

The High Court may transfer to the County Court an action which should have been commenced in the latter. Where an action which could have been tried in the County Court is tried in the High Court, the plaintiff though successful may lose all or part of his costs.

Procedure.—The procedure in County Courts is generally by plaint followed by summons, and summary trial by the Judge.

A County Court Judge must be a barrister of at least seven years' standing. The salary is £2,000. A Judge is appointed for each district on the recommendation of the Lord Chancellor, except within the Duchy of Lancaster, where appointments are made by the Chancellor of the Duchy. One Judge usually functions in a number of districts.

There may be a jury consisting of eight persons qualified to serve on a jury in the High Court. In cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, jury trial must be ordered on the application of either party, unless the Court considers that the case involves a prolonged

(*y*) The proposals contained in the second part of the Government's white paper on Social (National) Insurance, issued in 1944, will alter the basis of the law relating to Employers' Liability and Workmen's Compensation, and disputes will be decided by administrative tribunals.

examination of documents or accounts, or a scientific or local investigation which cannot conveniently be made with a jury. A jury is not allowed in Admiralty proceedings, proceedings under the Increase of Rent and Mortgage Interest (Restrictions) Acts, or appeals under the Housing Acts. In all other cases the Court has an absolute discretion to order a jury if—as in fact rarely happens—either party applies for one (County Courts Act, 1934, s. 91).

There is a right of appeal to the Court of Appeal on a question *of law or the admission or rejection of evidence, though in actions* of contract or tort not involving title to real property the leave of the Judge is generally required if the claim does not exceed £20. An appeal on questions of fact is available in Admiralty causes exceeding £100 in value (*z*).

(*z*) NOTE.—Some ancient civil Courts, with a local jurisdiction wider than that of County Courts, survive. The most important are the Mayor's and City of London Court, the Salford Hundred Court, the Liverpool Court of Passage and the Bristol Tolsey Court.

Among Courts of Special Jurisdiction are those which administer military law (*ante*, Chapter XXII) and ecclesiastical law (*ante*, Chapter XXIII).

There are also a number of "administrative tribunals" set up by Ministers and Government Departments, whose function is at most quasi-judicial and which are outside the ordinary judicial system; they are not for the most part staffed by professional lawyers Some of these are mentioned in Chapter XVIII. See further, Robson, *Justice and Administrative Law.*

CHAPTER XXVIII.

THE CRIMINAL COURTS.

CRIMINAL jurisdiction has so far been touched on incidentally in treating of the history of the Courts of common law; but it may now be convenient to summarise the past and present organisation of criminal justice as a whole.

Criminal jurisdiction has been and is mainly administered through the instrumentality of the Assize Courts, the Courts of Quarter Sessions and the Justices of the Peace or "magistrates."

In treating of these, it is not proposed to repeat what has already been said, nor to deal separately with historical origin and modern development. In connection with Assize Courts, for instance, it is unnecessary to recapitulate what has been said of Courts leet (*a*) or of the sheriff's tourn and view of frankpledge (*b*); and it is inconvenient to dissociate the Assize Courts, whose genesis is ancient, from the modern Central Criminal Court which was created by statute in 1834.

I. ASSIZE COURTS AND OTHER SUPERIOR CRIMINAL COURTS.

The early Norman Kings, as has been seen, occasionally travelled round the country administering justice in person. More often they dispatched deputies under royal "commissions" to discharge on their behalf governmental business, which included a fiscal and administrative as well as a legal province.

The institution of regular circuits for itinerant royal justices dates from the reign of Henry II. The Assizes of Clarendon (1166) and Northampton (1176) contain, *inter alia*, the Judges' instructions for dealing in particular with criminal and civil "pleas of the Crown." As early as Glanvil's time (temp. Henry II) the itinerant justices are distinguishable from the general body of the Curia. They do not yet specialise in judicial work; their activities embrace tax collection and general administration.

The General Eyre.—In these times the non-judicial classes of work indeed predominated, at least at certain special sessions of the

(*a*) See p. 337. (*b*) See p. 336.

travelling Judges known as the General Eyre. The General Eyre flourished during the reign of Edward I; thenceforward it waned, and became obsolete in the time of Richard II. Its object had been the essential one of keeping the King informed about local matters (*c*). Parliament, from the latter part of the thirteenth century onwards, supplied a competing and more efficient machinery for attaining this object.

The Judges' Commissions.—The formal mandate or authority issuing from the King to the circuit Judges was in the form of a "Commission." Until after Henry III's reign commissions were more often special than general: to try this or that specific matter, not all matters of a particular class. They were, moreover, issued irregularly, notwithstanding provisions in Magna Carta to the contrary; and until 1272 to laymen as well as to lawyers. In Edward I's reign, as might have been expected, the ragged ends of the system were trimmed. Order and symmetry were introduced. The commissions issued were now "general"; circuits were standardised, and assizes were directed to be held three times a year (Statute of *Nisi Prius*, 1285).

Circuit Judges held assizes under four commissions, one purely civil, two purely criminal, and one civil and criminal. These were the Commissions of (1) *Nisi Prius*, (2) Oyer and Terminer, (3) Gaol Delivery, and (4) Assize.

Notwithstanding the civil element contained in (1) and (4), it is convenient to treat of all four in this chapter.

(i) *The Commission of Nisi Prius.*—In Bracton's time the justices in eyre had jurisdiction to try all common pleas—cases between subject and subject—arising in a particular county, if they arrived in that county before the case could be heard by the Court of Common Pleas at Westminster. By the Statute of Westminster II (1285) this practice was applied to the circuits of the justices of assize. Civil cases begun by writ in the Courts of King's Bench and Common Pleas were only to be tried in those Courts on the day fixed "*nisi prius justitiarii itinerantes in illas partes venerint*" (if the itinerant justices have not come into those parts, *i.e.*, the county concerned, before that date).

(*c*) See further, Potter, *Historical Introduction to English Law* (2nd ed.), pp. 103—105, and the authorities there cited.

This system often saved litigants the trouble and expense of a journey to Westminster, and it was only by this means, says Holdsworth, "that the extreme centralisation of justice which resulted from the decline of the local Courts was made bearable" (*d*).

(ii) *The Commission of Oyer and Terminer.*—This commission empowered the travelling justices or other persons (called "Commissioners") to inquire concerning certain crimes alleged to have been committed within the area covered by the Commission, and to hear (*oyer*) and determine (*terminer*) the proceedings in respect of such crimes.

(iii) *The Commission of Gaol Delivery.*—In later times this commission was conferred on the same persons as discharged the one last-named, and directed the release from gaol and the trial of persons detained in prison. In earlier times—*e.g.*, that of Edward I—this office was assigned to different Commissioners from those of oyer and terminer, and the two sets of Commissioners were even on occasion charged to investigate each other's delinquencies.

(iv) *The Commission of Assize.*—This conferred a criminal, but also a limited civil, jurisdiction. "*Assisa*" meant originally a sitting or session; later what was done by those who sat, including legislative acts. Some of these legislative acts made provisions concerning title to land, others concerning possession. Jurisdiction under the latter head (which included the "Assizes" of "*novel disseisin*," "*mort d'ancestor*," and "*darrein presentment*" (*e*)) supplied a more convenient, if less direct, method of determining title to land than the "real" remedies, such as the "writ of right," and it was assigned increasingly to the royal justices owing to the difficulty of the questions involved. It was natural that the Courts administering this jurisdiction should come to be called "Assize" Courts.

The possessory assizes, however, declined, and were finally abolished in 1833. Not so the expression "assize" or "assizes," which clung to the jurisdiction of the Circuit Judges and ultimately designated the whole of it. At the present day England and Wales (*f*) are divided

(*d*) Holdsworth, *History of English Law*, vol. I (5th ed.), p. 230. These commissions are set out, *ibid.*, pp. 668—670.

(*e*) See Potter, *op. cit.*, pp. 431—433.

(*f*) It is convenient to mention here that the process of incorporating Wales into England for political and legal purposes, begun by Edward I (*Statutum Walliæ*, 1284),

into seven circuits (*g*), the Judges visiting one important town in each county, generally three times a year, and assizes are held at Leeds, Liverpool and Manchester four times annually. In modern times the Assize Judges have invariably been drawn from the King's Bench Division, but since the Supreme Court of Judicature (Amendment) Act, 1944, Judges of the Probate Divorce and Admiralty Division may hear divorce petitions at the chief Assize towns. The practice of conferring supplementary commissions on persons other than Judges (experienced King's counsel on the Circuit and County Court Judges are now eligible) still obtains, and such Commissioners enjoy the full powers, *pro hac vice*, of Circuit Judges.

The Central Criminal Court.—The present Court was constituted by the Central Criminal Court Act, 1834, its jurisdiction embracing the City of London, the county of Middlesex, and adjoining parts of Essex, Kent, and Surrey (*h*). Before the Act cases were tried at the sessions house, popularly known as the "Old Bailey" (*i*), under a commission of oyer and terminer for the City of London and a commission of gaol delivery for Newgate gaol. These commissions were issued at the commencement of each mayoralty to the Lord Mayor, the Lord Chancellor, the King's Ministers and Secretaries of State, the Judges of the Courts at Westminster, the Attorney- and Solicitor-General, the aldermen of the City of London, the Recorder, the Common Serjeant, and the Judges of the Sheriff's Court, any two of whom were entitled to act judicially at a trial.

The Central Criminal Court Act, 1834, provided that the Lord Mayor, the Lord Chancellor or Lord Keeper, the Judges of the King's

was completed by Henry VIII from 1535 onwards, and the judicial systems were amalgamated in 1830.

The Welsh Courts Act, 1942, provides that the Welsh language may be used in any Court in Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his national language of communication being Welsh. The oath or affirmation may be taken in Welsh. Interpreters will be provided at public expense. The proceedings are to be recorded in English. For the purposes of the Act, Wales includes Monmouthshire.

(*g*) (i) Northern, (ii) North Eastern, (iii) Midland, (iv) South Eastern, (v) Oxford, (vi) Western, (vii) North and South Wales (two Divisions).

(*h*) A charter of Henry I granted to the citizens of London the privilege of choosing their own justiciar, who was to hold pleas of the Crown, and a charter of Edward I conferred on the Lord Mayor the right to act as a justice of gaol delivery. The County of London, composed of parts of Middlesex, Essex, Kent and Surrey, was not created until the Local Government Act, 1888.

(*i*) From the name of the street, which is the site of an old keep or "bailey."

Bench, Common Pleas, and Exchequer, the Dean of the Arches (*k*), the Recorder, the Common Serjeant, the Aldermen, the Judges of the Sheriff's Court, ex-Lord Chancellors, ex-Judges, and others nominated by the Crown, should be the Judges of the Central Criminal Court. The Lord Mayor and aldermen are still in theory Judges, but by ancient custom the Lord Mayor and aldermen do not act judicially, neither do the Recorder, the Common Serjeant or the Judges of the Sheriff's Court try the more serious offences, though to form the necessary quorum either the Lord Mayor or an alderman sits by the side of the Judge. By section 15 of the Act offences on the high seas can be tried at the Old Bailey, though these cases, for the sake of convenience, are now also triable at certain assize Courts. The sessions are held once a month, or oftener if need be.

By the Central Criminal Court Act, 1856, the King's Bench (now King's Bench Division) may remove into the Central Criminal Court indictments for felony or misdemeanour committed beyond its jurisdiction, and by 25 & 26 Vict. c. 5, persons accused of murder in England or Wales under the Mutiny Act may be tried at the Central Criminal Court. The Winter Assizes Act, 1876, and the Spring Assizes Act, 1879, give power by Order in Council to annex the neighbouring counties or part of them to the Central Criminal Court for purposes of trial. Indictments under the Corrupt and Illegal Practices Act can be tried at the Old Bailey.

The Central Criminal Court became a branch of the High Court of Justice under the Judicature Act, 1873 (*l*).

The King's Bench Division of the High Court.—Something has been said above (*m*) of the criminal jurisdiction of the old Court of King's Bench. The King's Bench Division, as successor of the King's Bench, can try all indictable offences committed in England (*n*); but though it has this jurisdiction it is now only exercisable in the following cases:—

(1) where a criminal information *ex officio* has been filed at the Crown Office by the Attorney-General;

(*k*) *Ante*, p. 328.
(*l*) And see *R.* v. *Justices of the Central Criminal Court*, [1925] 2 K. B. 43.
(*m*) *Ante*, p. 344.
(*n*) See *R.* v. *Parke*, [1903] 2 K. B. 432; *R.* v. *Davies*, [1906] 1 K. B., at p. 37.

(2) where the High Court has directed that an indictment or inquisition shall be tried *at bar* (*i.e.*, before not less than three Judges) in the King's Bench Division; or

(3) where an indictment has been preferred or found by a grand jury (*o*) of the County of London and County of Middlesex (see Administration of Justice (Miscellaneous Provisions) Act, 1938).

Divisional Court.—A Divisional Court (two Judges) of the King's Bench Division may determine questions of law on a special case stated by a Court of summary jurisdiction. The Summary Jurisdiction Acts, 1857—79, provide that either party to a proceeding before a justice or justices upon an information or complaint which can be determined summarily, and any person aggrieved by a decision of a Court of summary jurisdiction, on the ground that it is erroneous in point of law or is in excess of jurisdiction, may apply to that Court to state a special case for the opinion of the High Court. The judgment of a Divisional Court in a "criminal cause or matter" is conclusive.

II. APPEALS IN CRIMINAL CASES.

The Court for Crown Cases Reserved.—This Court was established by statute in 1848, and lasted until the Criminal Appeal Act, 1907, came into force. Before the establishment of this Court it was the practice of Judges to reserve points of law in favour of a prisoner for the opinion of their colleagues, and there were informal gatherings of Judges at which counsel for both sides were present. By the Crown Cases Act, 1848, where a person had been convicted of any treason, felony or misdemeanour the Judge at the trial might at his discretion reserve a point of law for the consideration of a tribunal of common law Judges to be called the Court for Crown Cases Reserved. There was no obligation on the part of the Judge to reserve a point, and if he did not, the only remedy was to petition the Sovereign. The Court might be composed of any uneven number between three and thirteen, and the verdict of the majority prevailed. This Court was not affected by the Judicature Acts, 1873—75. Justices of quarter sessions and recorders could reserve points just as Judges of the superior Courts could.

(*o*) *Post*, p. 400.

The Court of Criminal Appeal.—This Court owed its genesis largely to the interest created by the case of Adolf Beck who, himself innocent, had twice been convicted and suffered imprisonment for crimes committed by a "double." The Criminal Appeal Act, 1907, abolished the Court for Crown Cases Reserved and writs of error in criminal cases, and established the Court of Criminal Appeal. The Court consists of the Lord Chief Justice and all the Judges of the King's Bench Division (Criminal Appeal Amendment Act, 1908). Three Judges constitute a quorum, and in no case is the number trying an appeal to be even.

Section 3 of the Criminal Appeal Act, 1907, provides that a person convicted on indictment may appeal to the Court of Criminal Appeal: (a) against his conviction on any question of law; (b) with the leave of the Court of Criminal Appeal or on the certificate of the Judge who tried him, on a question of fact or a question of mixed law and fact or on any other ground which the Court deems sufficient; and (c) with the leave of the Court of Criminal Appeal against sentence, unless the sentence is one fixed by law.

Under section 4 (1) the Court of Criminal Appeal must allow an appeal against conviction if they think that the verdict of the jury was unreasonable or cannot be supported by the evidence, or that the judgment of the Court below was a wrong decision of any question of law, or that on any ground there was a miscarriage of justice; but the Court may, although they think that the appellant's point might be decided in his favour, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred (*p*).

The decision of the Court is final unless the Attorney-General certifies that the decision involves a point of law of exceptional importance, and that it is desirable in the public interest that a further appeal should be brought, in which case appeal lies to the House of Lords. (Criminal Appeal Act, 1907, s. 1 (6).) The Attorney-General has so certified in a few cases, *e.g.*, *Woolmington* v. *Director of Public Prosecutions* (*q*).

For the **House of Lords** as a final Court in criminal cases, see Chapter IV.

(*p*) See *Stirland* v. *Director of Public Prosecutions*, [1944] A. C. 315.
(*q*) [1935] A. C. 462. See also *Ambrose* v. *Director of Public Prosecutions*, [1937] A. C. 576, and *Stirland* v. *Director of Public Prosecutions*, *supra*.

III. INFERIOR COURTS WITH CRIMINAL JURISDICTION.

(1) Courts of Quarter Sessions.—It was enacted by a statute of Edward III (1363) that the Justices of the Peace for each county should meet at least four times a year. Hence the name "Quarter Sessions." When the ancient County Courts (*r*) died out, these general meetings of the Justices became the chief organs of local government, and remained so until the reforms of the nineteenth century (*s*). It is now provided by the Criminal Justice Act, 1925, that General Sessions of the Peace shall be held in every county for judicial business once every quarter.

A Court of Quarter Sessions is a Court of first instance and of appeal. Two or more justices make a quorum. One of them, the chairman, acts as Judge, deciding questions of evidence and summing up to the jury, though really both or all are Judges. Two or more Courts may sit when the work is heavy. The Court can try all indictable offences with the exception of the following, which by the Quarter Sessions Act, 1842, and subsequent statutes, are triable only at Assizes: treason, murder and other capital offences; any felony (burglary excepted) which, when committed by a person not previously convicted of felony, is punishable with penal servitude for life; misprision of treason; offences against the Royal title, prerogative of government or either House of Parliament; offences punishable in the same way as a *præmunire*; blasphemy, perjury, and subornation of perjury; making or being privy to the making of false oaths; administering of unlawful oaths; forgery; burning corn, grain, wood, etc.; bigamy; abduction; concealment of birth; bribery; certain conspiracies; theft of records; stealing bills, etc., and documents relating to real property; and frauds by trustees, factors, etc., punishable under the Larceny Act of 1916.

In addition to this original jurisdiction this Court exercises appellate jurisdiction on the merits from decisions of magistrates in Petty Sessions; and where a matter arises out of an appeal from Petty Sessions, Quarter Sessions may state a case on a point of law for the decision of a Divisional Court of the King's Bench Division.

An appeal lies from its original decisions to the Court of Criminal Appeal on points of law, law and fact, fact alone, and against sentence.

(*r*) *Ante*, p. 333. (*s*) See *ante*, Chapter XXVII.

Although justices in quarter sessions can impose very heavy sentences, no legal qualification is necessary either for the members of the Court or the chairman. The Administration of Justice (Miscellaneous Provisions) Act, 1938, however, provides that the chairman may be a legally qualified person paid by the County Council, and if a qualified chairman is so appointed the jurisdiction of the Court is somewhat enlarged.

Borough Quarter Sessions.—Where a borough has a Court of Quarter Sessions the Court sits four times a year, and its judicial functions are similar to the county Court of Quarter Sessions Its Judge is the "Recorder" alone, who then becomes a borough magistrate *virtute officii*. He is appointed by the King on the recommendation of the Home Secretary, and must be a barrister of at least five years' standing. He is not eligible to stand for his borough in the House of Commons, neither can he be elected a member of the corporation. When necessary, he may appoint a deputy, similarly qualified, to do his work.

(2) Justices of the Peace.—Up to the time of Richard I, frankpledge was resorted to for maintaining public order (*t*), but, by a decree of Richard I's justiciar made in 1195, knights were assigned to receive oaths for the preservation of the peace. These knights were probably the precursors of the conservators of the peace, afterwards known as justices of the peace, who are first heard of in the reign of Edward III. In 1253 and 1264 there appear *custodes pacis*, who were occasionally chosen by the landowners of the shire but afterwards appointed by royal writ. By a statute of Edward III (1327) it was ordained that for the better maintaining of the peace good and lawful men be assigned to keep it, and by a statute of 1360 these men received the power of trying felonies and also obtained the title of justices of the peace. These justices were the precursors of the present Courts of quarter session.

Blackstone, however, states that the justices "seldom if ever try any greater offence than small felonies within the benefit of clergy; their commission providing that if any case of difficulty arises, they shall not proceed to judgment but in the presence of one of the justices of the King's Bench or Common Pleas or one of the judges of assize" (*u*). They cannot try any newly created offence without express power

(*t*) *Ante*, p. 335. (*u*) Blackstone, Comm., IV, 271.

given them by the statute which creates it. "These justices," says Blackstone, "are appointed by the King's special commission under the Great Seal, the form of which was settled by all the judges in 1590." Numerous statutes have conferred on justices jurisdiction both civil and criminal.

County justices.—For a long time before the Local Government Act, 1888, the administrative work of the county fell to the lot of the justices. That Act, while it left alone their judicial work, withdrew the bulk of their administrative functions It should be said, however, that by means of a joint committee the magistrates and the county council jointly superintend the county police.

A person is appointed a county magistrate by the Lord Chancellor, who usually selects a person recommended by the Lord-Lieutenant. The Lord Chancellor, however, it is believed, can appoint county justices independently of the Lord-Lieutenant (*x*). The post has no salary attached to it, and no property qualification is now necessary.

Borough justices.—Before the passing of the Municipal Corporations Act, 1835, borough magistrates were not only ignorant of law but often lacked the rudiments of education. Recorders were often laymen; borough coroners, petty tradesmen; and aldermen, *ex officio* magistrates.

The Municipal Corporations Act, 1835, purged the Augean stable by substituting magistrates appointed by the Lord Chancellor for illiterate and undesirable persons who had contrived to get elected members of the corporation. That Act is now repealed and replaced by the Municipal Corporations Act, 1882.

The mayor is a magistrate *ex officio* during his year of office and the year after.

Boroughs can petition the Crown for the appointment of a stipendiary magistrate, who is then appointed by the Home Secretary. He must be a barrister of at least seven years' standing, and he has the same powers, sitting alone, as a petty sessional Court of two or more justices.

The Lord Mayor and aldermen of the City of London have the same powers as a stipendiary magistrate.

(*x*) *Report of the Royal Commission on the Selection of Justices of the Peace* (1910), Cmd. 5250.

Powers of magistrates generally.—One magistrate acting alone has very limited powers unless he be a stipendiary. He can, however, hear a case before committing for trial, bail the prisoner, take his recognisances to appear, and discharge him if the evidence is insufficient to commit him for trial. A *petty sessional Court* consisting of two justices (whether county or borough magistrates) has far more power of acting judicially than one ordinary justice sitting alone.

Numerous civil judicial powers have more or less recently been conferred on magistrates. They can make orders in bastardy cases, grant judicial separations between husband and wife, make maintenance orders against a husband in favour of his wife up to £2 per week, and exercise limited jurisdiction as to ejectment. They can also license places for the sale of intoxicants. Many of their duties are purely ministerial.

Magistrates have important judicial duties under the Summary Jurisdiction Acts, 1848—79. A *Court of summary jurisdiction* is a Court criminal and civil, consisting of two or more justices. It is an open Court to which the public can, as a rule, demand admittance. It can try a man in his absence, though it can enforce his attendance on a warrant of arrest if it chooses. It usually tries cases of minor, though increasing, importance. The Lord Mayor, or any alderman of the City of London, or a stipendiary magistrate or his deputy, constitute a Court of summary jurisdiction, even when sitting alone.

Justices of the peace, in addition to administrative work, occupy judicial positions, but they are on a different footing as regards liability for acts done in the discharge of their official duties from High Court and even County Court Judges. They may be civilly and criminally responsible for such acts.

A civil action for damages lies against a justice of the peace where it can be shown that he has acted not only maliciously, but without reasonable and probable cause; or that he has acted without, or in excess of, jurisdiction (Justices Protection Act, 1848, s. 1). The most usual cause of action in such a case would be false imprisonment and trespass to person or goods. Where a civil action lies, the defendant has the benefit of the Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939 (*y*).

(*y*) *Ante*, p. 394.

According to the prevailing opinion, a magistrate, like a Judge, is not liable for defamatory words used in Court, but when he is transacting administrative work he is wise to choose his language cautiously. A meeting of licensing justices is not a Court where slanderous words can be uttered with impunity (*z*).

An order of mandamus lies to compel a judicial authority or a public body to fulfil a public duty. Disobedience by justices to this order may, in certain circumstances, subject them to payment of costs.

Juvenile Courts.—The Children Act, 1908, required a Court of summary jurisdiction, when hearing charges against children and young persons, to sit either in a different building or room from that in which the ordinary sittings of the Court were held or else at different times or places. A Court so sitting was given the name of a "Juvenile Court."

The Children and Young Persons Act, 1933, goes considerably further. Under this Act no charge against a "child" (*i.e.*, a person under fourteen years of age) or "young person" (*i.e.*, a person of fourteen years or upwards and under seventeen) may be heard by a Court of summary jurisdiction other than a Juvenile Court, that is, a Court of summary jurisdiction sitting for that purpose. A Juvenile Court must sit in a different room or building from that in which Courts for adults are held, or on different days. The general public is excluded but not the Press, though no names or photographs may be published in the report. Special provisions are made for the punishment *or other treatment* of children and young persons: in particular, a person under eighteen may not be sentenced to death, a young person may not be sentenced to penal servitude, and a child may not be sentenced to penal servitude or imprisonment.

The Clerk of the Peace is now appointed by a joint committee of quarter sessions and the county council. He is usually paid fees for what he does instead of a salary. He has various duties. He may be clerk to the county council; he has certain duties in connection with quarter sessions juries and jury lists in general; he keeps the records of quarter sessions and justices out of session; he or his deputy usually attends the justices in quarter sessions and advises them on

(*z*) For slanderous words used in Court, see *post*, p. 398.

points of law. He is almost always a solicitor by profession. When he devotes his entire time to county duties he, like other county officials, cannot sit in Parliament.

Clerks to magistrates or their deputies usually attend the magistrates at petty sessions, write down the depositions and give legal advice to the magistrates. The post is a salaried one, and is almost invariably given to a solicitor. The salary is paid by the county council.

(3) Coroners.—*Origin of the Office of Coroner.*—According to Maitland the office of coroner dates from 1194, when it was provided that three knights and one clerk were to be elected in the County Court to keep the pleas of the Crown (*a*). The duties of the ancient coroner resembled in many respects his duties at the present day, but amongst other things he had to keep a roll of suspected persons, to act as a check not only on the sheriff but on the jury of presentment.

Again, when a man who was suspected of a crime fled to the nearest church for safety ("sanctuary") the coroner was sent for. The coroner talked with the refugee, giving him the option of abjuring the realm or throwing himself on his country. If the prisoner chose the first alternative he was taken to the nearest available port and shipped, and if he returned was executed. Abjuring the realm in this instance entailed forfeiture of property. Again, when a man desired to "appeal" another of felony, the coroner was approached. The ancient coroner had also jurisdiction over wreck, whales, sturgeons, and deodands (*b*).

Present Jurisdiction of Coroners.—The coroner still has jurisdiction in cases of treasure trove (*b*) and where the sheriff is personally interested in a case the coroner acts as his substitute. But his chief duty is to inquire into the deaths of persons who have died suddenly, by violence, under suspicious circumstances, in prison, or at the hands of the hangman. (Coroners Act, 1887.) The witnesses are examined on oath, the coroner discharging the office of Judge. The coroner can enforce a *post mortem* examination, and insist on the attendance of medical and other witnesses. He can order exhumation, though in cases of doubt, or where other graves would be interfered with, he usually gets the Home Secretary's order. The coroner can commit the accused for trial, and in manslaughter cases admit him to bail.

(*a*) Maitland, *Constitutional History*, pp. 43—44. (*b*) *Ante*, p. 167.

The Coroners (Amendment) Act, 1926.—By section 1 of the Coroners (Amendment) Act, 1926, coroners, who may be of either sex, appointed after the statute has come into force, must be either barristers, solicitors, or general medical practitioners of at least five years' standing in their profession. Mayors, aldermen and councillors, during their term of office and for six months thereafter, are disqualified for the post.

The Act provides that a coroner may hold an inquest without a jury unless there is reason to suspect that the death:—

(1) was caused by murder, manslaughter, or infanticide; or

(2) occurred in prison or in such place or in such circumstances as to require an inquest other than under the Coroners Act, 1887; or

(3) was caused by an accident, poisoning, or disease, notice of which is required to be given to a Government Department or to any inspector or other officer of a Government Department; or

(4) was caused by an accident arising out of the use of a vehicle in a street or public highway; or

(5) occurred in circumstances the possible recurrence of which is prejudicial to the health of the public or a section of the public.

When a jury is summoned it consists of from seven to eleven persons. The jury need not view the body unless the coroner so directs (section 14). The coroner may accept the verdict of a majority of the jury where they fail to agree and the dissentients are not more than two (section 15). Otherwise, if the jury fail to agree, the coroner may discharge it and summon another. An inquest may be held by order of the Secretary of State where a body has been destroyed or is irrecoverable (section 18).

Where the coroner has been informed that some person has been charged with murder, manslaughter, or infanticide, he may adjourn the inquest till after the conclusion of the proceedings and discharge the jury (section 20). The coroner may order a *post mortem* examination without holding an inquest in cases of sudden death (section 21).

The Coroners (Amendment) Act, 1926, carried out some of the recommendations of a Committee on Coroners which had been set up in 1908. Further drastic changes were recommended by another Committee in 1936 (*c*), but so far they have not been implemented by legislation.

(*c*) *Report of the Committee on Coroners* (1936), Cmd. 5070.

Various kinds of coroners.—There are about 200 county coroners, who are chosen by the county council, and about 75 borough coroners, who are chosen by the borough council. In 1927 there were 54 "franchise coroners," chosen according to the charter of prescription. For example, the coroner for Westminster is chosen by the dean and chapter. Borough councils cannot elect a coroner unless they possess more than 10,000 in population and in addition possess a bench of borough magistrates. A county coroner must be a freeholder in the county. A High Court Judge is a coroner *virtute officii*, but no instance is recorded of Judges holding inquests. The Lord Chancellor can dismiss a coroner for inability or misbehaviour. Where a coroner misbehaves he is generally guilty of a misdemeanour.

(4) The Sheriff.—Though the sheriff is an executive rather than a judicial officer, it is convenient to deal with him here The sheriff (*vice-comes*) was formerly the deputy of the earl or ealdorman of the shire, and when the bishop and earl gradually desisted from judicial work at the County Court the sheriff took upon himself their functions. When in the reign of Henry II royal justice began to override local justice, it frequently fell to the lot of the sheriff to execute the King's writs. To this circumstance can be attributed the present function of the sheriff in executing writs of *fieri facias*, *elegit*, *capias*, and similar writs.

There are two kmds of sheriffs, viz., sheriffs of counties and sheriffs of certain ancient cities and boroughs, chosen by those towns.

The county sheriff is elected in the following manner: The Chancellor of the Exchequer and certain Judges of the High Court meet at the Royal Courts of Justice, Strand, on 12th November in each year, and choose three men of sufficient means from each county. The Sovereign pricks the name of one of these three men, who is then duly constituted sheriff of the county for the year. The sheriff is bound to serve without salary, but he is consoled by the fact that he takes precedence over the entire county, the Lord-Lieutenant excepted. If he refuses his services he can be fined, though he may be excused from taking the office in special circumstances.

His duties are to execute High Court writs, summon juries, supervise executions of persons sentenced to death, and perform the duty of returning officer at a Parliamentary election. Since the passing of the

Prisons Act, 1877, the sheriff has no longer control over prisoners in his county. He has to wait upon the Judges at the assizes, and to pay liberally for their entertainment. Though almost all the duties of the sheriff are undertaken by his deputy, the under-sheriff, the former is responsible for the acts of the under-sheriff and all persons engaged under him, *e.g.*, bailiffs who execute writs of execution. Where the sheriff's underlings commit tortious acts in the course of their employment, the sheriff is responsible, *e.g.*, trespassing in a man's house.

When judgment has been entered in the High Court for an unliquidated amount (interlocutory judgment), it often falls to the lot of the sheriff to assess the damages. On these occasions the under-sheriff sits in Court as Judge and hears both sides on the question of damages and all matters relevant thereto. A jury of twelve men then fix the damages. He has similar functions in compensation cases where land is compulsorily taken.

CHAPTER XXIX.

JUDGES AND JURIES.

I. THE CONSTITUTIONAL POSITION OF THE JUDGES.

The Appointment of Judges.—We have seen that puisne Judges of the High Court are appointed by the Crown on the advice of the Lord Chancellor, who no doubt consults the Prime Minister; that the other Judges of the superior Courts are appointed by the Crown on the advice of the Prime Minister, who presumably consults the Lord Chancellor; and that Judges and magistrates of inferior Courts are generally appointed by the Lord Chancellor, though some are *ex officio*. The qualifications required for the various judicial offices have also been noticed, as has the fact that Justices of the Peace need have no legal qualifications, though in some cases there may be a qualified chairman.

The Functions of the Courts.—The work of the Courts is, of course, mainly judicial, and involves the interpretation of the common law and statute law, and its application, according to the rules of procedure and evidence, to the cases which come before them. The Courts have also certain subsidiary executive or administrative functions, a fact which has been noticed especially in the case of the Justices of the Peace. The superior Courts supervise such matters as the affairs of infants and lunatics, the administration of trusts and of insolvent estates, and the liquidation of companies, and they issue declarations of legitimacy or legitimation (Legitimacy Act, 1926), and nullity of marriage.

The Supreme Court also has powers of delegated legislation, *i.e.*, to make rules of Court. This power it exercises through its Rule Committee, which consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, four Judges, two barristers, and two solicitors. The rules are required to be laid before Parliament. (Judicature (Consolidation) Act, 1925.)

Judicial Independence.—We have now to consider how the independence of the judiciary from political and other external

interference—one of the most important principles of the British Constitution—is secured. The main topic under this heading is the nature of the tenure of the judicial office and the manner in which Judges may be removed.

The Removal of Judges.—Down to the reigns of James I and Charles I, Judges, other than the Barons of the Exchequer, usually held office *durante bene placito nostro* (during the King's pleasure) and, like other Crown servants, could be dismissed by the King at will. This fact had a certain effect on the decisions of the Courts in those reigns, and, indeed, Coke was dismissed in 1616 for the attitude he adopted in the *Case of Commendams* (*a*). In the Commonwealth period Judges were appointed to hold office *quamdiu se bene gesserint* (during good behaviour), but Charles II and James II in many cases revived the former practice (*b*). William III's Judges held office during good behaviour, but when Parliament in 1691 wanted to put the matter on a statutory basis owing to the doubt whether at common law "good behaviour" meant only good behaviour in relation to the Crown, William refused his consent because the Bill charged their salaries on the hereditary revenues (*c*). At last the Act of Settlement, 1701, which was to come into force when the Hanoverians ascended the throne, provided "that . . . judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them."

It is commonly but erroneously stated that as a result of the Act of Settlement Judges can *only* be dismissed by the Crown on an address by both Houses of Parliament. The true position, however, is stated by Anson as follows: ". . . the words mean simply that if, in consequence of misbehaviour in respect of his office or from any other cause, an officer of state holding on this tenure has forfeited the confidence of the two Houses, he may be removed, although the Crown would not otherwise have been disposed or entitled to remove him. Such officers hold, as regards the Crown, *during good behaviour*; as regards Parliament, also during good behaviour, though the two Houses may extend the term so as to cover any form of misconduct

(*a*) (1616), Hob. 140; see Maitland, *Constitutional History*, pp. 270—271.
(*b*) Holdsworth, *History of English Law*, vol. I (5th ed.), p. 195.
(*c*) Holdsworth, *op. cit.*, vol. VI, p. 234.

which would destroy public confidence in the holder of the office" (*d*). The King would be bound by convention to act on such an address (*e*). The first case in which Parliament initiated proceedings for the removal of a Judge under the Act of Settlement was that of Mr. Justice Fox, of the Irish bench, in 1805; but it was abandoned on the ground that the proceedings should have commenced in the Commons instead of in the Lords. The first case which resulted in removal was that of Sir Jonah Barrington, another Irish Judge, in 1830. Most of the cases—and they are few—have concerned colonial Judges or Judges accused of partiality in hearing election petitions (*f*).

By a statute of George III, and now the Demise of the Crown Act, 1901, the tenure of judicial office is no longer affected by a demise of the Crown. Judges' salaries are now charged by statute on the Consolidated Fund, so that they do not come up for review by the Commons every year

The principles of the Act of Settlement, as regards Judges of the High Court and the Court of Appeal, were incorporated in the Judicature Acts, 1873—1925. The same principles were applied to the Lords of Appeal in Ordinary by the Appellate Jurisdiction Act, 1876. The Lord Chancellor, however, remains dismissible at pleasure as he is a Minister of the Crown.

The Lord Chancellor can remove County Court Judges, coroners and justices of the peace for misconduct, and in some cases incompetence, under various statutes. Justices of the Peace receive general guidance from the Home Secretary on the exercise of their functions.

It is hardly necessary to add that Judges could be removed by Act of Parliament, though there seems to be no point in adopting that form except to circumvent the House of Lords under the provisions of the Parliament Act, 1911, in a case where the Crown was not justified in dismissing by itself (*g*).

(*d*) Anson, *Law and Custom of the Constitution* (4th ed., Keith), vol II, Part 1, pp. 234—235.

(*e*) As to what amounts to misbehaviour in a public office, and the methods by which an office in which a person has a life interest may be forfeited, see Todd, *Parliamentary Government in England* (2nd ed.), vol. II, pp. 857—859; Anson, *ibid.*, pp. 235—236.

(*f*) For an account of a number of cases, and the principles and procedure established, see Todd, *ibid.*, pp. 861 *et seq.*

(*g*) The only kind of Bill which cannot become law under the provisions of the Parliament Act, 1911, without receiving the assent of the House of Lords is a Bill to extend the maximum duration of Parliament beyond five years; *ante*, p. 96.

Are the Judges "Crown Servants"?—A great stir was caused in 1931 when the Commissioners of Inland Revenue reduced the salaries of the Judges of the Supreme Court, purporting to act under the authority of an Order in Council made under the National Economy Act of that year. The Act provided that, in order to effect economies at that time of economic crisis, the remuneration "of persons in His Majesty's Service" might be reduced, even though the amount of the remuneration "in respect of certain officers in the service of His Majesty" was specified in statutes. It was widely thought that the Inland Revenue were not justified in making the deductions, as Judges are not properly regarded as servants of the Crown. There was no tribunal which could determine the question, because, as will be seen later, a Judge cannot be judge in his own cause. It should be added that the Judges themselves were willing to make the same sacrifices as many other members of the community, but it was considered that if Parliament had intended the Act to apply to them they should have been specifically mentioned.

Professor Holdsworth argued that the Judges are not properly called "servants" of the Crown because they are not subject to the orders of the Crown as to the manner in which they shall discharge their duties. On the contrary, such eminent authorities as Bracton, Fortescue and Coke could be cited—against Bacon—to the effect that the King is subject to the law, and the Judges enforce the law even against the King. It was not relevant to the question to consider whether Judges were paid or dismissed by the Crown. "It is a nice problem," Holdsworth added, "but the difficulty is to find out who is to solve it" (*h*).

As theory, the question was not solved; but it was solved in practice soon afterwards by the Inland Revenue restoring the cuts in deference to public opinion.

No duty to advise the Executive.—It is often said that one of the hallmarks of the independence of the English judiciary is that they have no duty to advise the executive on cases which do not come before the Courts in the ordinary course of litigation. That such a duty does not necessarily impair the independence of the Courts is shown by the fact that it exists in many constitutions, including

(*h*) Holdsworth, *The Constitutional Position of the Judges* (1932), 48 Law Quarterly Review, pp. 25—36.

those of Canada and Eire, and also, as we have seen, in our constitution in the case of the Judicial Committee (*i*). But in 1925 a great outcry was raised in the House of Lords when it was proposed in the Rating and Valuation Bill that advisory judgments should be allowed on rating questions.

Such advisory functions should be distinguished from the ancient duty of the Judges to advise the House of Lords in its judicial capacity (*k*), and from the binding declaratory judgments which may be given in certain cases (*l*).

Judicial Impartiality.—*Exclusion from the House of Commons.*—The exclusion from sitting in the House of Commons of the Judges of the Supreme Court by the Judicature Acts, and of other whole-time paid Judges by various statutes, is now based on the modern constitutional doctrine that Judges should not take part in political and party controversy (*m*). The rule extends to Judges of the Court of Session and the High Court of Justiciary in Scotland by the Parliamentary Elections (Scotland) Act, 1733.

As a matter of historical fact, however, the exclusion of Judges from the House of Commons was formerly based on different principles. When the Commons asserted their right to exclude James I's Judges they did so on the ground of Parliamentary privilege, because the Judges of the common law Courts were advisers of the House of Lords. For the same reason, the Law Officers of the Crown should have been disqualified, but in this case the disqualification was eventually waived. The rule existed at common law, or by the law and custom of Parliament, before 1707; and it seems that the Place Act, 1707, would not have availed to exclude the Judges, since they would have been elegible for re-election as the holders of "old" offices. In fact, the Master of the Rolls was not disqualified until the Judicature Act, 1873 (*n*).

Disqualification does not attach to Justices of the Peace whose office is unpaid and part-time, and who have always formed a valuable element of the House of Commons.

(*i*) *Ante*, p. 189. (*k*) *Ante*, p. 53.

(*l*) See *Dyson* v. *Att.-Gen.*, [1912] 1 Ch. 158, *ante*, p. 294.

(*m*) Here, again, the Lord Chancellor as a member of the Government is to some extent an exception.

(*n*) *Report and Minutes of Evidence of the Select Committee on Offices or Places of Profit under the Crown* (1941), H. C. Pap. 120, p. 147 (Memorandum by the Clerk of the House of Commons); see further, *ante*, pp. 72—78.

Natural Justice.—"The first and most fundamental principle of natural justice is that a man may not be a judge in his own cause" (*o*). Thus in *Dimes* v. *Grand Junction Canal* (1852) (*p*), the House of Lords, after consulting the Judges, set aside a decree of the Lord Chancellor, Lord Cottenham, granting relief to a company in which he was a shareholder. In that case Lord Campbell said: "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern, but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And it is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decision on that account was a decision not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence" (*q*). In the earlier case of *Bridgman* v. *Holt* (1693) (*r*), when the puisne Judges of the King's Bench were determining the question whether the valuable sinecure office of Chief Clerk of the King's Bench was in the gift of the Chief Justice, the latter took no part in the decision but sat "near the defendant's counsel upon a chair uncovered."

This principle is not confined to cases of pecuniary interest, but has been applied, for example, by the Court of Appeal to a decision of borough justices on a matter arising out of a proposal which, as Councillors, they had supported in the Borough Council. (*R.* v. *Sunderland Justices* (1901) (*s*).)

Publicity of Proceedings.—One of the chief safeguards of the impartial

(*o*) *Report of the Committee on Ministers' Powers* (1932), Cmd. 4060, p. 76.
(*p*) 3 H. L. C. 759.
(*q*) The Lord Chancellor may, however, sit in the House of Lords or the Judicial Committee in a case involving political questions in which the Government, of which he is a member, is interested; see *e.g.*, *Marais* v. *G. O. C.*, *Ex parte Marais*, [1902] A. C. 109.
(*r*) Shower, P. C. 111.
(*s*) [1901] 2 K. B. 357; see also *R.* v. *Rand* (1866), L. R. 1 Q. B. 230.

administration of justice lies in the common law right of the public, including the press, to be present, and to publish fair comments on the proceedings. This is embodied in the maxim that it is not sufficient that justice be done, but it must be seen to be done. (*Scott* v. *Scott* (1913) (*t*).) Fair reports of contemporary judicial proceedings are privileged. (*Kimber* v. *The Press Association* (1893) (*u*).)

The Courts have a discretion, which must be carefully exercised, to hear proceedings *in camera* on grounds of public policy, *e.g.*, where secret information which might endanger the safety of the State is to be divulged, or to clear the Court for the suppression of disorder. Statutory limitations on grounds of public morality are imposed in certain cases on the details which may be published, *e.g.*, under the Judicial Proceedings (Regulation of Reports) Act, 1926 (divorce, nullity, and similar causes), the Children and Young Persons Act, 1933 (*x*), and the Summary Procedure (Domestic Proceedings) Act, 1937.

Judicial Immunity.—Judges are exempt from liability for judicial acts done within their jurisdiction, even if done maliciously (*Anderson* v. *Gorrie* (1895) (*y*)), except that Judges of the Supreme Court are liable to a penalty of £500 for wrongfully refusing to issue a writ of *habeas corpus* in vacation in the case of a person in custody on a criminal charge. (Habeas Corpus Act, 1679, s. 10 (*z*).)

Judges of superior Courts are apparently not liable for judicial acts done outside their jurisdiction (*Hamond* v. *Howell* (1677) (*a*); *Houlden* v. *Smith* (1850) (*b*); *Anderson* v. *Gorrie*, *supra*), and the acts of a superior Court are presumed to be within their jurisdiction. (*Peacock* v. *Bell* (1666) (*c*).) Anyway, there is no tribunal to enforce such liability.

Judges of inferior Courts, including Courts-martial (*d*) and consular Courts (*e*), are liable for judicial acts done outside their jurisdiction (*Houlden* v. *Smith*, *supra*), and the acts of an inferior Court are

(*t*) [1913] A. C. 417 (circulation of details of nullity suit to interested parties)
(*u*) 62 L. J. Q. B. 152; but see below as to contempt of Court.
(*x*) For proceedings in Juvenile Courts, see *ante*, p. 385.
(*y*) [1895] 1 Q. B. 670 (Colonial Court); see also *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220 (County Court).
(*z*) A writ formerly lay under the Statute of Westminster II, 1285, against a Judge who refused to seal a bill of exceptions.
(*a*) 2 Mod. 219.
(*b*) 14 Q. B. 850.
(*c*) 1 Wms. Saund., at p. 74.
(*d*) *Dawkins* v. *Lord F. Paulet* (1869), L. R. 5 Q. B. 94; *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255; *ante*, p. 309.
(*e*) *Haggard* v. *Pelicier Frères*, [1892] A. C. 61.

presumed to be without the jurisdiction. (*Peacock* v. *Bell*, *supra*.) But the Judge of an inferior Court will not be deemed to have acted without jurisdiction if he was induced to act by some false allegation of fact which, if true, would have given him jurisdiction. (*Houlden* v. *Smith*, *supra*; *Calder* v. *Halket* (1839) (*f*).)

The modern principles were of slow growth. In the early common law there was no conception of an appeal against a judgment on the ground that it was based on an incorrect application of the law, or a mistaken interpretation of the facts; proceedings against a judicial decision were not distinguished from a complaint against the Judge himself. In the case of a judgment of a Court of record the complainant might bring a writ of error based either on some error on the face of the record, or on some ruling contained in a bill of exceptions which Judges could be required to seal by the Statute of Westminster II, 1285 (*g*). By Edward III's reign it was established that one could not go behind the record to fasten civil or criminal responsibility for false judgment. No such immunity was given to Judges of Courts not of record, who could be fined for false judgment, whether they acted without jurisdiction or in abuse of jurisdiction; nor did the immunity extend to a Court of record acting without jurisdiction, e.g., if the Court of Common Pleas should entertain a criminal appeal. (*Case of the Marshalsea* (1613) (*h*).) The judgment in *Floyd* v. *Barker* (1608) (*i*) shows traces of a more modern rule of immunity of superior Courts of record acting within their jurisdiction, based not so much on the fact that they are Courts of record as on the fact that otherwise "there will never be an end of causes; but controversies will be infinite." The distinction between superior and inferior Courts began to develop in the seventeenth century, and was the product of two principles, *viz.* (i) the jurisdiction of inferior Courts is limited by subject-matter, persons or place, while superior Courts are not so limited, and (ii) inferior Courts are answerable to the superior Courts if they exceed their jurisdiction, while superior Courts are answerable only to God and the King (*k*).

(*f*) 3 Moo. P. C. 28. Cf. below, as to justices of the peace.

(*g*) Holdsworth, *History of English Law*, vol. I (5th ed.), pp. 213—226.

(*h*) 10 Co. Rep., at 76 a. The reference here is not to an appeal in the modern sense in a criminal matter, but to one of the ancient modes of criminal accusation.

(*i*) 12 Co. Rep. 23.

(*k*) Holdsworth, *op. cit.*, vol. VI, pp. 234—240.

Justices of the Peace do not have such an extensive immunity as Judges. They are not liable for defamation uttered in their judicial capacity (*Law* v. *Llewellyn* (1906) (*l*)), but generally they may be sued for acts done without jurisdiction, and for wrongful acts done maliciously or without reasonable and probable cause within their jurisdiction. (Justices' Protection Act, 1848, ss. 1 and 2.) Action must be commenced within six months (*m*).

For the sake of completeness it should be noticed that immunity from suit attaches to words spoken in the course of judicial proceedings by the parties (*Astley* v. *Younge* (1759) (*n*)), witnesses (*Seaman* v. *Netherclift* (1876) (*o*)), and counsel (*Munster* v *Lamb* (1883) (*p*)), and to the verdicts of juries. (*Bushell's Case* (1670) (*q*).)

Contempt of Court.—Judges have no general immunity from criticism of their judicial conduct, provided that it is made in good faith and does not impute improper motives to those taking part in the administration of justice: it must be genuine criticism, and not malicious or an attempt to impair the administration of justice. "Justice is not a cloistered virtue," said the Judicial Committee in a recent case; "she must be allowed to suffer the scrutiny and respectful, though outspoken, comments of ordinary men" (*r*). It is a convention that the judicial conduct of Judges of the Supreme Court should not be reflected on in Parliament by a question, or by way of amendment, or in debate, unless the discussion is based on a substantive motion in proper terms

When criticism steps beyond the proper bounds, the Courts have power to punish the offender for contempt Contempt of Court may be either civil or criminal. Civil contempt of Court consists of disobedience to an order of the Court made in civil proceedings. Though punishable by fine or imprisonment, this is merely a form of civil process (*s*). Criminal contempt of Court is a common law misdemeanour, and may take such forms as: (i) contempt committed in face of the Court, such as directly insulting the Judge; (ii) interference

(*l*) [1906] 1 K. B. 487.
(*m*) Section 32 of the Limitation Act, 1939 (see *ante*, p. 295), provides that that Act shall not apply to any action for which a period of limitation is prescribed by any other enactment.
(*n*) 2 Burr 807.
(*o*) 2 C. P. D. 53.
(*p*) 11 Q. B. D. 588.
(*q*) 6 St. Tr. 999; see further, *post*, p. 402.
(*r*) *Ambard* v. *Att.-Gen. for Trinidad and Tobago*, [1936] A. C., at p. 335.
(*s*) *Scott* v. *Scott*, [1913] A. C. 417.

with jurors, parties or witnesses, or the publication of comments on a pending case which are calculated to prejudice a fair trial and so to interfere with the course of justice; (iii) the publication of matter scandalising the Court, *e.g.*, scurrilous abuse of a Judge with reference to remarks made by him in a judicial proceeding.

Criminal contempt of Court is punishable in the ordinary way by fine and imprisonment. Superior Courts may also impose such punishment summarily by attachment and committal, and any Court of record can punish contempt committed in face of the Court by immediate fine and imprisonment. An inferior Court of record has in general no jurisdiction to punish contempt summarily unless it is committed in face of the Court. The King's Bench Division has power to protect inferior Courts against contempt to the extent that they cannot protect themselves (*t*). Many people think that the summary power of attachment and committal is too wide, and that, especially in the interests of freedom of the Press, trial by jury should be more general in charges of contempt.

Criminal contempt of Court by a member of Parliament is not protected by Parliamentary privilege. (*Mr. Long Wellesley's Case* (1831) (*u*).) The prerogative power of pardon extends to contempt of Court. (*Re Bahama Islands Special Reference* (1893) (*x*).)

II. THE JURY IN CRIMINAL AND CIVIL CASES.

Trial by Jury and the English Constitution.—The belief was strongly held in the eighteenth century, and it has since become an accepted tradition, that trial by jury is one of the chief protections of the rights of the subject and a bulwark of the English constitution. Thus Blackstone, after discoursing upon the "antiquity and excellence of this trial" in civil cases (*y*), says that his remarks "will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another. . . . Our law has therefore wisely placed this strong and twofold barrier, of a

(*t*) *R.* v. *Judge*, [1931] 2 K. B. 442; *R.* v. *Daily Herald*, *Ex parte Bishop of Norwich*, [1932] 2 K. B. 402 (Consistory Court).

(*u*) 86 Commons' Journals, 701.

(*x*) [1893] A. C. 138.

(*y*) Bl. Comm. III, 379.

presentment (*z*) and a trial by jury, between the liberties of the people and the prerogative of the crown. . . . So that the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate" (*a*). So Lord Camden said: "Trial by jury is indeed the foundation of our free constitution; take that away, and the whole fabric will soon moulder into dust"; and Lord Eldon is stated when Solicitor-General to have professed "a most religious regard for the institution of juries, which he considered the greatest blessing which the British Constitution had secured to the subject" (*b*).

A recent writer, however, after examining the matter concludes that juries have in fact played "an insignificant part" in disputes between the citizen and the State. The Court most actively concerned, the King's Bench Division (formerly the King's Bench), exercises its jurisdiction in relation to prerogative writs or orders and appeals by case stated from summary Courts, without juries. Where a jury has been used in cases reported for their legal interest, it "either (a) answered questions so put that the jury cannot have known in whose favour they were finding, or (b) followed the Judge's opinion."

In reading Howell's *State Trials*—a series of political trials, including sedition, reported for their political interest regardless of whether an important point of law was involved—Dr. Jackson says it is impossible to predict what the jury is going to do. "The only cure for admiration of these juries," he adds, "is to read the *State Trials*, and ponder over the possibility that if the printer put 'guilty' when he meant 'not guilty' and *vice versa*, you would not have noticed anything odd." This fact he attributes largely to the restricted qualification of jurors and the mode of selecting juries (*c*).

Criminal Juries.—*The Grand Jury.*—The criminal jury is supposed by some to have originated from Ethelred's jury of presentment, but about this institution little that is reliable is known. Stubbs traces the jury to the Carolingian capitularies. In the reign of Henry II a similar kind of jury is provided by the Constitutions of Clarendon. In 1166 the Assize of Clarendon ordained that twelve lawful men

(*z*) The jury of presentment, or grand jury, has now been abolished for most purposes, *post*, p. 461.
(*a*) Bl. Comm. IV, 349.
(*b*) Quoted Jackson, *The Machinery of Justice in England*, p. 219.
(*c*) Jackson, *The Machinery of Justice in England*, pp. 220—221.

from each hundred and four lawful men from each township should be sworn to accuse reputed robbers, murderers, thieves, and receivers, and harbourers of murderers or thieves, and that the persons so presented be sent to the ordeal of water. The institution of a jury of presentment to prefer charges or indictments of serious crime was extended by the Assize of Northampton, 1176. By the Articles of Visitation (*temp.* Richard I) the constitution of the grand jury established by Henry II was further regulated and assimilated to the system then already in use for choosing the recognitors of the grand assize. The grand jury of those days were not judges of fact. They were neighbours who knew something of the transaction, either personally, or from others they trusted. They had, however, to conceal nothing about which they had heard, and the rolls of the coroner and sheriff served as a check on them in this respect. At times the Judges told the grand jury to institute inquiries in order to find out whether a given accusation was genuine.

Grand juries were abolished for nearly all purposes by the Administration of Justice (Miscellaneous Provisions) Act, 1933, as being an unnecessary archaism (*d*). Before a person is tried on indictment there is usually a preliminary hearing before the justices, who dismiss the charge if a *prima facie* case is not made out.

The Petty Jury.—Till about 1215, when the Lateran Council forbad the clergy to assist at ordeals, reputed bad characters were sent to the ordeal; but even before that date we hear of another jury, the forerunner of the present petty jury, being impanelled to give the accused a further opportunity for acquittal. All these persons were witnesses rather than judges of fact like the jury of modern days. In the reign of Edward III we hear of witnesses giving evidence who had no part in the verdict, but such evidence was given out of Court.

In the reign of Henry IV witnesses, who were clearly not jurymen, gave evidence at the bar of the Court, and in Fortescue's time (*e*) juries were judges of fact, as at the present day.

(*d*) A grand jury of the county of London or the county of Middlesex may still be summoned in the King's Bench Division where a person is indicted under certain statutes set out in the first schedule to the Act. These relate, *e.g.*, to treason committed overseas, oppression by governors or other colonial officers, offences against the Official Secrets Acts committed abroad, and neglect of official duties in connection with the issue of writs for Parliamentary elections.

(*e*) Sir John Fortescue, Chief Justice of the King's Bench, published his *De Laudibus Legum Anglie* about 1465.

The jury were originally summoned from the hundred. As long as this practice prevailed they generally knew something about the case, but after a time they were selected from the body of the county.

In 1676 Penn and Mead were indicted under the Conventicle Act, and the jury at the trial, of whom Bushell was one, acquitted the prisoners. Bushell and his colleagues on the jury were fined and imprisoned for disregarding the ruling of the Judge. On the application for a *habeas corpus* Vaughan, C.J., decided to the effect that a jury cannot lawfully be punished by fine, imprisonment, or otherwise for finding against the evidence or direction of the Judge. (*Bushell's Case* (1670) (*f*).)

It is a strange fact that a man was not obliged, when charged with a criminal offence, to throw himself on his country for deliverance, and when the crime of which he was accused involved forfeiture he did not forfeit his property unless he pleaded. To make him plead he was crushed by heavy weights till he either pleaded or died (*peine forte et dure*). Strangeways was executed in this fashion in 1658, and the practice was not abolished until 1772 (*g*), when it was replaced by a plea of not guilty.

When a man was appealed of felony he could challenge the appellant to battle. Trial by battle was abolished in 1820 after its attempted resurrection in the case of *Ashford* v. *Thornton* (*h*).

A prisoner who is indicted is tried by a petty jury, except that some indictable offences may be dealt with summarily at Petty Sessions with the consent of the accused. An indictment is a written accusation of crime—whether treason, felony or misdemeanour—formerly presented by the Grand Jury, and now since 1933 (with a few rare exceptions, where the Grand Jury is still used) signed by the proper officer of the Court. Petty offences are triable summarily, *i.e.*, on information or complaint by magistrates sitting in Petty Sessions without formal indictment or jury. A person charged with an offence punishable on summary conviction, however, may in certain cases claim to be tried by jury at Assizes or Quarter Sessions.

The Jury in Civil Cases.—*Origins of the Civil Jury.*—In mediæval days there was no weighing or sifting of evidence. There was no trial,

(*f*) Vaughan, 147—149.
(*h*) 1 B. & A. 405.
(*g*) 12 Geo. 3, c. 20.

but a mode of proof was put forward. The demandant had to satisfy the Court that his cause of complaint was genuine before the defendant (or "tenant") had to do anything (*i*)

Cases were proved by compurgation, by an attested written document, or else by battle, or perhaps ordeal. Disputes respecting freeholds were settled by battle.

After the introduction of Henry II's grand assize (probably by a Council at Windsor, c. 1170), trial by battle, so far as civil cases, at any rate, were concerned, began to decline; for though, according to Glanville, the defendant in a real action relating to the title to land could choose between the assize and battle, the Judges probably frightened him into choosing the assize for the settlement of the dispute. Another ancestor of the civil jury can be traced to the Petty or Possessory Assizes introduced by Henry II from 1166 onwards to decide questions relating to the possession of land. The idea was not by any means new, for local "inquisitions" had for centuries been used for administrative purposes, in particular, to enquire into the King's affairs. A link between the civil jury and the petty jury used in criminal cases may be found in the action of trespass (*k*).

At first the original writ commencing the action summoned a jury, or assize as it was then called, but after the introduction of pleadings the jury were summoned after joinder of issue by writ of *venire facias*. The jury so summoned was known as the *jurata*. Hence the expression, *Assisa vertitur in juratam*.

The notion of adducing evidence unknown to the jury arose from the Judge directing them to investigate facts before delivering a verdict. In Henry IV's reign witnesses gave evidence before the Judge and jury, and the custom of taking the jury from the body of the county instead of the hundred helped to convert the jury into judges of fact.

Modern Use of the Civil Jury.—Jury trial was an institution of the Common Law Courts, which explains why in civil cases it is practically confined to the King's Bench Division of the High Court. Before 1933 the general rule was that a jury could be ordered in the King's Bench Division if either party so required, though for various reasons during the sixty years following the Judicature Acts the use of the

(*i*) Potter, *Historical Introduction to English Law* (2nd ed.), pp. 209—213.
(*k*) Plucknett, *Concise History of the Common Law* (3rd ed.), pp. 102—107, 121.

jury declined by about half. The Administration of Justice (Miscellaneous Provisions) Act, 1933, gives the Court a discretion whether or not a jury shall be summoned on the application of either party, except that a jury must be ordered in cases of fraud, libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage, unless the Court considers that the trial will involve a prolonged examination of documents or accounts or a scientific or local investigation which cannot conveniently be made with a jury. The result has been a further decline in the number of jury trials in common law actions. Where the Court has a discretion under the Act it is a "completely untrammelled discretion." (*Hope v. Great Western Railway* (*l*).) Where a Judge sits without a jury, of course, he determines the facts as well as the law.

Trial by jury was not used in the Court of Chancery before the Chancery Amendment Act, 1858, and the power to summon juries in the Chancery Division given by the Judicature Acts has been practically neglected.

Juries are not used in Admiralty causes, and the right to apply for a jury in defended divorce petitions and contested probate cases is seldom exercised.

The right to apply for a jury (of eight persons) in County Courts, which by the County Courts Act, 1934, is on the same footing as the right to jury trial in the King's Bench Division, is also rarely exercised (*m*).

Duty of Jury Service.—Persons between the ages of twenty-one and sixty who own real property of £10 annual value or leaseholds of £20 annual value or who pay rates of £30 in London and Middlesex and £20 elsewhere are liable to serve on juries. The jury list is based on the Parliamentary register (Juries Act, 1922) and is supervised by the rating authorities (Rating and Valuation Act, 1925). An alien may be a juror after ten years' domicil (Juries Act, 1870), unless he is challenged by any party to the proceedings (Aliens Restriction (Amendment) Act, 1919). Various classes of persons are exempt

(*l*) [1937] 2 K. B. 130.

(*m*) Dr. R. M. Jackson, writing in 1939, gives the proportion of jury trials as 10 per cent. in the King's Bench Division, 5 per cent. in defended divorce and contested probate cases, and one in 4,000 County Court cases. He says that juries "are not used" in the Chancery Division: *The Machinery of Justice in England*, pp. 62—63.

from jury service, including peers, members of Parliament, clergymen, barristers, solicitors, medical practitioners, members of the armed forces and certain civil servants.

The number of twelve, which applies except in County Courts and Coroner's Courts, is ancient and arbitrary, as is also the requirement (save for the Coroner's jury) of unanimity (*n*). The latter has sometimes caused hardship to conscientious but hungry jurors, though it is now established that the Judge may dismiss a jury which cannot agree (*o*), and it is noteworthy that the unanimity rule has never been applied to Judges.

(*n*) The necessity for juries to be unanimous is one of the reasons why jury trial has never been successful in Ireland.

(*o*) See *Wensor* v. *The Queen* (1866), L. R. 1 Q. B. 289.

PART V.

THE RIGHTS AND DUTIES OF THE CITIZEN.

CHAPTER XXX.

RIGHTS AND DUTIES OF THE CITIZEN: GENERAL PRINCIPLES.

Declarations of the Rights of Man.—Formulations of natural rights date from the second half of the eighteenth century, the revolutionary period in America and France. Both countries borrowed largely from English experience and thought, especially as embodied in the writings of Locke, the apologist of the English revolution of 1688 (*a*), and, in the case of America, the Commentaries of Blackstone.

In the first chapter of his *Commentaries on the Laws of England*, published in 1765, Blackstone wrote: "By the absolute *rights* of individuals we mean those rights which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. . . . For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. . . . The absolute rights of every Englishman (which taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. . . . And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property. . . . I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life,

(*a*) *Two Treatises on Government* (1690); see Book II, "Of Civil Government."

his limbs, his body, his health, and his reputation. . . . II. Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. . . . III. The third absolute right inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

The American Declaration of Independence, drawn up under the chairmanship of Jefferson and adopted by Congress in 1776, declares "that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed; that, wherever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness."

The American "Bill of Rights" consists of ten Amendments added in 1791 to the Federal Constitution of 1789. These rights include free exercise of religion, freedom of speech and of the Press, peaceable assembly, petition for redress of grievances (1st Amendment); security of persons, houses, papers and effects from unreasonable searches and seizures (4th Amendment); no deprivation of life, liberty or property without due process of law (5th Amendment); and freedom from excessive bail or fines and from cruel or unusual punishments (8th Amendment). The Constitution had already provided that the writ of *habeas corpus* should not be suspended, and that no *ex post facto* law should be passed (Art. 1, s. 9), and that the trial of all crimes, except in cases of impeachment, should be by jury (Art. 3, s. 2). Slavery was abolished by the 13th Amendment (1865), and the franchise was preserved from discrimination on grounds of race, colour (15th Amendment, 1870) or sex (19th Amendment, 1920).

The French Declaration of the Rights of Man.—In 1789 the French Assembly adopted a Declaration of the Rights of Man and of the Citizen, which was prefaced to the Constitution of 1791. Among the "natural, inalienable and sacred rights of man" were equality before the law and absence of social distinctions (Art. 1); liberty (*i.e.*, the power to do anything which does not injure others), property, security and resistance to oppression (Arts. 2 and 4); freedom from being called upon to answer for acts which the law does not forbid, and from compulsion to do what the law does not ordain (Art. 5); the right to consent personally or through representatives to the framing of the laws, and equal admission to public offices according to capacity and without other distinction than virtue and talents (Art. 6); freedom from accusation, arrest or detention except under authority of the law and in accordance with the procedure prescribed by law (Art. 7); immunity from punishment except by virtue of a law established and promulgated before the offence (Art. 8); minimum severity in preventive detention, since everyone is presumed innocent until he has been adjudged guilty (Art. 9); freedom from being harassed for one's opinions, including religious opinions (Art. 10); freedom of speech, writing and printing (Art. 11); equal distribution of taxation according to means (Art. 13); freedom of employment (Art. 14); and fair compensation for property lawfully taken for public purposes (Art. 17).

Resistance to oppression and the right of insurrection are, according to Locke, the ultimate remedy, based on the law of necessity or self-defence; though this does not justify rebellion against a regularly constituted government which occasionally infringes the rights of a few individuals.

By contrast, famous English documents such as Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689), did not lay down general and abstract rights, but merely reaffirmed certain particular principles of the common law which had recently been infringed by the King.

Rights commonly regarded as Fundamental.—Most modern Constitutions are written (*b*), and may take the opportunity of incorporating certain fundamental rights of the citizen. The earliest example

(*b*) For the meaning of "written" Constitution, see *ante*, p. 6.

seems to be the Constitution of the State of Virginia. The contents of these rights and the emphasis placed on particular rights, vary according to the political philosophy, experience and practical needs of different peoples, but the following are the most important rights usually found.

(i) *Personal freedom, i.e.*, freedom to come and go and to do anything so long as one does not infringe the law. This is the most fundamental right, and is pre-supposed by the others. With it is often associated the inviolability of the dwelling.

(ii) *Equality before the Law.*—This does not imply that the same laws apply to all persons. Some classes of persons have special immunities, *e.g.*, Ambassadors (*c*), Judges (*d*) and trade unions (*e*); there may be a special time limit on actions against public authorities (*f*), or a special procedure (*g*) or even special Courts (*h*) for such actions. Conversely, certain classes of persons may labour under disabilities in public or private law or both, *e.g.*, infants, aliens (*i*), convicts, bankrupts and even women. Further, the extensive powers conferred in all developed countries on public authorities for the administration of government and the provision of social services (*k*) affect individuals to a varying extent according to where they live, whether they own land and houses, what occupation they carry on, etc. Equality before the law means "that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence" (*l*). Even then, the government or the police may have a discretion whether or not to prosecute, and Judges may have a discretion as regards the severity of sentence.

(*c*) The immunity of ambassadors is based on international custom; for the English law implementing this custom, see *ante*, p. 175.
(*d*) For the immunity of Judges in English law, see *ante*, pp. 396—398.
(*e*) For the special position of trade unions, their officers and members in English law, see *post*, pp. 481—485.
(*f*) For the limitation of actions against English public authorities, see *ante*, pp. 394—397.
(*g*) *E.g.*, petition of right against the Crown; see *ante*, pp. 283—287.
(*h*) Wrongly supposed by Dicey to be the essence of *droit administratif*; see *ante*, p. 10.
(*i*) For the position of aliens in English law, see *post*, pp. 429—436.
(*k*) Some indication of the administrative powers of Government Departments and Local Authorities in England may be found in Chapters XVIII and XIX.
(*l*) Jennings, *Law and the Constitution* (3rd ed.), p. 49.

(iii) ***Freedom of Property*** is closely associated with personal freedom. It means that a person should not be deprived of his lands or goods, or restricted in his enjoyment of them, except in accordance with the law. He must not be fined except for a breach of the law, and fines must not be excessive. Taxes must be evenly imposed according to means. If a person's property is required for some public purpose, he should receive fair compensation.

(iv) ***Free Elections.***—A democratic system requires that electors should be free from intimidation and from compulsion as to the candidates for whom they cast their vote. This usually involves a secret ballot. The tendency is also towards universal suffrage, *i.e.*, the right to vote of all adult nationals, of either sex.

(v) ***Freedom of Speech.***—Freedom of thought requires freedom to communicate one's opinions to others; also freedom of discussion and of the Press. The right to petition the government for redress of grievances is often included under this heading.

(vi) ***Freedom of Conscience*** requires freedom not only to propagate one's religious beliefs, but also to take part in acts of public worship.

(vii) ***Freedom of Contract***, in which is included the right to choose how one shall earn one's living, and the right to carry on industry and commerce.

(viii) ***The Right of Assembly.***—Public meetings are one of the chief means whereby topical matters of national or local interest are discussed.

(ix) ***The Right of Association.***—This includes the right to form companies, partnerships, societies and trade unions.

(x) ***Family Rights.***—The protection of marital and parental rights features among the fundamental laws of some Constitutions.

These rights are, of course, always expressly or impliedly limited to some extent, even in normal times, by the notions of public order and security and by the corresponding rights of other individuals. They are further restricted, or even suspended, in time of emergency.

The Incorporation of Fundamental Rights into Constitutions.—In most Continental countries, where the executive and the police have wide discretionary powers (*régime administratif*), the fundamental rights of the citizen are exceptions to administrative powers.

The United States Constitution declares certain fundamental rights

as well as imposing specific limitations on the legislature and the executive; and since the United States (save for the private law of some of the States) inherited the English common law anyway, these declarations of individual rights are directed especially against the legislature.

Where fundamental rights are contained in the Constitution itself, as in the United States and Belgium, they cannot be repealed or diminished except by means of the special process prescribed for constitutional amendment.

Fundamental rights incorporated in a Constitution are not *legally* binding on the *legislature* unless some organ has the power of declaring laws void as being unconstitutional, *i.e.*, beyond the powers of the legislature to enact. In Belgium there is no such organ, and therefore the constitutional restrictions on legislative activity appear to be merely conventions resting on the force of public opinion (*m*). The rights of the citizen have not been incorporated in the French Constitution since 1875, but are regarded as forming part of a sacred "higher law." They are in fact carefully observed in France as in Belgium, and are described by a French writer as being "relatively guaranteed" (*n*).

It is difficult to bind the legislature unless power to declare laws unconstitutional is vested in the Courts, a device which most Continental thinkers regard as infringing the doctrine of the separation of powers (*o*). Two nineteenth-century French constitutions experimented for a time with the idea of the *Sénat conservateur*; but this body, so far from annulling unconstitutional laws, served chiefly to modify the Constitution by means of senatus-consults (*p*).

It is in fact rare for the Courts to have jurisdiction to review legislation except in Federal States, where it is necessary to preserve the respective rights of the Federation and its component members. The Swiss Federal Courts can declare Cantonal legislation unconstitutional; but they cannot declare Federal legislation unconstitutional, though this may be impugned by referendum. The purpose, however, is not primarily to protect the rights of individuals.

(*m*) Dicey, *Law of the Constitution* (9th ed.), pp. 131—136; cf. Bryce, *Studies in History and Jurisprudence*, vol. I, Essay 3.
(*n*) Esmein, *Éléments de Droit Constitutionnel* (8th ed.), vol. I, pp. 601—602.
(*o*) *Ante*, p. 12.
(*p*) Hauriou, *Précis de Droit Constitutionnel* (2nd ed.), pp. 267—268.

In the United States the State Courts have jurisdiction to declare State legislation repugnant to the State Constitution, and the Federal Courts have jurisdiction to declare provisions of State Constitutions, State legislation and Federal legislation repugnant to the Federal Constitution. It is not strictly accurate to say that the Courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist because the statute relied on is unconstitutional. It is difficult to say how far the power of review now exercised by the Federal Supreme Court is expressly granted by the Constitution and how far the Court has assumed jurisdiction under the guise of interpretation. Article 3 of the Federal Constitution provides that "the judicial power shall extend to all cases in law and equity arising under this Constitution . . .," and Article 6 provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Under the influence of Chief Justice Marshall the Supreme Court openly exercised the power of declaring Federal legislation unconstitutional in *Marbury* v. *Madison* (1803), and the power of declaring State legislation repugnant to the Federal Constitution in *Fletcher* v. *Peck* (1810), and the principle of judicial supremacy is now well established.

The Constitution of Eire (1937), which is unitary and borrows from almost every type of Constitution, declares certain "fundamental rights" (Arts. 40—44), which are only alterable by the special process laid down for constitutional amendments, and it also expressly gives the Courts jurisdiction to determine the constitutional validity of any law (Art. 34). It further prescribes certain "Directive Principles of Social Policy," but states that they are only for the "general guidance" of the legislature and "shall not be cognisable by any Court" (Art. 45).

The Duties of the Citizen.—We are so much accustomed nowadays to the assertion of rights by trade unions, women, "youth," and so on, that it would be salutary if more emphasis were placed on duties; but unfortunately the duties of the citizen do not lend themselves to precise definition. Broad generalities such as those of Justinian,

following Ulpian—"The precepts of the law are these: to live honestly, to refrain from injuring others, and to render to everyone his due" (*q*)—do not take us very far. Blackstone says that, while the law protects absolute rights (*i.e.*, those which belong to men by nature) as well as relative or social rights (*i.e.*, those conferred by political communities), it only enforces relative or social duties. He hints at the existence of absolute duties, analogous to his absolute rights (*supra*), "which man is bound to perform, considered as a mere individual," but he says that "it is not to be expected that any human municipal law should at all explain or enforce them," for the law can only concern itself with a person's acts in so far as they affect other members of society, even if only by the bad example they set (*r*). Nor have attempts to frame detailed Declarations of Duties, as in France in the last century, met with success (*s*).

We can only say that it is the citizen's duty to obey the law, civil and criminal, and in a book on Constitutional Law it would be out of place to do more than indicate some of the offences of a public or political nature which he must avoid committing. Every great social philosopher from Plato onwards has insisted on the distinction between liberty and license, and maintained that liberty can only be enjoyed by obedience to law. If the citizen does not think a particular law is just or necessary there are ways, in a democratic system, whereby he can seek to have it changed; meanwhile, it should be obeyed.

Rights of the Citizen in the British Constitution.—There are in the British Constitution no fundamental rights in the strict sense, because our Constitution is unwritten and any part can be changed in the same way as any other part, namely, by an ordinary Act of Parliament. Further, owing to the legislative sovereignty of Parliament (*t*), there is no legal limit to the extent to which Parliament can abridge or abolish rights which in other countries would be regarded as fundamental, a power which is specially noticeable in times of emergency. The practical checks are the influence of public opinion, the vigilance of the Opposition, and the restrictive interpretation of the Courts. The "rights" of the citizen in English law are merely a *residue* of freedom, the extent of which at any given time can only be determined

(*q*) Inst. I, 1. 3.
(*r*) I Comm., pp. 122—124.
(*s*) Hauriou, *op. cit.*, pp. 634—636.
(*t*) See Ch. 2.

by examining the restrictions placed on the activity of the citizen and the enjoyment of his property. They are the residue which is left after legislative and executive powers have been defined.

The general principle is that a person may do what he likes so long as he does not infringe the civil or criminal law. English law says what a person *must not* do rather than what he *may* do. The restrictions, however, are with us not a matter of executive discretion but of law (*u*). The Executive have no discretion to create offences, though they often have a discretion *not* to prosecute if an offence is committed (*x*). The Executive must justify its acts by showing some power given by law, whether common law (prerogative) or statute (*y*).

If a person has a right, the law provides a remedy to enforce it. As Holt, C.J., said in *Ashby* v. *White* (*z*): "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." Remedies against public authorities have been described in Chapter XXI.

Some of the more important offences of a political or public nature are described in Chapter XXXII, and the extent to which English law recognises and protects freedom of the person and property, freedom of speech and of the Press, and the rights of association and public meeting, is discussed in Chapters XXXIII—XXXV, below. The slow growth of the rights of the citizen even in this country may be illustrated from the necessity of passing the Habeas Corpus Acts of 1679 and 1816, the legislation restricting the holding of public meetings in the period following the French Revolution, the censorship of the Press which continued until nearly the end of the seventeenth century, the Combination Laws which prevented the growth of trade unions until quite recently, the lack of genuine freedom of elections before the passing of the Ballot Act, 1872 (*a*), and the fact that universal

(*u*) The law should, therefore, clearly define the restrictions, which can hardly be said to be the case with the indictable common law misdemeanour of effecting a public "mischief": see *R.* v. *Manley*, [1933] 1 K. B. 529; Stallybrass, *Public Mischief* (1933), 49 L. Q. R., pp. 183—191.

(*x*) Jennings, *op. cit.*, pp. 244—246.

(*y*) For prerogative powers, see Chapter XIV. Many statutory powers are mentioned in Part III.

(*z*) (1704), 2 Ld. Raym. 938; see *ante*, p. 106.

(*a*) For the manner in which Parliamentary elections were conducted immediately before the passing of this Act, see Anson, *Law and Custom of the Constitution*, vol. I (5th ed. Gwyer), pp. 143—144.

adult suffrage has only existed since 1928 (*b*). The restriction of the rights of the citizen by the prerogative and statutory powers of the Executive in time of emergency is discussed in Chapter XXXVI.

The distinction between British subjects and aliens is discussed in Chapter XXXI. Nationality is chiefly of importance in connection with public rights, for example, as a qualification for the parliamentary and local franchise, for holding public office or being employed in the armed forces or civil service, and also as entitling to diplomatic protection in places abroad. Nationality is not of much importance in English private law, its place in cases involving a "foreign element" being taken for most purposes by domicil, that is, residence in a country with the present intention to reside there permanently or indefinitely, or by the conception of "enemy character." The word "citizen" has been used in the present chapter rather than "subject," as the position of an alien friend within the realm is the same as that of a British subject for the purpose of most of the topics here discussed, except the right to vote. The Crown may have a prerogative power to exclude or expel aliens, but in practice, as we shall see, these matters are now regulated by statute.

The protection given to the citizen by the law is said to be the converse of the duty of allegiance, which is owed by British subjects everywhere and by aliens within the realm, and the breach of which constitutes the crime of treason. The obligation on the part of the Crown to protect the citizen, however, seems in fact to amount to little more than the principle that if a public official injures a British subject anywhere, or a friendly alien within the King's dominions, he cannot plead "act of State" as a defence.

Act of State.—The expression "act of State" is used in various senses. Acts done by the Crown with respect to foreign States or alien enemies, or with respect to friendly aliens outside the King's dominions, are acts of sovereignty in International Law rather than acts of prerogative in Constitutional law, and their validity cannot be questioned by the Courts. The Courts can determine whether the essential characteristics of an act of State in this strict sense are present in a given case; if they are, the Courts will take cognisance of the effects of the act on the rights of individuals. The authority of the Crown may be given by subsequent ratification. In *Buron* v. *Denman*

(*b*) See *ante*, p. 85.

(1848) (*c*) the defendant, a naval captain, made a treaty with the chief of an uncivilised country for the abolition of the slave trade without the authority of the Crown, and then, in pursuance of the treaty, committed acts of aggression on the plaintiff's property. The Court held that the subsequent ratification by the Crown of what was, at the time of making, an unauthorised treaty, made what would otherwise have been illegal an act of State; hence no right of action lay.

Although such an act of State may be valid in itself, it may be constitutionally impossible to implement some of its terms without the approval of Parliament; for example, the provisions of a treaty purporting to affect the rights of British subjects or involving taxation (*e.g.*, customs duties) would not bind British subjects unless they were embodied in an Act of Parliament. And the better opinion is that convention at least demands that Parliament should be consulted before a treaty ceding British territory is made—for example, the cession of Jubaland to Italy in 1927—as this affects the rights of the inhabitants by changing their nationality (*d*).

The plea of "act of State" or "State necessity" is not permissible as a defence to an action respecting anything done within the realm or to any action brought by a British subject. It is only an answer to proceedings both (i) brought by *an alien*, and (ii) in respect of acts done by officers or servants of the Crown *abroad*, in pursuance of an authority, antecedent or subsequent, given by the Crown. In *Entick* v. *Carrington* (1765) (*e*) Lord Camden said: "With respect to the argument of State necessity, or a distinction that has been arrived at between State offences and others, the common law does not understand that kind of reasoning."

So in *Walker* v. *Baird* (*f*) the owner of a lobster factory on the Newfoundland coast successfully brought an action of trespass against a Naval Officer who had taken possession of the factory, although he was acting under orders from the Admiralty to suppress lobster factories whose erection contravened a fisheries treaty with France. And in *Johnstone* v. *Pedlar* (1921) (*g*) the House of Lords held that

(*c*) 2 Ex. 167.
(*d*) See McNair, *Legal Effects of War* (2nd ed.), pp. 397—402; Holdsworth, *The Treaty-Making Power of the Crown* (1942), 58 L. Q. R., pp. 175—182.
(*e*) 19 St. Tr. 1067. (*f*) [1892] A. C. 491.
(*g*) [1921] A. C. 262. Cf. *per* Moulton, L.J., in *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613, at p. 639.

an American citizen was entitled to recover money which had been taken from him by the Chief Commissioner of the Dublin Metropolitan Police on his arrest for illegal drilling (for which he had since been convicted), notwithstanding that the Chief Secretary for Ireland had purported to ratify the seizure and detention of the money as "an Act of State for the Defence of the Realm and for the prevention of crime."

The presence or absence of a declaration of fundamental rights provides little evidence of the extent of the liberty which the citizens of a State in fact enjoy. Much depends on the spirit in which the law is administered, and on the habit of lawabidingness of the people.

Duties of the Citizen in the British Constitution.—British subjects everywhere owe a natural or permanent allegiance to the Crown, and aliens within the King's dominions owe a local or temporary allegiance. Allegiance is usually implied, but occasionally it has to be expressed in an oath, for example, in the case of members of Parliament and the holders of judicial and certain other high public offices, and when an alien becomes naturalised as a British subject.

There was a general common law duty to serve the Crown when called upon. Thus persons might be required to serve as constables or in the local militia. One survival of this doctrine is the obligation to serve as sheriff, which may only be avoided for special reasons (*h*); another is the prerogative power which theoretically remains to impress seamen into the Navy (*i*). Conscription into the armed forces, with that theoretical exception, requires an Act of Parliament, and compulsory conscription was in fact provided for by statute in both the great wars of the present century.

Persons may be called upon to help in the administration of justice by serving on juries (*k*), and they may be summoned to appear as witnesses in criminal trials and, on payment of reasonable expenses, in civil actions.

Every citizen has the common law power, somewhat ill-defined, to assist in the preservation of the peace, and also the duty to assist in suppressing insurrections, riots and other violent outbursts of disorder (*l*).

(*h*) See *ante*, p. 388.
(*i*) See *ante*, p. 172.
(*k*) See *ante*, p. 404.
(*l*) See *post*, pp. 504—505.

It would not be practicable to detail the numerous statutory duties which are imposed on the citizen. Examples are the duty to pay rates and taxes, including the filling up of returns of income; registration for national service in wartime; and the duty of parents to ensure that their children receive an adequate education up to a certain age.

These duties, except for service under the Crown and modifications as regards jury service, apply to aliens in this country as well as to British subjects.

CHAPTER XXXI.

BRITISH NATIONALITY AND THE STATUS OF ALIENS.

I. BRITISH NATIONALITY AND ALLEGIANCE.

Meaning of Allegiance.—Allegiance has been defined as the "natural and legal obedience which every subject owes to his Prince" (*Termes de la Ley*) in exchange for the protection extended by the Prince to the subject (Blackstone) (*a*). In addition, however, to subjects who owe permanent or natural allegiance there are those who owe local allegiance, namely, aliens resident in the dominions of the Prince so long as they reside there; and these may owe allegiance even after protection is withdrawn. (*De Jager* v. *Att.-Gen. of Natal* (*b*).)Allegiance is correlative with treason, in the sense that treason can only be committed against the Sovereign by a person owing allegiance to him, either natural, acquired, or local. Allegiance is, moreover, due to the *de facto* Sovereign (*Calvin's Case* (1609) (*c*)), even though he be an usurper.

Common Law Principles of Allegiance and Nationality.—The doctrine of allegiance may be traced back to the feudal idea that a person owed the duty of fealty to the lord of whom he held his land, though in relation to the King as lord the tenure of land was not necessary (*d*). Allegiance was not in feudal times owed by aliens, who in the thirteenth and fourteenth centuries were virtually rightless. It therefore distinguished aliens from subjects, who were born within the King's dominions. For commercial reasons, however, the King extended his protection in the fifteenth century, if not before, to alien friends, *i.e.*, the subjects of foreign sovereigns with whom he was not at war. The further development of international trade in the seventeenth century led to the modification of the position of such alien enemies as were allowed to remain in England. Further, the distinction between merchants and other aliens was abandoned.

(*a*) Bl. Comm. I, 369. (*b*) [1907] A. C. 326.
(*c*) (1609), 7 Co. Rep. 1.
(*d*) For the history of the common law principles, see Holdsworth, *History of English Law*, vol. IX, pp. 72—91.

Thus, during the eighteenth and nineteenth centuries, the new conception of "enemy character" was formed, based not so much on nationality as on residence or place of business (*e*).

Early History.—The feudal system was both territorial and personal. Under that system, says Holdsworth, "All rights and duties are bound up with and dependent upon the holding of land, and there is a personal tie of fealty between the tenant and his lord. These two ideas underlie the doctrine of allegiance, by which the later law will define both the classes of persons who are to be reckoned as subjects, and the modes in which this status can be acquired and lost" (*f*). It was with the loss of Normandy that the common law development of the doctrine of allegiance began.

In the thirteenth century all persons born in England, whoever their parents were, owed allegiance to the King of England and were therefore his subjects, and, to remove doubts, Parliament in the fourteenth century declared that persons born abroad of English parents were subjects. It was established at the beginning of the fifteenth century that, while the King by virtue of his prerogative could give the limited rights of a denizen, an Act of Parliament was necessary to confer the full rights of a subject. The significance of the personal aspect of allegiance is shown by the fact that a subject did not lose his status by loss of territory, still less by merely going abroad. At common law, allegiance was indissoluble and the status of subject permanent. The King could not by the exercise of his prerogative (*g*) deprive a subject of his status any more than he could confer the full status.

Calvin's Case (1609) (*h*).—James I, anxious for the consolidation of England and Scotland into one Kingdom, approached the Commons and was opposed. Two collusive actions were therefore brought. Land was bought in the name of John Calvin, an infant, born in Scotland after the accession of James I (James VI of Scotland) to the English throne in 1603, and claimed as a "*post natus.*" In the first action the land was claimed for Calvin as a natural-born subject of the King, and in the second action the title deeds were claimed in Chancery. Both actions were adjourned to the Exchequer Chamber. The defendant claimed

(*e*) *Post*, p. 435. (*f*) Holdsworth, *ibid.*, p. 73.
(*g*) Apart from the process of outlawry or attainder.
(*h*) (1609), 7 Co. Rep. 1.

that Calvin was an alien and debarred as such from holding land in England. This plea was demurred to, and on the hearing of the demurrer the Court held that it was bad. The decision, therefore, was that a person born in Scotland after the accession of James I to the English throne, and during his reign, was not an alien in England.

It must be remembered that James I's accession in 1603 only gave rise to a personal union of the Crowns: the political union of the two Kingdoms only came by legislation in 1707 (*i*). The personal element of allegiance was stressed in the principle laid down in *Calvin's Case* that it was to the King in his "natural" capacity, and not in his "politic" capacity (*k*), that allegiance was owed: hence it was possible for one who was subject to Scots law to owe allegiance to the King of England. The territorial element of the tie of allegiance was apparent in the common law principle laid down in that case that for a person to be a natural-born English subject it was essential that the country in which he was born should have been, at the time of his birth, within the King's dominions: hence *antenati* (*i.e.*, those born in Scotland before James's accession to the English throne) were not natural-born English subjects but remained aliens.

The Consequences of Calvin's Case.—"Though it was one of the shortest and least that ever we argued in this Court," said Coke, "yet it was the longest and weightiest that ever was argued in any Court, the shortest in syllables and the longest in substance."

(i) "It gave a uniform status to all persons born within these (the King's) dominions; it made this uniform status depend on the personal tie of allegiance to the Crown; and it thus played no small part in consolidating the position of the King as the head and main bond of union between the confederation of independent communities, which now constitute the British Empire" (*l*). A similar uniformity of principle as regards naturalisation in various parts of the Empire has had to be attempted by statute in the present century (*m*).

(ii) The decision laid down definite rules for the acquisition of the status of a subject. Mediæval law drew no distinction between the status of subjects in different parts of the King's dominions, and henceforth it was clear that the inhabitants of dominions newly

(*i*) See *ante*, p. 2.
(*k*) See *ante*, p. 151.
(*l*) Holdsworth, *ibid.*, p. 83: see *post*, pp. 533, 575.
(*m*) *Post*, p. 496.

acquired by descent or conquest automatically became subjects, and that subjects who founded colonies by settlement retained their former status (*n*).

(iii) A person born in any of the King's dominions retained his status as subject in spite of the subsequent loss of that dominion, and even if he also became the subject of a new sovereign. This doctrine might obviously be inconvenient, and even absurd, where the person continued to reside in the lost territory, whether the territory was lost (as in the case of the United States) by recognition of independence or (as in the case of Hanover) by the laws of succession, and so the Courts abandoned the doctrine in the first half of the nineteenth century. (*Isaacson* v. *Durant* (*o*).) The rule that a person could not of his own volition relinquish his status as subject ("*nemo potest exuere patriam*") was, however, retained, largely for the purpose of the impressment of emigrant seamen.

Statutory Modifications.—The statute of 1351, which provided that children born abroad of English parents should be capable of inheriting land in England, probably had a wider intention, and Parliament in 1708 removed doubts by declaring that children born abroad of natural-born British subjects should be deemed to be natural-born British subjects for all purposes. By a statute of 1730 it was only necessary that the father of such a person should be a natural-born British subject. The status so conferred was not transmissible, but an Act of 1733 extended these principles to the second generation.

Defective State of the Law in 1869.—A Commission on the laws of naturalization and allegiance reported in 1869 on four main defects in the existing law, viz :—

(i) the rule that all persons born in British territory were British subjects, regardless of their parentage, led to conflicts of allegiance as most European countries applied the test of the nationality of the father (*p*);

(ii) the necessity of obtaining a private Act of Parliament before an alien could become naturalized;

(iii) the rule that a subject could not relinquish his British nationality;

(*n*) *Campbell* v. *Hall* (1774), 20 St. Tr. 239; *post*, p. 541.
(*o*) (1886), 17 Q. B. D. 54.
(*p*) The adoption of the *jus sanguinis* was favoured by some countries in the interests of military service.

(iv) the unsatisfactory state of the law regarding the status of married women. The common law principle that an alien woman who married a British subject remained an alien had been altered by statute in 1843, but it was still the law that an English woman who married an alien remained a British subject.

These defects have to a great extent been remedied by the Naturalisation Act, 1870, and a series of British Nationality and Status of Aliens Acts.

Classification of British Subjects and Aliens.—All persons are either:—

(A) British subjects, or
(B) Aliens.

(A) British subjects are either:—

(1) Natural born;
(2) Naturalised, including denizens; or
(3) Have acquired British nationality owing to a British conquest or cession of territory to Great Britain or, if a woman, by marrying a British subject.

(B) Aliens are either:—

(1) Friendly aliens, or
(2) Enemy aliens.

Both classes of aliens, so far and so long as they are resident in His Majesty's dominions, owe local allegiance.

The Acquisition of British Nationality.—(1) *By Birth.*—At common law, as we have seen, every person born within His Majesty's dominions and allegiance was a natural-born British subject; and conversely, every person born outside His Majesty's dominions was an alien. Thus, the rule at common law was that the British nationality of any person depended entirely on his being born within the realm; so that the son of a Frenchman who happened to be born in London was a natural-born British subject, whereas the son of an Englishman born in Paris was not. This last rule was, in 1914, subject to the qualification that a person born outside His Majesty's dominions was deemed to be a natural-born British subject if his father or paternal

grandfather was born in the British dominions and his father was at the time of such person's birth a natural-born British subject.

The law has now been codified and to some extent modified by the British Nationality and Status of Aliens Acts, 1914—1943.

These Acts provide that the following persons born after 1914 shall be deemed to be natural-born British subjects:—

(a) Any person born within His Majesty's dominions and allegiance; and

(b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth (*q*), a British subject, and who fulfils any one of the following conditions:—

(i) his father was born within His Majesty's dominions or allegiance—the latter would include territories in which the Crown exercises extra-territorial jurisdiction (*r*); or

(ii) his father was a person to whom a certificate of naturalization had been granted; or

(iii) his father had become a British subject by reason of any annexation of territory; or

(iv) his father was at the time of that person's birth in the service of the Crown; or

(v) his birth was registered at a British consulate within one year after its occurrence, or at any time with the permission of the Home Secretary (Act of 1943, s. 1); or

(vi) he was born in a country where the Crown was at that time exercising extra-territorial jurisdiction over British subjects (Act of 1943, s. 2); and

(c) Any person born on board a British ship, whether in foreign territorial waters or not.

A person born on board a foreign ship is not to be deemed to be a British subject by reason only that the ship was in territorial waters at the time of his birth.

It was held in *Murray* v. *Parkes* (*s*) that a person born in that part of Ireland which is now Eire was a British subject, notwithstanding that he was also a citizen of Eire and was domiciled in Eire; and in

(*q*) A posthumous child, whose father died a British subject, is a natural-born British subject if he would have been so had his father survived and remained a British subject until after the birth: British Nationality and Status of Aliens Act, 1943, s. 3.

(*r*) For extra-territorial jurisdiction, see *post*, p. 451.

(*s*) [1942] 2 K. B. 123; see further, *post*, p. 662.

R. v. *Ketter* (*t*) it was held that a person who was born in Palestine when that country was under the suzerainty of Turkey was an alien, although he had come to England in 1937 (after Palestine had become a British mandate) with a "British Passport: Palestine" issued by the British High Commissioner.

(2) *By Naturalization.*—At common law no alien could by any voluntary act become a British subject, nor, as we have seen, could any British subject become an alien. "It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince," it was said in *Æneas Macdonald's Case* (1747) (*u*); "nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown." Up to 1844 private Acts of Parliament were passed from time to time naturalizing individual aliens, but the Act of Settlement, 1701, prevented any but natural-born British subjects from being Privy Councillors or members of either House of Parliament or from holding any public office, civil or military, or from receiving a grant of land from the Crown. An Act of 1844 gave the Crown a limited power to grant certificates of naturalization to aliens, though some disabilities continued to attach to persons so naturalized. Since then a number of statutes have been passed to enable any alien complying with certain conditions to apply for, and in suitable cases to obtain, a certificate of naturalization. The most important of these statutes are the Naturalization Act, 1870, and the British Nationality and Status of Aliens Act, 1914. The former still affects many persons born before 1915, but the latter regulates naturalization after 1st January, 1915.

A person obtaining such a certificate enjoys, so long as it is in force, to all intents and purposes the full political and civil status of a natural-born British subject. (British Nationality and Status of Aliens Act, 1914, s. 3 (1).) The application must be made to the Home Secretary, who before granting a certificate must be satisfied (i) that the applicant has resided in His Majesty's dominions for at least five years during the previous eight years, of which the last year must have been spent in the United Kingdom, *or* that he has been in the service of the Crown for not less than five years; (ii) that he is of good

(*t*) [1940] 1 K. B. 787. (*u*) 18 St. Tr. 858.

character, and has an adequate knowledge of the English language; and (iii) that he intends, if his application is granted, to reside in His Majesty's dominions or to enter or continue in the service of the Crown (*x*).

The grant of a certificate of naturalization to any alien lies in the absolute discretion of the Home Secretary. He may, without assigning any reason, give or withhold the certificate as he thinks best in the public interest, and no appeal lies from his decision.

As the law stood before 1914 a British colony could, in certain cases, naturalise an alien so as to make him a British subject within that colony. The Act of 1914 has, in this respect, made an important innovation. Section 8 (1) of the Act provides in effect that the Government of India and of any self-governing Dominion may grant certificates in the same way and with the same effect as a Secretary of State, *i.e.*, can confer full imperial naturalization. A similar grant by the Government of any of the other British possessions must be confirmed by the Home Secretary.

No certificate takes effect until the applicant has taken the oath of allegiance (section 2, sub-section (4)).

The Home Secretary may at his discretion grant a certificate to any person with respect to whose nationality as a British subject doubt exists.

An alien applying for a certificate may ask that any infant child of his may be included in the certificate, and if the request is granted such child is naturalized as from the same date as the parent, subject to the child's right on attaining majority to revert to its parent's earlier nationality by a declaration of alienage.

Before the Act of 1914 a certificate of naturalization was irrevocable. That Act enables certificates to be revoked if obtained by fraud or false representations. The 1918 Act, however, provides that certificates may be revoked on a number of additional grounds, *e.g.*, when the Home Secretary is satisfied that the holder of the certificate has shown himself disloyal to His Majesty, or has traded with the enemy during any war, or has been sentenced to not less than twelve months' imprisonment within five years of the grant of the certificate, or was

(*x*) Special power was given by the British Nationality and Status of Aliens Act, 1943, to grant certificates of naturalisation to French nationals serving during the war in His Majesty's Forces.

not of good character at the date of the grant—but in the last three cases the Secretary of State must further be satisfied that the continuance of the certificate is not for the public good.

(3) *By Marriage.*—A woman who marries a British subject, whether natural born or naturalised, herself becomes a British subject, and (with certain exceptions mentioned below) her nationality changes with his. By the British Nationality and Status of Aliens Act, 1933, however, the wife of an alien who becomes naturalized does not become a British subject unless within a year she makes a declaration that she desires to acquire British nationality; and the Act of 1918 provides that the British-born wife of an enemy alien may be naturalized on making a declaration of her desire to resume British nationality.

Denizens.—The status of denizens is not affected by the foregoing Acts. (Naturalization Act, 1870, s. 13.) By letters patent the Crown can confer on a foreigner the majority of the rights of citizenship. A denizen can hold land and vote at a Parliamentary election (*Solomon's Case* (1869) (*y*); but he cannot sit in Parliament or be a privy councillor, or hold any office of trust under the Crown. (Act of Settlement, 1701.) Denization may be described as naturalization by virtue of the prerogative, though the status of a denizen is inferior to that of a person naturalized by or under Act of Parliament since 1844.

The practice of granting letters of denization became virtually obsolete when certificates of naturalization were introduced in that year, but it has been suggested that the absence of any requirement of residence in this country may still make it convenient in exceptional cases (*z*).

The Loss of British Nationality.—(1) *By Naturalization Abroad.*—A British subject could not at Common Law become naturalized in a foreign country, but he may now under the British Nationality and Status of Aliens Act, 1914, and any person so doing ceases to be a British subject. Naturalization, however, in a country with which His Majesty is at war not only amounts to an overt act of treason, but is probably for civil purposes a mere nullity. (*R.* v. *Lynch* (*a*).)

(2) *By Marriage.*—The general rule is that a woman loses her

(*y*) 2 Peck. 117.
(*z*) Hall, *Foreign Jurisdiction of the British Crown*, pp. 33—34.
(*a*) [1903] 1 K. B. 444; *post*, p. 441.

British nationality if she marries an alien (*b*) or if her husband becomes an alien after marriage, but there are now the following exceptions:—

(a) a wife whose husband becomes an alien after marriage may make a declaration of retention of British nationality (British Nationality and Status of Aliens Act, 1914);

(b) a woman who marries an alien does not lose her British nationality unless by the marriage she acquires her husband's nationality (British Nationality and Status of Aliens Act, 1933);

(c) a wife whose husband becomes an alien after marriage does not lose her British nationality unless she acquires her husband's nationality (*c*); further, she may within a year after acquiring such nationality make a declaration resuming her British nationality (Act of 1933).

(3) *By Declaration of Alienage.*—A person can also in some cases renounce British nationality by declaration of alienage, *e.g.*—

(a) An infant child of a foreign father, naturalized at the same time as its father and at his request, may do so on attaining majority (*d*).

(b) A person who, though born out of His Majesty's dominions, is deemed to be a natural-born British subject can make a declaration of alienage, apparently at any time after majority.

The Act of 1943, however, provides that a person whose British nationality depends on the fact that his birth was registered at a British consulate before he was twenty-one shall cease to be a British subject at the end of one year after reaching that age, unless meanwhile he asserts his British nationality by making and registering a *declaration of retention*. Such a declaration may be made at any time after the expiration of that period with the permission of the Home Secretary (section 6 (1) (*e*)).

(*b*) Even an enemy alien: *Fastender* v. *Att.-Gen.*, [1922] 2 Ch. 850.

(*c*) This and the previous provision are to prevent the married woman from becoming "Stateless," a condition whose existence was recognised in *Stoeck* v. *The Public Trustee*, [1921] 2 Ch. 67. Cf. *Ex p. Weber*, [1916] 1 A. C. 421.

(*d*) By s. 12 of the British Nationality and Status of Aliens Act, 1914, the infant children born abroad of a person who ceases to be a British subject lose British nationality where by the law of the country of their father's adoption they become the subjects of such country, but where the child is born in England and the father afterwards loses British nationality the child remains a British subject.

(*e*) There are saving clauses for persons who, during the war, are in His Majesty's Forces, or would have been in the Forces but for their being engaged on work of national importance.

A declaration of alienage made after 1943 must be duly registered, and a declaration of alienage made during wartime requires the Home Secretary's permission. (Act of 1943, s. 7.)

II. THE STATUS OF ALIENS.

Historical Development.—By the common law aliens could not hold any public office or exercise any franchise, and that is still the general position to-day under various statutes.

As regards private rights, the chief rule in the middle ages was that an alien could not hold land, and no inheritance of land by or through an alien was permitted until the Naturalization Act, 1870. After the loss of Normandy, the King seized English lands belonging to Normans and Frenchmen; if they claimed the land they were met with the answer that they could not have it so long as the King was at war with the King of France and until the latter restored French lands to English subjects. As the dispute with France was never settled, this led to the development of the principle that no alien could hold English land; but its origin was preserved by the rule that a conveyance of land to an alien was not void—the grantor was divested of the land and the King could take it.

Owing to the predominance of the land law in early English law, the rule that aliens could not bring a real action led to their being regarded as incapable of bringing personal actions as well; and this, combined with the exclusiveness of the Borough Courts, resulted in aliens having practically no civil rights at common law. Littleton, however, went too far in saying that an alien could not bring any real or personal action: Coke was probably nearer the truth in saying that the common law principle was that only alien enemies were excluded altogether from bringing actions, while alien friends were only excluded from bringing real or mixed actions (*f*).

Magna Carta (Art. 41) provided that all merchants should have liberty to enter, dwell, and travel in and depart from England for purposes of commerce without being subject to any evil tolls but only to the ancient and allowed customs, except in time of war. On the outbreak of war merchants of the hostile States were to be attached, if in England, without damage to body or goods until it was known

(*f*) Co. Litt. 129b; Holdsworth, *History of English Law*, vol. IX, pp. 91—99.

how our merchants were treated in such hostile State; if ours were safe, the others were to be safe also. In the first re-issue of Henry III's charter the words "*nisi publice antea prohibiti fuerint*" were added after the opening words "*Omnes Mercatores.*"

By a statute of 1540, aliens could rent neither a shop nor a residence, but the statute was silent as to pre-existing restrictions. Higher taxation was imposed on aliens. At common law they could be expelled at the royal pleasure, this prerogative right being last exercised in 1575.

Aliens were protected to some extent as regards private rights by the mercantile and maritime Courts, as well as by the Court of Admiralty and the Council, and during the fifteenth and sixteenth centuries the Common Law Courts extended their sphere to cover aliens, as otherwise much lucrative business would have been taken over by the Court of Chancery. They first extended their protection to alien merchants, and later to all alien friends. By the end of the sixteenth century alien friends could bring personal actions such as trespass and debt, and could own personal property, including leases of dwelling-houses.

In the sixteenth century also it was recognised that aliens owed a temporary and local allegiance. The fact that aliens could bring actions of tort meant that the defence of "act of State" was not available to the Executive against aliens resident within the realm. (*Johnstone* v. *Pedlar* (*g*).) Alien enemies, however, remained rightless (*h*). In *R.* v. *Speyer* (*i*) it was held that a naturalized alien could be a member of the Privy Council. Proceedings in the nature of a writ of *quo warranto* were instituted to determine the legality of Sir Edgar Speyer's appointment as a Privy Councillor, and the statutes relevant to the claim were as follows: The Act of Settlement (section 3) provided that nobody born abroad or outside the British Dominions, though "*naturalized or*" a denizen, except born of English parents, should be eligible for (*inter alia*) the Privy Council. By section 7 of the Naturalization Act, 1870, persons duly naturalized thereunder were to be entitled to all political and other rights of a British subject. By section 3 of the British Nationality and Status of Aliens Act, 1914,

(*g*) [1921] 2 A. C. 262; *ante*, p. 416. Cf. *Buron* v. *Denman* (1848), 2 Ex. 167 (alien abroad).
(*h*) Cf. *post*, p. 434 (enemy aliens), and p. 435 (enemy character).
(*i*) [1916] 2 K. B. 858; *ante*, p. 194.

holders of a certificate of naturalization in the United Kingdom were to have all political and other rights attaching to a natural-born British subject, and it was further provided that section 3 of the Act of Settlement, as regarded naturalized subjects, should be read as if the words "*naturalised or*" were omitted therefrom. The Court held that the Act of 1870 had repealed by implication section 3 of the Act of Settlement as regarded naturalised subjects, and that as the Act of 1914 had not revived the disqualification the appointment of Sir Edgar Speyer was valid.

So long as the State to which he belongs is at peace with His Majesty, an alien in England at the present day enjoys full civil or private, as opposed to civic or political, rights. He owes "temporary allegiance," and as he is subject to our laws he enjoys their protection, *e.g.*, he can bring and defend actions and institute prosecutions. He can acquire land, has full personal liberty, and can generally do as he pleases; but though he must pay taxes when domiciled in England, he cannot exercise either the parliamentary or municipal franchise, neither can he own a British ship or aircraft or any share in one (*j*).

Under the Aliens Restrictions (Amendment) Act, 1919, it is a misdemeanour, punishable by penal servitude for ten years, for an alien to attempt, or do any act calculated or likely, to cause sedition or disaffection amongst any of His Majesty's forces or the forces of His Majesty's allies or the civilian population. An alien is also liable to imprisonment on summary conviction for promoting or attempting to promote industrial unrest in any industry in which he has not been *bona fide* engaged in the United Kingdom during the preceding two years.

Undesirable Aliens.—There are *dicta* in favour of the view that the Crown has a general power to exclude aliens from this country (*k*), though since the passing of an Act in 1793 the government has always sought statutory powers. In any event, an alien cannot by action enforce his right to enter, as measures taken by the Crown to exclude

(*j*) By a Defence Regulation made under the Emergency Powers (Defence) Acts, 1939 and 1940, aliens possessing special qualifications or experience were allowed, with the consent of the Treasury, to be temporarily employed in a civil capacity under the Crown, if suitably qualified British subjects were not readily available. As to service in the armed forces, see *post*, p. 511.

(*k*) *E.g.*, *Johnstone* v. *Pedlar*, [1921] A. C. 262, *per* Lord Atkinson at p. 283; see further, Holdsworth, *History of English Law*, vol. X, pp. 393—400.

aliens are acts of State. (*Musgrove* v. *Chun Teeong Toy* (*l*).) Forsyth was of the opinion that "the Crown has no power, by its prerogative alone, to send anyone, whether he be a subject or an alien, compulsorily out of the realm" (*m*). In spite of *dicta* to the contrary by Lord Ellenborough, C.J., in a debate in the House of Lords on the Alien Bill in 1816 and by Lord Atkinson in *Johnstone* v. *Pedlar* (*n*), Forsyth's opinion is probably correct, except where (as in the latter case) the alien entered in contravention of the immigration laws. The Crown can enter into extradition treaties without parliamentary sanction, but it is doubtful whether it can extradite alien criminals except under Extradition Acts (*o*).

The Aliens Act of 1905 provided that an alien classed under the Act as "undesirable" might, under certain conditions, be prevented from landing, and the following were denominated undesirable aliens:—

(i) those who (not being political or religious refugees) could not show that they had in their possession, or that they were in a position to obtain, the means of supporting themselves and their dependants;

(ii) lunatic or idiot aliens, or those suffering from any disease or infirmity by which they might become a burden to the public;

(iii) those who had been sentenced to an extraditable offence in a foreign country; and

(iv) those against whom an expulsion order had been made.

The Act further provided for the expulsion of aliens who abused our hospitality, and for the detention of undesirable aliens till the Home Secretary had made an order, and then until their embarkation.

The Aliens Restriction Act, 1914, gave wide powers to the executive to make orders concerning aliens in time of war or emergency, *e.g.*, for prohibiting or restricting the landing of aliens in the United Kingdom or requiring their departure or deportation therefrom; for restricting the residence of aliens to certain areas; for the registration of aliens and the supervision of their movements and activities; and for the summary punishment of persons offending against the Act.

(*l*) [1891] A. C. 272; for acts of State, see *ante*, p. 415.
(*m*) Forsyth, *Cases and Opinions on Constitutional Law* (1869), p. 181.
(*n*) *Ubi supra.* (*o*) For the Extradition Acts, see *post*, p. 436.

The Aliens Restriction (Amendment) Act, 1919, repealed the Aliens Act, 1905, but incorporated many of its provisions, and it also perpetuated some of the emergency powers contained in the 1914 Act. A code of regulations was laid down by Order in Council in 1920, and these have been amended by subsequent Orders. It was held in *R.* v. *Governor of Brixton Prison, Ex parte Lannoy* (*p*) that an immigration officer may refuse leave to an alien to land under the Aliens Order, 1920, even if he does not ask for leave, *e.g.*, where he was brought here under naval escort.

The British born wife of a resident alien was exempted from registration by the British Nationality and Status of Aliens Act, 1933.

In *R.* v. *Governor of Brixton Prison, Ex parte Sarno* (*q*), Lord Reading, C.J., alluding to the powers under the Aliens Restriction Act, 1914, during war or emergency, stated that the object of the Act was to confer on the Secretary of State extraordinary powers of dealing with aliens, and that it permitted sweeping regulations; but he expressed doubt whether the Executive or the alien had the right to choose the country to which he is to go. The use of the power of deportation as an act of comity to allies is exemplified in *Ex parte Duc de Chateau-Thierry* (*r*). In this case the French demanded the surrender of the Duke of Chateau-Thierry, who had resided in England for some years before the war. The Duke contended that he was a political refugee, and also that he was unfit for military service. Here the Court confirmed the order for deportation, and held also that the Government could choose a ship and place the Duke on board. (Cf. *R.* v. *Governor of Brixton Prison, Ex parte Sarno, supra.*)

In *Sacksteder's Case* (*s*) the applicant had expressed his desire to enlist in the British Army, but failed to do so and was ordered to be deported; the Court confirmed the order. The circumstances relating to the arrest of Sacksteder were peculiar. The Home Secretary had left general directions for the arrest of certain aliens under the Aliens Restriction Act, and the arrest of Sacksteder was carried out by the directions of the Home Secretary. He had previously given general directions that persons named in a deportation order were to be put on certain ships and detained in custody until they sailed. The

(*p*) [1943] 2 K. B. 281.
(*q*) (1916), 86 L. J. K. B. 62.
(*r*) [1917] 1 K. B. 922.
(*s*) (1918), 87 L. J. K. B. 608.

Assistant Secretary instructed the police to arrest Sacksteder. On the hearing of a *habeas corpus* application the Court held (1) that Sacksteder was in legal custody; (2) that orders for deportation should be signed by the Home Secretary; (3) that the Court can go behind an order for arrest though it be valid on its face. In *Venicoff's Case* (*t*) it was held that an alien could be deported under the Act of 1914 without a preliminary inquiry into the circumstances of the case, an order of deportation being an executive and not a judicial act. The Aliens Restriction Act is a permanent Act conferring summary powers over aliens during time of war or other great emergency.

The Defence (General) Regulations issued under the Emergency Powers (Defence) Acts, 1939 and 1940, placed restrictions on aliens changing their name (D. R. 20). The Home Secretary was given power under these Regulations to detain aliens against whom a deportation order had been made, if he was of the opinion that their deportation was impracticable or would be prejudicial to the prosecution of the war and their detention was necessary or expedient for securing the public safety, the defence of the realm or the maintenance of public order; and also to detain aliens who had been brought or sent to the United Kingdom by order of a competent naval, military or air force authority (D. R. 20A). The Home Secretary was further given power to require ex-aliens, who had become British subjects since 1932 (*i.e.*, roughly, refugees from Nazi and Fascist States) to register themselves and notify the authorities of their movements (D. R. 20AA).

Enemy Aliens.—Enemy aliens can be arrested and imprisoned (*Sylvester's Case*, (1702) (*u*)), and they cannot bring a writ of *habeas corpus*. (*R.* v. *Schiever* (1759) (*x*).) In *R.* v. *Knockaloe Camp Commandant, Ex parte Forman* (1917) (*y*), it was held that the King by virtue of his prerogative could intern enemy aliens, whether they were registered under the Aliens Restriction Act or not.

An alien enemy cannot sue or initiate any proceedings in a British Court, except, perhaps, in a representative capacity as executor or administrator (*Rodriguez* v. *Speyer Bros.* (*z*).) He may, however, be sued or prosecuted, and therefore may appeal. (*Porter* v. *Freudenberg* (*a*).)

(*t*) [1920] 3 K. B. 72.
(*u*) 7 Mod. 150.
(*x*) 2 Burr. 765.
(*y*) 87 L. J. K. B. 43.
(*z*) [1917] A. C. 59.
(*a*) [1915] 1 K. B. 857; see also *Eichengruen* v. *Mond*, [1940] 1 Ch. 785.

If a cause of action has accrued to an enemy alien before the war, it is not extinguished but merely suspended till peace comes. No right of action can accrue to him during war. When war has been declared by this country, the declaration operates as a prohibition against all intercourse with an enemy except by licence of the Crown. (*The Hoop* (1799) (*b*).) Contracts made before the war with an enemy are dissolved during the continuance of the war if their fulfilment would involve any intercourse or dealings between those whom the war has constituted enemies. The Trading with the Enemy Act, 1939, s. 7, provides for the collection of enemy debts and the custody of enemy property. The Board of Trade appoints a Custodian of Enemy Property, who is usually the Public Trustee.

Enemy Character.—Strictly, an alien enemy is a national of a foreign State which is at war with this country, and who is not a British subject or a British protected person. (Treachery Act, 1940.) The development of international trade, however, has led to the substitution of "enemy character" for enemy nationality for many purposes as regards private rights and duties, and this conception affects public law in so far as it is applied to the offence of trading with the enemy. For this purpose the test is residence or place of business. (*Jonson* v. *Driefontein Consolidated Mines* (*c*); *Porter* v. *Freudenberg*, *supra*.)

The origin of the modern law may be traced to the case of *Wells* v. *Williams* (1697) (*d*). In the developed common law an alien enemy coming to reside in this country under a "safe conduct" from the Crown was in the same position as an alien friend. This rule was extended in *Wells* v. *Williams* to an alien who came here before the war and "continued here by the King's leave and protection ever since, without molesting the government or being molested by it." The concession was granted especially to French Protestants, and it was pointed out in that case that in the declaration of war with France the King had excepted all French Protestants.

Originally, all British subjects were regarded as being at war with the subjects of foreign States at war with the King. Later, the prohibition against commercial intercourse with enemies was based on grounds of public policy, that is, to prevent any advantage accruing

(*b*) 1 C. Rob. 196. (*c*) [1902] A. C. 384.
(*d*) 1 Ld. Raym. 282; and see Holdsworth, *History of English Law*, vol. IX, pp. 99—104.

to enemy States, and so the rule was extended to all persons, even British subjects or neutrals, carrying on business or merely residing in an enemy country (*e*), including an enemy-occupied country (*f*). These principles have been more precisely defined and developed by the Trading with the Enemy Acts, 1914—18 and 1939 (*g*).

The Extradition Acts, 1870—1935.—These Acts provide that when the Crown makes a treaty by virtue thereof with a foreign State, the Crown may, subject to certain restrictions and formalities, hand over to that State any persons (whether British subjects or aliens) who have been found guilty of committing in that State any offence covered by the Extradition Acts (*h*). The foreign State in return undertakes to surrender to Great Britain persons who have committed extraditable crimes in British territory.

English law will not allow a man's surrender for a political offence. (Extradition Act, 1870, s. 3.) Thus, in *Re Castioni* (*i*), where a native of the Swiss Canton of Ticino committed murder during an insurrection and escaped to England, he was not surrendered, because the offence was a political one.

Provision is also made that, subject to certain reservations, no person is to be surrendered or tried for any crime other than the crime in respect of which his extradition was demanded.

The Act of 1870 further enables the Crown to make Orders in Council directing that the Extradition Acts shall apply to any given State. Such an Order in Council shall be deemed conclusive evidence that the arrangement therein referred to complies with the provisions of the Act, and that the Act applies in the case of the foreign State mentioned in the Order, and the validity of the Order is not to be questioned.

The Act of 1870 provides for the question of surrender being tried by a Bow Street magistrate, who is styled in the Act a "police magistrate." When extradition is desired, the accused can be arrested either by police magistrate's warrant issued on the order of the Home

(*e*) *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, at pp. 867—869. For the position of corporations, see *Daimler Co.* v. *Continental Tyre and Rubber Co.*, [1916] 2 A. C. 307; and as to firms, see *Rodriguez* v. *Speyer Bros.*, [1919] A. C. 59.

(*f*) *In re An Arbitration*, [1942] 1 K. B. 222.

(*g*) See further, *post*, pp. 448—449.

(*h*) There is no prerogative power to seize an alien in this country and hand him over to a foreign State: Forsyth, *Cases and Opinions on Constitutional Law*, pp. 369—370. *cf. East India Co.* v. *Campbell* (1749), 1 Ves. Sen. 246; *Mure* v. *Kaye* (1811), 4 Taunt. 43.

(*i*) [1891] 1 Q. B. 149.

Secretary, or by warrant of a justice of the peace issued upon information on oath in the ordinary way. When a police magistrate commits a prisoner for surrender, such surrender cannot take place for fifteen days, or such further time as a *habeas corpus* application (if applied for) may occupy. (Extradition Act, 1870, s. 11.)

Section 12 provides that if a fugitive criminal is not conveyed out of the kingdom within two months after committal for surrender by the police magistrate, or if a writ of *habeas corpus* is issued after the decision thereon, any superior Court Judge may upon the prisoner's application, and upon proof that the Home Secretary has had reasonable notice of such application, order the discharge of the prisoner from custody.

If the fugitive is not discharged, he is surrendered under the warrant of the Home Secretary.

The following points should be noted with reference to extradition cases:—

(i) No person is to be surrendered for an offence of a political character. An offence is political only when there are two parties in the State each striving to impose its own government on the other. Therefore an explosion caused by an anarchist is not a political offence within the Act (*k*). The fact of the prisoner being accused of murder in a political disturbance does not *per se* justify the refusal of an order for his surrender to a foreign State, unless the offence be a political one in the sense above mentioned (*l*).

(ii) Where a person has been tried in England for an extradition offence he cannot be surrendered to a foreign State for that particular crime.

(iii) Where a prisoner can show that though surrender is asked for in respect of another crime the real object of the application is to try him for a political offence, he ought to be discharged on a writ of *habeas corpus* (*ibid.*).

(iv) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State or by arrangement that the fugitive criminal shall not, until he has been sentenced or had an opportunity of returning to His Majesty's dominions, be detained or tried in that foreign State for any offence committed

(*k*) *Re Meunier*, [1894] 2 Q. B. 415. (*l*) *Re Castioni*, [1891] 1 Q. B. 149.

before his surrender other than the extradition crime proved by the facts on which the surrender is grounded (*ibid.*) (*m*).

(v) The magistrate ought not to order a surrender unless the treaty permits of the same and the crime in respect of which surrender is demanded is the exact equivalent of the like offence in England. Therefore it is not sufficient to ask for a surrender for false pretences or forgery by a mere general description, as it must be shown that the forgery or the false pretences, as the case may be, are of the same kind as would be punishable in England.

(vi) Section 3 of the Extradition Act, 1873, provides that "every person who is accused or convicted of having counselled, procured, commanded, aided or abetted the commission of any extradition crime . . . shall be liable to be surrendered." Therefore physical presence of the prisoner in the foreign State is not necessary where it can be proved that he has brought about through a partner or agent the commission of an extradition offence (*n*).

(vii) Evidence must be furnished that the prisoner committed the crime within the territory of the State demanding extradition; it is not sufficient that he was convicted there (*o*).

(*m*) Extradition Act, 1870, s. 3.
(*n*) Cf. *R.* v. *Godfrey*, [1923] 1 K. B. 24. See also *R.* v. *Nillins* (1884), 53 L. J. M. C. 157.
(*o*) *Kosechechatko* v. *Att.-Gen. of Trinidad*, [1932] A. C. 78

CHAPTER XXXII.

OFFENCES AGAINST THE STATE.

In a wide sense, all crimes are offences against the State. It is proposed to confine our attention here to the more important of those criminal offences which have a political aspect and which are usually regarded as falling within the scope of Constitutional Law, in so far as they are not mentioned elsewhere in this book.

Classification of Offences against the State.—Offences of a public nature are usually classified in the following manner:—

(i) *Offences against the Crown and Government.*—These include treason, misprision of treason, treason-felony, treachery, incitement to mutiny, sedition, disclosure of official secrets, and foreign enlistment, which are described below; as well as illegal training and drilling, illegal wearing of uniforms, associating with military organisations (*a*), and incitement to disaffection (*b*).

(ii) *Offences against Public Peace and Morals.*—These include blasphemy (*b*), obscene and defamatory libels (*b*), unlawful assembly, rout and riot (*a*), and public nuisance (*c*).

(iii) *Offences against Public Justice.*—These include perjury, bribery, embracery and interference with witnesses, barratry, maintenance and champerty, contempt of Court (*d*), obstructing or resisting the police (*a*), and corrupt and illegal practices at elections (*e*).

(iv) *Offences connected with Trade and Commerce.*—These include illegal strikes and lockouts (*a*); trading with the enemy, which is discussed below; coinage offences (Coinage Offences Act, 1936), and smuggling. (Customs Consolidation Act, 1876.)

Treason.—Treason is a betrayal (*trahison*) or breach of faith and allegiance against the Sovereign.

(*a*) *Post*, Chapter XXXV.
(*b*) *Post*, Chapter XXXIV.
(*c*) *Ante*, Chapter XXI.
(*d*) *Ante*, Chapter XXIX.
(*e*) *Ante*, Chapter VIII.

The earliest statute on the subject is the Statute of Treasons, 1351, which constitutes the following offences high treason (*f*):—

(a) compassing or imagining the death of the King, Queen, or their eldest son; or

(b) violating the King's consort or the King's eldest daughter unmarried or King's eldest son's wife; or

(c) levying war against the King in his realm; or

(d) adhering to King's enemies in his realm, giving them aid and comfort in the realm or elsewhere; or

(e) counterfeiting the Great Seal or Privy Seal or coin of the realm, or knowingly importing false money for improper use; or

(f) slaying the Chancellor, Treasurer, King's justices of the one Bench or the other, justices in Eyre, justices of Assize, or other justices assigned to hear and determine in their places, while they are discharging their offices.

Compassing the death of the Sovereign.—The word "compass" or "imagine" imports design which must be manifested by an overt act. The following are overt acts according to Blackstone: providing weapons, conspiring to imprison the King though not intending his death, assembling and consulting to kill the King. Idle words are not now treason, though they were formerly deemed so, but they are high misdemeanours.

In arbitrary reigns people were punished for unpublished treasonable writings, *e.g.*, Peacham (afterwards pardoned) for an unpublished and undelivered sermon, and Algernon Sydney for treasonable unpublished papers found in his closet. Blackstone considers both Peacham and Sydney guiltless of treason, on the ground that even if mere writing down were a sufficient overt act, such writing was in those cases clearly not relative to any previously framed design of murdering the King, but merely to speculative opinions of the authors.

Levying of war.—This includes not only levying of war to dethrone the King, but levying war to reform religion, remove councillors, or redress grievances. Resistance to the royal forces by defending a castle against them is levying war, and so is an insurrection with an

(*f*) Petit treason under this statute consisted of (a) the killing of a master by his servant, (b) the killing of a husband by his wife, and (c) the killing of a prelate by his ecclesiastical inferior. Since 1828 these offences have been regarded as ordinary murder. (Offences against the Person Acts, 1828—1861.)

avowed design to pull down all chapels and the like. In *Dammaree's Case* (1710) (*g*) Dammaree and Purchas were convicted of treason for burning meeting-houses, the Court being of opinion that the design was a general one against the State, and therefore a levying of war.

Blackstone says that merely conspiring to levy war is not a treasonable levying of war, but that it constitutes compassing the King's death where it is pointed at the royal person or government.

Adhering to the King's enemies.—Pirates and robbers who invade our coasts are the King's enemies, and so also are foreign enemies and our fellow-subjects in rebellion at home. Where, according to Blackstone, a rebel flees the realm, he is not an enemy within the Statute of Treasons.

Persons acting under duress as regards life or person cannot be convicted as traitors, provided that they leave the King's enemies at the first opportunity.

The facts of modern civilisation and the overwhelming strength of present-day central governments make it extremely difficult for anyone to "levy war against the King in his realm" with much prospect of success. Again, whether owing to the excellence of our institutions or to other causes, attacks on the person of the monarch or other royal personages are extremely rare in England. We hear little of charges of high treason of this nature, or indeed any other, and when *R.* v. *Lynch* (*h*) came before the Courts, it was the first charge of high treason tried for sixty-two years past. That case is important on the construction of that section of the statute of 1351 which deals with adhering "to the King's enemies in his realm, giving them aid or comfort in the realm or elsewhere." At the outset of the trial it was moved to quash the indictment on the ground that each count charged an adhering "without the realm," and therein disclosed no offence under the statute. The Court, while leaving the accused the right to move in arrest of judgment should he choose to do so, were of the opinion that the words in question were governed by *R.* v. *Vaughan* (1696) (*i*), and that the words "adhering to the King's enemies in his realm" did not mean that the "accused person *being in the realm* has been adherent to the King's enemies *wherever they were*," to the exclusion of such a case as that before the Court. It is clear

(*g*) 15 St. Tr. 521.
(*i*) 13 St. Tr. 485.
(*h*) [1903] 1 K. B. 444.

that so narrow a construction not only would enable an Englishman to engage with a foreign hostile power against his own country so long as he took care to remain abroad, but also ignores the words "or elsewhere" in the same sentence of the section. The case also decided that section 6 of the Naturalisation Act, 1870, does not enable a British subject to become naturalised in an enemy State in time of war and, further, that the very act of purporting to become naturalised in those circumstances constitutes an overt act of treason. (*R.* v. *Lynch*, *supra*.)

In *R.* v. *Casement* (1917) (*j*) it was decided that a subject may "adhere to the King's enemies in his realm" and be found guilty of treason whether the act complained of was committed within or outside the realm. In that case a British subject, an Irishman by birth, was found guilty on the ground that he went to Germany when the United Kingdom was at war with that country, and while there endeavoured to persuade British prisoners of war to join the enemy's forces and thus to assist the liberation of Ireland.

In *R.* v. *Ahlers* (*k*) the facts were as follows. The accused was German Consul at Sunderland and it was therefore part of his ordinary duty to give his compatriots assistance, monetary and otherwise. Ahlers on August 5th, 1914, on the day after the outbreak of war, took steps to assist German subjects of military age to return home to fight in the German army. On August 5th an Order in Council was made under the Aliens Restriction Act, 1914, which limited the time of departure for alien enemies to August 11th; of this the accused knew nothing, but, as he afterwards stated in his evidence, he believed he was acting in accordance with International Law. He was indicted for treason and convicted of adhering to the King's enemies, but the conviction was quashed by the Court of Criminal Appeal on the ground that proof was wanting that in acting as he did he was not simply carrying out his duties, and also that he was aware that he was assisting the King's enemies.

Slaying the Chancellor, etc.—As the Lord Chancellor and Judges represent the King in Court, Blackstone considers them entitled to equal protection, and justifies this section of the statute accordingly. However, *attempted* murder of the Chancellor and Judges in Court

(*j*) [1917] 1 K. B. 98. (*k*) [1915] 1 K. B. 616.

is, according to the same authority, not treason. These technical treasons could conveniently be turned into murder.

Treason Acts subsequent to 1351.—The Treason Act, 1495, confirmed the common law principle that allegiance is due to the *de facto* Sovereign (*i.e.*, the King who is for the time being actually in possession of the Crown), and not to a King *de jure* (*i.e.*, with a right to the Crown) who is not also King *de facto*.

Under the Treason Act, 1702, endeavouring to deprive or hinder any person next in succession to the throne under the Act of Settlement from succeeding thereto, and maliciously and directly attempting the same by any overt act, is treason. The Succession to the Crown Act, 1707, made it treason maliciously and directly by writing or print to maintain and affirm that any other person has any right to the Crown other than in accordance with the Act of Settlement, or that Parliament has not power to make laws to bind the Crown and the descent thereof.

The compassing of, or imagining or intending, either within the realm or without, the King's death, destruction, or bodily harm tending to death or destruction; maiming or wounding, imprisonment or restraint of the King's person, his heirs and successors; and uttering or declaring any such treasonable intent by any overt act, is treason. (Treason Acts, 1795 and 1817.)

Trial and Punishment.—The punishment for treason is now death by hanging or beheading. (Treason Act, 1814 (*l*).)

Formerly a male traitor was hanged, drawn and quartered, after being dragged on a hurdle to the place of execution; a female traitor was burnt. Until the Forfeiture Act, 1870, conviction was followed by forfeiture.

The offence of treason committed within the realm must be prosecuted within three years after its commission, save in the case of compassing the King's death. (Treason Act, 1695.) Bail can only be granted by a Secretary of State, the King's Bench Division, or a judge of that Division in vacation. (Indictable Offences Act, 1848.)

Misprision of Treason.—Misprision of treason is the bare knowledge and concealment of treason, without the assent thereto which is

(*l*) Beheading is, in practice, obsolete. Among other offences for which civilians are punishable with death are treachery (Treachery Act, 1940), piracy (Piracy Act, 1837) and arson of H.M. dockyards (Dockyards Protection Act, 1772).

necessary to constitute the crime of treason. (Treason Act, 1555.) At common law mere concealment of treason was deemed to constitute assent, and there is no distinction in treason between principals and accessories, so that misprision itself amounted to treason. Misprision under the Act of 1555 consists in knowing of the treasonable design, its nature and would-be perpetrators, and failing to disclose the information to some responsible public officer, such as a judge of assize or justice of the peace.

Misprision of treason is a *misdemeanour* punishable by imprisonment for life. As the Forefeiture Act, 1870, did not extend to this offence, conviction may still be followed by forfeiture of the offender's property.

Treason-felony.—By the Treason Felony Act, 1848, if any person shall, within or without the realm, compass, imagine, invent, devise, or intend to depose the Sovereign, his heirs or successors, from the throne of the United Kingdom, or any of His Majesty's dominions, or to levy war against the Sovereign, his heirs or successors, within any part of the United Kingdom, in order to compel by force a change of counsels or measures, and in order to put any constraint upon either House of Parliament, or move any foreigner to invade the realm, or other part of His Majesty's dominions, and shall express such compassing, etc., by publishing any print or writing, or any overt act, such person shall be guilty of *felony*. Some of these offences had been made treason by the Treason Act, 1795 (*m*).

The maximum punishment is penal servitude for life, and if a person is indicted for treason-felony, and the offence turns out to be treason, such person may be convicted of treason-felony.

Attempt to Alarm or Injure the King.—An attempt to alarm or injure the King by discharging or aiming or producing a gun, whether loaded or not, at or near the person of His Majesty is a misdemeanour, punishable by penal servitude for seven years and whipping. (Treason Act, 1842.)

Treachery.—The Treachery Act, 1940, s. 1, provides that: "If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give

(*m*) For the reasons for passing the Act of 1848, see Holdsworth, *History of English Law*, vol. VIII, pp. 309—322.

assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony and shall on conviction suffer death." The prosecution, trial and punishment of offences under this Act are to be similar to those on an indictment for murder, except that the consent of the Attorney-General is necessary before a prosecution is instituted, and there are special provisions for the trial by court-martial of persons subject to naval, military and air force law, and alien enemies (section 2). The "enemy" means the enemy in any war in which His Majesty may be engaged, and "enemy alien" means a person who possesses the nationality of a State at war with His Majesty, not being either a British subject or a person certified by a Secretary of State to be a British protected person (section 5).

The Treachery Act, 1940, applies to anything done: (a) by a British subject elsewhere than in a Dominion (not including Newfoundland), India, Burma or Southern Rhodesia; (b) by any person subject to naval, military or air force law, in any place whatsoever; or (c) by any person in the United Kingdom, or on any British ship or aircraft, not being a Dominion ship or aircraft (section 4); but no person shall be guilty of an offence under the Act by reason of anything done after the date fixed by Order in Council as the date in which the emergency which was the occasion of the passing of the Act came to an end (section 6).

Incitement to Mutiny or Disaffection.—By the Incitement to Mutiny Act, 1797, persons maliciously endeavouring to seduce the King's soldiers or sailors from their duty *and* allegiance, or to commit an act of mutiny or traitorous practice, are to be guilty of felony, and may receive a maximum punishment of penal servitude for life.

The Incitement to Disaffection Act, 1934, makes it an offence for any person maliciously and advisedly to endeavour to seduce any member of His Majesty's forces from his duty *or* allegiance to His Majesty (section 1); or—and this is new—to be in possession, with intent to commit, abet, counsel or procure the commission of an offence under section 1, of any document such that dissemination of copies among members of the forces would be an offence against section 1 (section 2). The Act enables a Judge of the High Court, if satisfied by sworn information that an offence has been committed, and

that evidence thereof is to be found on premises named in the information, to grant a search warrant to the police on their application therefor. A prosecution under this Act requires the consent of the Director of Public Prosecutions.

It is a misdemeanour under the Police Act, 1919, to cause, or attempt to cause, disaffection amongst the members of any police force, or to induce, or attempt to induce, any member of a police force to withhold his services or to commit breaches of discipline (*n*).

Sedition.—Sedition is the attempt to bring into hatred and contempt the person of the reigning monarch, or the government and Constitution of the United Kingdom as by law established, or either House of Parliament, to incite His Majesty's subjects to attempt the alteration of any matter in Church or State otherwise than by lawful means (Criminal Libel Act, 1819, c. 8), to incite any person to commit any crime in disturbance of the peace, to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes.

In *R.* v. *Burns* (1886) (*o*), Cave, J., stated that "sedition embraces everything, whether by word, deed or writing, which is calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and law of the empire." It is a common law misdemeanour covering a number of acts of a political nature falling short of treason.

A meeting lawfully convened may become an unlawful meeting if, during its course, seditious words are spoken of such a nature as to produce a breach of the peace, and those who do anything to assist the speaker in producing upon the audience the natural effect of their words, as well as those who spoke the words, are guilty of sedition (*R.* v. *Burns*, *supra*).

Apart from illegal drilling and unlawful secret societies (*p*), which are sometimes included under this heading, sedition usually takes the form of seditious conspiracy or seditious libel.

Seditious Conspiracy.—A conspiracy is formed when two or more persons combine to do an unlawful act, or to do a lawful act by unlawful

(*n*) See also the Aliens Restrictions (Amendment) Act, 1919, *ante*, p. 431.
(*o*) 16 Cox, 355.
(*p*) *Post*, Chapter XXXV.

means. A seditious conspiracy is a conspiracy having a seditious object (*q*).

Seditious Libel.—Libel is the publication in permanent form, without lawful justification or excuse, of matter calculated to hold another person up to hatred, contempt or ridicule. A seditious libel is a libel in which the defamatory matter is of a seditious nature. The truth of a statement is no defence if it is seditious (*r*). In modern practice prosecutions for seditious libel are rare, and are not instituted unless there is *incitement to violence* (*s*).

Offences against the Official Secrets Acts.—The Official Secrets Act, 1911, provides for the prosecution of persons who, for any purpose prejudicial to the safety or interests of the State: (a) approach a place thereby defined to be a prohibited place; (b) make sketches, etc., of such prohibited place; or (c) communicate to any other person any sketch, documents or information, etc., calculated or intended to be useful to any enemy (section 1). Such persons are guilty of a felony (section 10).

Persons are guilty of a misdemeanour under the Act who carelessly part with any sketch, documents or information, etc., to any unauthorised person, or who retain sketches, plans or documents or information too long after the time has arrived for handing them over (section 2). Persons are guilty of a misdemeanour, again, who either harbour spies or wilfully refuse to give information to a police superintendent respecting spies whom they have harboured (section 7). A "prohibited place" includes any arsenal, munition works, camp, fort, workshop, or place where munitions, etc., are made (section 3).

By the Official Secrets Act, 1920, s. 1, the following offences have been made punishable as misdemeanours—

(i) wearing an unauthorised uniform for the purpose of gaining admission to a prohibited place;

(ii) making false declarations, oral or written, with the same object;

(iii) forging passports, passes or permits;

(*q*) *R.* v. *Hunt* (1820), 3 B. & Ald. 566; *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155; and see *post*, p. 482.

(*r*) *R.* v. *Burdett* (1821), 4 B. & Ald. 314.

(*s*) *The King* v. *Aldred* (1909), 22 Cox, C. C. 1, *per* Coleridge, J.

(iv) pretending to be a government official or in the employ of one; or

(v) communicating with foreign agents, *i.e.*, persons authorised by foreign Powers, with a view to doing acts prejudicial to the State (*t*).

It is a felony or misdemeanour, as the case may be, to attempt, incite, aid or abet, the commission of an offence under either Act. (Official Secrets Act, 1920, s. 7.) The consent of the Attorney-General is required for a prosecution for an offence under the Acts. (Official Secrets Act, 1911, s. 8.) The Acts apply to offences committed in any part of His Majesty's dominions, and to offences committed anywhere by British officers or subjects. (Official Secrets Act, 1911, s. 10.)

A chief officer of police may apply to a Secretary of State for permission to require information from persons suspected of having committed an offence under section 1 of the Act of 1911. (Official Secrets Act, 1939 (u) (*x*).)

Trading with the Enemy.—It has been seen that it is an offence at common law to have any trade or commercial relations with the enemy (*y*). In the present century the law on this subject has been formulated by statute, and now rests mainly on the Trading with the Enemy Act, 1939 (as amended by the Defence (Trading with the Enemy) Regulations, 1940), which repeals the Trading with the Enemy Acts, 1914—18. The Act of 1939, however, is without prejudice to the exercise of any right or prerogative of the Crown (section 16), and does not make an offence anything done before the Act was passed, which was not unlawful at common law (section 17). The Act is administered by the Board of Trade, subject in certain respects to Treasury regulations.

Definition of "Enemy."—The expression "enemy" for the purposes of this Act means: (a) any State, or Sovereign of a State, at war with His Majesty; (b) any individual resident in "enemy territory," *i.e.*, any area which is under the sovereignty of, or in the occupation (*z*)

(*t*) The archives of a foreign embassy in London can be the subject-matter of a charge under the Acts: *R.* v. *A. B.*, [1941] 1 K. B. 455.

(u) Replacing s. 6 of the Official Secrets Act, 1920; cf. *Lewis* v. *Cattle*, [1938] 2 K. B. 454.

(*x*) The Official Secrets Acts were amended in several respects by the Defence (General) Regulations, 1939.

(*y*) *Ante*, p. 435. (*z*) See *In re An Arbitration*, [1943] 1 K. B. 222.

of, a Power with whom His Majesty is at war (*a*); (c) any body of persons (whether corporate or unincorporate) carrying on business in any place, *if and so long as* the body is controlled by a person who is an enemy under the Act; (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty; and (e) any individual or body as respects any business carried on by him or it in enemy territory. The expression does not include an individual by reason *only* that he is an enemy subject (sections 2, 15 (1)).

Definition of "Trading with the Enemy."—Trading with the enemy means generally having any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy. It includes (i) supplying goods to or for the benefit of an enemy; obtaining goods from an enemy; trading in, or carrying, goods consigned to or from an enemy or destined for or coming from enemy territory; (ii) paying or transmitting money, negotiable instruments or securities for money to or for the benefit of an enemy or to a place in enemy territory, (iii) performing any obligation to, or discharging any obligation of, an enemy; and (iv) certain acts connected with the transfer of negotiable instruments and choses in action by enemies, the transfer and allotment of securities, and the purchase of enemy currency (sections 1 (2), 4—6). Licenses may, however, be given in certain cases by the Treasury or the Board of Trade

Trading with the enemy is punishable on indictment by penal servitude and fine, and on summary conviction by imprisonment and fine. The goods or money in respect of which the offence was committed may also be forfeited (section 1 (1)). Where an offence committed by a corporate body was committed with the consent or connivance of, or is attributable to the negligence of, any officer of the corporation, such officer is also punishable for the offence (section 10). Attempts to trade with the enemy are to be similarly dealt with under the Defence (Trading with the Enemy) Regulations, 1940 (*b*).

Offences against the Foreign Enlistment Act, 1870.—This Act, which is designed to prevent friction with States at peace with this

(*a*) The Board of Trade was given power by the Defence (Trading with the Enemy) Regulations, 1940, to extend the provisions of the Act to any specified area in the same way as they apply to enemy territory.

(*b*) See further, McNair, *Legal Effects of War* (2nd ed.), ch. 7, Clive Parry, *The Trading with the Enemy Act and the Definition of an Enemy* (1941), 4 Modern Law Review, pp. 161—182.

country, makes the following acts misdemeanours if done without the King's licence:—

(i) *Illegal Enlistment.*—The acceptance by a British subject, whether within or without the King's dominions, of a commission or engagement in the naval or military forces of a foreign State at war with a friendly State (section 4); or the leaving of the King's dominions by a British subject with intent to accept any such commission or engagement (section 5).

(ii) *Illegal Shipbuilding* – The building, equipment or dispatch, by any person in the King's dominions, of a ship which he knows or has reasonable cause to believe will be employed by a foreign State at war with a friendly State (section 8) (*c*).

(iii) *Illegal Expeditions.*—The preparation or fitting out, by any person within the King's dominions, of a naval or military expedition against the territory of a friendly State (section 11).

The Fugitive Offenders Act, 1881, makes provision for the arrest and surrender of persons accused of crimes to which the Act applies when they flee from one part of His Majesty's dominions to another part. The Act allows ordinary magistrates to effect arrests in these cases (*d*), but the question of surrender can only be decided by certain officials specified in the Act On an order for surrender being made the prisoner cannot be removed from the territory within fifteen days, and he must be told that he can apply for a *habeas corpus* if he desires. If he is not removed within a month he can demand his liberty, and if not tried within six months he can demand to be sent back to the place of arrest The Fugitive Offenders Act, 1915, empowers His Majesty by Order in Council to extend the provisions of the foregoing Act to protectorates outside his dominions.

The Act only applies to offences punishable with imprisonment with hard labour for twelve months and upwards

Fugitive offenders can be arrested under an endorsed warrant or a provisional warrant. A warrant for arrest is in the first instance sent out to the place where the suspect is believed to be, and then

(*c*) A licence from the Admiralty is required for the building, equipment or adaptation of a warship in, or the dispatch of a warship from, this country. (Treaties of Washington Act, 1922, London Naval Treaty Acts, 1930 and 1937.)

(*d*) For the liability of a police officer who arrests the wrong person, see *Dumond* v. *Minter*, [1941] 1 K. B 657.

the high officials specified in the Act endorse this warrant in a proper case. The prisoner is then arrested and the question of his surrender is investigated. If an order for surrender is made, fifteen days must elapse before the prisoner leaves the colony or territory in question, and he must also be informed of his right to apply for a writ of *habeas corpus*. If the prisoner is not conveyed out of the colony within one month he can claim his discharge. If after six months of his arrival in that part of His Majesty's dominions which required his surrender he is not tried, he can demand to be sent back to the territory in which he was arrested. Where a fugitive offender is discovered in a colony or other territory belonging to His Majesty, any magistrate may issue a provisional warrant for arrest, but he must send the case before one of the officials specified in the Act to be finally dealt with.

Section 9 of the Act provides that a person can be surrendered for any crime punishable under the law of the territory demanding surrender, even though the same is not an offence in the territory to which the prisoner has escaped.

Foreign jurisdiction.—The foreign jurisdiction of the Crown is not easy to deal with in an elementary treatise. It rests primarily on the fact that when a British subject goes abroad he still remains a British subject, though he may owe temporary allegiance in the country where he is residing.

In the first place, if a British subject commits certain crimes in foreign territory, he may by statute be tried and punished for them on his return to England, although, in many cases also, he may be tried and punished in the country where he committed the crime. Some of the chief examples are treason, murder, manslaughter, bigamy, offences against the slave-trading and kindred Acts, offences against the Foreign Marriages Acts, offences against the Official Secrets Acts, offences against the Foreign Enlistment Act, offences against the Maritime Conventions Act, and misdemeanours committed in the Colonies and abroad by governors and certain other officials triable in the King's Bench Division.

In the second place, special provision has to be made for the protection of the persons and property of British subjects abroad. As regards civilised countries, this is provided for by the appointment of consuls, whose duty it is to help British subjects who are charged

with crime abroad or would otherwise get into difficulties. Of course, if the foreign country persists in doing wrong to a British subject, the only remedy is by way of diplomatic representation. Diplomatic agents and consuls have notarial powers, and under certain restrictions have the power to celebrate marriage between British subjects.

Thirdly, in the case of barbarous countries, or countries where there is no regular government, foreign jurisdiction is exercised on a much more extensive scale Its exercise is regulated by the Foreign Jurisdiction Act, 1890, which begins by reciting that by treaty, capitulation, grant, usage, sufferance and other lawful means, the Crown has jurisdiction within divers foreign countries, and then proceeds to empower persons authorised by warrant from the Crown to send for trial, at some specified British Court, persons charged with offences in the particular foreign country named. It also authorises the Crown, by Order in Council, to create Courts of civil and criminal jurisdiction in the foreign country and to regulate the procedure of these Courts, and to define the persons who should be subject to their jurisdiction (*e*). Most of these "capitulations," *e.g.*, in Egypt and China, have recently been extinguished.

(*e*) See Hall, *Foreign Powers and Jurisdiction of the British Crown*, Jenkyns *British Rule and Jurisdiction beyond the Seas* See also *post*, p. 569.

CHAPTER XXXIII.

FREEDOM OF PERSON AND PROPERTY.

I. FREEDOM OF THE PERSON.

The Right of Personal Freedom.—Dicey opens his classical treatment of this subject by calling attention to a significant fact. The written Belgian Constitution, among others, contains clauses guaranteeing to the subject freedom of the person, of discussion, of the Press, and so forth: and with these abstract declarations he contrasts the means by which our own Constitution secures the same rights. Under our Constitution liberty does not need to invoke the authority of any formal written enactment. First, every man is free to do what he will except in so far as the law otherwise provides. Secondly, this freedom is enforced, not by general declarations of rights, which are often ineffectual in practice, but by concrete remedies—writs, the issue of which the aggrieved party can compel, and thereby bring his oppressor to book. It is true that Magna Carta and other great constitutional documents proclaim abstract rights, but in so doing they were merely declaratory of the existing common law (*a*)

Redress for Wrongful Deprivation of Liberty.—It is "one of the pillars of liberty," said Lord Atkin in *Liversidge* v. *Anderson*, that "in English law every imprisonment is *prima facie* unlawful, and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a Judge, who from the nature of his office cannot be sued" (*b*) On wrongful deprivation of liberty, the following remedies (*c*) are open to the subject and to an alien within the realm:—

(1) civil proceedings for damages either in respect of malicious prosecution or false imprisonment or assault;

(2) a criminal prosecution for assault, battery, or even in respect of false imprisonment itself;

(*a*) *Law of the Constitution* (9th ed.), ch. 5; *ante*, Chapter XXX.

(*b*) [1942] A. C. 206. The fact that this was said in a dissenting judgment is irrelevant for the present purpose. For the power of a Judge to commit for contempt, see *ante*, p. 398. See also *ante*, pp. 108, 111 (imprisonment by order of one of the Houses of Parliament).

(*c*) See also *ante*, Chapter XXI

(3) in certain cases a summons can be taken out before a magistrate under the Summary Jurisdiction Acts to recover costs incidental to defending irregular and unjustifiable proceedings;
(4) the suing out a writ of *habeas corpus* to obtain one's release;
(5) the issue in certain exceptional instances of an order of *certiorari* or prohibition,
(6) appeal from the verdict of a jury to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, or from magistrates to quarter sessions

Bail.—In many cases a person who is subject to a criminal charge is released on bail pending the trial, that is to say, he finds sureties who enter into recognizances that he will appear (*d*). The question of bail has long occupied the attention of the legislature. The Bill of Rights provides that bail be not "excessive," but leaves the fixing of the amount to the judicial officer

The police may, and in some cases must, grant bail under the Criminal Justice Act, 1914, s 22, and the Criminal Justice Act, 1925, s. 45. Magistrates cannot grant bail for treason (*e*), but they may grant bail for any felony and for certain other offences specified in section 43 of the Indictable Offences Act, 1848, *e.g.*, riot, perjury, attempt to commit a felony, assault on a police officer in the discharge of his duty, and any misdemeanour where the costs of the prosecution may be allowed out of local rates That Act provides that justices must grant bail in the case of all misdemeanours not included in the list mentioned above, but, as section 1 of the Costs in Criminal Cases Act, 1908, allows the costs of all indictable offences to be defrayed out of local funds, justices may perhaps be entitled to refuse bail for any misdemeanour except the non-repair or obstruction of highways, to which the latter Act does not apply It is a misdemeanour for a magistrate to refuse to allow bail where it ought legally to be granted, but as this is a judicial act no action lies without proof of malice or improper motive (*f*).

Where a magistrate has a discretion whether or not to grant bail he can fix it at any amount he chooses, but an appeal lies to a High Court Judge sitting in chambers Bail can be procured in a proper case where a prisoner is appealing against imprisonment awarded by

(*d*) The bailment originally consisted in the accused being handed over into the custody of his sureties
(*e*) *Ante*, p 443 (*f*) See *ante*, p. 398.

a Court of summary jurisdiction; and by the Criminal Justice Administration Act, 1914, the justice who has issued a warrant for the arrest of a prisoner can endorse thereon the amount of bail a superintendent of police may accept.

The trial Court can grant bail, but it is not usual to do so after indictment in the case of serious charges. A person committed for treason or felony may demand bail if he is not tried at the first practicable assizes, unless the witnesses for the prosecution were unable to attend; and if he is not tried at the second assizes he must be discharged. (Habeas Corpus Act, 1679, s. 6.) A person committed for trial at quarter sessions, if he is not tried at the next quarter sessions, may apply to the assize for trial or discharge. (Assizes Relief Act, 1889.)

The Court of Criminal Appeal may allow bail pending an appeal (Criminal Appeal Act, 1907, s. 14), but this is rarely done

Arrest.--The general rule is that no man can be arrested or imprisoned except under due process of law. Where a person is suspected of serious crime, the usual course is to apply to a magistrate for a warrant for his arrest That warrant can only be granted on a sworn information. A Justice of the Peace may issue a written warrant for the arrest of a person who has committed or is suspected of having committed any treason, felony, indictable misdemeanour or other indictable offence within his jurisdiction, or of a person residing in his jurisdiction who has committed or is suspected of having committed such an offence elsewhere. (Indictable Offences Act, 1848.) Sufficient particulars of the charge must be specified in non-technical language. (Criminal Justice Act, 1925.) If the magistrate had not jurisdiction to issue the warrant, a constable is exempt from liability for acting upon it so long as he does not exceed the authority given on the face of the warrant. (Constables Protection Act, 1750.)

A "general warrant," *i.e.*, one which does not name the person to be arrested, is illegal In *Leach* v. *Money* (1765) (*g*) a Secretary of State had issued a warrant to search for the authors, printers and publishers of *The North Briton*, alleged to contain seditious libels, and to apprehend them together with their papers. The plaintiff, who was arrested but released as he was not the printer, obtained damages against the officers for trespass and false imprisonment.

(*g*) 19 St. Tr. 1002; Holdsworth, *History of English Law*, vol. X, pp. 659 *et seq.*

"There is no case for these uncertain warrants," said Lord Mansfield, C.J.; ". . . The magistrate ought to judge and give definite directions to the officer as to the person to be arrested."

In minor cases a summons is usually applied for, and if the person summoned does not appear a warrant can then be issued.

There are many cases where a person can be arrested without warrant, especially by a peace officer. A constable may arrest where he has reasonable suspicion that his prisoner has committed felony. A private person, on the other hand, cannot do so unless he can show in addition to this that a felony has actually been committed, or unless he does so when called upon to assist the constable or, perhaps, a justice of the peace, or unless there has been a hue and cry (a general chase of a suspected person).

Where an affray or breach of the peace accompanied by violence has been committed, any person present may interfere to part the combatants, and onlookers may hold a combatant till his temper evaporates; further, the onlookers are entitled to detain the combatants and afterwards hand them over to a constable at the first convenient opportunity. A mere threat to fight will not justify interference, and till it actually begins no arrest can take place, either by a constable or anyone else.

A person attempting to commit a felony may be arrested by a private person present at the time, and a policeman may arrest to prevent a breach of the peace, and on all occasions where a breach of the peace has been committed before him.

Where an indictable offence has been committed between 9 p.m. and 6 a.m., it appears that any person can arrest. (Prevention of Offences Act, 1851.) Again, where an offence is committed directly against a person, a power to arrest is in many cases given to that person, and also to his servants. A magistrate may either arrest or order the arrest of a person committing a breach of the peace in his presence.

There are also many statutes giving a power of arrest for particular offences, either to constables or the public generally or to specified persons

The writ of habeas corpus and kindred writs at common law.—Before the passing of the Habeas Corpus Acts there were various old

writs designed to secure personal liberty to the subject in various circumstances (*h*)

(1) The writ of mainprize, whereby the sheriff was directed to take sureties for the appearance of a prisoner on a given occasion, and subject to such sureties (mainpernors) being forthcoming to set him temporarily at liberty

(2) The writ *de odio et atia*, bidding the sheriff to hold an inquiry whether a prisoner accused of murder was committed on reasonable grounds for suspecting guilt or *propter odium et atiam* (from hatred and malice), and if the sheriff found that the prisoner was committed *propter odium et atiam*, bidding him to admit the prisoner to bail

(3) The writ *de homine replegiando*, directing the sheriff to replevy (i e, release) a person, just as goods the subject of distress were and are repleviable in the action of replevin Sureties bound themselves before the sheriff that the prisoner would appear and answer the charge against him

(4) The following writs of *habeas corpus* (i) were designed to secure temporary liberty, and for other purposes —

(a) *habeas corpus ad respondendum*, to bring up a prisoner in the custody of an inferior Court in order to charge him with a fresh action in the superior Court,

(b) *habeas corpus ad satisfaciendum*, to bring up a prisoner against whom an adverse judgment had been obtained in an inferior Court,

(c) *habeas corpus ad recipiendum*, or *habeas corpus cum causa*, to bring up a defendant already in custody in an inferior Court to do and receive what the King's Court shall deliver in that behalf,

(d) *habeas corpus ad subjiciendum*, directed to the person who had the prisoner in custody, commanding such person to produce the prisoner in Court with the day and cause of detention, *ad faciendum subjiciendum et recipiendum* whatever the Court should ordain in that behalf This was the writ which was improved upon by the Habeas Corpus Acts

Where a prisoner was brought into his presence the Judge, on release being demanded, had to satisfy himself that the captive was

(h) Blackstone, *Comm* III, pp 121 *et seq* Holdsworth *History of English Law*, vol IX, pp 105—112

(i) *Habeas corpus* — bring the body of X before the Court]

detained on some ground which would be valid in a Court of law. The writ, however, was not particularly efficacious, as the gaoler to whom it was addressed could evade liability by proving change of prison as an excuse for non-production of the accused.

The numerous ways in which the right to a release could be evaded occasioned great indignation in the reign of Charles I, when Sir Thomas Darnel demanded his freedom on the ground of illegal detention. In this case the Judges held that the fact of Darnel being detained by the royal command (*per speciale mandatum regis*) was quite sufficient, irrespective of the cause of detention (*k*). Later the Petition of Right, 1628, declared that the orders of the Sovereign were not in future to be sufficient justification for the imprisonment of his subjects. In the reign of Charles II (1676) a man named Jenkes was arrested, and afterwards, on a writ of *habeas corpus* being applied for, the Court held that change of prison quarters amply exempted the governor of the prison from liability for not delivering up the prisoner (*l*). The treatment of the prisoner, who had been confined during the Long Vacation, excited popular sympathy, and in 1679 the Habeas Corpus Act of that year was passed (*m*)

The Habeas Corpus Act, 1679.—This Act applies only to persons imprisoned on a charge of crime Its general effect is that such a person, or anyone else on his behalf, may apply to the Court for a writ of *habeas corpus*. If the applicant shows that there is any ground for supposing that the prisoner is wrongfully imprisoned, such writ will be issued (*n*) The writ requires the person detaining the prisoner to bring him in person (*habeas corpus*) before the Court and inform the Court of the grounds of his detention If it appear that the prisoner has been confined without any legal warrant, the Court will release him. If it appear that there was a legal warrant, then the Court, if the crime charged was a misdemeanour, will as a rule order his release subject to bail, and if the crime was a treason or felony, will make provision for his speedy trial

(*k*) *Darnel's Case* (*The Five Knights' Case*) (1627), 3 St. Tr. 1, Holdsworth, *History of English Law*, vol VI, pp 32—37

(*l*) *Jenkes's Case*, 6 St. Tr 1190.

(*m*) For an account of the passing of the Act, see Holdsworth, *History of English Law*, vol. IX, pp 112—117 The Bill is said to have been saved at one stage by a teller counting one fat peer as ten (*ibid* p. 117)

(*n*) Generally the Court grants a rule *nisi*, calling upon the person detaining the prisoner to show cause why the writ should not issue against him.

The detailed provisions of the statute are as follows:—

(1) On complaint in writing by or on behalf of any person charged with any crime (unless he was committed for treason or felony plainly expressed in the warrant, or as accessory, or on suspicion of being accessory, before the fact to any felony, or unless he was convicted or charged in execution by legal process), the Lord Chancellor, or any of the Judges in vacation, upon viewing a copy of the warrant, or upon affidavit that a copy is denied, shall (unless the party has neglected for the two whole terms after his imprisonment to apply to any Court for his enlargement) award a writ of *habeas corpus* for such prisoner, returnable immediately before himself or any other of the Judges, and upon service thereof the officer in whose custody the prisoner is shall bring him before the Lord Chancellor, or other Judge, with the return of such writ and the true cause of the commitment, and thereupon within two days after the party shall be brought before them, the Lord Chancellor or other Judge shall discharge the prisoner if bailable, or on giving security, to be fixed according to their discretion, to appear and answer to the accusation

(2) Such writs shall be endorsed as granted in pursuance of the Act and signed by the person awarding the same

(3) The writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days after service of writ

(4) Officers and keepers neglecting to make due returns or not delivering to the prisoner or his agent within six hours after demand a true copy of the warrant of commitment, or shifting the custody of the prisoner from one prison to another without sufficient reason or authority (see section 8), shall for the first offence forfeit £100 and for the second offence £200 to the party aggrieved, and be disabled to hold his office.

(5) No person once delivered by *habeas corpus* shall be re-committed for the same offence on penalty to the party aggrieved of £500.

(6) Every person committed for treason or felony shall, if he so requires, in the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session or else admitted to bail, unless it appear on oath made that the King's witnesses cannot be produced at that time; and if acquitted or not indicted or tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence. After the assizes

shall be open for the county in which he is detained, however, a person shall not be removed from the common gaol by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the Judges of assize.

(7) Any such prisoner may move for and obtain his *habeas corpus* as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas, and the Lord Chancellor or Judge denying the same on view of the copy of the warrant or oath that such copy is refused shall forfeit severally to the party grieved £500.

(8) This writ of *habeas corpus* shall run in the counties palatine, the cinque ports and other privileged places, and the islands of Guernsey and Jersey

(9) No inhabitant of England (save as in this section excepted) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier, or other place beyond seas within or without the King's dominions, on pain that the party committing, his advisers, aiders and assistants, shall *forfeit* to the party grieved a sum not less than £500, to be recovered with treble costs, shall be disabled to have any office of trust or profit, shall incur the penalties of a præmunire, and shall be incapable of receiving the King's pardon for any of the said forfeitures, losses and disabilities (*o*)

The defects of the above Act were that:—

(i) there was no protection where the bail was fixed too high (*p*),
(ii) the return to the writ might not be truthful; and
(iii) illegal civil detention was ignored.

The Habeas Corpus Act, 1816.—This Act extended the provisions of the Act of 1679 to cover civil detention. By the Act of 1816 Judges are required, upon complaint made to them, to issue in vacation writs of *habeas corpus* returnable immediately, in cases other than a criminal matter, and for debt or on civil process. Any person disobeying a writ sued out under this Act is to be deemed guilty of contempt of Court, and becomes liable to be sent to prison for such contempt Provision is further made that where on the face of it the return to the writ, which is addressed to the person detaining,

(*o*) This summary of the Habeas Corpus Act, 1679, has been taken, by permission of the proprietors of the copyright, from Taswell-Langmead's *Constitutional History* (7th ed.), pp. 575—576

(*p*) The Bill of Rights, 1688, says that "excessive bail ought not to be required"; *ante*, p. 454.

shows a valid ground for the course pursued, the Judge may yet go into the merits of the case.

Habeas Corpus to places abroad.—The writ runs to the Channel Islands and Isle of Man (Habeas Corpus Acts, 1679—1816), but it cannot issue into a British colony or overseas dominion of the Crown where a Court of competent jurisdiction has been established. (Habeas Corpus Act, 1862.)

Uses to which the writ of habeas corpus has been put.—The writ of *habeas corpus* has been used to set free slaves during the period when slavery was unlawful in England, but recognised as still being lawful in the Empire. Slavery was a legal institution in our country till the days of James I. In this reign one Caley claimed the horse of one Pigg, whom the defendant (Caley) alleged was his *villain regardant* Pigg brought an action, and the Court held in doubtful cases that slavery was obsolete, and that the law was "*in favorem libertatis*" (*q*) In or about 1772 one *Sommersett*, the slave of an English colonist, came to England with his master. As the master put him under arrest a writ of *habeas corpus* was applied for, and the Court held that any slave who set foot in England became *ipso facto* free (*r*) In the case of *The Slave Grace* (1827) (*s*), a female slave accompanied her mistress to England, and then returned with her to the colony where she had been a slave The Court held that the fact of such voluntary return caused her to relapse into the status of a slave. Slavery in English colonies has now been abolished, and Englishmen are forbidden, under pain of severe criminal punishment, to traffic in slaves, fit out ships to be used in the slave trade, or do various other things connected therewith In the case of *Forbes* v. *Cochrane* (1815) (*t*) the liberty of a slave who escaped to a British ship was expressly recognised.

The provisions of the Habeas Corpus Act, 1816, have been made use of to restrain the rights of a parent over a child and a guardian over his ward. Where a father, as is almost universally the case, is the guardian of his child, he can generally enforce his rights to the custody of such child, though by comparatively recent legislation the rights of the mother are recognised also. Again, the mother of a bastard

(*q*) *Pigg* v. *Caley* (1617), Noy, 27.
(*r*) *Sommersett's Case* (1772), 20 St. Tr. 1.
(*s*) 2 Hag. Adm. 94; see at pp. 104—111.
(*t*) 2 B. & C. 448.

child can claim the custody of such child as against the reputed father by suing out a writ of *habeas corpus*. Where a father is unfit to have the custody of a child, the Court will deprive him of such custody.

Modern practice relating to writs of habeas corpus.—Where a writ has been sued out, the modern practice is either to instruct counsel to move the Divisional Court of the King's Bench Division or to apply by summons to a King's Bench Division Judge sitting in chambers; but where the case is one of extradition (*u*), a motion must, except in vacation, be made by counsel to the Divisional Court. At the hearing the Court may make either an order absolute for the issuing of the writ "*ex parte*," or may make an *order nisi*, thus giving an opportunity for the person detaining the prisoner to oppose. Where time is not of grave importance, a *rule nisi* is made, and the applicant then issues a summons, which is served on the respondent, at the hearing of which the Judge determines whether or not he will accede to the application The person to whom the writ is addressed, *i.e.*, the person detaining the prisoner in civil or criminal custody, is obliged to state in his return to the writ all causes for detention, if more than one, and it is not necessary to endorse these causes on the writ, as they may be set out in a schedule which must be annexed to the writ.

A prisoner or anyone suing out process on his behalf may impeach the return to the writ by affidavit (*The Canadian Prisoners' Case*, (1839) (*x*).)

When the person detained is produced in Court or chambers the Judge may either—

(i) make no order at all;

(ii) discharge the person detained, or

(iii) award bail.

In *R.* v. *Richards* (1844) (*y*) it was held that where a commitment order is disputed for a reason which is purely technical, a properly drawn up warrant or order may be substituted for the original one. In the above case the return stated that the prisoner was committed to gaol for three months by the order of a magistrate. The warrant of commitment recited a conviction which was bad on its face. The return further stated that a week after the committal, whilst the

(*u*) See *ante*, p 436 (*x*) 3 St. Tr. (N.S.) 963.
(*y*) 5 Q. B. 926. As to a warrant irregularly signed, see *R.* v *Allen* (1860), 30 L. J. K. B. 38.

prisoner was still in custody, the same magistrate delivered to the gaoler a fresh warrant of committal relating to the same offence, in which the matter was put right. The Court held that the prisoner was not entitled to be discharged from custody, as the return disclosed a good warrant for his detention.

Personal Freedom and Emergency Powers.—Parliament confers very extensive powers on the executive in time of war or other great emergency, and such powers may place considerable restrictions on personal freedom. The checks are judicial, *i.e.*, the application by the Courts of the *ultra vires* test, and political, *i.e.*, the responsibility of the Government in general, and of the Home Secretary in particular, to Parliament. The leading cases in the two wars of the present century are *R.* v. *Halliday, ex parte Zadig* (1917) and *Liversidge* v. *Anderson* (1942), which are discussed below.

In *R.* v. *Halliday, ex parte Zadig* (z), Zadig, a naturalised British subject of German birth, was interned by order of the Home Secretary under Regulation 14B made under the Defence of the Realm Consolidation Act, 1914. Section 1 (1) of the Act gave power to the King in Council "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm," and went on to make detailed provisions for the trial and punishment of offences against the regulations. Regulation 14B provided that where, on the recommendation of a competent naval or military authority or of one of the advisory committees set up by the Home Secretary to advise him on the internment and deportation of aliens, it appeared to the Home Secretary that for securing the public safety or the defence of the realm it was expedient in view of the hostile origin or associations of any person that he should be subjected to restriction of movement or internment, the Home Secretary might issue an order accordingly; failure to comply with such order would be an offence. Zadig contended that the regulation was *ultra vires*, but its validity was upheld by a Divisional Court of five Judges, by the Court of Appeal, and by the House of Lords (Lord Finlay, L.C., and Lords Dunedin, Atkinson and Wrenbury, with Lord Shaw dissenting).

"It is beyond dispute," said Lord Finlay, "that Parliament has

(z) [1917] A. C. 260.

power to authorise the making of such a regulation. The only question is whether on a true construction of the Act it has done so." "It may be necessary in a time of great public danger," he continued, "to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised. . . It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on previous occasions of national danger, for suspension of rights of the subject as to a writ of *habeas corpus* The answer is simple. The Legislature has selected another way of achieving the same purpose, probably milder as well as more effectual than those adopted on the occasion of previous wars."

Lord Shaw in the course of his dissenting judgment said: "The appellant has been (1) interned, (2) without a trial, (3) because he is of hostile origin or associations. Parliament never said in words one of those things They are and are alone inferences—inferences from the delegation of a power, a power to make regulations for safety and defence . . if Parliament had really meant to sanction internment without trial for the cause assigned it could have said so without the slightest difficulty, and not left a point which, I think, is so fundamental to be reached by inference." He went on to remark that the interpretation put on this section by the Court below made most of the Act, detailing rules about trial and punishment, mere surplusage as it all could have been covered by regulations. "No such repeal of ancient liberties," he continued, "at once so sweeping and so covert, has ever been accomplished in the modern history of this island. That Parliament should have entertained such an intention of repeal I do not believe, that it would have recoiled from putting such an intention of repeal into words I can well understand." Zadig was in fact released shortly afterwards (*a*)

Another important case was *The Secretary of State for Home Affairs* v. *O'Brien* (*b*). Art O'Brien was sent in custody to the Irish Free State by virtue of a regulation made under the Restoration of Order in Ireland Act, 1920, and was set at liberty by the Court of Appeal in proceedings by writ of *habeas corpus*. The case, which ultimately went to the House of Lords, was remarkable in two ways: (i) the

(*a*) [1917 A. C. 260. (*b*) [1923] A. C. 603.

fact of such writ being directed to the Home Secretary instead of to the governor of the gaol being approved; and (ii) the decision that where imprisonment has been held to be illegal, no further appeal can be permitted, even though the order of the Court does not go so far as to order the discharge of the prisoner from custody. The ground for the discharge of the prisoner was that the Irish Free State Constitution Act, 1922, by implication partially repealed the Restoration of Order in Ireland Act, 1920.

The Emergency Powers (Defence) Act, 1939, s. 1 (1), provided that His Majesty by Order in Council "may . . . make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged . . ." Without prejudice to the generality of these powers, sub-section (2) provided that regulations might be made (*inter alia*) "for the detention of persons whose detention *appears to the Secretary of State to be expedient* in the interests of the public safety or the defence of the Realm" (*c*). Regulation 18B of the Defence (General) Regulations issued under this Act provided that: "(1) If the Secretary of State *has reasonable cause to believe* any person to be of hostile origin or associations . . . and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained. (1A) If the Secretary of State *has reasonable cause to believe* any person to have been or to be a member of . . . any such organisation as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained. The organisations hereinbefore referred to are any organisation as respects which the Secretary of State *is satisfied* that either—(a) the organisation is subject to foreign influence or control . . ." etc. (*d*). In May, 1940, a detention order was made by Sir John Anderson, Home Secretary, against one Liversidge (*alias* Perlzweig) on the ground that he had reasonable cause to believe that Liversidge was a person of hostile associations, and that by reason thereof it was necessary to exercise control over him. Liversidge was accordingly

(*c*) The Emergency Powers (Defence) Acts, 1940, gave even wider powers to the Executive; see *post*, p. 510.

(*d*) The italics in the above quotations are the present editor's.

detained in Brixton Prison, and in the following year he issued a writ against the Home Secretary, claiming a declaration that his detention was unlawful, and damages for false imprisonment. The Home Secretary did not make any affidavit showing why, or on what information, he had reached his decision, but merely produced the order purporting to be made under Regulation 18B (1) (*e*). The action, *Liversidge* v. *Anderson*, proceeded on a claim for particulars of defence; there was no suggestion that the Home Secretary had not acted in good faith; and the Court of Appeal held that the onus was on the plaintiff to prove that the order was invalid. The House of Lords (Lord Maugham, L.C., and Lords Macmillan, Wright and Romer, with Lord Atkin dissenting) held that the order was valid, and the Home Secretary's answer sufficient (*f*).

Lord Maugham (*g*) first disposed of the argument that, where the liberty of the subject is involved, legislation should, if possible, be construed in favour of the subject and against the Crown. Quoting Lord Finlay, L.C., in *R.* v. *Halliday* (*h*), he held that "the suggested rule has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved." He then went on to deal with the construction of the words, "if he has reasonable cause to believe" Firstly, he pointed out that this was a matter for executive discretion; secondly, that the Home Secretary was not acting judicially; thirdly, that his decision must necessarily be based on confidential information; and fourthly, that the Home Secretary is responsible to Parliament for the exercise of the powers entrusted to him (*i*). With regard to the argument that the original draft of the Regulation had used the expression "if satisfied," and that this was changed before publication to "if he has reasonable cause to believe," Lord Maugham pointed out that an Order in Council is not so carefully drafted and considered as an Act of Parliament, and that even in a statute changes of words often occur without a change of meaning; and he explained that the words "if he has reasonable cause to believe" draw the attention of the Home

(*e*) Cf. *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K. B. 72 (application for habeas corpus; Court of Appeal held Home Secretary's affidavit sufficient answer).

(*f*) *Liversidge* v. *Anderson*, [1942] A. C. 206.

(*g*) *Ibid.* at pp. 210—228. (*h*) [1917] A. C. 260, at p. 270.

(*i*) This was not entirely a matter of constitutional convention, as the Home Secretary was required by the Regulation to make a monthly report to Parliament.

Secretary to the fact that he should personally consider the matter himself, whereas he might be "satisfied" of some fact by the report of a subordinate. The only requirement, then, is that the Home Secretary must have acted in good faith. Finally, on the question of onus of proof, Lord Maugham said: "In my opinion the well-known presumption *omnia esse rite acta* applies to this order, and accordingly, assuming the order to be proved or admitted, it must be taken *prima facie*, that is, until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with."

The other majority opinions stressed the fact that these were emergency executive powers, conferred at a time of great national danger on a responsible minister who was answerable to Parliament, and whose sources of information were confidential on security grounds (*k*).

Lord Atkin, in his spirited dissenting judgment (*l*), contended that the words, "if he has reasonable cause" to believe did not mean "if he *thinks* he has reasonable cause." They have an objective meaning in ordinary use, and he supported his argument by references to the common law and statutory power of arrest, statutes dealing with other criminal matters, and actions at common law for malicious prosecution. He quoted other Defence Regulations, and even a later part of the same Regulation (*supra*), to show that, by contrast to other expressions (such as "if he is satisfied"), the expression "if he has reasonable cause to believe" was intended here to have an objective meaning—an intention which he thought was confirmed by the change of form which the Regulation had undergone in its drafting. Lord Atkin did not consider that the case of *R.* v. *Halliday* (*supra*) was relevant, as in that case (on which he had sat as a member of the Divisional Court) there was no doubt that the Regulation was valid. Here, he said, the question of expediency did not arise, because there was no ambiguity. Nor was he suggesting that the Courts should substitute their opinion for that of the Home Secretary as to whether, for example, a person is of hostile origin; the question was, whether the Home Secretary had reasonable cause to believe that he was of

(*k*) [1942] A. C. at pp. 247—256 (*per* Lord Macmillan), at pp. 258—273 (*per* Lord Wright), and at pp. 274—283 (*per* Lord Romer).
(*l*) *Ibid.* at pp. 225—247.

hostile origin. "I view with apprehension," he continued, "the attitude of Judges who, on a mere question of construction when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the Executive . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I."

In *Greene* v. *Home Secretary* (*m*), the House of Lords dismissed an appeal on an application for *habeas corpus* arising out of the same Regulation. "In the present case," said Lord Maugham, L.C. (*n*), "I think the order itself is a sufficient answer, and we must presume that the Secretary of State acting under a regulation having the force of law had what he considered reasonable cause for his belief." He added that it would be useless anyway to hold otherwise, as the Home Secretary could not be made to disclose the sources of the grounds for his belief if he took the view that it would be contrary to the public interest. In this case Lord Atkin sided with his colleagues, as the Home Secretary had filed an affidavit setting out a number of particulars and stating that he had acted on information from responsible and experienced persons.

Both Liversidge and Greene were, in fact, released shortly after these decisions.

Liversidge v. *Anderson* and *Greene* v. *Home Secretary* were applied by Asquith, J., in *Budd* v. *Anderson* (*o*), a case arising out of Regulation 18B (1A). The decision in *Liversidge* v. *Anderson*, however, met with a mixed reception outside the Courts (*p*), and we

(*m*) [1942] A. C. 284. The Court of Appeal refused habeas corpus in *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K. B. 72, in a case arising under Regulation 18B (1A).

(*n*) *Ibid.* at p. 295.

(*o*) [1943] K. B. 642. Cf. *R.* v. *Home Secretary, Ex p. Budd*, [1942] 2 K. B. 14 (Court of Appeal).

(*p*) For: Keith, Journal of Comparative Legislation (1942), 3rd Ser., vol. XXIV, pt. I, pp. 63—64; *Holdsworth* (1942), *58* Law Quarterly Review, pp. 1—3; Goodhart, *ibid.*, pp. 3—8 and 243—246. Against: Allen, *ibid.*, pp. 232—242; Keeton (1942), *5* Modern Law Review, pp. 162—173. Neutral: Jennings, *The Law and the Constitution* (3rd ed.), pp. xxx—xxxi.

cannot do better than adopt the conclusion of the late Professor Berriedale Keith: "The question is one of great difficulty, but the concurrent view of so many judges leaves little doubt that the decision has been rightly taken on the wording of the regulation as it now stands" (*g*).

II. FREEDOM OF PROPERTY.

"By the laws of England," said Lord Camden, C.J., in *Entick* v. *Carrington* (1765) (*r*), "every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence . . . If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him." The owner is protected against unjustifiable interference with his property by actions for damages or for the recovery of the property.

Power of Entry and Search.—The police may enter premises in order to execute a warrant for arrest, and search a person whom they have lawfully arrested. (*Elias* v. *Pasmore* (*s*).) The police had been in the habit of entering private premises at the owner's request to deal with actual breaches of the peace, but *Thomas* v. *Sawkins* (*t*) went considerably further and held that the police may, without warrant or licence, enter private premises—at least if a public meeting is being held there—in which they have reasonable grounds for believing that an offence is *likely* to be committed. So the hirer of a private hall at which a public meeting was being held to protest against the Incitement to Disaffection Bill, then before Parliament, was unsuccessful in his prosecution of a police officer for assault in resisting an attempt to eject him (the officer) from the hall with reasonable force.

It is a principle of the common law that a "*general warrant*" to search premises, *i.e.*, one in which either the person or the property is not specified, is illegal. Thus, in *Wilkes* v. *Wood* (1765) (*u*), John Wilkes recovered damages for trespass to property from the officers who seized his papers, on the ground that he was not named in the warrant. In *Entick* v. *Carrington* (*x*), the plaintiff recovered damages

(*g*) *The Constitution under Strain*, p. 51.
(*o*) [1934] 2 K. B. 164; *post*, p. 470.
(*t*) [1935] 2 K. B. 249; see further, *post*, p. 488.
(*u*) 19 St. Tr. 1153.
(*r*) 19 St. Tr. 1067.
(*s*) *Ibid.* 1067.

from officers who entered his house and seized his papers under a warrant from a Secretary of State which did not specify what "papers" were to be seized. A magistrate acting on sworn information may, however, issue a warrant where there is reason to suspect that the person named has in his possession *stolen* property although the property is not specified.

Magistrates have power under various statutes, *e.g.*, the Criminal Libel Act, 1819, the Obscene Publications Act, 1857, the Offences against the Person Act, 1861, the Official Secrets Act, 1911, the Forgery Act, 1913, the Larceny Act, 1916, the Children and Young Persons Act, 1933, and the Coinage Offences Act, 1936, to issue warrants to search premises and to seize specified property found there which may be evidence of a particular offence which has been committed or is reasonably suspected to have been or to be about to be committed.

The Incitement to Disaffection Act, 1934, and the Public Order Act, 1936, provide that a Judge of the High Court, acting on sworn information and on the application of a police officer of a rank not lower than that of inspector, may issue a warrant giving authority to enter specified premises which are reasonably suspected to contain evidence of an offence committed under the Act, to search the premises and any persons found therein, and to seize anything found there which is reasonably suspected to be evidence of the commission of such an offence. It should be noticed that it is an offence under section 2 of the Incitement to Disaffection Act, 1934, for a person to have in his possession or under his control, with intent to commit or aid the commission of an offence under section 1 of the Act, any document whose dissemination among members of His Majesty's forces would constitute an offence under the Act.

It was formerly thought that the police had power at common law to seize documents found in the possession of a person lawfully arrested on a certain charge, which would constitute material evidence *of his having committed that offence;* but in *Elias* v. *Pasmore* (*y*), Horridge, J. —basing his opinion on a Scottish and an Irish decision, and on a case relating to the exceptional power to search for stolen goods—held that this power extended to the seizure of any documents found on the premises where a person is lawfully arrested and which would form material evidence *on any criminal charge committed by anyone.*

(*y*) [1934] 2 K. B 164.

In *Elias* v. *Pasmore* the police, in order to execute a warrant for the arrest of Harrington for making a seditious speech in Trafalgar Square, entered the headquarters of the National Unemployed Workers' movement occupied by Harrington and Elias. They arrested Harrington and seized a large number of papers, most of which were later returned as they did not provide any evidence. The papers that were retained were used in the prosecution of Harrington for sedition, and subsequently in the prosecution of Elias for incitement. This action was then brought by Elias and Harrington against the police officers for trespass to the premises, the return of the documents and damages for their detention. Horridge, J., held, that, although the original seizure of the documents was unlawful, the retention of those documents which were used in the prosecutions until they were concluded was excused "in the interests of the State." The plaintiffs were therefore entitled to damages for the taking of the documents which were not used at the trials, the return of the documents used at the trials and damages for the detention of documents after the conclusion of the trials.

The correctness of this decision has been questioned, and it is certainly to be preferred that if the police need extensive powers in certain kinds of cases they should be specifically granted and defined by Parliament (z). This was in fact done in the Incitement to Disaffection Act, 1934, and the Public Order Act, 1936, the very enactment of which provisions throws doubt on the decision in *Elias* v. *Pasmore*.

Liability to Taxation.—Since the Bill of Rights, 1689, it has been firmly established that taxation may only be imposed by Act of Parliament. (*Att.-Gen.* v. *Wilts United Dairies* (a).) This is done by Parliament either directly as in the case of income tax, customs and excise duties, estate duties and stamp duties, or indirectly through the delegation of power to local authorities to levy rates.

Statutory Restrictions on Freedom of Property.—Parliament also controls the compulsory acquisition of land by the Crown for defence

(z) See further, Wade, *Police Search* (1934), 50 Law Quarterly Review, pp. 354—367.
(a) (1921), 91 L. J. K. B. 897; 37 T. L. R. 884. For previous attempts by the Crown to raise taxes by way of monopolies, customs, forced loans and benevolences, and shipmoney, see *Darcy* v. *Allein* (*Case of Monopolies*) (1602), 11 Co. Rep. 84d; *Bates' Case* (1606), 2 St. Tr. 371; *Hampden's Case* (*Case of Shipmoney*) (1637), 3 St. Tr 825; Petition of Right, 1628.

purposes by the Defence Acts, 1842—1935 (*b*), and by local authorities and public utilities by such statutes as the Lands Clauses Acts, 1845—1895, and the Railway Clauses Consolidation Act, 1845. Compensation is given on a fairly generous scale by the Acquisition of Land (Assessment of Compensation) Act, 1919.

Restrictions on the use or enjoyment of property are increasingly imposed by such statutes as the Restriction of Ribbon Development Act, 1935, Town and Country Planning Acts and Increase of Rent and Mortgage Interest (Restrictions) Acts.

(*b*) Cf. *Att.-Gen.* v. *De Keyser's Royal Hotel*, [1920] A. C. 508, *ante*, p. 178.

CHAPTER XXXIV.

FREEDOM OF SPEECH.

FREEDOM of speech, which includes freedom of conscience and of worship, consists in the right of a citizen to speak or write what he chooses provided that the law is not infringed (*a*). The law is infringed in particular by the publication of treasonable (*b*), seditious (*c*), defamatory, blasphemous or obscene matter, or matter inciting to mutiny or disaffection (*d*). By "publication" is meant communication by any means to another person.

Defamation.—Defamatory matter is matter which exposes the person about whom it is published to hatred, ridicule or contempt, or which causes him to be shunned or avoided (*e*). Such matter, if in writing, printing, or some other permanent medium (*f*), is a libel; if in spoken words or significant gestures, a slander. The identification of persons responsible for libels is facilitated by the requirement that all newspapers and books published shall show the name and address of the printer (*g*).

Privileged Occasions.—Communications made on certain occasions are *absolutely* privileged, *i.e.*, no proceedings, civil or criminal, can in any circumstances be brought in respect of them. These include the following:—

(i) Judicial proceedings, including documents necessary to the case of a litigant, and all proceedings in a Court. We have seen that statements made in the course of litigation by Judges, counsel and witnesses are immune (*h*). The same applies to litigants conducting their cases in person.

(*a*) See Dicey, *Law of the Constitution* (9th ed.), ch. 6; but cf Appendix, section II (2), by Dr. Wade.

(*b*) *Ante*, p. 440.

(*c*) *Ante*, p. 446. (*d*) *Ante*, p. 445.

(*e*) *Imperial and Counties Bank* v. *Henty* (1882), 7 App. Cas., *per* Lord Blackburn, at [illegible] *Sim* v. *Stretch* (1936), 52 T. L. R. 669.

(*f*) [illegible]atory talking film is libel: *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.* [illegible]50 T. L. R. 581.

(*g*) Newspapers, Printers and Reading Rooms Repeal Act, 1869.

(*h*) *Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431; *ante*, Chapter XXIX.

(ii) Words uttered in either House of Parliament by members. (*R.* v. *Creevey* (1813) (*g*).)

(iii) State communications, which include, possibly, communications about State business made by all persons in Government service. (*Isaacs & Sons* v. *Cook* (*h*).)

(iv) Proceedings at a court-martial or a military inquiry, and reports made in pursuance of military duty. (*Dawkins* v. *Rokeby* (1875) (*i*).)

(v) Fair and accurate reports in *newspapers* of proceedings publicly heard before a Court exercising judicial authority (*k*) if published contemporaneously, and neither blasphemous nor indecent. (Law of Libel Amendment Act, 1888, s. 3; *Kimber* v. *Press Association* (1893) (*l*).)

(vi) Reports and other documents published by order of either House of Parliament. (Parliamentary Papers Act, 1840, ss. 1 and 2 (*m*).)

The following communications are privileged in a *qualified* sense, *i.e.*, protected unless there be "malice in *fact*," viz., spite, fraud, or some other indirect motive of which the law disapproves:—

(i) Communications made in pursuance of a legal, social or moral duty (*Stuart* v. *Bell* (*n*)) to a person who has an interest or duty to receive the communication (*o*).

(ii) Statements in his own defence by a man whose character or conduct has been attacked. (*Koenig* v. *Ritchie* (1862) (*p*).)

(iii) Communications between persons possessing a common interest. (*Hunt* v. *G. N. Railway* (*q*).)

(iv) Reports of judicial proceedings not covered by section 3 of the Law of Libel Amendment Act, 1888 (*supra*). These are not privileged if inaccurate, biased, or not published *bona fide*, or if blasphemous or indecent. This privilege is not confined to newspapers (*r*).

(*g*) 1 M. & S. 273; *ante*, pp. 100, 112.
(*h*) [1925] 2 K. B. 391.
(*i*) L. R. 7 H. L. 744; *ante*, p. 310.
(*k*) Cf. an administrative tribunal, *Collins* v. *H. Whiteway & Co.*, [1927] 2 K. B. 378.
(*l*) 62 L J Q. B. 152; *Ponsford* v. *Financial Times* (1900), 16 T. L R. 248; *ante*, p. 396.
(*m*) *Ante*, p. 103.
(*n*) [1891] 1 Q. B. 530.
(*o*) *Adam* v. *Ward*, [1917] A. C. at p. 334.
(*p*) 3 F & F 413.
(*q*) [1891] 2 Q. B. 191.
(*r*) *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261.

No protection exists when the publication of proceedings is prohibited by order of the Court (*s*) or by statute (*t*).

(v) Extracts from, or abstracts of, authorised parliamentary papers or reports. (Parliamentary Papers Act, 1840, s. 3 (*u*).)

(vi) Faithful and correct, though unauthorised, reports of parliamentary debates, and also fair and reasonable comments by public writers on matters of public interest. (*Wason* v. *Walter* (1868) (*x*).)

(vii) Fair and accurate reports in any *newspaper* of the proceedings of a public meeting or (except where neither the public nor newspaper reporters are admitted (*y*)) of a meeting of any vestry, town council or other public body mentioned in section 4 of the Law of Libel Amendment Act, 1888, or of documents published at the request of any Government Department or any official specified in the Act. A public meeting, for the purposes of the Act, is any meeting *bona fide* and lawfully held for a lawful purpose, whether admission thereto be general or restricted.

Defamation as a Crime.—Defamation is usually treated as a civil wrong, and as such it belongs to the law of torts. It will be convenient here to summarise the differences between defamation as a crime and defamation as a civil wrong.

(i) *Slander* is not a crime merely as defamation, but is only a crime if the words are also treasonable or seditious, etc. This is because the Court of King's Bench, when it took over all jurisdiction in defamation from the Star Chamber, followed the principles of the latter in relation to defamation as a crime, and the Star Chamber concerned itself entirely, or almost entirely, with libel (*z*).

(ii) It is possible that *libel* is always a common law misdemeanour, but the gist of the offence is its tendency to cause a breach

(*s*) *R.* v. *Clement* (1821), 4 B. & Ald. 218.
(*t*) *E.g.*, the Judicial Proceedings (Regulation of Reports) Act, 1926; *ante*, p. 396.
(*u*) *Ante*, p. 103.
(*x*) L. R. 4 Q. B. 73; *ante*, p. 103. Strictly, the defence of fair comment does not come under the heading of qualified privilege; but space does not permit a perfectly scientific classification.
(*y*) The press have a right of admission to meetings of the councils of local authorities under the Local Authorities (Admission of the Press to Meetings) Act, 1908.
(*z*) Potter, *Historical Introduction to English Law* (2nd ed.), pp. 371—373.

of the peace, and in practice libel is not proceeded against criminally unless it is likely to cause a breach of the peace (*a*).

(iii) Truth is a defence to a *civil* action for libel, for a person cannot lose a reputation which he has not got or does not deserve; but in *criminal* libel, truth is not a defence at common law, since a breach of the peace is as likely, or more likely, to occur if the statement is true. By section 6 of the Libel Act, 1843 ("Lord Campbell's Act"), however, it is a defence to a prosecution for criminal libel if the accused can prove not only that the matter published was true in substance, but also that publication was for the public good. Truth, of course, is no defence if the matter is also seditious, etc. By section 7 of this Act the defendant on indictment or information may escape liability by proving that the publication was made without his authority, consent or knowledge, and did not arise from want of care on his part.

(iv) In *civil* libel, publication to a third party is necessary as otherwise a person's reputation does not suffer; but since the gist of *criminal* libel is a tendency to cause a breach of the peace, publication merely to the person defamed is sufficient to found a prosecution (*b*).

(v) At common law, a jury in a prosecution for criminal libel could not give a verdict on the general issue (*i.e.*, guilty or not guilty) as it could in a civil action (*i.e.*, liable or not liable); the jury could only determine the fact of publication and the meaning of innuendos. (*Dean of St. Asaph's Case* (1783) (*c*).) The law was changed by the Libel Act, 1792 ("Fox's Libel Act"), by which the jury can give a general verdict of guilty or not guilty. It is still for the judge to say, as questions of law, whether the words are capable of a defamatory meaning and whether they amount to criminal libel, so that he can direct the jury to give a verdict of "*not* guilty" (*d*).

(*a*) *Wood* v. *Cox* (1887), 4 T. L. R. at p. 264; *R.* v. *Wicks* (1935), 52 T. L. R. 253.

(*b*) *Clutterbuck* v. *Chaffers*, 1 Stark. 471. Conversely, where matter published to a third party does not reach the person defamed, that is sufficient: *R.* v. *Adams* (1889), 22 Q. B. D. 66.

(*c*) *R.* v. *Shipley*, 21 St. Tr. 847, *per* Mansfield, C.J.

(*d*) For a historical account of the passing of this Act, see Holdsworth, *History of English Law*, vol X, pp. 673—695.

Censorship of Stage Plays.—From the time of Henry VIII onwards, the drama has been controlled by the Executive. Under the Theatres Act, 1843, the Lord Chamberlain has power to forbid the performance of unlicensed stage plays intended to be produced and acted for hire at any theatre in Great Britain. He has an arbitrary right to prohibit any stage play whenever he thinks its public performance would militate against good manners, decorum and the preservation of the public peace; and in order that he may exercise complete supervision, all new plays, and all old plays which have been altered, must be submitted to him, and fees for perusal paid.

The Lord Chamberlain also has under this Act local jurisdiction to license all theatres in the cities of London and Westminster, in Finsbury, Marylebone, the Tower Hamlets, and also in Windsor and other places where the King possesses a royal residence. In other places playhouses are licensed by county councils and county borough councils. (Local Government Act, 1888.)

The Position of the Press.—"The press" covers printing matter of all kinds, but for present purposes we are concerned mainly with newspapers (*e*) and periodicals. It was some time before official recognition was given to Milton's famous plea for a free press in his *Areopagitica* (1644): "as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book kills reason itself." The "liberty of the press," which Lord Mansfield defined in the *Dean of St. Asaph's Case* (*f*) as consisting in "printing without any previous licence, subject to the consequences of law," has existed only since the end of the seventeenth century.

Soon after the introduction of the art of printing, a series of proclamations and statutes began to be issued to restrict and control printing, in addition to the law of treason, sedition, heresy and blasphemy. Throughout most of the sixteenth and seventeenth centuries all printing required a licence. In the late Tudor and early Stuart periods, secular printing was controlled by the Star Chamber, and theological printing by the High Commission. After the abolition of these bodies in 1641, a licence to print was still required by statute

(*e*) Newspapers are now defined in s. 1 of the Newspaper Libel and Registration Act, 1881.
(*f*) 21 St Tr. at p. 1040.

until the last Act was repealed in 1694. In England the printing of books was confined to the Stationers' Company in London and to the Universities of Oxford and Cambridge (*g*). Since 1694 the press has been governed by the ordinary law of sedition and libel, etc., with some statutory modifications, of which the more important should be mentioned.

(i) In a civil action for libel contained in a newspaper or other periodical, the defendant may plead absence of actual malice and of gross negligence and that a full apology was inserted at the earliest opportunity, or, where that course was impossible, that a full apology has been offered. Payment of money into Court by way of amends must also be made. (Lord Campbell's Act, 1843, s. 2; R. S. C., Ord. XXII, r. 1.)

(ii) In proceedings for criminal libel against the publisher, proprietor or editor of a newspaper, evidence of truth and publication in the public interest may be heard by a Court of summary jurisdiction, who may dismiss the charge if they are of the opinion that a jury would probably acquit. (Newspaper Libel and Registration Act, 1881, s. 4.)

(iii) If, in the circumstances set out in paragraph (ii) above, the Court of summary jurisdiction is of the opinion that, although the accused is guilty, the libel was of a trivial character, it may with his consent deal with the matter summarily and inflict a fine not exceeding £50. (*Ibid.*, s. 5.)

(iv) No prosecution for criminal libel, except a criminal information laid by the Attorney-General for an attack on the Government, may be commenced against the proprietor, publisher or editor of a newspaper without the order of a Judge in chambers, after notice given to the accused. (Law of Libel Amendment Act, 1888, s. 8 (*h*).)

(v) All newspapers, other than those owned by a joint-stock company, must be registered at Somerset House. (Newspaper Libel and Registration Act, 1881, s. 9.)

Blasphemy.—"Every publication is said to be blasphemous which contains matter relating to God, Jesus Christ, the Bible, or the Book

(*g*) For the history of the law of the press, see Holdsworth, *History of English Law*, vol. VI, pp. 360—378.
(*h*) For ss. 3 and 4 of this Act, see *ante*, p. 474 and p 475.

of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the Church, or to promote immorality. Publications intended in good faith to propagate opinions on religious subjects, which the person publishing them regards as true, are not blasphemous within the meaning of the definition merely because their publication is calculated to wound the feelings of Christian people, or because their general adoption might tend by lawful means to alterations in the constitution of the Church as by law established " (*i*).

Prosecutions for blasphemy are now rare, as the gist of the offence is a tendency to cause a breach of the peace. A sober and reverent enquiry into the truth of Christian doctrines is no longer against the policy of the law. (*Bowman* v. *Secular Society* (*k*).)

Denial of Christian Truths.—Stephen also mentions another offence dealt with by a statute of 1697, whereby persons educated in or professing the Christian doctrines incur various disabilities and punishments when they, by writing, printing, teaching, or ill-advised speaking, deny the truth of the Christian religion or the Holy Scriptures or their Divine authority. He also mentions the misdemeanours of depraving the Lord's Supper, and depraving the Book of Common Prayer (*l*).

Blackstone mentions the offence of apostasy or denial of the Christian truths, and also heresy or denial of some essential doctrine of Christianity; but all these offences are now practically obsolete, blasphemy excepted. Persons are still, in theory, liable to censure and punishment at the instance of an Ecclesiastical Court for fornication, adultery, and other deadly sins, and also for heresy; but these proceedings are also obsolete (*m*).

The offence of profane and common swearing is cited by Blackstone as an offence against religion, and he alleges that it is a misdemeanour punishable by a small fine or a short alternative period of imprisonment. This offence is obsolete, save in so far as it may come within the range of certain by-laws.

Obscenity.—It is a misdemeanour to write, make and publish obscene and criminal books, pictures, etc., when the writing, picture,

(*i*) Stephen, *Digest of Criminal Law*, p. 161. (*k*) [1917] A. C. 406.
(*l*) Stephen, *op. cit.* pp. 162, 164: and see 1 Edw. 6, c. 1.
(*m*) See *ante*, p. 327.

effigy, etc., has a tendency to deprave and corrupt those whose minds are open to immoral influence. (*R.* v. *Hicklin* (1868) (*n*).) Purity of motive is no excuse for the publication of indecent matter, but, if the manner and extent of the publication are within appropriate bounds, it is a good defence that publication was for the public good as being necessary or advantageous to religion, science, literature or art. (*Ibid.*; *R.* v. *Barraclough* (*o*).)

Uttering obscene words before a large number of persons may also constitute a misdemeanour. Exhibiting publicly for sale or otherwise indecent writings, etc., is criminal; but mere possession of them is not.

In *R.* v. *Bradlaugh and Besant* (1878) (*p*), an indictment for obscene libel was quashed because the indecent matter constituting the libel was not set out at full length, but by the Law of Libel Amendment Act, 1888, it appears to be no longer necessary to do this.

By the Post Office Act, 1870, the Postmaster-General, with the consent of the Treasury, might make regulations for stopping in the post the transmission of indecent matter. It is also a misdemeanour to send by post indecent writings, prints, cards, etc. (Post Office Protection Act, 1884.)

By the Indecent Advertisements Act, 1889, it is a summary offence to place an indecent advertisement or to write indecent words or otherwise publish indecent matter on any building, wall, etc.

By the Obscene Publications Act, 1857, any Court of petty sessions on complaint on oath being made that any obscene documents are in any house or other place for sale or other purpose of gain may issue a search warrant to have such articles searched for, seized and brought into Court. A summons can then be issued against the occupier of the place in question to show cause why such articles should not be destroyed, and they may be destroyed after the time for appeal has expired unless cause be shown to the contrary. There are certain formalities to be complied with in drawing up the order. The Court must be satisfied that the works, etc., are obscene before granting the search warrant, and there must be some evidence of sale or exhibition for purposes of gain.

(*n*) L. R. 3 Q. B. 360.
(*o*) [1906] 1 K. B. 201.
(*p*) 3 Q. B. D. 569.

Provoking Public Disorder.—The Public Order Act, 1936, s. 5, makes it an offence to use threatening, abusive or insulting words or behaviour in any public place or at any public meeting with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be caused. A person guilty of such offence is liable on summary conviction to imprisonment for three months, or a fine of £50, or both; and a constable may arrest, without warrant, any person reasonably suspected by him to be committing such offence (section 7).

CHAPTER XXXV.

THE RIGHTS OF ASSOCIATION AND PUBLIC MEETING.

1. FREEDOM OF ASSOCIATION.

English law allows complete liberty of association for any lawful object, so long as no particular rule of law, *e.g.*, conspiracy, is infringed. Thus, people may combine to form a club or society or partnership without any permit from the Government and without fulfilling any legal formality. But various statutes have restricted this common law freedom, *e.g.*, a club which supplies intoxicating liquors must be registered and comply with certain formalities; a trading company must not consist of more than twenty members, or a banking company of more than ten, unless it registers under the Companies Acts.

Politically, the most important aspect of the right of association is the freedom to form political parties, but public law has been affected most by the formation of trade unions.

Conspiracy.—*Conspiracy as a Crime.*—A combination of two or more persons to effect a common purpose is *prima facie* legal; but "the agreement of two or more persons to do any unlawful act or to do a lawful act by unlawful means" (*per* Willes, J., in *Mulcahy* v. *R.* (*a*)) is a conspiracy, and as such an indictable misdemeanour at common law. The gist of the offence is the combining; it is not necessary that any act should have been done in furtherance of the agreement (*b*). The unlawful act which the conspirators agree to do may be either a crime, *e.g.*, to obtain admission as a student to an Inn of Court by means of forged documents (*c*), or a civil wrong, *e.g.*, deceit or fraud (*d*). The use of violence is an example of unlawful means of doing what may otherwise be a lawful act.

A seditious conspiracy, *i.e.*, conspiracy for a seditious purpose, is a common law misdemeanour. Sedition covers also illegal drilling and unlawful secret societies (*e*). By the Unlawful Societies Act,

(*a*) (1868), L. R. 3 H. L. 306, at p. 317.
(*b*) *R.* v. *Gill* (1819), 2 B. & A. at p. 206.
(*c*) *R.* v. *Bassey*, 22 Cr. App. R. 160.
(*d*) *R.* v. *Orman*, 14 Cox, 381.
(*e*) For sedition, see *ante*, p. 446.

1799, and the Seditious Meetings Act, 1817, societies whose members are required to take an oath or engagement which is unlawful under the Unlawful Oaths Acts, or the names of whose officers or members are kept secret from the members, are, with certain exceptions, unlawful combinations.

Conspiracy as a Tort.—The series of cases on the nature of conspiracy as a tort have recently been reviewed by the House of Lords in *Crofter Harris Tweed Co.* v. *Veitch* (*f*). "The tort of conspiracy," said Lord Simon, L.C., in that case, "is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. . . . The appellants . . . have to establish (a) agreement between the two respondents (b) to effect an unlawful purpose (c) resulting in damage to the appellants." The chief difficulty in these cases is to define (b), unlawful purpose. "It is enough to say," continued the Lord Chancellor, "that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. *If that predominant purpose is to damage another person and damage results, that is tortious conspiracy.* If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners, it is not a tortious conspiracy, even though it causes damage to another person. . . . I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful. Although most of the cases have dealt with trade rivalry in some form or other, I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition. Indeed, in its original sense, conspiracy as a tort was a combination to abuse legal procedure." What is here referred to as the promotion of a legitimate common interest is often called, in the earlier decisions, "lawful justification or excuse."

It may be a tort to conspire to do something which would not be actionable if done by one person, though no completely satisfying reason has been adduced for this state of the law. Thus the act of

(*f*) [1942] A. C. 435. This was an appeal from the Court of Session, but it was assumed that Scots law and English law are the same on this point.

an individual which is otherwise lawful is not rendered actionable by reason of the fact that it was actuated by malevolence (malice, spite, ill-will or other improper motive); but malevolence as the predominant object will make a conspiracy of two or more persons actionable. On the other hand, Lord Wright expressed the opinion in *Crofter Harris Tweed Co.* v. *Veitch* that malevolence is not a necessary element in the tort of conspiracy.

Trade Unions.– Industrial disputes and kindred matters are capable of assuming such serious dimensions as to threaten the tranquillity of the State, and therefore they demand the attention of the Government and Parliament. In the early part of the nineteenth century trade unions were illegal under the Combination Acts. In the middle of the century and finally by the Trade Union Act, 1871, the illegality was removed; and by the Conspiracy and Protection of Property Act, 1875, the Trade Disputes Act, 1906, the Trade Union Act, 1913, and the Trade Disputes Act, 1927, the emancipation of trade unions was carried further

The Trade Disputes Act, 1906, provided that the act of inducing A to break a contract with B (which is a tort in ordinary circumstances) shall not be actionable if done in contemplation of a trade dispute (s. 2). Further, apart altogether from any question of a trade dispute (*g*), it relieved trade unions from all liability in respect of any tortious act alleged to have been committed on their behalf (s. 4) (*h*).

Of considerable importance from a constitutional point of view is the practice of trade unions applying the subscriptions of their members to political purposes by way of financing or remunerating candidates for Parliament. In *Amalgamated Society of Railway Servants* v. *Osborne* (1910) (*i*) it was held in the House of Lords that "there was nothing in the Trade Union Acts from which it could be reasonably inferred that trade unions were meant to have the power of collecting and administering funds for political purposes," and that a rule purporting to confer on a trade union registered under the Act of 1871 a power to levy upon members contributions for the purpose of securing parliamentary representation, whether it were an original rule of the union or subsequently introduced, was *ultra vires* and illegal.

(*g*) *Hardie and Lane* v. *Chilton*, [1928] 1 K. B. 663.
(*h*) *Vacher* v. *London Society of Compos.*, [1913] A. C. 107; *cf. Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426. (*i*) [1910] A. C. 87.

"Peaceful picketing" was allowed by section 2 (1) of the Act, but this has since been restricted where done in an intimidating manner. (Trade Disputes and Trade Unions Act, 1927, s. 3.)

The Trade Union Act, 1913, overrode the *Osborne* decision to the extent of legalising the application of the funds to certain political objects set out in section 3, but subject to the condition that any member might claim exemption from contributing to the political fund. The onus of claiming exemption was thus on the member (*k*). Section 3 also provided that the contributions of members should not be applied for political purposes unless a ballot has been taken.

The Trade Disputes and Trade Unions Act, 1927, passed in consequence of the "General Strike" of 1926, contains important provisions relating (*inter alia*) to (1) strikes and lock-outs, (2) the political application of trade union funds.

(1) Section 1 of the Act "declares" to be illegal any strike which "(i) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged; *and* (ii) is a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community."

Illegal lock-outs are defined in corresponding terms.

Workmen are deemed to be within the same "trade or industry" if their conditions of employment, etc. are determined by the same Joint Industrial Council, Conciliation Board, or similar body.

Where a strike or lock-out is illegal under the terms of the Act it is made an offence to take part in it: the provisions of the Trade Disputes Act, 1906, do not apply, and the Attorney-General may ask for an injunction to restrain the application of the union's funds in support of the strike or lock-out.

(2) Section 4 of the Act of 1927 makes it unlawful to require any member of the trade union to contribute to the political fund unless he has given notice of his willingness so to contribute. Under the 1913 Act the member was liable unless he claimed exemption. Under this Act he is not liable unless he volunteers to contribute. The force of inertia, which used to operate in favour of the political fund, is now enlisted against it (*l*).

(*k*) Cf. s. 4 of the Act of 1927, *infra*.

(*l*) Strikes may also be affected by the operation of the Emergency Powers Act, 1920; see *post*, p. 506.

Quasi-Military Organisations.—The statutes against liveries and maintenance which were passed in Tudor times were repealed in the nineteenth century as being no longer necessary. In "the years between the wars," however, the growth of militant fascist, communist and similar organisations led, or threatened to lead, to public disorder. Section 2 of the Public Order Act, 1936, therefore enacted that if the members or adherents of any association of persons are "(a) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or (b) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose," then any person who takes part in the control or management of the association or in so organising or training its members or adherents, shall be guilty of an offence punishable by fine and imprisonment.

The consent of the Attorney-General is necessary before initiating a prosecution under this section A person charged with taking part in the control or management of such an association may plead that he neither consented to nor connived at the unlawful organisation, training or equipment of its members or adherents.

II. PUBLIC MEETINGS AND PROCESSIONS.

Introduction and Definitions.—The common practice of holding public meetings dates from the habit of promoting meetings to discuss and present petitions to Parliament in the late eighteenth and early nineteenth centuries (*m*), the popular interest in Parliamentary affairs being no doubt stimulated first by a more widespread dissemination of newspapers and then by the extension of the franchise. The restrictive legislation of that period shows that the Executive was concerned with criticism of the Government, whereas the later statutes are intended mainly to prevent outbreaks of disorder.

Before discussing the general legal principles which govern this topic, it would be as well to attempt a few definitions.

A "public meeting" is a meeting held for the purpose of discussing or expressing views on matters of public interest, and which the public

(*m*) Holdsworth, *History of English Law*, vol. X, pp. 696—700.

or any section thereof is invited to attend. A public meeting may be held either on private premises or in a public place.

"Private premises" are premises to which the public have access only by permission of the owner or occupier. A "public place" includes any highway (*n*), public park, sea beach, or any public road, etc. whether it is a thoroughfare or not.

A "public procession" is a procession in a public place (*o*).

A "breach of the peace" is a fight in a public place, or an assembly or challenge with that object. This includes an "affray," which is a common law misdemeanour consisting of a fight in a public place by two or more persons to the terror of His Majesty's subjects (*p*); but not merely quarrelsome or threatening language.

General Principles.—There is a general right to promote or take part in a public meeting on private premises, and to promote or take part in a public procession, subject in either case to the infringement of particular legal rules. It is doubtful whether there is such a general right to promote or take part in a public meeting in a public place without licence, since this will in itself almost invariably involve a trespass to land as well as in many cases a public nuisance, though a public meeting in a public place is not necessarily unlawful (*q*).

Among the common law rules which may be infringed by the holding of a public meeting or procession are those relating to sedition (*r*); unlawful assembly, rout and riot, which are discussed below; public nuisance, which may be proceeded against on indictment; and trespass (*t*). A meeting or procession which would otherwise be lawful will not be so if there is intention, provocation or incitement to cause a disturbance. Further, magistrates have an inherent jurisdiction to bind persons over to keep the peace (*u*).

Among the statutes which may be infringed by the holding of a public meeting or procession are those relating to treason (*x*); tumultuous petitioning (statute of 1662); the Riot Act, 1714; the

(*n*) For the meaning of "highway," see *ante*, p. 279.
(*o*) The above definitions are taken, with modifications, from s. 9 (1) of the Public Order Act, 1936.
(*p*) Archbold, *Pleading, Evidence and Practice in Criminal Cases* (31st ed.), p. 1241.
(*q*) Cf. Goodhart, *Public Meetings and Processions* (1937), 6 Cambridge Law Journal, pp. 161—174. See also Wade, *The Law of Public Meetings* (1938), 2 Modern Law Review, pp. 177—193.
(*r*) *Ante*, p. 446.
(*t*) *Ante*, p. 469.
(*u*) *Lansbury* v. *Riley*, [1914] 3 K. B. 229. This is, perhaps, based on the statute of Edward III (1360) which created the office of Justice of the Peace, *ante*, p. 382.
(*x*) *Ante*, p. 440.

Incitement to Mutiny Act, 1797 (*y*); seditious meetings (statute of 1817); unlawful drilling (statute of 1820); the Highways Act, 1835, s. 72, directed against the obstruction of highways; insulting words and behaviour, punishable summarily under the Metropolitan Police Act, 1839; assault, punishable summarily under section 42 of the Offences against the Person Act, 1861; malicious damage to property (Act of 1861); obstructing the police in the execution of their duty (Prevention of Crimes Acts, 1871—1885); the Public Meetings Act, 1908; and the Public Order Act, 1936, especially as regards processions. Some of these are discussed more fully below. In addition, there are a number of statutes which enable local authorities to issue regulations relating to meetings in public places and public processions, *e.g.*, Metropolitan Police Acts, Municipal Corporations Act, 1882, Local Government Act, 1933, Parks and Gardens Regulation Act, 1872, and Open Spaces Act, 1908, breaches of which regulations will constitute offences. Further, summary proceedings may be taken in respect of breaches of local by-laws.

Public Meetings in Private Premises.—As has been said, there is a general right to hold public meetings in private premises (*z*), but the exercise of this right may be embarrassed by the decision in *Thomas* v. *Sawkins* (*a*) that the police may enter the premises if they have reasonable grounds for believing that, if they were not present, seditious speeches would be made or breaches of the peace would occur. In that case the meeting was held to protest against the Incitement to Disaffection Bill and to demand the dismissal of the Chief Constable of Glamorgan. There is some doubt as to the scope of this decision, as Hewart, C.J., said the police had a right to enter if they had reasonable grounds for believing that "an offence is imminent or is likely to be committed," and Avory, J., said they had this right if "seditious speeches would be made and/or that a breach of the peace would take place," while the remaining member of the Divisional Court, Lawrence, J., did not express an opinion on this point. Stress was laid in the judgments on the fact that, as the public were invited, the police could attend as members of the public; but against this it may be remarked that the conveners of a meeting can withdraw the

(*y*) *Ante*, p 445.

(*z*) It is assumed that the meeting is convened by, or with the licence of, the occupier of the premises.

(*a*) [1935] 2 K. B. 249; and see *ante*, p. 469. See also Goodhart, *Thomas* v. *Sawkins*: *A Constitutional Innovation* (1936), 6 Cambridge Law Journal, pp. 22—30.

invitation from particular persons (*b*), and that in this case they did in fact ask the police to leave (*c*).

Public Meetings in Public Places.—The right of the public to use the highway is the right to pass and repass on their lawful occasions. If the highway is used for any other purpose, save for such reasonable extensions as looking at the view or into shop windows, that is a trespass against the owner, whether the private owner or owners of adjoining land (*d*), or the local highway authority as the owner of the surface (*e*).

Further, if the user of the highway causes an appreciable obstruction, that is a public nuisance (*f*), which may be proceeded against by indictment or summarily under local by-laws. It is not necessary to prove that anyone has actually been obstructed (*g*), nor is it a good defence that there was a way round the obstruction (*h*). Rather more latitude is allowed in public parks and gardens, which are intended for recreation and exercise.

Thus, it has been held that there is no common law right to hold public meetings on a common (*De Morgan* v. *Metropolitan Board of Works* (1880) (*i*)), on the foreshore (*Brighton Corporation* v. *Packham* (1908) (*k*)), in Hyde Park (*Bailey* v. *Williamson* (1873) (*l*)), or in Trafalgar Square. (*R.* v. *Cunningham Graham and Burns* (1888) (*m*); *Ex parte Lewis* (1888) (*n*).) On the other hand, although a public meeting in a public place is not *prima facie* lawful, and a right thereto cannot be acquired by prescription (*R.* v. *Cunningham Graham*, *supra*), such a meeting is not necessarily unlawful. (*Burden* v. *Rigler* (*o*).)

Public Processions.—Since the right to use the highway is for the purpose of passing and repassing, a public procession is *prima facie*

(*b*) Different considerations arise if a person has paid money for admission. *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K. B. 1.

(*c*) The police have no right to enter private premises without a warrant in connection with a summary offence not involving a breach of the peace: *Davis* v. *Lisle*, [1936] 2 K. B. 434.

(*d*) *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142; *Hickman* v. *Maisey*, [1900] 1 Q. B. 772.

(*e*) *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434; *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705.

(*f*) *R.* v. *Bartholomew*, [1908] 1 K. B. 554.

(*g*) *Gill* v. *Carson and Nield*, [1917] 2 K. B. 674.

(*h*) *Homer* v. *Cadman* (1886), 16 Cox, C. C. 51.

(*i*) 5 Q. B. D. 155.

(*k*) (1908), 72 J. P. 318.

(*l*) 12 R. 8 Q. B. 118.

(*m*) 16 Cox, C. C. 420.

(*n*) 21 Q. B. D. 191.

(*o*) [1911] 1 K. B. 337.

lawful (*p*). Apart from causing a breach of the peace or constituting an unlawful assembly or riot, which are discussed below, a public procession may, however, easily involve a public nuisance.

A public nuisance will be caused if the user of the highway, though reasonable from the point of view of those taking part in the procession, is not reasonable from the point of view of the public. The question whether the user of the highway is reasonable depends on the circumstances of the case, and may be affected by the numbers taking part in the procession. (*Att.-Gen* v. *Brighton and Hove Co-operative Supply Association* (*q*).) The occasion, duration, place and hour must be considered, and also whether the obstruction is trivial, casual, temporary and without wrongful intent. (*Lowdens* v. *Keaveney* (*r*).)

The same principles apply whether the obstruction is caused by the procession itself or by onlookers. (*Bellamy* v. *Wells* (*s*).) Thus, in *Lowdens* v. *Keaveney* (*supra*), it was held that a band which marched through Belfast playing party airs, with the result that a crowd of several hundreds collected, was not liable for causing a material obstruction.

In the well-known case of *Beatty* v. *Gillbanks* (*t*) (*infra*), it was held that a procession, otherwise lawful, did not become an *unlawful assembly* merely because it was known that it would probably arouse opposition, from which breaches of the peace might occur. In *Beaty* v. *Glenister* (*u*) a member of the Salvation Army who marched down the street playing a cornet, with the result that persons in the neighbourhood were disturbed by the noise of the hostile crowd, was held not liable for *causing a breach of the peace*, though in a case of this kind the result might be different if the charge were that of causing a public nuisance.

Unlawful Assembly.—An unlawful assembly is a common law misdemeanour which arises where three or more persons *either* (i) assemble to commit, or when assembled do commit, a breach of the peace; *or* (ii) assemble with intent to commit a crime by open force; *or* (iii) assemble for any common purpose, whether lawful or unlawful, in such a manner as to give firm and courageous persons in the neigh-

(*p*) Goodhart, *Public Meetings and Processions, loc. cit.*, at pp. 169—174.
(*q*) [1900] 1 Ch. 276.
(*r*) [1903] I. R. 82.
(*s*) (1890), 7 T. L. R. 135
(*t*) (1882), 9 Q. B. D. 308.
(*u*) (1884), 51 L. T. 304.

bourhood reasonable cause to fear that a breach of the peace will occur (*x*). Where, however, people assemble for a lawful object without intending to cause a breach of the peace, though they have reason to believe that there will be such a breach in consequence of their meeting being opposed, such persons do not, according to the decision in *Beatty* v. *Gillbanks* (1882) (*y*) constitute an unlawful assembly.

The facts of *Beatty* v. *Gillbanks* were that a section of the Salvation Army marched about the streets of Weston-super-Mare singing hymns and disturbing the tranquillity of the inhabitants. An opposition force, called the Skeleton Army, was accordingly raised to oppose them. Fearing a disturbance, the local magistrates caused a notice to be served on the Salvationists not to assemble. In spite of this notice, they persisted in assembling. The two armies met, and a breach of the peace occurred. One Beatty, the commanding officer of the Salvationists, was convicted by the magistrates for being a member of an unlawful assembly, but, for the reason above stated, the conviction was reversed on appeal by the Divisional Court.

The case of *Wise* v. *Dunning* (*z*) presents the law in a different aspect. Here the plaintiff was a conscientious but violent critic of "the scarlet woman and her creed." Clad in a peculiar costume, he gave religious addresses in places of public resort in Liverpool. Certain Roman Catholics taking umbrage at these meetings, and street brawls resulting, the magistrate bound Wise over to keep the peace and be of good behaviour. Proceedings were taken, on the hearing of which Darling, J., gave judgment to the following effect: "To begin with, we have the appellant's own description of himself. He calls himself a crusader who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about . . . Got up in this way he admittedly made use of expressions most insulting to the faith of the Roman Catholic population. . . . There had been disturbances and riots caused by this conduct . . and the magistrate has bound him over to be of good behaviour, as he considered that the conduct was likely to occur again. Large crowds assembled in the streets, and a riot was only prevented by the police. The kind of

(*x*) *R.* v. *Vincent* (1839), 3 St. Tr. (N. S.) 1037; *R.* v. *Billingham* (1825), 2 C. & P. 234. See Dicey, *Law of the Constitution* (9th ed.), ch. 7; but cf. Appendix, section II (I), by Dr. Wade.

(*y*) 9 Q. B. D. 308. (*z*) [1902] 1 K. B. 167.

person which the evidence here shows the appellant to be I can best describe in the language of Butler. He is one of

> 'That stubborn crew
> Of errant saints whom all men grant
> To be the true church militant;
> A sect whose chief devotion lies
> In odd perverse antipathies.' "

In the result the learned Judge upheld the opinion of the magistrate.

At first sight the case of *Wise* v. *Dunning* appears to be inconsistent with *Beatty* v. *Gillbanks*. The distinction sought to be drawn between them appears in the following excerpts from the judgments in the two cases. In *Beatty* v. *Gillbanks*, Field, J., said: "The finding of the justices amounted to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition" (*a*). In *Wise* v. *Dunning* Lord Alverstone said: "No reasonable man . . can doubt that the police and the magistrate rightly concluded that the appellant, by holding these continual meetings attended by increasing crowds, by using language insulting to a religious sect to which the larger number of persons present might belong, and by inviting his own supporters to give him protection, went very far indeed towards inciting the people, at any rate, so to behave as to occasion a breach of the peace." *Beatty* v. *Gillbanks* merely decided that the meeting (or procession) in the circumstances of that case was not an unlawful assembly, while in *Wise* v. *Dunning* the appellant had clearly behaved and spoken in a provocative manner.

Prevention and Dispersal of Meetings and Processions.—It was held in the Irish case of *O'Kelly* v. *Harvey* (1883) that a magistrate may disperse a public meeting, which is lawful in itself and where there is no intention to disturb the peace, if he believes that there will be a breach of the peace if the meeting continues assembled *and that there*

(*a*) 9 Q. B. D. at p. 314. "The principle so laid down is that a man can only be held criminally answerable for the crime of another if he has procured or incited it; and that the mere intention (however well advertised) of B. to commit a crime if A. exercises his lawful rights cannot constitute the exercise of those rights a crime on the part of A.": Letter from the Hon. Cyril Asquith, K.C., now Asquith, J., to *The Times*, 14th November, 1936

is no other way by which the breach of the peace could be avoided but by stopping and dispersing the meeting (*b*).

In *Humphries* v. *Connor* (1864) (*c*), another Irish case, where a disturbance was caused by the fact that a Protestant lady, without intending to disturb the peace, wore an orange lily while walking through a crowd of Roman Catholics, a police constable was held justified in removing the lily on the ground that the peace could not be restored in any other way. Similarly, the procession in *Beatty* v. *Gillbanks* (*supra*) could properly have been dispersed if the rival factions had come to blows.

A public meeting in private premises to which the police had obtained access under the principle laid down in *Thomas* v. *Sawkins* (*d*), could apparently be dispersed under the principle in *O'Kelly* v. *Harvey* (*supra*).

A recent case which caused some discussion was *Duncan* v. *Jones* (*e*). Mrs. Duncan was about to make a speech in the street opposite a training centre for the unemployed. About a year before, she had made a speech in the same place, as a result of which a disturbance took place among *sympathisers* in the training centre. On the present occasion a police inspector told her she could not hold a meeting there, but might do so in another street nearby. She persisted in attempting to hold the meeting, whereupon she was arrested on a charge of obstructing a police officer in the course of his duty under the Prevention of Crimes Acts, 1871 and 1885. The findings of Quarter Sessions, who dismissed the appeal, were: "(1) that *in fact* (*if it be* material) the appellant [Mrs. Duncan] must have known of the probable consequences of her holding the meeting—namely, a disturbance and possibly a breach of the peace—and was *not unwilling* that such consequences should ensue; (2) that in fact the respondent [Jones, the police inspector] reasonably apprehended a breach of the peace; (3) that in law it therefore became his duty to prevent the holding of the meeting; and (4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty." The Divisional Court upheld these findings.

(*b*) 14 L. R. Ir. 105, at p. 109 (*c*) 17 Ir. C. L. R. 1.
(*d*) [1935] 2 K. B. 249; *ante*, p. 488.
(*e*) [1936] 1 K. B. 218; Wade, *Police Powers and Public Meetings* (1937), 6 Cambridge Law Journal, pp. 175—181; Letter from the Hon. Cyril Asquith, K.C., to *The Times*, 2nd November, 1936.

It seems to follow that the principle laid down in *Beatty* v. *Gillbanks* (*supra*) affords little, if any, protection where a charge of obstructing the police in the execution of their duty is brought. Persons in Mrs. Duncan's position, apparently, should obey the police and pursue their remedy afterwards.

As has been indicated, a Court of summary jurisdiction may bind a person over to keep the peace, *i.e.*, order him to give sureties for his good behaviour as a *preventive* measure (*f*), and if he fails or refuses to give such sureties he may be imprisoned for a maximum of six months under the Summary Jurisdiction Act, 1879.

Some Statutory Offences.—*Tumultuous Petitions Act, 1662.*—This statute provides that no person shall solicit the signatures of upwards of twenty persons to a petition to the King or either House of Parliament for alteration of matters of Church or State without previously obtaining the consent of one or other of the authorities mentioned in the Act. Further, not more than ten persons shall repair to His Majesty or both Houses or either House of Parliament under the pretence of delivering any petition or complaint, etc. The penalty for this offence is a fine of £100 or three months' imprisonment, and trial is to be commenced within six months of the offence. Three witnesses are necessary to secure a conviction.

Seditious Meetings Act, 1817.—The convention, or giving notice for the convention, of any meeting consisting of more than fifty persons, or for more than fifty persons to assemble in any street, square or open space within one mile of Westminster Hall, to consider or prepare any petition or address to the King or either House of Parliament for the alteration of matters in Church or State, on any day on which the Houses are sitting, is deemed to be unlawful, and such meetings, if held, are unlawful assemblies. The same applies to such a meeting within one mile of the Law Courts in the Strand when the Courts are sitting. (Judicature Act, 1925, s. 224.)

Unlawful Drilling Act, 1819.—Persons attending illegal meetings for drilling or training in the use of arms, or practising military evolutions without authority from the King or the lord lieutenant or two justices, are liable to a fine and imprisonment not exceeding two years. A prosecution must take place within six months.

(*f*) *Lansbury* v. *Riley*, [1914] 3 K. B. 229; *R.* v. *Sandbach, Ex p. Williams*, [1935] 2 K. B. 192.

Public Meeting Act, 1908.—Disorderly conduct at any lawful public meeting is punishable by fine not exceeding £5 or imprisonment not exceeding one month. In the case of a political meeting between the issue of a writ for the return of a Member of Parliament and the return, the offence is an illegal practice within the meaning of the Corrupt and Illegal Practices Act, 1883 (*g*).

Section 6 of the Public Order Act, 1936, amends the Public Meeting Act, 1908, by providing that if a constable reasonably suspects any person of committing an offence under the latter Act, he may, if requested to do so by the chairman of the meeting, require the person to give his name and address. If the person refuses to give his name and address, or gives a false name and address, he is guilty of an offence and liable on summary conviction to a fine not exceeding forty shillings. The constable may arrest without warrant if the person refuses to give his name and address, or if the constable reasonably suspects him of giving a false name and address.

The Public Order Act, 1936.—It is an offence to wear in any public place or at any public meeting a *uniform* signifying association with any *political* organisation or with the promotion of any political object. The consent of the Home Secretary is necessary for a prosecution, and the Home Secretary may give permission for political uniforms to be worn on special occasions (section 1).

It is also an offence to carry any offensive or unauthorised *weapon* at any public meeting or public procession (section 4); or in any public place or at any public meeting to use *threatening, abusive or insulting words or behaviour* with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned (section 5).

The Act gives to local authorities on the application of the Chief Officer of Police and with the consent of a Secretary of State, and to the Commissioners of the City of London and of the Metropolitan Police with the consent of the Home Secretary, power to prohibit *for a specified period* the holding of all *processions* or of any class of processions within their areas. A person who contravenes such an order, or directions prescribing a definite route for a procession issued in reasonable apprehension of serious public disorder, is guilty of an offence (section 3).

(*g*) See *ante*, p. 79.

A person guilty of an offence under these sections of the Act is liable on summary conviction to imprisonment not exceeding three months and/or a fine not exceeding £50. A constable may arrest without warrant any person reasonably suspected by him to be committing an offence under sections 1, 4 or 5. The Act was passed at a time when much annoyance was being caused by Fascist and Communist demonstrations.

Rout.—A rout is a disturbance of the peace by three or more persons, who assemble with the intention of doing something which if executed would amount to a riot (*infra*), and who actually make a motion towards the execution thereof but do not complete it (*h*). A rout, like an unlawful assembly, is a common law misdemeanour.

Riot.—A riot is a tumultuous disturbance of the peace by three or more persons who assemble together of their own authority with the intention mutually to assist one another, by force if necessary, against anyone who may oppose them in the execution of some enterprise of a private nature, whether lawful or unlawful, and afterwards actually execute the same in a violent and turbulent manner to the terror of the people (*i*). A riot is in itself a common law misdemeanour, but rioters will be guilty of felony if, *e.g.*, they burn a house or injure property.

In order to constitute a riot five elements are essential: (i) three or more persons; (ii) a common purpose of a private nature (*k*); (iii) execution or inception of the common purpose; (iv) intent to help one another, by force if necessary, against anyone who may oppose them in the execution of the common purpose; and (v) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness. (*Field* v. *Receiver of Metropolitan Police* (*l*).)

Where damage had been caused by rioters the inhabitants of the hundred had to compensate persons who had lost property owing to the conduct of the rioters, but the law on this subject is now regulated by the Riot (Damages) Act, 1886, which provides that where a house, shop, or building in any police district, or the property therein, has

(*h*) Archbold, *Pleading, Evidence and Practice in Criminal Cases* (31st ed.), p. 1234.
(*i*) Archbold, *op. cit.*, p. 1235.
(*k*) If the common purpose were of a public or general nature, the offence would amount to treason.
(*l*) [1907] 2 K. B. 853.

been injured or stolen owing to a riot, compensation to the persons aggrieved is to be paid out of the police rate.

In *Ford* v. *The Receiver for Metropolitan Police District* (*m*), the facts were as follows: During the Peace Night in 1919, a good-humoured crowd entered an empty house and took away the woodwork and flooring to make a bonfire. A next-door neighbour told some of the mob that he hoped they would not touch his house, but made no attempt to prevent damage being done to his neighbour's house, alleging that he apprehended injuries if he interfered with the crowd. The Court held that the conduct of the crowd was a riot, that the transaction embraced all the five ingredients of a riot, that the next-door neighbour was a man of reasonable courage, and that he had been alarmed. Damages should therefore come out of the police rate. In *Pitchers* v. *Surrey County Council* (*n*) it was held that a mutinous disturbance created by soldiers in a camp where a civilian owned property, the said property being injured, was a riot within the meaning of the Riot (Damages) Act, 1886, s. 1. In *Jarvis* v. *Surrey County Council* (*o*) the facts were as follows: Certain property inside Whitley Camp was injured by Canadian troops, and the plaintiff had received from the Canadian authorities £750 in part satisfaction of damages sustained, and claimed the balance from the police district more than two years after the cause of action arose. The Surrey County Council contended that the claim was statute-barred under section 3 of the Civil Procedure Act, 1833, but Finlay, J., decided in favour of the plaintiff.

A riot is none the less a riot because the crime committed amounts to a felony. In *London and Lancashire Insurance Co.* v. *Bolands, Ltd.* (*p*), four armed men entered the premises of the respondent company in Dublin, held up the employees with revolvers, and stole large sums of money from the cashier's office. There was no disturbance at the time within the neighbourhood. The respondents had effected a policy with the insurance company under which the appellants were to be answerable for burglary, housebreaking, or theft, but not for damage caused by rioters. The Irish King's Bench Division and Court of Appeal decided in favour of the respondents, but the House of Lords held that the occurrence was a riot and that the insurance company were exempted from liability.

(*m*) [1921] 2 K. B 344.
(*n*) [1923] 2 K. B. 415.
(*o*) [1925] 1 K. B. 554.
(*p*) [1924] A. C. 836.

The Riot Act, 1714.—Some persons think that before a riot can exist it is necessary to "read the Riot Act." This is not so, as the effect of the statute is to constitute the rioters felons if they do not comply with the proclamation (*q*).

The Riot Act, 1714, is to the following effect: Where twelve or more persons, being unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, are commanded by a magistrate, county sheriff or under-sheriff, mayor of a borough or a borough justice where such assembly shall be, by proclamation in the form thereinafter set forth to disperse themselves, and such persons shall to the number of twelve or more unlawfully, riotously and tumultuously remain together for *one hour* after the reading of the proclamation, such persons shall be guilty of *felony* (section 1). The person authorised by the Act to read the proclamation shall go among the rioters, or as near to them as he can safely come, and with a loud voice command silence or cause silence to be commanded during the reading of the proclamation. The form of the proclamation is to be as follows: "Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. *God Save the King*" (*r*).

If the twelve or more persons in question do not disperse within the hour, any justice, constable and such other persons as shall be commanded to be assisting unto such justice may seize and apprehend the rioters, and if any be killed or hurt when resisting apprehension the persons so killing are to be indemnified (section 3)

Wilful opposition by force of arms to the reading of the proclamation is a felony (section 5). Offences under the Act must be prosecuted within twelve months (section 8), and are punishable by penal servitude for life

Persons who happen to be on the spot are not to be treated as felons, unless evidence be forthcoming of some participation in the riot. (*R.* v. *Atkinson* (*s*).)

(*q*) For the reasons for passing this Act, see Holdsworth, *History of English Law*, vol. VIII, pp. 327—331.

(*r*) See *R.* v. *Child* (1831), 4 C. & P. 442.

(*s*) (1869), 11 Cox, 330.

The Use of Force to Suppress Riots.—The duty of maintaining order and restraining disorder rests with the local authorities, and not with the central government. Sheriffs, mayors of boroughs, and magistrates, are bound to suppress rioting, and are charged with the duty of dispersing unlawful assemblies.

Force must not be used unless or until necessary, nor in a degree disproportionate to the necessity of the case. It is only upon a reasonable apprehension of serious rioting, and as a last expedient, that the civil authority, with whom primarily rests the responsibility for preserving order, should invoke the assistance of the military. The latter, if invoked, should act under the direction of the civil authority (usually a magistrate); they should not, in ordinary cases, fire without his orders, nor omit to fire when ordered by him. Still, circumstances may exist which make it the duty of the troops to ignore or act in independence of the orders of the magistrate, or, indeed, of their own superior officers (*t*).

In the case of *R.* v. *Pinney* (1832) (*u*), Littledale, J., made the following remarks: "A person, whether a magistrate or not, who has the duty of suppressing a riot, is placed in a very difficult situation, for if by his acts he causes death he is liable to be indicted for murder, and if he does not act he is liable for an indictment on information for neglect. He is, therefore, bound to hit the precise line of his duty."

In *Keighley* v. *Bell* (1866) (*x*), Willes, J., said: "I hope I may never have to determine how far the orders of a superior officer justify force. If compelled to determine that question, I should hold probably that those orders were an absolute justification in time of riot, at all events as regards enemies and foreigners, and probably also against natural-born subjects, unless the orders were not legally given. I believe that the better opinion is that a soldier acting under the orders of his superior officer is justified unless the orders be *manifestly* illegal" (*y*). Soldiers refusing to obey orders of superiors are liable to be tried by court-martial, in which case the same principles appear to apply (*z*).

(*t*) See the Report of the Commission on the Featherstone Riots (1893), C. 7234; *post*, p. 505.
(*u*) 5 Car. & P. 254; 3 B. & Ad. 947.
(*x*) 4 F. & F. 763.
(*y*) *Ibid.*, at p. 790.
(*z*) See *ante*, p. 300.

CHAPTER XXXVI.

RIGHTS AND DUTIES OF THE CITIZEN IN TIME OF EMERGENCY.

I. COMMON LAW POWERS TO DEAL WITH AN EMERGENCY.

THE Crown is responsible for the defence of the realm by sea and land, and is the only judge of the *existence* of danger to the realm from external enemies (*R.* v. *Hampden* (1637) (*a*)), though it is not the sole judge of the *means* by which such danger is to be averted, *e.g.*, the imposition of taxation or conscription. (Bill of Rights, 1689.)

We have mentioned in a previous chapter the prerogative power of the Crown to enter upon and use the lands of the citizen in order to repel invasion (*Case of the King's Prerogative in Saltpetre* (1606) (*b*)), and the Crown may requisition ships, at any rate, British ships in territorial waters, on payment of compensation. (*The Broadmayne* (*c*).)

Martial Law.—*Uses of the term "Martial Law."*—The question is often raised, whether the Crown has a prerogative power to declare martial law. It is as well first to note that the term "martial law" is sometimes *incorrectly* used to cover any one or more of the following:—

(i) The law formerly administered by the Court of the Constable and Marshall (*d*).

(ii) What is properly termed Military Law, *i.e.*, the codes governing the armed forces at home and abroad, in war and in peace (*e*).

(iii) The law administered by a British commander in occupied enemy territory in time of war, and (possibly) the law administered by a British commander in an occupied district of ex-enemy territory. Of these it is unnecessary to say more than that the law so administered amounts to arbitrary government by the military, tempered by international

(*a*) 3 St. Tr. 825.
(*b*) 12 Co. Rep. 12; and see *Warren* v. *Smith* (*The Magdalen College Case*) (1615), 1 Roll. 151.
(*c*) [1916] P 64; and see *The Serpon*, [1916] P. 306.
(*d*) *Ante*, p 306. (*e*) *Ante*, Chapter XXII.

custom (*e.g.*, the Hague Conventions), and such disciplinary control as the British War Office or home Government think fit to exercise.

(iv) The common law right and duty to maintain public order by the exercise of any degree of necessary force in time of invasion, rebellion, insurrection or riot. This is discussed below (*f*).

État de Siège in France.—Martial law in the strict sense means the suspension of the ordinary law, and the substitution therefor of discretionary government by the Executive exercised through the military. In France a state of siege (*état de siège*) may be declared in the event of imminent danger resulting either from foreign war or armed insurrection. A state of siege involves the temporary and partial transfer of powers from the civil to the military authorities. Its characteristics are: (i) the military take over whatever general administrative and police powers are considered necessary, and leave the rest to the civil authorities who collaborate with them; (ii) the military are given certain specific powers by law, viz.: (a) to search houses, (b) to impose a curfew, (c) to require the delivery up of arms, and (d) to prohibit publications and meetings which they consider likely to provoke disorder; (iii) the competence of military tribunals varies according to whether or not there is imminent danger of war. The establishment of a state of siege in France is not, as might be inferred from Dicey (*g*), left to the discretion of the executive. Assuming that there is imminent danger of war or insurrection, (i) the declaration is made by the Chambers if they are in session, and the areas are specified and the duration fixed; (ii) the President of the Republic on the advice of the Cabinet can make the declaration if the Chambers stand adjourned, but the Chambers must meet two days after; (iii) if the Chamber of Deputies has been dissolved, a state of siege cannot be declared by the President of the Republic, even provisionally, until a new Chamber has been elected; but in the case of foreign war, the President on the advice of the Cabinet could declare a state of siege in the areas threatened by the enemy, on condition that the electoral colleges were convened and the Chambers met as soon as possible. A

(*f*) *Post*, p. 504.
(*g*) *Law of the Constitution* (9th ed.), pp. 491—493.

state of siege is lifted in case (i) by operation of law when the time fixed expires, and in cases (ii) and (iii) by the Chambers (*h*).

It should be noted that the purpose of a state of siege in France is merely to maintain public order, and that for the conduct of a war it is necessary in France, as in England, for emergency powers to be conferred on the Executive by legislation (*i*).

Is Martial Law known to English Law?—High authorities, notably Dicey (*k*), assert that martial law in this sense is unknown to our Constitution. Other eminent lawyers draw a distinction between martial law in time of peace and in time of war, and contend that while the Petition of Right, 1628, declares it illegal in the first case, it may still validly be proclaimed in the second.

In *Great Britain*, at any rate, the Crown cannot proclaim martial law by prerogative in time of peace. Nor has the Crown purported to proclaim it in time of war since the reign of Charles I, and it makes no difference whether or not a state of war has been proclaimed. What on rare occasions has been called "martial law" since 1628 by British constitutional writers has been a state of affairs, outside Great Britain, in which, owing to civil commotion, the ordinary Courts were unable to function, and it was therefore necessary to establish military tribunals. It is merely an extended application of the principle—discussed below—that the Executive has such powers as are necessary for the preservation of public order. Even then specific powers have usually been obtained from Parliament, for example, in Ireland in 1799 and in Jamaica in 1865.

Some authorities hold, nevertheless, that martial law may validly be called into operation in time of war both in Great Britain and outside it, and that when this has been done, the civil Courts have no authority to call in question the actions of the military authorities. They rely on the preamble to certain Irish Acts of Parliament, *e.g.*, 39 Geo. 3, c. 11 (1799), which refers to "the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law." They also pray in aid language used by Lord Halsbury in

(*h*) Hauriou, *Précis de Droit Constitutionnel* (2nd ed.), pp. 705—708. Duguit emphasises that the powers of the military remain limited by law: *Traité de Droit Constitutionnel* (3rd ed.), vol. V, ch. 1, § 7.

(*i*) Hauriou, *op. cit.*, pp. 448—453, 709.

(*k*) Dicey, *op. cit.*, p. 293.

Ex parte D. F. Marais (*l*): "The framers of the Petition of Right well knew what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." One answer to this line of reasoning was anticipated by Lord Blackburn when he said, in his charge in *R.* v. ***Eyre*** (1868) (*m*): "It would be an exceedingly wrong presumption to say that the Petition of Right, in not condemning martial law in time of war, sanctioned it." Another is afforded by the circumstance that when martial law has been proclaimed, the Crown has almost invariably protected its servants after the event by obtaining the passing of Acts of Indemnity. It is, at least, difficult to see why Acts of Indemnity should be needed if the actions which they retrospectively legalise were by virtue of martial law legal all the time and could not be reviewed or questioned by the civil Courts (*n*).

It is sometimes difficult to determine when a state of war exists in a particular district. It was formerly supposed that in answering this question the test to be applied was whether the civil Courts were open. It is now, however, established by the decision of the Privy Council in ***Elphinstone*** v. ***Bedreechund*** (1830) (*o*), and in ***Ex parte D. F. Marais*** (*supra*), that this test is not conclusive, and that the existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil Courts within that district.

The judicial decisions are few and inconclusive and mostly Irish, but the following seem to be the general principles. The ordinary Courts have jurisdiction to determine as a question of fact whether a state of war exists or did exist at the relevant time in a given area so as to justify the setting up of a military tribunal. (*R.* v. ***Allen*** (*p*); *R.* v. ***Strickland*** (*q*).) (i) If it is held that a state of war does or did exist, then the military tribunal—not being a Court but merely a body of military officers to advise the military commander—would not be bound by the ordinary law or procedure. In ***Re Clifford and O'Sullivan*** (*r*) the appellants had been sentenced to death for being in

(*l*) [1902] A. C. 109. This decision gave rise to four articles on Martial Law in 18 Law Quarterly Review, at pp. 117, 133, 143 and 152.
(*m*) Finlason, 73.
(*n*) See, on this part of the subject, *R.* v. *Nelson and Brand* (1867), F. Cockburn's Reports, pp. 59, 79; Forsyth, *Cases and Opinions on Constitutional Law*, pp. 198, 199, 553, 556—557; Holdsworth, *History of English Law*, vol X, pp. 705—713.
(*o*) 1 Knapp. 316.
(*p*) [1921] 2 Ir. R. 241.
(*q*) [1921] 2 Ir. R. 317.
(*r*) [1921] 2 A. C 570

possession of firearms by a military tribunal constituted under the authority of the Commander-in-Chief in Ireland, and they applied for a writ of prohibition. The House of Lords held that if in fact a state of war exists or existed at the time in question, a military tribunal is not a Court in the ordinary sense, but merely a body of military officers advising their commander; such a tribunal is not bound by the ordinary law or procedure, and therefore prohibition would not lie. Further, in this case the military "Court" had concluded its business, so that prohibition was too late any way: relief might be sought by *habeas corpus* when order was restored if the appellants were still alive. There is no remedy during the state of war. (*Ex parte D. F. Marais, supra.*) During the disturbances in Ireland, which followed the passing of the Irish Free State Constitution Act, 1922, many persons were sentenced to death by courts-martial, among them Erskine Childers. He applied for a writ of *habeas corpus*, which was refused on the ground that a state of war existed in Ireland at the time, and that the civil Courts were unable to discharge their duties. (*R.* v. *Portobello Barracks Commanding Officer, Ex parte Erskine Childers* (*r*).) Nor is there any remedy after the war is over if what was done was done in good faith or at least was dictated by necessity, (*Wright* v. *Fitzgerald* (*s*).) (ii) If on the other hand it is held that a state of war does not or did not exist at the relevant time, the person injured has his remedy by *habeas corpus* (*Wolfe Tone's Case* (*t*)) or otherwise for injury done to him, subject to the terms of an Act of Indemnity which will probably have been passed in the meanwhile. (*Tilonko* v. *Att.-Gen. for Natal* (*u*).)

The right to maintain public order by the exercise of any degree of necessary force.—Every citizen both may, and in the last resort, must, preserve the King's peace by the exercise of any degree of necessary force in time of riot, insurrection or invasion.

The degree of force thus properly applicable may extend to the destruction of life and property to any extent. Nor must it be supposed that because this duty devolves in practice mostly on the servants of the Crown—magistrates, soldiers and police—it is not binding also on the ordinary citizen. All must, if necessary, co-operate in re-establishing public order. In *R.* v. *Brown* (1841) (*x*) it was held

(*r*) [1923] Ir. R. 5.
(*s*) (1798), 27 St. Tr. 613.
(*t*) (1799), 27 St. Tr. 758.
(*u*) [1907] A. C. 93.
(*x*) C. & Mar. 314; and see *R.* v. *Pinney* (1832), 5 C. & P. 254.

that it was an indictable misdemeanour to refuse to aid a police officer in suppressing a riot. The moment public order is disturbed all citizens are entitled to suppress the disturbance. In doing so they must apply neither more nor less force than a reasonable man would judge necessary to restore peace. If they adopt excessive or cruel measures they will be criminally answerable in the ordinary Courts (*Wright* v. *Fitzgerald*, *supra*), and they are bound when the actual conflict is at an end to hand over prisoners to the civil powers (*y*). If the right amount of force is applied, and in the course of its application acts are committed which in normal times would amount to assaults or trespasses, the Courts will regard the acts as justified and required by a state of public disorder, and will give no relief to their victims. Not merely so, but they will, as the case of *R.* v. *Pinney* (*z*) shows, punish severely a magistrate who hesitates, in the course of a riot, to commit acts, illegal in ordinary circumstances, but necessary to the restoration of order.

Something has been said in the previous chapter about the use of force in suppressing riots (*a*). The common law principles are explained in the report of the Commission appointed to report on the disturbances at Featherstone in 1893. "By the law of this country," say the Commissioners, "every one is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained . . . It was a crowd . . . which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons. Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. . . . One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance.

(*y*) Forsyth, *op. cit.*, p. 557; and cf. *Wolfe Tone's Case*, 27 St. Tr. 613, at pp. 624—625.
(*z*) 5 C. & P. 254. (*a*) *Ante*, p. 499.

. . . The question whether, on any occasion, the moment has come for firing upon a mob of rioters, depends, as we have said, on the necessities of the case. . . . An order from the magistrate who is present is required by military regulations . . . But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists. . . . The justification of Captain Barker and his men must stand or fall entirely by the common law [*i.e.*, it was not affected by the Riot Act]. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could reasonably be avoided?" (*b*)

II. STATUTORY POWERS TO DEAL WITH AN EMERGENCY.

(1) In Time of Peace.

The Emergency Powers Act, 1920.—This statute provides that, if at any time it appears to His Majesty that action has been taken, or is immediately threatened, to interfere on an extensive scale with the supply of food, fuel, light, or other necessaries of life or with the means of locomotion whereby the public or a large section thereof would be seriously affected, His Majesty may, by proclamation, declare a state of emergency. No such proclamation shall be in force for more than a month, without prejudice to the issue of a fresh proclamation during that period. Where proclamation of emergency has been made Parliament is to be informed thereof forthwith, and if the Houses be then adjourned or prorogued, they shall be summoned to meet within five days.

Where a proclamation of emergency has been made, and so long as it shall be in force, His Majesty in Council may make regulations for securing the essentials of life to the community, and those regulations may confer on a Secretary of State or other Government Department, or any other person in His Majesty's service or acting on His Majesty's behalf, such powers and duties as His Majesty may deem necessary

(*b*) (1893), C. 7234. Lord Justice Bowen (afterwards Lord Bowen) was a member of the Commission, whose opinion has almost judicial authority. This passage is quoted more fully in Dicey, *op. cit.*, pp. 621—624.

for preserving the peace, securing to the public the necessaries of life, the means of locomotion, and the general safety. Nothing in the Act is to authorise the making of regulations imposing military or industrial conscription, the alteration of the rules of criminal procedure, or punishment for the peaceable persuasion of persons to join in a strike.

All regulations made by His Majesty shall be laid before Parliament as soon as practicable, and shall not continue in force after the expiration of seven days from the time they were laid before Parliament, unless a resolution is passed by both Houses providing for the continuance thereof. The regulations may provide for the trial by Courts of summary jurisdiction of persons offending against the same, and the maximum penalty for breach of the regulations shall be imprisonment with or without hard labour for three months, or a fine of £100, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed.

The regulations so made may be added to, altered, or revoked by resolution of both Houses, but the expiry or revocation of such regulations is not to affect any action taken thereunder.

The Emergency Powers Act, 1920, is a permanent statute and was designed to meet an emergency such as the coal strike of 1921 or the general strike of 1926, but the principle of temporary regulation by statutory Orders in Council subject to the close supervision of Parliament provides a model for dealing with other kinds of "crisis." It does not seem to go nearly as far as the declaration of an *état de siège* of the French type, but it provides a more exact comparison than does the prerogative power to put down violent outbreaks of disorder with force (c).

Another example of a statute conferring exceptional powers on the Executive in time of peace was the Prevention of Violence (Temporary Provisions) Act, 1939, to deal with bomb outrages committed in this country by members of the Irish Republican Army. Its duration was limited in the first instance to two years.

(2) In Time of War.

The Defence of the Realm Acts, 1914—15.—The experience of the two great wars of the present century shows that the Executive rely

(c) Cf. Dicey, *Law of the Constitution* (9th ed.), pp. 291—293.

in time of war almost exclusively on statutory powers. Shortly after the outbreak of war in 1914 the whole of the United Kingdom was placed under martial law by the Defence of the Realm Act, 1914, and British subjects and aliens alike remained under martial law for some months. Subsequent Defence of the Realm Acts allowed British subjects to claim a civil trial on taking the prescribed steps, and gave to the King in Council such powers as were necessary for the efficient prosecution of the war. The doctrine of *ultra vires*, of course, still applies (*e*). Thus the Food Controller, who was empowered by regulation to grant licences to deal in milk, was held to have acted beyond the powers given by the regulation, and so in contravention of the Bill of Rights, in requiring sums of money to be paid as a condition of receiving a licence. (*Att.-Gen.* v. *Wilts. United Dairies*(*f*).) But, as a learned Judge has said, a modern war can no more be conducted in accordance with the provisions of Magna Carta than on the principles of the Sermon on the Mount (*g*), and so there is a tendency in construing statutes in time of war for the Courts to lean away from the liberty of the subject and towards the freedom of action of the Executive. (*R.* v. *Halliday, Ex parte Zadig* (*h*).)

The Emergency Powers (Defence) Acts, 1939 and 1940.—The main provisions of the Emergency Powers (Defence) Act, 1939, which was passed a week before the outbreak of war with Germany, are as follows:—

Section 1 (1) gives a general power to His Majesty by Order in Council to make such Regulations "as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community." Subsection (2), without prejudice to the generality of the preceding powers, specifies certain particular matters which may be the subject of Defence Regulations so far as appears to His Majesty to be necessary or expedient for the above purposes, viz.: the apprehension, trial and punishment of persons offending against the Regulations; the detention of persons whose detention appears to the Secretary of State

(*e*) For the doctrine of *ultra vires*, see *ante*, p. 277.
(*f*) (1922), 91 L. J. K. B. 897.
(*g*) St. Matthew, 5. 1—7. 27.
(*h*) [1917] A. C. 260; *ante*, p. 463.

to be expedient in the interests of the public safety or the defence of the realm; the taking of possession or control of any property or undertaking; the acquisition of any property other than land; the entering and search of any premises; and the amendment, suspension or modification of any enactment (*i*). Defence Regulations may delegate power to make orders, rules and by-laws for any of the purposes for which Regulations are authorised to be made (section 1 (3)), but they may not impose any form of compulsory naval, military or air force service or any form of industrial conscription, or make provision for the trial by courts-martial of persons who are not subject to the Naval Discipline Act, military law or the Air Force Act (section 1 (5)).

Section 2 of the Act allows the Treasury to impose charges in connection with any scheme of control authorised by Defence Regulations, *e.g.*, the grant of licences or permits (cf. *Att.-Gen.* v. *Wilts United Dairies*, *supra*), but any such order must be laid before the Commons and shall cease to have effect unless approved within twenty-eight days by a resolution of the Commons.

Section 6 allows a Court, if satisfied that it is expedient in the interests of the public safety or the defence of the realm, to exclude persons or classes of persons from the proceedings, and to prohibit or restrict the disclosure of information with respect to the proceedings. These powers are in addition to the Court's existing powers, and, without prejudice to the law against contempt of Court, heavy penalties may be imposed for disobedience to the directions (*k*).

Section 8 provides that every Order in Council containing Defence Regulations shall be laid before Parliament, and shall cease to have effect if either House within twenty-eight days resolves that the Order be annulled.

Section 9 states that the powers conferred by the Act "shall be in addition to, and not in derogation of, the powers exercisable by virtue of the prerogative of the Crown," though when the Crown has power to do something both by prerogative and by statute, the power must be exercised in the manner prescribed by the statute. (*Att.-Gen.* v. *De Keyser's Royal Hotel* (*l*).)

(*i*) This means any enactment passed before the Emergency Powers (Defence) Act, 1940.

(*k*) Cf. Chapter XXIX.

(*l*) [1920] A. C. 508; *ante*, p. 178.

Section 11 limits the force of the Act to the period of one year (extended to two years by the Emergency Powers (Defence) Act, 1940), provided that it may be continued for further annual periods by Order in Council on the address of both Houses of Parliament; but the Act is to expire on the date on which an Order in Council, declaring that the emergency that was the occasion of the passing of the Act has come to an end, comes into operation.

The Emergency Powers (Defence) Act, 1940, passed at a time when invasion seemed to be imminent, allows Defence Regulations, issued for the purposes prescribed by the Act of 1939, to make provision "for requiring persons to place themselves, their services, and their property at the disposal of His Majesty." This very remarkable piece of legislation, which was passed through all its stages in both Houses and received the Royal assent in one day (22nd May), describes itself as an extension of powers, but it is doubtful whether it did extend the powers already contained in the earlier Act (*f*).

The Emergency Powers (Defence) (No. 2) Act, 1940 (1st August), which was passed in order to remove doubts, declared that provision might be made by Defence Regulations "for securing that, where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary Courts, persons, whether or not subject to the Naval Discipline Act, to military law, or to the Air Force Act, may . . . be tried by such *special courts, not being courts-martial*, as may be so provided."

Defence Regulations.—It is not possible here to do more than indicate the nature and scope of the numerous Defence Regulations issued under the authority of the Emergency Powers (Defence) Acts, 1939 and 1940, by mentioning examples that are of special interest to students of constitutional law

The Defence (Administration of Justice) Regulations, 1940, gave power, if expedient having regard to hostile operations, to alter the place or to postpone the sittings of assizes and quarter sessions, and to alter the sittings and jurisdiction of petty sessions; took away

(*f*) Dr. Jennings suggests that it was rather an act of defiance to the all-conquering Germans, which "put into a legal formula the 'blood and tears and sweat' that Mr. Churchill had promised as the British contribution to the war effort": *Law and the Constitution* (3rd ed.), pp. xxv—xxvi.

from persons indicted for treason or felony the right of peremptory challenge of jurors; and empowered assizes and quarter sessions to supply a deficiency of jurors by requiring the sheriff to return the names of any specified number of persons, whether or not otherwise qualified or liable to serve on a jury.

The Defence (*Armed Forces*) *Regulations*, 1939, provided that an alien might hold a commission or be enlisted in any of H.M. forces as if he were a British subject, and might be enlisted without taking the oath of allegiance.

The Defence (*Finance*) *Regulations*, 1939, entitled the Treasury to acquire certain kinds of securities at a price which, in the opinion of the Treasury, was not less than the market value; and restricted the purchase, sale and loan of foreign currency or gold, and the export of currency, gold and securities, without permission of the Treasury.

The Defence (*Parliamentary Under-Secretaries*) *Regulations*, 1940, amended the Ministers of the Crown Act, 1937 (*g*), by increasing from twenty-two to twenty-five the number of Parliamentary Under-Secretaries of existing Departments entitled to sit and vote in the House of Commons (*h*).

The Defence (*Trading with the Enemy*) *Regulations*, 1940, amended the Trading with the Enemy Act, 1939, by making an attempt to trade equivalent to trading, extending the definition of "enemy," and empowering the Board of Trade to specify areas to be treated in the same way as enemy territory (*i*).

The Defence (*War Zone Courts*) *Regulations*, 1940, are of special interest, though fortunately they never had to be called into operation. They gave power to the Minister of Home Security to declare areas to be war zones, and to establish therein special Courts called "war zone courts" for the purposes of the Emergency Powers (Defence) (No. 2) Act, 1940. A war zone Court was to consist of a President appointed by the Lord Chancellor, and two advisory members. The President was to be a Judge of the Supreme Court or qualified to be a commissioner of assize, and he was to hold office on similar terms to a puisne Judge of the High Court. The jurisdiction conferred

(*g*) *Ante*, p. 75.
(*h*) The number was also increased by various statutes setting up new Ministries, see Chapter XVIII.
(*i*) See Chapter XXXII.

was that of the High Court, Court of assize, quarter sessions and Court of summary jurisdiction. The prosecutor was to be allowed to appear by counsel, solicitor, officer of H.M. forces or police officer not lower in rank than inspector; and the accused was to be allowed to appear by counsel, solicitor or officer of H.M. forces. Similar rules of evidence were to apply as to ordinary criminal Courts. There was to be a review of the proceedings by three persons who hold or have held high judicial office, if (a) a person was sentenced to death or penal servitude for seven years or more; or (b) the President of the Court was of opinion that the case involved questions of special difficulty, whether of law or fact; or (c) a Secretary of State was of opinion that a review was expedient in the interests of justice.

The Defence (General) Regulations, 1939, covered such a wide field that it is impracticable even to summarise the more important ones. They prohibited strikes and lockouts in connection with trade disputes and among persons engaged in the performance of essential services (*k*); made looting from blitzed premises punishable by *death* or penal servitude for life, and sabotage by penal servitude for fourteen years (*l*), permitted the Home Secretary to prohibit the printing, publication and distribution of any newspaper if he was satisfied that it systematically published matter which in his opinion was calculated to foment opposition to the successful prosecution of the war (*m*); authorised the prohibition or regulation of the entry of persons to "protected places," "protected areas" and "regulated areas" (in the case of "regulated areas," including regulation by naval, military or air force authorities), and the regulation of the movements of persons in "defence areas"; empowered the Home Secretary to regulate the entry of British subjects into the United Kingdom and their exit therefrom, to restrict the movements of suspected persons and to issue detention orders (*n*); entitled the police to arrest without warrant suspected persons who failed to satisfy as to their identity, such detention not to exceed

(*k*) Cf. Chapter XXXV. These Regulations did not in fact prevent a number of "unofficial" strikes in war factories, mines and public utilities, against the advice of the Union officials; and in many cases no prosecution was instituted.

(*l*) *Sabotage* was defined in Regulation 2B as any act done with intent to impair the efficiency or to impede the working or movement of any vessel, aircraft, vehicle, machinery, etc., used in His Majesty's service or in the performance of essential services, or to impair the usefulness of any buildings, etc. so used.

(*m*) This power was exercised for a time in respect of *The Daily Worker*; cf. *ante*, p. 477.

(*n*) For cases decided on Regulation 18B, see *ante*, pp. 455 *et seq.*

twenty-four hours, except with the authority of a police officer not lower in rank than inspector, and not in any event to exceed forty-eight hours; allowed aliens in certain cases to be employed in a civil capacity under the Crown, and amended the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, *e.g.*, by prohibiting aliens from changing their name; restricted the change of name by British subjects; provided for the compulsory evacuation of areas for the purpose of meeting any actual or apprehended attack by the enemy or of protecting persons and property from the dangers involved in any such attack; empowered the Minister of Health and the Minister of Works to impose compulsory billeting of evacuees, transferred war workers, etc.; authorised the Home Secretary to impose blackout and curfew regulations; made part-time civil defence duties compulsory for all able-bodied civilians between certain ages; made it an offence to publish any report or statement relating to matters connected with the war which was "likely to cause alarm or despondency" (*o*); entitled the heads of the Service and Supply Departments and certain other Ministers to do any work on any land, to prohibit or restrict the doing of specified work on any particular land, to take possession of any land, to requisition property other than land (*p*), and to use land for the purpose of H.M. forces; authorised the Minister of Supply to declare a public utility, trade or business engaged on war work to be a "controlled undertaking" and so subject to the orders of one of the Ministers mentioned; gave the Government a general control over the carrying on of industry and the location of industry, and entrusted to the Minister of Labour and National Service a wide control over employment; entitled the Minister of Transport to take control of railways; and authorised the Minister of Home Security, if he thought it necessary or expedient in the circumstances, to delegate to Regional Commissioners power to make by-laws for any of the purposes for which Defence Regulations could be made. The penalties imposed for a breach of any of the Regulations which did not prescribe special penalties were: (a) on summary conviction, three months' imprisonment and/or a fine of

(*o*) This Regulation was generally regarded as a bad joke, and was discontinued on the initiative of Mr. Churchill when the danger of invasion was over.

(*p*) Compensation for the taking possession of land, the doing of work on land and the requisition or acquisition of goods other than land, was payable in accordance with the Compensation (Defence) Act, 1939; *post*, p. 516.

£100, or (b) on conviction on indictment, two years' imprisonment and/or a fine of £500. Any constable might arrest without warrant any person whom he had reasonable grounds for suspecting to have committed an offence against any of these Regulations or certain serious crimes specified in a schedule.

Other War Legislation, 1939, etc.—Legislation for the purposes of the war which began in 1939 was mostly carried out by means of Defence Regulations, but Acts of Parliament were necessary where (i) what was wanted to be done was outside the scope of the Emergency Powers (Defence) Acts, 1939 and 1940, (ii) the provisions were not to be limited to the war period, or (iii) it was necessary to raise money. The practice with regard to the last was for the Government to ask Parliament periodically for votes of £1,000,000,000, while for security reasons the estimates for each of the Service and Supply Departments were put at the nominal figure of £100.

The following is a brief summary of some of the emergency statutes which are of most interest to the student of constitutional law (*q*):—

National Service.—One important group of statutes passed on account of the war was that which imposed liability for national service, either military or civilian, on practically the whole able-bodied adult population, of either sex. The National Registration Act, 1939, required all persons over a certain age in the United Kingdom to be registered: identity cards were issued, and a constable in uniform, or any person authorised by regulations under the Act, might require persons to produce their identity card. The National Service (Armed Forces) Act, 1939, rendered all male British subjects (with certain exceptions) within Great Britain between certain ages liable for service in the armed forces. Among the exceptions to this Act were clergymen, and nationals or citizens of any part of His Majesty's dominions not ordinarily resident in Great Britain. A person might, however, apply to be registered as a conscientious objector, and the application might be allowed either absolutely or conditionally on his undertaking some other form of national service. Application was to be made to a local tribunal, consisting of a County Court Judge as chairman and four other members appointed by the Minister of

(*q*) See Carr, *Concerning English Administrative Law*, ch. 3, for the spate of legislative activity in the first week of the war.

Labour; and if the application was refused, appeal lay to an appellate tribunal, consisting of a chairman appointed by the Lord Chancellor and two other members appointed by the Minister of Labour. The Service Departments asked for the number of persons they wanted, within the limits of War Cabinet policy, and it was the responsibility of the Minister of Labour and National Service to allocate them between the forces on the one hand and industry and other civilian occupations on the other. Provision was made for reinstatement in civil employment on demobilisation. The Armed Forces (Conditions of Service) Act, 1939, allowed embodied Territorials to be sent abroad (*r*) The National Service Act, 1941, provided for calling up for Civil Defence duties in the United Kingdom and the Isle of Man, men otherwise liable for service in the armed forces and men not so liable by reason only that they were conditionally registered as conscientious objectors. The National Service (Foreign Countries) Act, 1942, subjected British subjects in foreign countries to obligations similar to those contained in the National Service Acts, 1939—41. The Act did not apply to nationals or citizens of the Dominions or belonging to India, Burma, Newfoundland or Southern Rhodesia, and the expression "foreign country" did not include a British protectorate or mandated territory or territory under His Majesty's protection or suzerainty, but included territory administered by a Dominion government. The Allied Powers (War Service) Act, 1942, provided that the nationals of allied Powers resident in Great Britain, who were not in allied forces, might be called up under the National Service Acts, 1939—41.

Regional Commissioners.—The Regional Commissioners Act, 1939, merely provided for the payment of Regional Commissioners and other persons appointed for the co-ordination of civil defence measures during the emergency. As we have seen, powers could be delegated to the Regional Commissioners by Ministers under Defence Regulations. The primary purpose of the Regional Commissioners was to administer areas which might be cut off from the central Government, for example, by invasion or breakdown of communications through air raids. In fact, they never had to perform this function, and their offices became regional headquarters for many purposes connected with war production as well as civil defence.

(*r*) See *ante*, p. 306.

The Administration of Justice.—The Courts (Emergency Powers) Acts, 1939—43, restricted the right to proceed to execution or other enforcement of a judgment or order of a Court without leave of the Court. Its object was to protect persons in the forces, evacuees and others whose position was prejudiced by the war. The Administration of Justice (Emergency Provisions) Act, 1939, empowered the Lord Chancellor to order the evacuation of the Supreme Court and the Court of Criminal Appeal, and the alteration or suspension of the sittings of Courts. It also provided that during the Emergency a civil or criminal jury need not consist of more than seven persons, except in a trial for treason or murder, and that no civil action was to be tried with a jury unless the Court was of opinion that the question ought to be tried by a jury (*s*).

Comptroller and Auditor-General.—The Exchequer and Audit Departments (Temporary Provisions) Act, 1939, authorised issues and transfers from the Consolidated Fund without the grant of credits by the Comptroller and Auditor-General (*t*).

Compensation for Property.—The Compensation (Defence) Act, 1939, laid down the principles on which compensation should be given where in the exercise of emergency powers (including prerogative powers), possession had been taken of land, any property other than land had been requisitioned, or work had been done on land on behalf of His Majesty Such compensation was not to take account of loss of profits or injury to goodwill. It was not necessary, as in the previous war, to claim compensation by petition of right, for the determination of disputes was entrusted to a General Claims Tribunal and a Shipping Tribunal, whose decisions were final. The General Claims Tribunal was to consist of not less than seven persons appointed by the Lord Chancellor (including a Judge of the High Court), together with a Judge of the Court of Session appointed by the Lord President of the Court of Session, and a Judge of the High Court of Justice in Northern Ireland appointed by the Lord Chief Justice of Northern Ireland. The Shipping Claims Tribunal, appointed by the Lord Chancellor, was to consist of a president and one other member of the legal profession having special knowledge of commercial and admiralty law, and a third member having special qualifications as an average adjuster or

(*s*) Cf. *ante*, p. 404. (*t*) Cf. *ante*, p. 128.

accountant. While the Act specifically allows compensation to be assessed on a different basis by mutual agreement, the principle of *Att.-Gen.* v. *De Keyser's Royal Hotel* (*u*) prevents the requisitioning authority from imposing a settlement otherwise than in accordance with the Act.

Allied Governments and their Forces.—The Allied Forces Act, 1940, allowed naval, military or air force Courts and authorities of allied Powers to administer their own law concerning discipline and internal administration in relation to their forces in the United Kingdom or on board British ships or aircraft, without prejudice to the jurisdiction of civil Courts of the United Kingdom to try a member of any armed forces for an offence against the law of the United Kingdom. It further provided that the Crown might apply the Naval Discipline Act, the Army Act and the Air Force Act to any such forces for the purpose of securing effective co-operation between His Majesty's forces and allied forces (*x*). The Allied Powers (Maritime Courts) Act, 1941, permitted allied and associated Powers to establish and maintain in the United Kingdom Maritime Courts for the trial and punishment of certain criminal offences committed by persons other than British subjects in accordance with the law of such Power, without prejudice to the jurisdiction of any British Court over an offence against the law of any part of His Majesty's dominions. Members of a Maritime Court were to enjoy the same immunities and privileges as a superior Court of record of the United Kingdom, and corresponding immunities were conferred on persons taking part in judicial proceedings therein. A claim to British nationality was to be conclusively determined by a local tribunal consisting of one person, being a County Court Judge or qualified to be such a Judge, appointed by the Lord Chancellor. The offences triable by these Allied Maritime Courts were offences (a) committed on board a merchant ship of that Power; (b) committed by the master or any member of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power; or (c) committed by a person who was both a national of that Power and a seaman of that Power in contravention of the mercantile marine

(*u*) [1920] A. C. 508; *ante*, p. 176.

(*x*) See *In re Amand*, [1941] 2 K. B. 239; *In re Amand* (No. 2), [1942] 1 K. B. 445; *R.* v. *Home Secretary, Ex p. Amand*, [1942] 2 K. B. 26; *Amand* v. *Home Secretary*, [1943] A. C. 147.

conscription law of that Power (*y*). The United States of America (Visiting Forces) Act, 1942, passed as the result of an agreement with the United States, went so far as to provide that criminal proceedings should not be taken in United Kingdom Courts against members of United States forces, who were to be triable only in United States courts-martial (*z*). Such proceedings could, however, be taken with the consent of the American authorities, as was the case of an American soldier who was tried and convicted in the Central Criminal Court for the murder of a London taxi-driver committed jointly with an English woman. The Diplomatic Privileges (Extension) Act, 1941, extended diplomatic privileges during the emergency to members of a recognised foreign government or provisional government allied with His Majesty and established in the United Kingdom (*e.g.*, Belgium, Holland, Norway and Poland), to members of a national committee established in the United Kingdom and recognised as competent to maintain armed forces for service in association with His Majesty's forces (*e.g.*, France), and also to envoys accredited to such allied foreign Powers (*a*).

Other emergency statutes which have been mentioned elsewhere in this book are the Prolongation of Parliament Acts, 1941—1944; the Ministers of the Crown (Emergency Appointments) Act, 1939, whose operation was limited to the war period by the Ministers of the Crown and House of Commons Disqualification Act, 1942; the House of Commons Disqualification (Temporary Provisions) Acts, 1941—1944; the Local Elections and Registration of Electors (Temporary Provisions) Acts, 1939, etc.; the Trading with the Enemy Act, 1939; the Treachery Act, 1940; and the Fire Services (Emergency Provisions) Act, 1941.

The dearth of judicial decisions since 1939 on the nature and extent of the prerogative in time of war is due to the fact that the Emergency Powers (Defence) Acts and the other emergency statutes mentioned cover practically everything which the Crown would want to do,

(*y*) See further, Viscount Simon, L.C., *The Allied Maritime Courts* (1942), 58 Law Quarterly Review, pp. 41—52; *Foreign Maritime Courts* (1942), Journal of Comparative Legislation, pp. 1—5.

(*z*) See further, Brig.-Gen. McNeil, *United States Army Courts-Martial in Britain* (1944), 60 Law Quarterly Review, pp. 356—360; Coutts, *The New Capitulations* (1942), 5 Northern Ireland Legal Quarterly, pp. 70—75.

(*a*) The Diplomatic Privileges (Extension) Act, 1944, whose operation is not limited to the Emergency, provides that diplomatic immunities and privileges may be accorded by Order in Council to any specified organisation (*e.g.*, U.N.R.R.A. and the Edropean Commission) and, within certain limits, to its officers and servants.

except for taxation and the acquisition (as distinct from the taking possession) of land (*b*).

Acts of Indemnity.—The liability of the Executive with regard to such matters as action taken to put down grave civil disturbances, and acts done in the prosecution of a war whether at home or abroad, may be greatly limited by Acts of Indemnity (*c*) which are usually passed when peaceful conditions recur. Acts of Indemnity may be quite narrow in scope, or they may be framed in such general terms as that passed in 1920. Their interpretation is, of course, a matter for the Courts, who tend to resume their normal strict interpretation of statutes in favour of the liberty of the citizen when an emergency is over.

(*b*) The Requisitioned Land and War Works Act, 1945, gives the Government wide powers of compulsory purchase of land on which buildings, etc. have been erected at public expense for the purposes of the war. In so doing it extends the provisions of the Defence Acts, 1842, etc.

(*c*) See *ante*, p. 14

PART VI.

THE BRITISH EMPIRE AND COMMONWEALTH.

CHAPTER XXXVII.

THE EMPIRE AND THE BRITISH ISLANDS.

I. TERRITORIES OF THE BRITISH EMPIRE.

The British Empire in a wide sense includes all territories over which the Crown exercises or claims some degree of control, viz. the British Islands, British Colonies, the self-governing Dominions and their Dependencies, British India, British Burma, British Protectorates and British Mandated Territories. On the fringe are "Spheres of Influence," and foreign territories in which the Crown has by treaty or usage jurisdiction over its own subjects, confirmed by the Foreign Jurisdiction Acts. Sometimes the term "British Empire" is used for all His Majesty's dominions or possessions outside the United Kingdom, while sometimes it includes the United Kingdom but is contrasted with the self-governing Dominions.

The United Kingdom consists of England (including Wales), Scotland and Northern Ireland.

British Possessions are any parts of His Majesty's dominions exclusive of the United Kingdom (Interpretation Act, 1889).

The British Islands consist of the United Kingdom, the Isle of Man and the Channel Islands. Formerly, they included the whole of Ireland, and the term still covers the whole of Ireland for some purposes, but we shall exclude Eire in our treatment of the British Islands (*a*).

A *British Colony* is any part of His Majesty's dominions, exclusive of the British Islands, the self-governing Dominions, British India and British Burma. (Interpretation Act, 1889; Statute of Westminster, 1931; Government of India Act, 1935 (*b*).)

(*a*) *Post*, pp. 522 *et seq.* (*b*) *Post*, Chapter XXXVIII.

The Dominions are the Dominion of Canada (*c*), the Commonwealth of Australia (*d*), the Union of South Africa (*e*), the Dominion of New Zealand (*f*), Eire (*g*) and Newfoundland (*h*). (Statute of Westminster, 1931.) The Provinces of Canada and the States of Australia since the Statute of Westminster, 1931, occupy a special position between the Dominions and self-governing Colonies.

The British Commonwealth of Nations is the name which has recently come to be used of the United Kingdom and the self-governing Dominions. It is the product of conventions and resolutions of Imperial Conferences, and is recognised in the preamble to the Statute of Westminster, 1931. "The British Commonwealth of Nations," however, is not a precise legal term, and is sometimes used to include India, Burma and Southern Rhodesia, who send observers to Imperial Conferences. In some contexts the British Commonwealth (the United Kingdom and the Dominions) is part of the British Empire, while in others the British Empire (excluding the Dominions) is part of the British Commonwealth. Other documents, again, treat the term British Commonwealth as synonymous with the British Empire, in order to avoid using the word "Empire" which in some quarters is thought to have implications of subjection which in fact are obsolete. This last use is extremely confusing. Throughout this book "the British Commonwealth" means the United Kingdom and the six Dominions (*i*).

India.—"British India" consists of all territories comprised within the Governors' Provinces and the Chief Commissioners' Provinces. "India" means British India together with the Indian States and tribal areas. India, or, at least, British India, is itself an Empire, as well as forming part of the British Empire (*k*).

Burma.—"British Burma" means so much of Burma as belongs to His Majesty, who has power to determine its boundaries. "Burma" includes all Burmese territories which were comprised in India before 1st April, 1937. (Government of India Act, 1935; Government of Burma Act, 1935 (*l*).)

(*c*) *Post*, Chapter XLII.
(*d*) *Post*, Chapter XLII.
(*e*) *Post*, Chapter XLIII.
(*f*) *Post*, Chapter XLIII.
(*g*) *Post*, Chapter XLIV.
(*h*) *Post*, p. 571.
(*i*) For Dominion status, see *post*, Chapters XL and XLI.
(*k*) *Post*, Chapter XLV.
(*l*) *Post*, pp. 668 *et seq.*

British Protectorates are territories under the protection of the Crown and which are for the most part administered like British Colonies. They differ from Colonies, however, in that they are not British territory and therefore do not form part of His Majesty's dominions (*m*).

British Mandated Territories are those territories whose administration was entrusted to the Crown by the Allied and Associated Powers in 1919, to be exercised on behalf of the League of Nations. They are not British territory and do not form part of His Majesty's dominions (*n*).

Miscellaneous Territories and Spheres of Influence.—Some British possessions are so small as to be virtually unadministered, *e.g.*, the Great and Little Basses and Minicoy in the Indian Ocean.

The Sudan is a condominium under the joint protection of the United Kingdom and Egypt (*o*), and the New Hebrides are a condominium under the joint protection of the United Kingdom and France.

A British "sphere of influence" is foreign territory in which Britain has certain interests, mainly as regards trade and communications, with which other States have agreed not to interfere by annexation, creation of protectorates or treaty. The notion of spheres of influence is now wilting under the criticisms of "power politics," but surviving examples are Egypt, Iraq, Yemen, Saudi Arabia and the Persian Gulf area, and the more or less independent States of Bhutan and Sikkim between India and Tibet. Egypt, formerly a vassal of Turkey, was a British Protectorate from 1914 to 1922, and since 1936 is bound by a defensive military alliance with this country. Iraq was until recently a British mandate.

II. THE BRITISH ISLANDS.

(1) The United Kingdom.—Wales.—The *Statutum Walliæ*, passed in 1284 after Edward I had defeated Llewelyn ap Griffith, declared that Wales was to be considered as incorporated into the Kingdom of England. The Principality was divided into the six counties of Caernarvon, Anglesey, Merioneth, Flint, Cardigan, and Carmarthen, while the rest of Wales remained under the control of the Lords

(*m*) *Post*, Chapter XXXIX. (*n*) *Post*, Chapter XXXIX.
(*o*) *Post*, p. 564.

Marcher. Henry VIII completed the introduction of the English legal and political system into Wales. Welsh constituencies received representation in the English Parliament, and the Principality was divided into twelve counties on the English model for the purposes of local government, Monmouth becoming an English county. As has been seen, the judicial systems remained distinct until 1830 (*p*).

Scotland.—The Kingdom of Scotland had a separate history from England until 1603, when James VI of Scotland succeeded Elizabeth as James I of England. This was merely a personal union (*q*), and was followed in 1706 by a union of the two Kingdoms into the United Kingdom of Great Britain. The treaty was ratified in 1707 by the English and Scottish Parliaments, which ceased to exist on the transference of their powers to the Parliament of the United Kingdom.

From the Union until 1885 Scottish internal affairs were directed first by a Secretary of State and later by the Home Secretary and the Lord Advocate In 1885 the office of Secretary for Scotland was created, and he became Secretary of State for Scotland in 1926 (*r*).

Scotland has its own system of Courts. The Court of Session consists of the Inner House and the Outer House. The five Judges of the Outer House sitting separately have a superior civil jurisdiction. The Inner House hears civil appeals sitting in two divisions, one presided over by the Lord President and the other by the Lord Justice Clerk. The High Court of Justiciary is a superior Court of criminal jurisdiction, and is composed of the Lord Justice General (the Lord President), the Lord Justice Clerk and all the Judges of the Court of Session. There is a Court of Criminal Appeal. The sheriffs substitute have a limited local civil and criminal jurisdiction, appeal lying directly or through the sheriff principal to the Inner House of the Court of Session or the High Court of Justiciary. Scottish juries, which number fifteen in criminal cases and twelve in civil cases, decide by a majority.

The English and Scottish systems of private law, local government and administrative law still retain their different characteristics, although, as a result of legislation and the fact that the House of Lords is the supreme Court of appeal from the Courts of both

(*p*) *ante*, p. 376, n. (*f*).
(*q*) See *ante*, p. 2.
(*r*) See further, *ante*, p. 221.

countries (*s*), a tendency towards assimilation may be discerned (*t*). Many references in this book to the Home Secretary, the Lord Chancellor and the Attorney-General should be read, for the purpose of application to Scotland, as references to the Secretary of State for Scotland, the Lord President of the Court of Session and the Lord Advocate respectively.

Northern Ireland.—*Basis of the Constitution.*—Ireland before 1800 had for centuries been a subordinate Kingdom of the English Crown. It had a Parliament (Houses of Lords and Commons) and a system of Courts on the English model. Doubts were expressed at various times as to whether the English Parliament was competent to legislate for Ireland and whether final appeal from Irish Courts lay with the English or Irish House of Lords. The executive in Ireland was definitely under the control of the English government through the Lord-Lieutenant. The Act of Union, 1800, united the two Kingdoms of Great Britain and Ireland into the United Kingdom of Great Britain and Ireland, in a manner similar to the union of 1706. The chief executive officers in Ireland were the Lord-Lieutenant and the Chief Secretary, though the Home Secretary retained certain powers with regard to the maintenance of order.

The union proved unpopular in Southern Ireland, and after a long agitation for "Home Rule" the Government of Ireland Act, 1914, was passed, providing for an Irish Parliament with limited legislative power in matters exclusively relating to Ireland, subject to the over-riding authority of the Parliament of the United Kingdom. Owing to the outbreak of war, the coming into operation of the Act was postponed until the end of hostilities. Meanwhile, as a result of the rebellion in Dublin in Easter, 1916, and subsequent disorders, and the unwillingness of unionists in the North to throw in their lot with the South, it became evident that the scheme would have to be recast. The Government of Ireland Act, 1920, then provided for the setting up of two subordinate Parliaments, one for Northern Ireland and the other for Southern Ireland, with a government in each area responsible to its Parliament. The Lord-Lieutenant and

(*s*) The appellate jurisdiction of the House of Lords was not expressly mentioned in the Act of Union, but has been assumed by the House of Lords; see *ante*, p. 44.

(*t*) The main differences in administrative law and local government law are brought out in W. J. R. Fraser, *Outline of Constitutional Law.*

a Council of Ireland would form a bond of union between North and South with a view to the eventual termination of partition. This Act was not effectively implemented in Southern Ireland, and following the Anglo-Irish Treaty of 1921, Ireland was accorded Dominion status by the Irish Free State (Agreement) Act, 1922 (*u*).

Northern Ireland, however, comprising the counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, exercised its option to remain in the United Kingdom under the terms of the Government of Ireland Act, 1920. That Act, as amended by the Irish Free State (Consequential Provisions) Act, 1922, and various Northern Ireland (Miscellaneous Provisions) Acts, remains the basis of the constitution of Northern Ireland (*v*).

Parliament.—The Parliament of Northern Ireland, which meets at Stormont, near Belfast, consists of the King, the Senate and the House of Commons. The Senate is composed of the Lord Mayor of Belfast and the Mayor of Londonderry (*ex officio*) and twenty-four senators elected by the House of Commons for eight years, half the elected members retiring every four years. The House of Commons consists of fifty-two members, the franchise being the same as for the United Kingdom Parliament except that the residence qualification is three years and peerage is not a disqualification for voting or being elected. The offices, procedure and privileges of the House are similar to those of the House of Commons at Westminster. Parliament must be summoned at least once in every year, and the maximum duration of a Parliament is five years. The Parliament has no constituent power. Its legislative authority extends to the making of laws for the peace, order and good government of Northern Ireland, with certain exceptions and reservations. "Excepted matters" are matters of Imperial concern which are outside its powers altogether, *e.g.*, matters relating to the Crown, peace and war, defence and defence forces, foreign and inter-Imperial relations, naturalisation and the control of aliens, external trade, coinage, wireless telegraphy, patents and copyright. "Reserved matters" are certain matters reserved to the United Kingdom Parliament, in particular, postal services and

(*u*) For the constitutional history of Ireland up to the Anglo-Irish Treaty, reference may be made to Curtis and McDowell, *Irish Historical Documents, 1172—1922*.

(*v*) For the purpose of serving a writ out of the jurisdiction, the word "Ireland" in the Rules of the Supreme Court is to be construed as meaning Northern Ireland: *Hume Pipe and Concrete Construction Co.* v. *Moracrete, Ltd.*, [1942] 1 K. B. 189.

such taxation (including income tax and customs and excise duties) as the latter Parliament continues to levy. The Parliament is further forbidden to pass any law establishing or prohibiting the exercise of any particular religion, or imposing a general levy on capital. The Senate may not amend Money Bills. If a public Bill is rejected by the Senate in two successive sessions, the two Houses may sit jointly and the Bill may be passed by a majority of the members of the two Houses sitting together. The parliamentary electors of Northern Ireland are also represented by thirteen members in the United Kingdom House of Commons. An Act of the United Kingdom Parliament is not, of course, invalid if it deals with a matter within the competence of the Northern Ireland Parliament. The Governor or the Home Secretary may require the Judicial Committee of the Privy Council to give an opinion on the validity of legislation of the Northern Ireland Parliament. Thus the Judicial Committee upheld the validity of an Act which required local authorities to raise a contribution out of the poor rate towards the costs of the State education service, which was contended by the Belfast Corporation to be *ultra vires* on the ground that the Parliament may not impose any income tax. (*In re a Reference under the Government of Ireland Act 1920* (*x*).)

The Executive.—Executive authority is in the hands of the Governor, who summons, prorogues and dissolves the Parliament on the advice of the Prime Minister of Northern Ireland The Cabinet, which is the Executive Committee of the Privy Council of Northern Ireland, consists of the heads of the seven Government Departments, namely, the Prime Minister and the Ministers of Finance, Home Affairs, Labour, Education, Agriculture and Commerce. Ministers may address either House. The Home Secretary is the channel of communication between the governments of the United Kingdom and Northern Ireland. A separate branch of the Civil Service is housed in the Parliament buildings.

The Courts.—The Supreme Court of Judicature of Northern Ireland consists of the High Court and the Court of Appeal, which sit in Belfast. A Court of Criminal Appeal was established in 1930. Appeal lies in certain cases to the House of Lords, including appeals from the

(*x*) [1936] A. C. 352.

Court of Appeal in questions relating to the validity of legislation of the Northern Ireland Parliament. Thus, in *Gallagher* v. *Lynn* (*y*) the House of Lords held that an Act requiring a licence for the sale of milk in the City of Londonderry, which is near the border, was valid as being designed to protect the health of the people of Northern Ireland and not *ultra vires* as interfering with external trade.

(2) **The Isle of Man.**—The Isle of Man came into the allegiance of the King of England in the reign of Henry IV. It was held more or less independently under letters patent until 1765, when George III bought out the Duke of Atholl's feudal rights. The Island has retained its ancient institutions, and has legislative independence. It is, however, subject to the authority of the United Kingdom Parliament, though it is not part of the United Kingdom (*z*) and therefore not bound by Acts of Parliament unless expressly mentioned.

The Legislature, known as the Court of Tynwald, consists of the Lieutenant-Governor, the Legislative Council and the House of Keys. The Council is composed of the Bishop of Sodor and Man, the Attorney-General, two Deemsters, four members elected by the House of Keys and two members nominated by the Lieutenant-Governor. The House of Keys consists of twenty-four members elected for five years. Legislation requires the confirmation of the King in Council and promulgation on the Tynwald Hill. The Court of Tynwald levies an income tax, but Parliament controls the amount and collection of customs duties.

The King's representative is the Lieutenant-Governor, who summons the Court of Tynwald and is responsible, subject to the Home Secretary, for police and defence. The Home Secretary is the channel of communication between the United Kingdom and the Isle of Man, and advises the Lieutenant-Governor.

The Island has its own system of Courts, and appeal lies to the Judicial Committee of the Privy Council from the Staff of Government and the Court of Criminal Appeal in civil and criminal cases respectively. Manx law is partly Norse in origin.

(3) **The Channel Islands.**—The Channel Islands formed part of the Duchy of Normandy and remained to the King of England when the

(*y*) [1937] A. C. 863.
(*z*) *Davison* v. *Farmer* (1851), 6 Ex. 242.

rest of Normandy reverted to France in the thirteenth century. The Channel Islanders, though loyal to the Crown, affect to recognise the King only as Duke of Normandy, and they deny the right of the United Kingdom Parliament or of the King in Council to legislate for them without the consent of the States (the legislatures) confirmed by registration in the local Royal Court. There can be no real doubt, however, of the legislative competence of Parliament, but the efficacy of legislation by prerogative Orders in Council is uncertain. In practice the consent of the States is obtained and the Statute or Order is registered, the Islanders asserting—contrary to the British view—that it is the local registration which gives it legal effect. The Crown appoints a Lieutenant-Governor of Jersey and a Lieutenant-Governor of Guernsey, who summon the States and have powers, subject to the Home Secretary and the Secretary of State for War, in relation to the preservation of the peace and defence. Although the Channel Islands do not form part of the United Kingdom, they are within the diocese of Winchester. Measures of the Church Assembly may, with consent, be applied to the Islands by Order in Council, and they are represented in the Winchester Diocesan Conference. There is a special standing committee of the Privy Council to deal with Channel Islands affairs (*a*).

Jersey.—Legislative authority in Jersey is vested in the Assembly of the States, consisting of the Lieutenant-Governor, the Bailiff (nominated by the Crown) as president, the Viscomte (sheriff and coroner), attorney-general, solicitor-general, twelve parish rectors and twelve parish constables (mayors) (*ex officio*), and seventeen deputies elected for three years. If the Lieutenant-Governor vetoes, or the Bailiff dissents from, proposed legislation it is suspended for the consideration of the King in Council; the power to impose taxes is restricted; and permanent legislation, as opposed to certain kinds of temporary legislation, requires the consent of the King in Council. The Lieutenant-Governor's power of veto applies to measures which he considers to be contrary to the King's interests, but he must furnish his reasons to the Home Secretary.

Civil and criminal jurisdiction is exercised by the Royal Court, presided over by the Bailiff. He is assisted in civil cases by twelve Jurats, who are elected for life, are unpaid and have not necessarily

(*a*) See *ante*, p. 186.

any legal knowledge. Appeal lies as of right to the Judicial Committee of the Privy Council. In criminal cases there is a jury of twenty-four members, and there is no appeal to the Judicial Committee as of right, but it was held in *Renouf* v. *Att.-Gen. for Jersey* (*b*) that the prerogative power to grant special leave to appeal had never been relinquished.

Guernsey.—The legislative and judicial institutions of Guernsey are similar to those of Jersey.

The States as a legislative body (*Etats de Déliberation*) consist of the Bailiff (president), the jurats, the rectors, twenty elected constables (mayors), and thirty-three elected members.

The Royal Court (*Chef Plaids*) consists of the Bailiff and twelve jurats. The jurats are elected by the States sitting for that purpose (*Etats d'Election*), which is composed differently from the above in that the thirty-three elected members are displaced by 180 douzeniers elected by the ratepayers. In addition to its judicial functions, the Royal Court of Guernsey may initiate legislation in the States, and may issue ordinances which, if they involve an alteration of the law, must be approved by the King in Council.

Alderney has legislative and judicial institutions similar to those of Jersey and Guernsey; but the States of Guernsey can legislate also for Alderney, and appeals from Alderney go to the Royal Court of Guernsey from which appeal lies to the Judicial Committee.

Sark is still a feudal seignory held by the Dame de Sark. It has a legislature and Courts of its own, but is subject in certain respects to the authority of the Lieutenant-Governor, the States and Royal Court of Guernsey.

(*b*) [1936] A. C. 445.

CHAPTER XXXVIII.

THE COLONIES.

1. INTRODUCTION.

Colonial Policy.—The late Secretary of State for the Colonies (Colonel Oliver Stanley) recently described the British Government's aim for the Colonial Empire as *the maximum of self-government within the Empire at the earliest practicable time* (*a*). Self-government, not independence, was, he thought, to the real advantage of the Colonies, in accordance with the wishes of the inhabitants and in the best interest of the world. The proposed system of world security would hardly be strengthened by the substitution of forty small independent States for a cohesive Empire able to act as a strategic whole. The responsibility for colonial administration devolved on Britain more often by treaty, agreement or settlement than by conquest. An improved economic standard and social development are pre-requisites of true self-government, which could not be combined with a state of financial dependency on this country. In this process Britain regards herself as a trustee. Parliament recently voted £100,000,000 for Colonial development, whereas the Colonial Empire makes no contribution to the United Kingdom Exchequer. Various forms of Legislative Councils exist in most of the Colonies, with varying proportions of locally born members. But progress must be gradual, for in some parts—notably great areas of Africa—the inhabitants first came into contact with European thought and methods within living memory.

"The Indivisibility of the Crown."—The chief executive, legislative and judicial authority throughout the Colonial Empire is the Crown, *i.e.*, the King acting on the advice of his ministers or through the instrumentality of his officers and Judges (*b*).

In legal theory the Crown is said to be "one and indivisible throughout the Empire," a doctrine which is usually illustrated by

(*a*) *The Times*, 20th March, 1945.

(*b*) So also in the self-governing Dominions (except Eire), British India and Burma, British Protectorates and Mandates, but not in Protected States.

the case of *Williams* v. *Howarth* (1905) (*c*). There a soldier of the New South Wales contingent which served in South Africa brought a claim, in accordance with New South Wales procedure, against a nominal defendant on behalf of the Crown or the Government of New South Wales for the balance of pay due to him. He alleged that the Government of New South Wales had agreed to pay him 10s. a day, whereas he had only received 4s. 6d. a day from the Imperial Government. The defendant argued that the Imperial Government had discharged the debt on behalf of the New South Wales Government; but the Supreme Court of New South Wales found for the plaintiff, saying: "The King has no concern with payment for services rendered in this Colony; the obligation is with the Government of New South Wales." The defendant appealed to the Judicial Committee, who reversed the decision. "The plaintiff," said Lord Halsbury, L.C., "was in the service of the Crown, and his payment was to be made by the Crown. Whether the money by which he was to be paid was to be found by the Colony or the Mother Country was not a matter which could in any way affect his relation to his employer, the Crown. . . . The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature, are money granted to the King. . . . Under these circumstances the money paid was money paid for the service rendered to the King, and no other payment could possibly be due upon the contract declared on."

Isaacs, J., delivering the majority judgment of the High Court of Australia in *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Co.* (1920) (*d*), contrasted the Australian and American federations by saying: "The first step in the examination of the [Australian] Constitution is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's Dominions." But he went on to explain this maxim as follows: "*Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities,*

(c) [1905] A. C. 551.

(d) 28 C. L. R. 129: Jennings and Young, *Constitutional Laws of the British Empire*, p. 249.

or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown."

The case of *Williams* v. *Howarth* (*supra*), which was approved in *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Co.* (*supra*), was decided on general common law principles governing the soldier's contract of service. A different result may follow where Parliament has expressly or impliedly designated a particular fund to meet a debt. Thus in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (1925) (*e*), the House of Lords, reversing the decision of the Court of Appeal, held that a debt due by the Crown in the Irish Free State could not be sued on in England, because the King was acting through particular instrumentalities in respect of particular funds. The Irish company brought a petition of right in England for the cost of reconstructing a railway line under agreements made in 1917 and 1918 (when Ireland was part of the United Kingdom) with the President of the Board of Trade. As the result of various statutes and orders, Southern Ireland had since become the Irish Free State, and the Government of the Irish Free State had taken over the functions, property, rights and liabilities of the Board of Trade. Viscount Haldane said: "However clear it may be that before the Revolution Settlement [of 1688] the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply. In the present case Parliament transferred the duty of producing the fund out of which the liability in question when it accrued should be met to the Irish Parliament."

The fact that the King acts for some purposes through one set of instrumentalities and for other purposes through other instrumentalities explains how it is possible for legal disputes to arise, for example, between the Dominion of Canada and one of its Provinces or between the Commonwealth of Australia and one of its States (*f*). Some years ago there was a prolonged "economic war" between the United Kingdom and the Irish Free State.

It has been suggested that the abdication of Edward VIII in 1936 established the *divisibility* of the Crown, for the abdication took effect according to South African law on 10th December and according to

(*e*) [1925] A. C. 754. (*f*) *Post*, Chapter XL.

Irish Free State law on 12th December, while it took effect in the United Kingdom and the rest of the Empire on 11th December (*g*).

Classification of Colonies.—A British Colony is any part of *His Majesty's dominions exclusive of* (a) the British Islands (Interpretation Act, 1889), (b) the self-governing Dominions and their Provinces and States (Statute of Westminster, 1931), (c) British India (Government of India Act, 1935), and (d) British Burma (Government of Burma Act, 1935).

All persons born within a British Colony are natural-born British subjects. (British Nationality and Status of Aliens Acts, 1914—1943.) "Act of state" is no defence to an action in tort for a wrong done in a Colony either to a British subject or to an alien (*h*). Colonial constitutions are based on Acts of Parliament, Orders in Council and Letters Patent.

Colonies may be classified according to the manner in which they were acquired, which may have been by (i) settlement, (ii) conquest, or (iii) cession. This mainly affects the prerogative power of legislation and also the private law which prevails in a given Colony.

Another classification, which is based on convention rather than law, is that into (i) Colonies possessing responsible government, commonly called "self-governing Colonies" (*e.g.*, Southern Rhodesia and Ceylon), and (ii) Colonies not possessing responsible government, formerly known as "Crown Colonies." This distinction rests on whether the executive is responsible to the lower House of the Colonial legislature (*i*).

Settled, Conquered and Ceded Colonies.—(i) A *Settled Colony* is a place to which British settlers have resorted, and which at the time of settlement was either uninhabited, *e.g.*, Pitcairn Islands, or had no civilised government, *e.g.*, Barbados, Bahamas, Bermuda, the Leeward Islands and British Honduras (*k*). The British Settlements Act, 1887, defines a British settlement as "any British possession which has not been acquired by cession or conquest and is not for the time being within the jurisdiction of a legislature constituted otherwise than by virtue of this Act or any Act repealed thereby of any British possession."

(*g*) *Post*, p. 601 *a*.
(*h*) *Ante*, p. 415.
(*i*) See *post*, p. 537.
(*k*) In this category also fell, before 1931, Newfoundland, the Northern and Western parts of Canada, and Australia.

Section 2 of the Act provides that it shall be lawful for His Majesty in Council from time to time to establish all such laws and institutions, to constitute such Courts and officers and to make such arrangements for the administration of justice, as may appear expedient to His Majesty for the peace, order, and good government of His Majesty's subjects and others within any British settlement.

Section 3 empowers the Sovereign to delegate to any three or more persons within the settlement all powers of legislation by His Majesty in Council either absolutely or conditionally (*l*).

Section 4 enables the Sovereign to confer jurisdiction as to matters arising within the settlement on any Court of any other British possession.

The settlers take with them (a) the common law of England so far as it is applicable to local conditions (*m*), and (b) existing English statute law so far as the same is applicable to an infant community (*n*) The Statutes of Mortmain, for instance, would not be so applicable (*o*).

Settlers are not bound by British statutes made after the foundation of the settlement unless the statute in question contains an express direction that it is to apply (*p*).

(ii) *Conquered Colonies.*—When a country is conquered the following constitutional changes take place:—

(a) The conquered territory belongs to the Crown and becomes subject to the legislative authority of the British Parliament.

(b) The conquered inhabitants become British subjects and cease to be alien enemies.

(c) The laws of the conquered Colony, other than constitutional law, so far as they are consonant with our principles of right and justice, continue to exist unless and until altered by the conqueror. Hence Roman-Dutch law obtains in Ceylon, and old French law in Mauritius and the Seychelles, while there are traces of Turkish law in Cyprus and of Spanish law in Trinidad and Tobago (*q*).

(*l*) See further, *post*, p. 540

(*m*) *Pictou Municipality* v. *Geldert*, [1893] A. C 524; but not Ecclesiastical law. *In re Bishop of Natal* (1865), 3 Moo. P. C. (N. S.) 115.

(*n*) Cf. *Cooper* v. *Stuart* (1889), 14 App. Cas. 286.

(*o*) *Mayor of Canterbury* v. *Wyburn*, [1895] A. C. 89.

(*p*) *New Zealand Loan Co.* v. *Morrison*, [1898] A. C. 349.

(*q*) Similarly, old French law applies in the Province of Quebec, Hindu and Mohammedan family law in India, Mohammedan law in Palestine, and Roman-Dutch law in the Union of South Africa. Roman-Dutch law has been introduced into Rhodesia, and displaced by English law in British Guiana.

If there are no laws, those entrusted with the management of the Colony must govern in accordance with right and justice.

In *R.* v. *Picton* (1802) (*r*) the Court held that torture allowed by the law of Spain could not be permitted in Trinidad, a British Colony taken from the Spaniards. A similar principle had been stated in *Fabrigas* v. *Mostyn* (1773) (*s*) in the case of Minorca.

(iii) *Ceded Colonies.*—There is no practical difference between a ceded colony and a conquered colony, save in so far as the treaty of cession may place the inhabitants in a better position than if they had been conquered (*t*). The terms of a treaty of cession or capitulation, however, though they may be binding in international law, are not binding on the Crown in constitutional law (*u*). Examples of ceded Colonies are Malta, Basutoland, Fiji, and the Gilbert and Ellice Islands (*x*).

II. EXECUTIVE GOVERNMENT IN THE COLONIES.

The Powers of the Governor.—Executive government in the Colonies is carried on in the name of the Crown by Governors (*y*). Governors are appointed by the Crown on the advice of the Secretary of State for the Colonies; and they are responsible to the Crown, though in some Colonies they may depend on the local legislature for supply.

The Office of Governor is created by Letters Patent; its duties are defined in Instructions issued under the Sign Manual and Signet; and its occupant designated, and his authority further delimited, by a Commission. He is the agent of the Crown, exercising on its behalf an authority limited by the above instruments, by any further instructions or directions he may receive from the Crown through the Secretary of State for the Colonies, and by statute.

Thus the powers of Governors vary; but generally they are empowered by their Commission, and apart from statute, to appoint members of the Legislative and Executive Councils; to issue Writs for the election of members to representative bodies, and to summon or dissolve such bodies; to appoint minor officials; to assent or refuse

(*r*) 30 St. Tr. 225.
(*s*) 20 St. Tr. at p. 181.
(*t*) *Campbell* v. *Hall* (1774), Cowp. 204.
(*u*) *Sammut* v. *Strickland*, [1938] A. C. 678.
(*x*) New Zealand fell into this category before 1931.
(*y*) In some colonies the representative of the Crown is called Lieutenant-Governor or High Commissioner, but for present purposes it is convenient to describe them all as Governors.

assent to bills, or to "reserve" them for the Crown's assent; to authorise the expenditure of public funds; to remit penalties and pardon offenders. Unless there is representative government, he initiates taxation and appropriation measures, and usually other bills.

In addition to these powers, commonly granted by the instruments appointing them, Governors have extensive and detailed authority conferred on them by various statutes in respect of customs, defence works, naturalization of aliens, and many other matters.

In some cases the Governor (subject to the Secretary of State for War) commands any troops stationed in the Colony; but never, apparently, the Imperial naval forces situated there (*z*).

Executive Councils.—Except where there is responsible government, the Executive Council is appointed by the Colonial Secretary or the Governor, and is composed mainly of senior officials. They are removable by the Crown, but are often appointed for a fixed time. Where there is responsible government the Governor appoints and dismisses the members of the Executive Council, whose continuance in office depends on the confidence of the lower house of the legislature, in the same way as a constitutional monarch. In the latter Colonies, he acts on the advice of his ministers in internal affairs, but follows the instructions of the Crown in matters of Imperial concern such as external relations and defence.

Legal liability of Governors.—*Civil* legal claims against a Governor may be:—

(a) in respect of (i) torts, or (ii) breaches of contract;
(b) committed (i) in the course of his official duties, (ii) outside them.

As to tortious acts committed in the course of his official duties he enjoys no immunity, and can be sued in the Colony (*Musgrave* v. *Pulido*, Governor of Jamaica held liable for trespass in respect of the seizure of the appellant's schooner (*a*)), or in the United Kingdom. (*Mostyn* v. *Fabrigas*, Governor of Minorca held liable for assault and false imprisonment, the plaintiff having been unjustifiably imprisoned and banished from the island (*b*).) The alleged wrong must be tortious

(*z*) Many examples of Orders in Council, Letters Patent and Instructions are given in *The Constitutions of All Countries, vol. I, The British Empire* (H. M. Stationery Office).
(*a*) (1879), 5 App. Cas. 102.
(*b*) (1774), 1 Cowp. 161; and see *ante*, p. 271.

both by English law and by the law of the Colony. (*Phillips* v. *Eyre*, Colonial Act of Indemnity held a good defence in action in England against the Governor of Jamaica for assault and false imprisonment arising out of an unnecessarily harsh suppression of a rebellion on the island (*c*).) As to contracts made in the course of his official duties, he cannot be sued at all. (*Macbeath* v. *Haldimand* (*d*).)

In respect of torts committed and contracts made and broken in his private capacity, a Governor can be sued in the Courts of the Colony or in England (*Hill* v. *Bigge*, Lieutenant-Governor of Trinidad held liable to be sued in the Courts of Trinidad for a private debt owed to a London jeweller (*e*)); but while he is in office his person cannot be attached in execution. (*Cameron* v. *Kyte* (*f*).)

A Governor is *criminally* liable under certain statutes to be tried in England in respect of acts of oppression and certain other crimes committed within the Colony (*g*). Such trial is normally in the King's Bench Division, but by special Commission may be elsewhere. (*R.* v. *Eyre* (*h*); *R.* v. *Picton* (*i*).) He probably cannot be prosecuted in the Courts of the Colony

Colonies with Responsible Government.—These Colonies are in somewhat the same position as that through which the Dominions (other than Eire) and their Provinces and States passed on the way towards attaining Dominion status (*k*). Apart from the fact that the Executive is in some degree responsible to the local Legislature, it is not possible to give a general description of the constitutions of the "Self-Governing Colonies." Thus in Southern Rhodesia the affairs of Europeans and natives are on a different footing; in Ceylon there is a complex compromise between "Crown Colony" government and fully responsible government; while in recent years the self-governing status of Malta has been suspended.

(i) *Southern Rhodesia* was formerly administered as a Protectorate

(*c*) (1870), L. R. 6 Q. B. 1. This is so even though the Governor himself assented to the Colonial Act of Indemnity.
(*d*) (1786), 1 T. R. 172; and see *ante*, p. 273
(*e*) (1841), 3 Moo. P. C. 465. (*f*) (1835), 3 Knapp. 332.
(*g*) It is not certain what offences, other than oppression, are covered by the Governors Act, 1699. Treason is covered by the Treason Abroad Act, 1543, and murder and manslaughter by s. 9 of the Offences against the Person Act, 1861; but as to felonies generally, see *R.* v. *Shaw* (1816), 5 M. & S. at p. 405, on the Offences by Officials Abroad Act, 1802.
(*h*) (1868), L. R. 3 Q. B. 487.
(*i*) (1802), 30 St. Tr. 225. (*k*) *Post*, Chapter XL.

by the British South Africa Company. It was granted a constitution with responsible government by letters patent in 1923, after a plebiscite had rejected inclusion in the Union of South Africa. The Legislative Assembly consists of thirty elected members, and Ministers (of whom there are six, including the Prime Minister) are required to have seats. Many of the natives were not qualified to vote, and their affairs were under the control of the High Commissioner for Basutoland, Bechuanaland and Swaziland, but in 1937 most of the control of native policy was transferred to the British Government, a Board of Trustees being appointed by the Secretary of State for the Dominions. The affairs of Southern Rhodesia fall under the supervision of the Dominions Secretary. The Colony was represented at the Ottawa Conference in 1932, and sends an observer to Imperial Conferences. It has a High Commissioner in London. The Prime Minister of the Colony attended meetings of the Commonwealth Prime Ministers in 1944 (*l*). Southern Rhodesia may eventually unite with at least part of Northern Rhodesia (*m*), with Dominion status.

(ii) *Ceylon* was administered as a Crown Colony until 1923. Its present constitution was granted by letters patent in 1931. The Colony remains under the supervision of the Secretary of State for the Colonies, and policy in relation to defence, external relations and revenue is controlled by the British government. The Council of State may be described as both a legislative and an executive body. Fifty members are elected on a wide franchise, eight members are nominated and three are official. The Council elects Committees to deal with the various branches of government, and the chairmen of these Committees, together with the Officers of State, constitute the Board of Ministers. The Board must have the confidence of the Council, but their responsibility is individual rather than collective. The Governor retains paramount legislative as well as executive powers, and the Crown has reserved the right to legislate or alter the constitution by Order in Council.

In 1943 Ceylon was promised after the war "full responsible government under the Crown in all matters of internal civil administration," and early in 1945 the Soulbury Commission went to the Colony to report on the constitutional problem.

(*l*) *Ante*, p. 203. (*m*) See *post*, p. 562.

III. LEGISLATIVE POWER AND THE COLONIES.

Legislation for the Colonies may be effected by (1) the Parliament of the United Kingdom, (2) the Crown, either by virtue of the prerogative or under statutory powers, and (3) Colonial legislatures.

(1) Legislation by the United Kingdom Parliament.—There has never been any doubt about the competence of Parliament to legislate for the Colonies, nor, in view of the doctrine of the sovereignty of Parliament, are there any legal restrictions on this power. The convention against Parliament legislating for five self-governing Colonies (*n*) that are now Dominions, which culminated in the passing of the Statute of Westminster, 1931 (*o*), may, however, develop in the case of other self-governing Colonies, *e.g.*, Southern Rhodesia. Any doubt that there may have been as to how far Acts of Parliament passed after the foundation of a given Colony applied to that Colony, were set at rest by section 1 of the Colonial Laws Validity Act, 1865, which states that, in construing this Act (which defines the limits of Colonial legislation), "an Act of Parliament, or any provision thereof, shall . . . be said to extend to any Colony when it is made applicable to such Colony by the *express words or necessary intendment* of any Act of Parliament."

Where Parliamentary authority is necessary or desirable for legislation in respect of Colonies, Parliament usually prefers to authorise the issue of Orders in Council by the Crown. Imperial Acts are used for matters of general concern, such as Admiralty jurisdiction, aerial navigation, armed forces, copyright, currency, extradition (*p*), foreign enlistment (*q*), fugitive offenders (*r*), international treaties, merchant shipping, nationality and naturalization (*s*), official secrets (*t*), reciprocal enforcement of judgments, and territorial waters jurisdiction (*u*). The creation of federal constitutions requires an Imperial Act, as in the case of the Leeward Islands Federation in 1871 and the establishment of a West Indian Court of Appeal in 1919; while by the Dominica Act, 1938, Dominica ceased to be a member of the Leeward Islands Federation and became a separate Colony.

(*n*) The Irish Free State, now Eire, was not a Colony, but was in 1922 given the same status as Canada.
(*o*) *Post*, p. 592.
(*p*) *Ante*, p. 436.
(*q*) *Ante*, p. 449.
(*r*) *Ante*, p. 450.
(*s*) *Ante*, pp. 423 *et seq.*
(*t*) *Ante*, p. 447.
(*u*) *Ante*, p. 1.

(2) Legislation by the Crown.—This may take the form of Orders in Council, proclamations or letters patent. Here it is necessary to distinguish between settled Colonies on the one hand and conquered or ceded Colonies on the other (*x*).

(a) **For Settled Colonies.**—The prerogatives of the Crown, and the rights and immunities of British subjects, in Colonies established by occupancy and settlement are similar to those which obtain in this country. In *Kielley* v. *Carson* (1842) (*y*) it was said: "Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the mother-country carried with them such portions of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws and the same rights, unless they have been altered by Parliament. And, upon the other hand, the Crown possesses the same prerogatives and the same powers of government that it does over its other subjects. Nor has it been disputed that the Sovereign had the right of creating a local legislative assembly, with authority subordinate indeed to Parliament, but supreme within the limits of the colony, for the government of its inhabitants." The Crown may appoint a Governor, establish Courts of justice, and provide for the summoning of a representative legislature on the English model, *i.e.*, with an elected lower house.

The prerogative power of legislation is lost when, as has usually been the case in settled Colonies, a representative assembly is established in the Colony, for the colonial legislature becomes, subject to the Imperial Parliament, the sole legislative authority for the Colony. "After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom." (*Per* Lord Chelmsford, L.C., in *Re Lord Bishop of Natal*, 1865 (*z*).)

This common law principle was sometimes found inconvenient in the nineteenth century, for example, in some of the West Indian Colonies. "Circumstances of varied kinds," says Keith, "the abolition

(*x*) See *ante*, p. 533.

(*y*) 4 Moo. P. C. 63, 84–85.

(*z*) 3 Moo. P. C. (N. S.) 115, 148.

of slavery and economic troubles, accompanied in Jamaica by a native rising, repressed with needless cruelty by the Governor, combined to force many of the colonies to resign their independence, especially as the Imperial Government adopted the perfectly natural attitude that no pecuniary aid could be advanced to colonies in which the executive government was at the mercy of the legislature for effecting necessary reforms of any kind" (*a*). Such Colonies surrendered their representative institutions, which were replaced by Constitutions enacted by or under general or special Acts of Parliament. An example of a special Act was the Jamaica Constitution Act, 1866. Legislation by the Imperial Parliament was also needed for certain sparsely populated settlements, as in West Africa and the Falkland Islands. The general Act now in force is the British Settlements Act, 1887, by which Parliament has delegated to the King in Council authority to legislate for settled Colonies or to create non-elective legislatures for them, and to make such Constitutions revocable (*b*).

(b) **For Conquered or Ceded Colonies.**—The Crown has a prerogative power to legislate for conquered or ceded Colonies, exercisable by Orders in Council, proclamations or letters patent (*c*). This includes the power to establish any kind of Constitution.

When a *representative* Legislature (*d*) has been granted to a Colony, the prerogative power to legislate cannot be exercised, as that would be repugnant to the grant, unless (as is now almost invariably the case) such power is expressly reserved in the grant. If, however, the representative government is *revoked*, whether by Imperial Act or by a valid exercise of the prerogative, the prerogative power to legislate revives, even though such power of resumption has not been expressly reserved. These principles were established in *Campbell* v. *Hall* (1774) and *Sammut* v. *Strickland* (*infra*).

Campbell v. *Hall* (*e*).—After the cession of Grenada by France in February, 1763, the King issued a proclamation dated 7th October, 1763, providing for the summoning of representative assemblies in the new Colony, and by letters patent dated 9th April, 1764, a Governor was commissioned with power to set up such a Legislature. The

(*a*) *The Governments of the British Empire*, p. 467.
(*b*) For the British Settlements Act, see *ante*, p. 533.
(*c*) *Abeyesekera* v. *Jayatilake*, [1932] A. C. 260.
(*d*) For the definition of representative legislature, see *post*, p. 547.
(*e*) 1 Cowp. 204.

question in issue was the validity of prerogative letters patent dated 20th July, 1764, imposing a duty of 4½ per cent. on all sugars exported from Grenada. In the course of his judgment in the Court of King's Bench, Lord Mansfield, C.J., said: "If the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects. . . It is left by the constitution to the King's authority to grant or refuse a capitulation; if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper He is entrusted with making the treaty of peace; he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion. . . . It is not to be wondered at that an adjudged case in point has not been produced. No question was ever stated before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster-Hall; it never was questioned in Parliament."

After pointing out that in the case of Grenada the King had not expressly reserved any legislative power to himself, Lord Mansfield continued: "We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council. . . ."

Sammut v. *Strickland* (*f*).—The question in issue here was the validity of an Ordinance issued by the Governor of Malta in 1936

(*f*) [1938] A. C. 678, *per* Lord Maugham, L.C., at pp. 691—707. There is some useful learning in Professor Berriedale Keith's argument for the respondents at pp. 682—691.

imposing customs duties on certain imports. By Letters Patent in 1921 Malta had been granted a representative legislature, with responsible government as regards internal affairs, though matters concerning the public safety and defence of the British Empire and the general interests of British subjects were reserved to the King in Council. The Letters Patent did not contain an express power to revoke or amend the Constitution, except in relation to reserved matters. The Malta (Letters Patent) Act, 1936, passed by the Imperial Parliament, provided that the Malta Constitution Letters Patent of 1921 should have effect as if they reserved to the Crown full power to revoke or amend any or all of their provisions by further Letters Patent. Letters Patent later in the same year revoked the Constitution of 1921 and conferred on the Governor alone the power "to make laws for the peace, order, and good government of Malta" in consultation with an official and nominated Executive Council. The Governor then issued the Ordinance in question, the validity of which depended on the validity of the Letters Patent of 1936 conferring legislative power on him. The Constitution of 1921 was, of course, effectively revoked under the express powers of the Imperial Act; but the respondents contended that, even if Malta was to be regarded as a ceded Colony, the Letters Patent of 1936 conferring legislative powers on the Governor were *ultra vires* according to the principles laid down in *Campbell* v. *Hall*, at least as regards matters (including taxation) which had not been reserved by the Letters Patent of 1921.

The Judicial Committee, on appeal from the Court of Appeal of Malta, after examining the history of Malta and finding that it was acquired by voluntary cession by the inhabitants, held that:—

(i) Colonies acquired by voluntary cession are in the same position in British constitutional law as Colonies acquired by cession after conquest or by conquest merely.

(ii) The correct interpretation of the decision in *Campbell* v. *Hall* is that if representative institutions are granted without the reservation of the power of concurrent legislation, the exercise of the prerogative of legislation is *suspended* while the legislative institutions continue to exist. There was no question in that case of representative institutions having been revoked.

(iii) Although the Crown has no prerogative power to amend or

revoke the grant unless such power is expressly reserved in the grant, it is not necessary for the Crown expressly to reserve the right to resume legislative power after lawful revocation of the grant.

(iv) There was nothing in the Letters Patent of 1921 to preclude the exercise of the royal prerogative as soon as the Letters Patent in respect of representative institutions ceased to be in force. To hold otherwise would be to leave the Colony without a Legislature—or, in the case of Malta, with a truncated and mutilated Legislature (*i.e.*, the Crown in respect of reserved matters)—unless and until the Imperial Parliament should intervene.

(3) Powers of Colonial Legislatures.—(a) General Powers.—Colonial Legislatures are subordinate law-making bodies (*g*), and their powers depend on the statute, Orders in Council or Letters Patent granting them. They are invariably given a general power to make laws "for the peace, order and good government" of the Colony. They have full powers within their sphere. The Courts would not declare their legislative acts to be invalid merely on the ground that they are not for the peace, order or good government of the Colony: the expression means that—within the limits of their powers, which are discussed below—they may choose the manner in which their powers shall be exercised. Their powers in relation to local affairs are not usually expressly limited, unless the Constitution is federal. Though subordinate, Colonial Legislatures are not mere delegates of the Imperial Parliament, but they can themselves delegate their powers.

These principles may be illustrated by the judgments in three cases heard by the Judicial Committee in the nineteenth century. In *Reg.* v. *Burah* (1878) (*h*) Lord Selborne, L.C., said: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself." In *Hodge* v. *Reg.* (1883) (*i*) Lord Fitzgerald said: "When

(*g*) See *ante*, pp. 30—32.
(*h*) 3 App. Cas. 889.
(*i*) 9 App. Cas. 117, at p. 131.

the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area the local legislature is supreme. . . ." "These two cases," said Sir Robert P. Collier in *Powell* v. *Apollo Candle Co.* (1885) (*k*), "have put an end to a doctrine which appears at one time to have had some currency, that a colonial legislature is a delegate of the Imperial Parliament. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate." In this last case the question was whether the New South Wales Legislature could delegate to the Governor its power to impose certain customs duties. "It is argued," concluded Sir Robert P. Collier, "that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the Order is issued."

A Colonial Legislature can bind its successors, for example, by requiring that constitutional amendments should be approved by a referendum, since section 5 of the Colonial Laws Validity Act, 1865, provides that such laws shall be passed "in such manner and form as may from time to time be required by any . . . Colonial Law for the time being in force" in the Colony. (*Att.-Gen. for New South Wales* v. *Trethowan* (*l*).)

(b) Limits to the Powers of Colonial Legislatures.—(i) *Repugnancy to United Kingdom Statutes.*—The Colonial Laws Validity Act, 1865, after reciting that "doubts have been entertained respecting the validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures," provides that:—

"2. Any Colonial Law which is or shall be in any respect repugnant

(*k*) 10 App. Cas. 282. (*l*) [1932] A. C. 526; *ante*, pp. 32—36.

to the provisions of any *Act of Parliament* extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, *to the extent of such repugnancy, but not otherwise*, be and remain absolutely void and inoperative.

"3. No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the Law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

"4. No Colonial Law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorising such Governor to concur in passing or to assent to Laws for the peace, order, and good government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument."

This Act was passed because doubts had been expressed—in particular with regard to some of the legislation of South Australia (*m*)—as to the validity of Colonial legislation which was inconsistent with English law, including common law. It will be seen from the words in italics in clause 2 above, that a Colonial Law is only void for repugnancy if it is repugnant to an Act of Parliament or statutory order, etc. made thereunder, and that it is only void to the extent of such repugnancy. Section 3 makes the matter quite clear by expressing it in a different way (*n*). Section 4 provides that inconsistency with the Governor's Instructions (other than the principal Instructions defining his general legislative authority) is immaterial for this purpose. It should be noted that a "Colonial Law" is defined in section 1 of the Act as including Laws made for a Colony by the King in Council (whether statutory or prerogative) as well as by the Colonial Legislature.

(ii) *Power to establish Courts.*—Section 5 of the Colonial Laws Validity Act, 1865, provides that "*Every Colonial Legislature* shall

(*m*) See s. 7 (*n*) See *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

have, and be deemed at all times to have had, full power within its jurisdiction to establish *Courts of Judicature*, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein." Such Laws must be passed in the appropriate *manner and form*, as mentioned below in connection with constitutional amendments.

(iii) *Constituent Powers.*—Section 5 of the Act further provides that "*every Representative Legislature* shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make Laws respecting the *constitution, powers and procedure of such Legislature;* provided that such Laws shall have been passed *in such manner and form* as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, *or Colonial Law* for the time being in force in the said Colony."

It will be seen that constituent powers under this Act are only vested in a *representative* Legislature, which is defined in section 1 of the Act as being "any Colonial Legislature which shall comprise a Legislative Body of which [not less than] one half are elected by inhabitants of the Colony." There are at present six Colonies with representative Legislatures (*o*). There are also some Colonies with non-representative Legislatures which have constituent powers surviving from the time when their Legislatures were of a representative nature, *e.g.*, British Honduras and Grenada. Constituent powers are sometimes expressly granted by Imperial Act, as in the case of British Guiana; but Legislatures created under the British Settlements Act, 1887, have generally no constituent power.

The requirement that constitutional amendments shall be passed in such manner and form as may from time to time be required by the laws (including Colonial Laws) for the time being in force in the Colony, has already been discussed (*p*).

(iv) *Extra-Territorial Legislation.*—The power of a Colonial Legislature extends to the making of laws for the peace, order and good government *of the Colony*, including its territorial waters (*q*). Special powers to legislate beyond these limits are conferred by the Imperial Parliament in such matters as defence and merchant shipping.

(*o*) *Post*, p. 553. (*p*) *Ante*, pp. 23—26; p. 545.
(*q*) As to territorial waters, see *ante*, pp. 1, 28—29.

Whether, apart from any special powers conferred by Imperial Act, a Colonial Law purporting to have extra-territorial effect is for that reason necessarily void is doubtful. There are *dicta* in *Macleod* v. *Att.-Gen. for New South Wales* (*r*) and other cases to the effect that such legislation is void; but some of the later cases, notably *Croft* v. *Dunphy* (*s*), throw doubt on the principle which was thought to be established in *Macleod's Case*, and there does not seem to be any decision actually based on that principle

In *Macleod* v. *Att.-Gen. for New South Wales* (*supra*) the Judicial Committee set aside the conviction by the Courts of New South Wales under an Act of the Legislature of New South Wales of a person who was married in New South Wales and who went through a second marriage ceremony in the United States. The New South Wales Act penalised bigamy, "whosoever" went through a second form of marriage and "wheresoever" such second marriage took place. On a literal interpretation, said the Judicial Committee, the Act would be so wide as regards both person and place that the Colony could have no such jurisdiction either in constitutional law or by International law, and it was therefore necessary to search for a reasonable limitation. They held that "whosoever being married" meant "whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales"; and that "wheresoever" meant "wheresoever in this Colony the offence is committed."

The case is therefore only authority for the principle that in interpreting a Colonial Law the *presumption* is that it is not intended to have extra-territorial effect. However, Lord Halsbury, L.C., went on to say: "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the Statute, and it was supposed that it was intended to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories. . . ." In *British Coal Corporation* v. *The King* (*t*), Lord Sankey, L.C., referred to the doctrine forbidding extra-territorial legislation as "a doctrine of somewhat obscure extent."

(*r*) [1891] A. C. 455.
(*s*) [1933] A. C. 560.
(*t*) [1935] A. C. 500.

Where extra-territorial legislation has been passed the Privy Council have in fact acted on the maxim *ut res magis valeat quam pereat*. Thus in *Ashbury* v. *Ellis* (*u*), the Judicial Committee upheld the validity of a New Zealand Act allowing judicial proceedings to be conducted in certain cases without service of the writ on an absent defendant, Lord Hobhouse saying: "It is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the defendant." The judgment of the Privy Council in *Peninsula and Oriental Navigation Co.* v. *Kingston* (*x*) implied that a Colonial Act penalising the breaking of Customs House seals on the high seas would be void, but it was held in that case that such breaking combined with entering port with broken seals was punishable under the Colonial Act. In *Att.-Gen. for Canada* v. *Cain* (*y*) the Privy Council held that a Canadian Act which impliedly authorised the personal restraint of an alien immigrant into the Dominion exercised outside the territorial limits, for the purpose of returning him to the country from which he came, was not *ultra vires*. The Dominion Parliament had power to deport aliens for breach of its immigration laws; that being so, said Lord Atkinson, "it necessarily follows that the [Dominion] Statute has also given [the Dominion Government] power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders. . . ."

The facts in *Croft* v. *Dunphy* (*z*) (*supra*) were as follows. A Dominion Act of 1927 authorised customs officers to board and examine any vessel hovering in Canadian territorial waters, and to bring the vessel into port. "Territorial waters of Canada" were defined as extending, in the case of vessels registered in Canada, to *twelve* marine miles from the territory of the Dominion. In 1929 a schooner, registered in Canada, sailed "for the high seas" from the French island of St. Pierre with a cargo of liquor which was dutiable under Canadian law. A Canadian customs officer boarded the schooner when 11½ miles from the coast of Nova Scotia, and had the vessel and cargo seised and taken into port. The Privy Council upheld the validity of the Canadian Act as extending beyond the three-mile

(*u*) [1893] A. C. 339.
(*x*) [1903] A. C. 471.
(*y*) [1906] A. C. 542.
(*z*) [1933] A. C. 500.

limit. "When it is found," said Lord Macmillan, "that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order, and good government of Canada, or as being one of the specific subjects enumerated in section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than one applicable to the legislation of a fully sovereign State." The expression "Dominion Parliament" has reference here to the federal Parliament of Canada, not to that Parliament as being the legislature of a self-governing Dominion in the present-day sense; although the appeal was heard after the passing of the Statute of Westminster, 1931, the relevant Act was passed and the events took place before the enactment of that Statute.

The Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926 (*a*), referred to "The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, *as a general rule*, only within the territorial area of the Dominion concerned." The Report of the Conference on the Operation of Dominion Legislation, 1929 (*b*), said: "It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation," and suggested a declaratory enactment "to put the matter beyond possibility of doubt." This proposal, as affecting the Dominions to which the Statute applies, was embodied in section 3 of the Statute of Westminster, 1931, which states: "It is hereby *declared and enacted* that the Parliament of a Dominion has full power to make laws having extra-territorial operation" (*c*). This declaratory form, however, must not be taken to imply that Parliament necessarily considered that the Dominions had previously enjoyed a general power of extra-territorial legislation.

(v) *Abdication of Powers.*—Although a Colonial Legislature can delegate its powers (*d*), and, where it has constituent powers, can join the electorate as a party to legislation by means of the initiative or

(*a*) Cmd. 2768. (*b*) Cmd. 3479.

(*c*) *Post*, p. 597.

(*d*) *Powell* v. *Appollo Candle Co.* (1885), 10 App. Cas. 282; *ante*, p. 545.

referendum (*e*), it cannot abdicate its functions altogether. Thus an Act which provided that laws might be passed or might cease to have effect by the will of the electorate alone, and without the concurrence of the Legislature, would be void. (*In re Initiative and Referendum Act* (*f*).)

(vi) *Rejection, Reservation, and Disallowance.*—(a) A Colonial Governor, as representative of the King and a constituent part of the Colonial Legislature, has power to *refuse his assent to Bills* submitted to him by the Legislature, or may in some cases return Bills to the Legislature with proposed amendments. The power to refuse assent exists at common law, and is implied in constituent Acts which provide that Bills shall not become law unless they receive the Governor's assent. The classes of cases in which the Governor should refuse his assent are commonly set out in his Instructions (*g*).

(b) A Colonial Governor has power to *reserve Bills* submitted to him by the Colonial Legislature, by withholding his assent until His Majesty's pleasure be taken thereon. This is a prerogative power which in most cases is embodied in the constituent Acts of the Colonies. The exercise of this power by the Governor may be either obligatory by reason of the subject-matter or discretionary. The King's pleasure would be made known on the advice of the Colonial Secretary (*h*).

(c) The Crown, acting on the advice of the Colonial (*h*) Secretary, has the power to *disallow* or annul a Colonial *Act*. The power exists at common law, but is embodied in most constituent Acts, usually with a time limit of one or two years. The power is reserved within one year in the Southern Rhodesia Letters Patent; but it would rarely, if ever, be exercised in relation to a Colony possessing fully responsible government unless Imperial interests were involved.

(vii) *Privileges of Colonial Legislatures.*—Unless the Constituent Act confers upon it the full privileges of the Imperial Parliament, or it has adopted by statute the privileges of the British House of Commons, a Colonial Legislature has only limited privileges. It can protect the assembly from disorder, but it is unable to punish disorderly persons.

(*e*) *Att.-Gen. for New South Wales* v. *Trethowan*, [1932] A. C. 526.
(*f*) [1919] A. C. 935.
(*g*) Cf. Colonial Laws Validity Act, 1865, s. 4; *ante*, p. 548.
(*h*) Or, as in the case of Southern Rhodesia, the Dominions Secretary.

The point arose in the case of *Kielley* v. *Carson* (1842) (*i*), where it was held that a legislative assembly did not possess as a legal right the power of arrest prior to adjudicating on a contempt outside the House, but only such powers as were reasonably necessary for the proper exercise of its functions and duties as a local Legislature. In *Barton* v. *Taylor* (1886) (*k*) it was held that punitive action was not justified, neither was the unconditional suspension of a member during the pleasure of the House, but that he could only be suspended during the sitting; and in *Doyle* v. *Falconer* (1866) (*l*) it was held that a member could not be committed to prison merely for disorderly conduct in a Colonial legislative assembly.

Imperial statutes have, however, expressly provided that certain dominions of the Crown may pass statutes conferring on their own Legislatures the privileges of the English House of Commons. The Colonial Laws Validity Act, 1865, by section 5, confers this power on every representative Legislature, but express statutes have been passed notwithstanding this section.

In *Dill* v. *Murphy* (1864) (*m*) a case arising under an old Act authorising the Victoria Parliament to adopt the English House of Commons privileges, the committal of a man for contempt for publishing a libel on a member of the Victoria Legislature was allowed. In the important case of *Speaker of Victorian Legislative Assembly* v. *Glass* (1871) (*n*) it was held that where an Imperial statute had given to the Victoria Legislature power to pass a statute conferring on itself the privileges of the English House of Commons, it was competent for the Victoria Assembly to commit a man for contempt under a warrant which did not specify the grounds of commitment, and that the Supreme Court of Victoria had acted illegally in releasing Glass from custody. Special leave to appeal was granted though the captive had been released, on the ground that the case was one of public interest on which a decision by the Judicial Committee would be welcome.

(4) Types of Colonial Legislatures.—There are several ways of classifying the various kinds of Colonial Legislatures. Some Colonies have no Legislative Council or Assembly, the sole legislative power

(*i*) 4 Moo. P. C. 63.
(*k*) 11 App. Cas. 197.
(*l*) 4 Moo. P. C. (*n. s.*) 203; L. R. 1 P. C. 328.
(*m*) 1 Moo. P. C. (*n. s.*) 487.
(*n*) L. R. 3 P. C. 560.

in the Colony being vested in the Governor. Where there is a legislative body, it may be composed in varying proportions of two or more of the following elements: *official* members, *i.e.*, senior executive officers who are members *ex officio*; *nominated* members, appointed usually by the Crown or the Governor; *elected* members, chosen by an electorate which may be based on a narrower or wider franchise. The legislative body may be either unicameral, in which case it is usually called the Legislative Council, or bi-cameral, in which case usually the upper House is called the Legislative Council and is partly official and partly nominated, while the lower House is called the House of Assembly and contains an elected element. Where there is a federation, as in the Leeward Islands, there will be a Federal Legislature, as well as Legislatures for each of the members of the Federation.

The following is perhaps the most convenient classification of Colonial Legislatures.

(i) *Representative Legislatures.*—A Representative Legislature, as has been said, is defined by section 1 of the Colonial Laws Validity Act, 1865, as a Colonial Legislature which comprises a Legislative Body of which at least one half are elected by inhabitants of the Colony. These exist at present in *Southern Rhodesia* (*o*), *Ceylon* (*p*), *Barbados, the Bahamas, Bermuda*, and *Jamaica* (including the Turks and Caicos Islands). In the first two, the Executive is responsible to the Assembly and the Council of State respectively.

Barbados, the Bahamas and Bermuda have each a nominated Legislative Council of nine members; Jamaica has a similar Legislative Council of fifteen members. The first three of these Colonies have each a wholly elected Assembly of twenty-four, twenty-nine and thirty-six members respectively; Jamaica has a House of Representatives composed of thirty-two elected members. The bi-cameral Legislature of Jamaica was granted in 1944 by Order in Council made under the Jamaica Act, 1866, the earlier representative institutions having been surrendered before the latter date.

(ii) *Non-Representative Legislative Bodies.*—(a) *Minority of Elected Members.*—The following Colonies have Legislative Councils containing elected members who are in a minority as against the Governor, official and nominated members together: *British Guiana*; *British*

(*o*) *Ante*, p. 537. (*p*) *Ante*, p. 538.

Honduras*; *Fiji*; *Gold Coast*; *Kenya Colony*;** the ***Leeward Islands, a federation consisting of Antigua, St. Christopher-Nevis (or St. Kitts), Montserrat and the Virgin Islands (*q*); ***Malta*** (Letters Patent, 1939) (*r*); ***Mauritius*; *Nigeria*; *Sierra Leone*; *Trinidad and Tobago***, which constitute one Colony; ***Dominica***, ***Grenada***, ***St. Lucia*** and ***St. Vincent***, separate Colonies forming the Windward Islands group under one Governor. Before 1940 Dominica was a member of the Leeward Islands federation (*s*). A number of these Colonies surrendered their earlier representative institutions (*t*). Malta formerly enjoyed responsible government (*u*).

(b) ***No Elected Members.***—The following Colonies have Legislative Councils consisting entirely of official and nominated members: ***Falkland Islands*; *Gambia*; *Hongkong***, together with the peninsular of Kowloon and the leased "New Territories" on the mainland; ***Seychelles***; the ***Straits Settlements***, a Colony consisting of the settlements of Labuan, Malacca, Penang and Singapore.

(iii) ***Colonies without Legislative Councils.***—The Governor or High Commissioner alone has legislative authority in the following Colonies: ***Aden***, including the island of Perim (*x*); ***Ashanti*** (Chief Commissioner appointed by the Governor of the Gold Coast); ***Basutoland*** (High Commissioner responsible to the Dominions Office); ***Cyprus*** (*y*); ***Gibraltar*; *Gilbert and Ellice Islands*** (High Commissioner for the Western Pacific); ***St. Helena***, with its dependencies Ascension and Tristan da Cunha.

IV. COLONIAL COURTS AND APPEALS TO THE PRIVY COUNCIL.

Colonial Courts.—It has been seen that the Crown has a prerogative power to establish Colonial Courts to administer common law (*In re*

(*q*) Each of these has also its own legislature, which, except in the Virgin Islands, includes a minority of elected members.

(*r*) Half the members of the Council of Government are elected, not counting the Governor, who has a casting vote.

(*s*) The federation of the Windward Islands with the Leeward Islands has been proposed, and even the federation of all the Colonies in the West Indies, as a step towards self-government; see Aspinall, *Constitutional Changes in the British West Indies* (1940), Journal of Comparative Legislation (3rd Ser.), vol. XXII, Pt. 1, pp. 129—135.

(*t*) For Grenada and Jamaica, see *ante*, p. 541.

(*u*) See *ante*, p. 543.

(*x*) Before 1932, Aden formed part of the Presidency of Bombay. From 1932 to 1937, when the new constitution of India came into force, it was a High Commissionership under the Indian Government.

(*y*) Cyprus had a representative legislature before 1931.

Lord Bishop of Natal (*z*)), and that a Colonial Legislature has power to establish Courts of Judicature and to provide for the administration of justice in the Colony under section 5 of the Colonial Laws Validity Act, 1865 (*a*). There is usually a supreme Court and subordinate Courts. The Leeward Islands and the (unfederated) Windward Islands share a Supreme Court and a Court of Appeal; appeals to the Judicial Committee from West African and East African Colonies lie only through the West African and the East African Court of Appeal respectively; while Southern Rhodesia and the Protectorate of Northern Rhodesia share a Court of Appeal.

The Judicial Committee of the Privy Council.—The origin of appeals to the Privy Council, and the creation of the Judicial Committee to hear all Privy Council appeals by the Judicial Committee Act, 1833, have been mentioned (*b*). The Judicial Committee Act, 1844, after reciting that by the laws in force in certain Colonies appeals could only be brought from Courts of Error or of Appeal, authorised the King by Order in Council to admit *any appeals* to the Privy Council from the judgments or orders of *any Court* within any British Colony or possession abroad, even though such Court might not be a Court of Error or of Appeal. This put the prerogative power on a statutory basis.

Appeals to the Judicial Committee.—Appeals to the Judicial Committee to-day fall into two classes:—

(a) Appeals by leave of the Court appealed from.

(b) Appeals by "special leave" of the Judicial Committee. These last are still sometimes called "prerogative appeals," although they now rest on the Judicial Committee Act, 1844.

(a) *Appeals by leave of the Court appealed from.* These resolve themselves into two groups:—

(i) Appeals "as of right."

(ii) Appeals at the discretion of the Court appealed from.

As regards (i), though the appeal is called an appeal "*as of right*," application has to be made to the Court *a quo*, which, however, must grant leave to appeal if certain objective conditions are complied with.

(*z*) (1865), 3 Moo. P. C. (*N. S.*) 115; *ante*, pp. 160 and 540.

(*a*) *Ante*, p. 547. (*b*) *Ante*, pp. 186 *et seq.*

These conditions vary according to the Colony concerned, but normally the subject-matter must be worth a specified amount (say £500) or more. The conditions in question are in the great majority of cases laid down by Order in Council; very occasionally by local Statute. Appeal as of right only lies in civil cases.

As regards (ii) (which include interlocutory as well as final appeals) the Court *a quo* has a *discretion* to grant or refuse leave to appeal, and exercises its discretion in favour of granting leave where the *issues are of sufficient general or public importance. It commonly* imposes, and often must impose, terms as to security for costs.

(b) *Appeals by "special leave" of the Judicial Committee.*

A petition for special leave lies where the Court below lacks power to grant leave to appeal, or, possessing that power, has declined to exercise it. (*Davis* v. *Shaughnessy* (*c*).)

(i) In *civil cases*, it is not easy to formulate the principles on which the Committee will act. It will generally grant leave where the liberty of the subject or his professional status is involved, or where the issue is one of general interest to the Colony concerned, but not if it is a question of fact only (*d*).

(ii) In *criminal cases*, special leave to appeal is granted very sparingly. There must have been some infraction of "natural justice," or some flagrant departure from the forms of law, or otherwise some serious injustice done or threatened. (*Re Dillet* (*e*); *Knowles* v. *R.* (*f*).) The Committee will not hear an appeal against sentence of a court-martial. (*Tilonko* v. *Att.-Gen. for Natal* (*g*).)

The power to grant special leave to appeal cannot be abolished by Colonial legislation. In *Nadan* v. *The King* (1926) (*h*) the Judicial Committee held that section 1025 of the Criminal Code of Canada, providing that "Notwithstanding any royal prerogative . . . no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard," was invalid in so far as it sought to prevent the hearing of appeals by special leave. The reasons for this decision

(*c*) [1932] A. C. 106.
(*d*) *Canada Central Railway Co.* v. *Thomas Murray* (1883), 8 App. Cas. 574.
(*e*) (1887), 12 App. Cas. 459.
(*f*) [1930] A. C. 566.
(*g*) [1907] A. C. 93.
(*h*) [1926] A. C. 482.

were explained by the Privy Council in *British Coal Corporation* v. *The King* (1935) (*i*) as being: "(1) that section 1025 was repugnant to the Privy Council Acts of 1833 and 1844, and was therefore void under the Colonial Laws Validity Act, 1865; (2) that it could only be effective if construed as having an extra-territorial operation, whereas according to the law as it was in 1926 [*i.e.*, before the Statute of Westminster, 1931, which applies to the Dominion of Canada, but not to Colonies] a Dominion statute could not have extra-territorial operation." As the extra-territorial limitation is of doubtful extent (*k*), it would be sufficient to base the decision on repugnancy to Imperial statute.

(*i*) [1935] A. C. 500 (*k*) *Ante*, pp. 547—556.

CHAPTER XXXIX.

PROTECTORATES AND MANDATED TERRITORIES.

I. BRITISH PROTECTORATES.

The Nature of Protectorates.—"There is no statutory definition of a 'protectorate'," as Farwell, L.J., said in *R.* v. *Earl of Crewe; Ex parte Sekgome* (*a*). "A British protectorate," says Jenkyns, "is a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the King, so that its government cannot hold direct communication with any foreign power, nor a foreign power with that government. . . . The British Crown, either by treaty, by sufferance, or by force, assumes over a defined territory a protectorate in this sense . . .; whilst, on the other hand, the Crown undertakes to protect the inhabitants of the territory from interference by any foreign power" (*b*).

British Protected Persons.—A British protected person is (a) any person born in a British protectorate who is not a British subject and does not possess the nationality of any foreign State, or (b) any such person born elsewhere whose father was at the time of the birth a protected person. (Order in Council, 14th May, 1934.) Although British protected persons are not British subjects, they receive diplomatic protection when in foreign countries.

The Jurisdiction of the Crown.—The jurisdiction exercised by the Crown over protectorates is now based on the Foreign Jurisdiction Act, 1890, though apart from statute the Crown would have prerogative powers over British subjects under the doctrine of allegiance and over other persons in the territory by virtue of the power to accept cessions of jurisdiction (*c*).

The following are the most important cases on the nature of protectorates and the position of persons resident therein.

The Case of the Ionian Ships (1855) (*d*). By the Treaty of Paris in 1815 the Ionian Islands were constituted a free and independent

(*a*) [1910] 2 K. B. 576, at p. 611.
(*b*) *British Rule and Jurisdiction beyond the Seas*, p. 165.
(*c*) See further, pp 567 *et seq.*
(*d*) 2 Ecc. & Adm. 212.

State under the exclusive protection of Great Britain, confirmed by grant of the Ionian Legislature. During the Crimean War certain Ionian ships were captured by British war vessels for trading with the enemy. The judgment of Dr. Lushington was to the following effect: "The protecting State has the right of making war or peace for the protected State, but its intention must be clearly expressed. As there was no clear expression of placing the Islands in a state of war, the trading with Russia was not illegal, since the islanders were neither British subjects nor allies of Great Britain, nor enemies of Russia."

In the case of *R.* v. *Earl of Crewe, Ex parte Sekgome* (*e*) the facts were as follows: There was a dispute between Sekgome, the appellant, and one Mathibe over the chieftancy of the Batawana Tribe in Bechuanaland. Sekgome, who was regarded by the authorities as a menace to the peace of the Protectorate, was detained in custody under a proclamation authorising his detention. This proclamation was expressed to be made in the name of the High Commissioner in the exercise of powers conferred on him by Order in Council made under the Foreign Jurisdiction Act, 1890. (These powers included the prohibition and punishment of all acts tending to disturb the public peace.) Sekgome's application for a writ of *habeas corpus* to the Colonial Secretary was refused by the Divisional Court, and the Court of Appeal confirmed the decision. Vaughan Williams, L.J., after laying stress on the preamble to the Foreign Jurisdiction Act (*f*), held that His Majesty could hold and enjoy the Protectorate of Bechuanaland in the same manner as if that jurisdiction had been acquired by cession or conquest. Farwell, L.J., was of opinion that the proclamation justifying the arrest of Sekgome had statutory force conferred upon it by the Order in Council, which in its turn had statutory force under the Foreign Jurisdiction Act, 1890. This judgment illustrates the principle that where an Order in Council respecting a protectorate is made under a statute and is *intra vires*, such Order in Council has itself the force of a statute, and proclamations made thereunder have the like effect.

The following extract from the judgment of Kennedy, L.J. (*g*), well illustrates the position of persons resident in a protectorate: "What the idea of a Protectorate excludes, and the idea of annexation on the

(*e*) [1910] 2 K. B. 576. (*f*) *Post*, p. 569.
(*g*) At p. 619.

other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting country a foreign State; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State. . . ." The Lord Justice then quotes the following passage from Dr. Lushington's judgment in *The Ionian Ships' Case* (*h*); "Allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so called, which they are not." He then proceeds: "A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection. . . ."

Sobhuza II v. *Miller* (*i*) goes further than *R.* v. *Earl of Crewe* (which was approved) to prove the right of the Crown to make Orders in Council for Protectorates. The circumstances of the case were as follows: Before the annexation of the South African Republic Swaziland was an independent State, though treated as a Protectorate by the Republic. Swaziland was administered under a Convention between the Republic and Great Britain. This Convention provided for the preservation of native laws, and certain agricultural and grazing rights of the natives. Swaziland was not affected by the annexation. After a time the Crown, under Orders in Council, seized certain lands, thereby depriving the natives of user and occupation, though the latter were reallotted to other natives. The Judicial Committee held that the Orders in Council were valid and legal, though they were *ultra vires* the powers recognised by the Convention.

The Position of Foreigners in British Protectorates.—Some doubt was formerly held with regard to the jurisdiction of the Crown over the nationals of foreign countries in British protectorates, the English view being that this was only exercisable with the consent of the foreigner and of his Government. (*Papayanni* v. *Russian Steam*

(*h*) *Supra*, at p. 226.

(*i*) [1926] A. C. 518. And see *North Charterland Exploration Co.* v. *R.*, [1931] 1 Ch. 169.

Navigation Co. (1863) (*k*).) The Foreign Jurisdiction Act, 1890, is at least ambiguous on the point; but it seems clear that since the Brussels Conference, 1890, Britain has adopted the European view that the protecting State has jurisdiction over foreigners within the Protectorate. The Crown has therefore a prerogative power to accept such jurisdiction by cession or usage (*l*).

Classification of Protectorates.—The regulation of the external affairs of a Protectorate involves to a greater or less degree an interest in internal affairs and some contact with the inhabitants. The primary object of establishing a Protectorate is to exploit its commercial potentialities, and the degree of intervention in the administration of the territory will depend on the security afforded by the native government to the traders of the protecting State. That security depends again on the degree of civilisation to which the natives have attained. Hence it is possible to draw a distinction between (i) those territories in which the Crown exercises an effective sovereignty without actual annexation, and (ii) those in which the administration is carried on by and in the name of the native sovereign with British advice. The former may conveniently be called "Colonial Protectorates" and the latter "Protected States."

Colonial Protectorates.—*Administration.*—Colonial Protectorates are administered in much the same way as Crown Colonies, and are under the control of the Colonial Office. Some are actually placed under the authority of the Governor of an adjacent Colony, while others have their own Governor, Commander-in-Chief or High Commissioner with powers similar to those of a Colonial Governor.

The Protectorates of *Aden* (including Socotra), *Gambia*, *Sierra Leone*, *the Northern Territories of the Gold Coast*, and *Kenya*, are administered by the governments of the Colonies of Aden, Gambia, Sierra Leone, Gold Coast and Kenya respectively. The *British Solomon Islands* are administered by the High Commissioner for the Western Pacific, who is also Governor of the Colony of Fiji. The ordinary affairs of the Protectorate of *Nigeria* are administered in accordance with the system of "indirect rule" through native chiefs with the advice of British district officers, the government of the Southern Provinces

(*k*) 2 Moo. P. C. 183, *per* Dr. Lushington; cf. *Jenkyns, op. cit.*, 174, 176, 194; Hall, *Foreign Jurisdiction of the British Crown*, p. 212.
(*l*) See further, *post*, p. 570.

being more closely related than that of the Northern Provinces to the government of the Colony of Nigeria, whose Governor has authority over the whole region. The Protectorate of *Uganda*, which is also administered under the policy of indirect rule through native chiefs, has its own Governor. The Protectorate of *Northern Rhodesia* is administered by a Governor, with an Executive Council and a Legislative Council having a minority of elected members. The Protectorates of *Nyasaland* and *British Somaliland* also have their own Governors. The Protectorates of *Bechuanaland* and *Swaziland* are administered by a High Commissioner, who is also High Commissioner for the Colony of Basutoland (*m*).

Courts and Appeals.—High Courts and inferior tribunals are established in the various Protectorates, with appeal to the Privy Council either directly from the High Court or indirectly through the Supreme Court of an adjacent Colony or Protectorate. Appeals to the Judicial Committee from West African Protectorates lie only through the West African Court of Appeal, and appeals from East African Protectorates (which do not include Northern Rhodesia or British Somaliland) lie only through the East African Court of Appeal (*n*).

Protected States.—*Sovereign Status.*—Protected States are those States under British protection whose external relations are controlled by the Crown, usually through the Colonial Office, but whose internal affairs are in general administered by their Sultans or Rajahs. The Crown acquires these rights by treaty made with certain States which have a civilised government, and does not in most cases exercise the jurisdiction allowed by the Foreign Jurisdiction Act, 1890. In spite of a degree of dependence on the British government, such Protected States and their rulers are entitled to the immunity from judicial process in this country enjoyed by sovereign States, their heads and governments. (*Mighell* v. *Sultan of Johore* (*o*).)

The leading case on this subject is *Duff Development Co.* v. *Kelantan Government* (*p*), where the House of Lords held that the Courts are bound by the certificate of a Secretary of State certifying that the government of a Protected State is recognised by the Crown as

(*m*) He is also British High Commissioner in the Union of South Africa; see *post*, p. 585.
(*n*) See *ante*, p. 555.
(*o*) [1894] 1 Q. B. 149. For State immunity generally, see *The Parlement Belge* (1880), 5 P. D. 197.
(*p*) [1924] A. C. 797.

exercising the attributes of sovereignty. Viscount Cave said: "In the present case the reply of the Secretary of State [for the Colonies] shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognise the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point." Similarly, Viscount Finlay said: "It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the Sovereign may in certain respects be dependent upon another power; the control, for instance, of foreign affairs may be completely in the hands of a protecting power, and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing a loss of the position of a sovereign power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government . . . The reply of the Colonial Office . . . states that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the Sovereign ruler, that His Majesty's Government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan, and that the Sultan makes laws, dispenses justice through the Courts, and, generally speaking, exercises without question the usual attributes of sovereignty . . . The answer of the King, through the proper Department, settles the matter whether it depends on fact or on law."

Administration (*q*).—The Protectorates of the *Federated Malay States* (Perak, Selangor, Negri Sembilan and Pahang), and the Protectorates of *Kedah*, *Perlis*, *Kelantan*, *Trengganu*, and *Johore* (unfederated Malay States) are supervised by the Governor of the Straits Settlements as High Commissioner. In these States British Residents, subject to the High Commissioner, advise on internal

(*q*) The Indian States form a special class of Protected States: see post p 634.

administration, as also in *Brunei* on the island of Borneo. The Protectorate over the island Kingdom of *Tonga* is supervised by the High Commissioner for the Western Pacific.

The island of *Zanzibar*, off the East coast of Africa, is in form ruled by a Sultan; but his decrees are only binding when countersigned by the British Resident, who is President of the Legislative Council and Vice-President of the Executive Council. The native Courts have jurisdiction only over the Sultan's subjects.

The Protectorates over *British North Borneo* and *Sarawak* are confined to external affairs. Their peculiarity lies in the fact that His Majesty's protection is extended to territories which for historical reasons are under the sovereignty of British subjects. The former is owned by the British North Borneo Company and governed by the Governor of the Company, whose appointment must be approved by the Crown. Sarawak is owned and governed by the heir of Sir James Brooke, questions of succession being determinable by the Crown.

Condominium.—The *Sudan* is under the joint protection (*condominium*) of the United Kingdom and Egypt, in accordance with an Agreement made in 1899 after its conquest and confirmed by the Anglo-Egyptian Treaty of 1936. Anglo-Egyptian Sudan is administered by a Governor-General appointed by the King of Egypt on the recommendation of the British Government. An annual report of the administration must be sent to the Egyptian Government; but Egypt has no control, except over finance and irrigation. Egypt still claims a theoretical sovereignty over the territory, which was neither expressly recognised nor denied in the Treaty of 1936. The British government department concerned with the administration of Anglo-Egyptian Sudan is the Foreign Office.

Another example of *condominium* is the *New Hebrides* in the Western Pacific. British jurisdiction is executed jointly with France under conventions of 1906 and 1922.

II. BRITISH MANDATED TERRITORIES.

Nature and Classification of Mandates.—Certain territories in Asia Minor belonging to Turkey, and the German Colonies in Africa and the Pacific, were handed over to the Allies at the end of the War of 1914—1918 to be administered by them on behalf of the League of Nations.

Article 22 of the Covenant of the League of Nations sets out the principles according to which Mandated Territories are to be administered. It declares that "to those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust (*une mission sacrée*) of civilisation." The tutelage of these peoples was therefore entrusted to certain advanced nations able and willing to exercise the trust. The mandatary authority in about half of these territories is the British Crown.

The character of the mandate differs according to the stage of development of the people, and the geographical situation and economic condition of the territory. Mandated territories are thus divided into three classes.

(A) Certain territories in Asia Minor formerly under Turkish rule which can be entrusted with powers of self-government, subject to the reception of advice as to administration and other assistance until such time as they are able to stand alone.

(B) Former German Colonies in Central Africa so circumstanced that the mandatary must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion subject only to the safeguarding of public order and morals; the prohibition of slavery; the regulation of the arms and liquor traffic; the prevention of any establishment of fortifications, of military and naval bases, of military training of the natives for other than police purposes and the defence of territory; and the maintenance of equal opportunities for the trade and commerce of other members of the League.

(C) Germany's former Colonies in South-West Africa and its South Pacific Islands, which, owing to sparseness of population, diminutive size, remoteness from the centres of civilisation, or geographical contiguity to the territory of the mandatary, are best administered under the laws of the mandatary as integral portions of its territory, subject, nevertheless, to the safeguards above mentioned for the benefit of the inhabitants.

Annual reports are to be furnished to the League Council and examined by a permanent Mandates Commission appointed by the League.

A mandate can be revoked with the consent of the mandatary, as was done in the case of Iraq in 1932.

The whole system of mandates will be reviewed by the United Nations. France has more or less recognised the independence of Syria and the Lebanon. In any event, the mandates in the Pacific Islands north of the equator will presumably be taken away from Japan.

Sovereignty in Mandated Territories.—The Mandataries of the various territories were designated by the Supreme Council of Allied Powers in 1919, before the Peace Treaties containing the League Covenant were ratified. This complicates the question as to where the sovereignty over mandated territories lies, a question to which twenty different answers have been suggested. Is it, for example, in the Mandatary? or in the principal Allied Powers (two of which were Italy and Japan)? or in the mandated territory itself? or in the League? Or is it divided—if sovereignty is divisible—between the Mandatary and the League?

Japan, relying on the grant from the Allied Powers, continued to exercise her mandates in the Pacific after she had left the League. Britain recognised the independence of Iraq by a treaty, subject to conditions which enabled the Crown to exercise the mandate until it was revoked. The decision of the Supreme Court of the Union of South Africa in *R.* v. *Christian* (*r*) that a native of a mandated territory might be guilty of treason to the Union, and also certain South African legislation, seemed to imply that the Union claimed sovereignty, but the legislation was modified in such a way as to satisfy the Permanent Mandates Commission (*s*).

British mandated territories are not regarded in British constitutional law as forming part of His Majesty's dominions. A native of such a territory is not a British subject. He receives diplomatic protection when abroad, but is treated as an alien in this country. (*R.* v. *Ketter* (*t*).)

(*r*) [1924] A. D. (South Africa) 101.
(*s*) Kennedy and Schlosberg, *Law and Custom of the South African Constitution*, p. 515—516.
(*t*) [1940] 1 K. B. 787; *ante*, p. 425.

Administration of British Mandates.—The mandates in *Palestine*, *Trans-Jordan*, *Tanganyika*, part of the *Cameroons* and part of *Togoland* are exercised by the United Kingdom under the Foreign Jurisdiction Act, 1890.

The mandate in *South-West Africa* is exercised by the Union of South Africa under the general power given by the Constitution to legislate for the peace, order and good government of the Union.

The mandate in the former German *New Guinea* (together with New Britain and some of the Solomon Islands) is exercised by the Commonwealth of Australia under the general power given by the Constitution to legislate for territories placed under the authority of the Commonwealth.

The mandate in *Western Samoa* is exercised by New Zealand by virtue of an Order in Council issued under the Foreign Jurisdiction Act, 1890.

The British Empire's mandate in *Nauru* is exercised through the Commonwealth of Australia in pursuance of an agreement between the United Kingdom, Australia and New Zealand, confirmed by Acts of their Parliaments.

The British government departments concerned with mandated territories are the Foreign Office and the Colonial Office.

Appeals to the Privy Council.—Courts are established in mandated territories, with appeal directly or indirectly to the Judicial Committee, as in the Colonies. Thus appeal lies from Palestine direct to the Judicial Committee, from Tanganyika through the East African Court of Appeal, from Togoland through the West African Court of Appeal, from Western Samoa through the Supreme Court of New Zealand, and from South-West Africa through the Appellate Division in the Union of South Africa.

III. THE FOREIGN JURISDICTION ACTS.

The Purpose of the Acts.—The practice of securing exemption for the merchants of one country from the laws of another country has been known since the sixth century B.C., disputes between such merchants being triable by Courts of their own nationality. England obtained many such exterritorial rights from the capitulations with the Porte (Turkey) in 1579 to the end of the nineteenth century. The nature and extent of such rights differed according to the degree

of civilisation attained by the countries concerned, which were either (a) semi-civilised by Western European standards but non-Christian (usually Mohammedan), or (b) barbarous or without organised government (*u*). The exemption might be confined to criminal charges against British subjects, or it might extend at the other extreme to the establishment in the foreign country of a system of British Consular Courts for the trial of all cases in which British subjects were concerned, though the Consular Courts could not hear proceedings against the subjects of a third nation without the latter's agreement and perhaps the consent of the person himself (*x*).

Jurisdiction in foreign countries was vested by prerogative in the Crown. Over British subjects it rested on allegiance. As regards subjects of the foreign country itself it might be described as a delegation of authority from the local sovereign. The position was not altogether clear as regards the subjects of a third nation, nor in the case of barbarous countries where the doctrine of delegation could not easily be applied, though as regards the latter the jurisdiction might be acquired by conquest or usage. In any event, it was desirable to regularise the machinery by which foreign jurisdiction should be exercised. For this purpose, and for setting at rest theoretical doubts, a series of Foreign Jurisdiction Acts was passed in the nineteenth century.

The first of these statutes was the Foreign Jurisdiction Act, 1843, the occasion for the passing of which was the necessity of establishing British criminal jurisdiction in the Levant after the extinction of the Levant Company. This Act, and others which followed from time to time, were consolidated by the Foreign Jurisdiction Act, 1890, which, with slight modifications, is the Act now in force.

Extra-territorial and consular jurisdiction was relinquished in Turkey (formerly the Ottoman Empire) in 1924, Thailand (Siam) in 1926, Iran (Persia) in 1929, and Ethiopia (Abyssinia) in 1938. The British government has intimated that it will not be revived after the war in China, now recognised as one of the Great Powers. British

(*u*) For the history, see *Papayanni* v. *The Russian Steam Navigation Co.* (the *Laconia* case) (1863), 2 Moo. P. C. (N. S.) 161; and the *Report on British Jurisdiction in Foreign States*, by Mr. Hope Scott, Q.C., quoted in Jenkyns, *British Rule and Jurisdiction beyond the Seas*, Appendix VI. This Report was written in preparation for the drafting of the Foreign Jurisdiction Act, 1843.

(*x*) For an account of extra-territorial and consular jurisdiction as it existed at the end of the nineteenth century, see Jenkyns, *op. cit.*, chh. 7 and 8.

jurisdiction has been relinquished in Egypt since 1937, save as regards British forces and the military mission and certain questions of status where nationality is the deciding factor (*y*). Except for the survival of British extra-territorial jurisdiction in Spanish Morocco and certain territories around the Persian Gulf (Bahrein, Kuwait and Muscat), the original purpose for which the Foreign Jurisdiction Acts were passed scarcely exists any longer; but, as we have seen, the Act of 1890 is now the basis on which rests the jurisdiction of the Crown in Protectorates, especially those of the Colonial type, and in those Mandated Territories which are administered by the United Kingdom and New Zealand (*z*).

The Foreign Jurisdiction Act, 1890.—The Act recites that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her dominions."

Section 1 declares: "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." Both the preamble and section 1 recognise that the Crown has jurisdiction in certain foreign countries by consent or sufferance independently of Parliamentary grant. Section 1 does not assimilate foreign jurisdiction to that which the Crown has in conquered or ceded territories; it means that such jurisdiction shall be exercised as if it were based only on the prerogative, and that the position of the Crown in relation to Parliament and to persons in the foreign countries shall be similar to its position in conquered or ceded territories (*a*). It is implied that such jurisdiction is exercisable by means of Orders in Council.

Section 2 provides that "Where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country . . . ."

(*y*) The jurisdiction does not cover nationals of the Union of South Africa or Eire.
(*z*) As to the Indian States, see *post*, pp. 683—688.
(*a*) Hall, *Foreign Jurisdiction of the British Crown*, § 9.

Section 1, which is the section usually relied on, presumably covers the subjects of third nations, though agreement or consent might formerly be required by International Law. Since other European nations claim full jurisdiction over foreigners in their Protectorates, it seems that International Law cannot be pleaded against the exercise of a corresponding jurisdiction in British Protectorates, which is now well established (*b*).

The certificate of a Secretary of State is conclusive evidence in any British Court of the Crown's jurisdiction in a foreign country. (Section 4.) Power is given to send persons charged with offences for trial to a British possession (section 6); to make provision as to the place of punishment of persons convicted (section 7); and to assign jurisdiction to any Court in any British possession in cases falling within the Act. (Section 9.)

Every Order in Council made in pursuance of the Act is to be laid before both Houses of Parliament forthwith, and has effect as if it were enacted in the Act. (Section 11.) An Order in Council issued under the Act is void to the extent that it is repugnant to any Act of Parliament extending to British subjects in the foreign country concerned, or to any order or regulation made thereunder. (Section 12 (*c*).)

Persons acting in execution or intended execution of the Act are protected from judicial proceedings if not brought within six months. (Section 13 (*d*).)

(*b*) Cf. Jenkyns, *op. cit.*, pp. 174—176, 194; Hall, *op. cit.* §§ 97—98.
(*c*) This provision is similar to ss. 2 and 3 of the Colonial Laws Validity Act, 1865; *ante*, pp. 545—546.
(*d*) This provision is similar to the general immunity later given by the Public Authorities Protection Act, 1893; *ante*, p. 294.

CHAPTER XL.

DOMINION STATUS—I.

I. INTRODUCTION.

The Dominions and their Constitutions.—The purpose of this chapter and the next is to describe in outline the present constitutional status of the six Dominions enumerated in section 1 of the Statute of Westminster, 1931, viz.: *the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, Eire* and *Newfoundland*. It should be borne in mind that many of the general statements which follow require modification when they are applied to particular Dominions: for example, the constitutions of Canada and Australia are federal, so that the powers of the Canadian and Australian legislatures, governments and Courts must be considered in relation to the powers of the corresponding organs of the Canadian Provinces and the Australian States; the Union of South Africa and Eire have passed legislation since the Statute of Westminster, which puts each of them into a peculiar position in certain respects; and the Dominion status of Newfoundland has been in suspense since an Imperial Act of 1933 entrusted the powers of administration to a Governor acting on the advice of a Commission. New Zealand might be taken as the type for illustration, were it not for the fact that she has not yet adopted the operative sections of the Statute of Westminster. Some of the essential modifications are mentioned in this and the following chapters. The scope of this book, however, does not permit us to go into much detail, or to illustrate the principles by reference to many events in the political history of the Dominions (*a*).

The constitutions of the Dominions rest on Imperial statutes (*b*), except the suspended constitution of Newfoundland, which is based on Letters Patent, though the Dominions have—or, in so far as they have not, could have if they wanted—the power of constitutional amendment. Their Constituent Acts are supplemented by con-

(*a*) See further, Keith, *Responsible Government in the Dominions* (2nd ed., 1928); *The Dominions as Sovereign States* (1938).

(*b*) But as to Eire, see *post*, p. 655.

ventions (*c*) and constitutional usage, partly implied and partly formulated in instructions to the Governors-General (*d*), and in the resolutions of Imperial Conferences.

The Development of Responsible Government.—The development of responsible government (*e*) began in those North American Colonies which now comprise Canada, and may be said to have originated in the *Durham Report* (1839), sent to the British Government by Lord Durham, who was charged with the investigation of the conditions that led to the rebellion of 1837. In the course of his Report, Lord Durham said: "It needs no change in the principles of government, no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the principles of the British constitution and introduce into the government of these great colonies those wise provisions by which alone the working of the representative system can in any country be rendered harmonious and efficient. We are not now to consider the policy of establishing representative government in the North American colonies. That has been irrevocably done . . . *But the crown must . . . submit to the necessary consequences of representative institutions; and, if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence.* . . . Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the colonial governor to be instructed to secure the co-operation of the assembly in his policy by entrusting its administration to such men as could command a majority, and if he were given to understand that he need count on no aid from home in any difference with the assembly that should not directly involve the relations between the mother country and the colony. *This change might be effected by a single dispatch containing such instructions . . . I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country.* The matters which so concern us are very few. The constitution of the form of government, the regulation of foreign

(*c*) See *ante*, Chapter III, especially pp. 37—38.

(*d*) Newfoundland has a Governor. There has been no representative of the Crown in Eire since 1937.

(*e*) See *ante*, p. 537.

relations and of trade with the mother country, the other British colonies, and foreign nations, and the disposal of the public lands are the only points on which the mother country requires a control . . ."

Lord Durham's Report, which has been described as "the greatest State paper in colonial history" (*f*), was followed a few years later by the grant of responsible government by means of Governors' instructions first to Ontario and Quebec, and then to the other North American Colonies (now Provinces of Canada). Lord Durham's division between matters of imperial and colonial concern was somewhat arbitrary, but it was not followed at all exactly in practice; full autonomy in internal affairs was gradually supplemented by a degree of autonomy in external affairs as well (*g*). Responsible government for the Dominion of Canada was not expressly mentioned, but was implied, in the British North America Act, 1867. The same principles were extended to Newfoundland, the Australian Colonies (now States) and New Zealand in the latter part of the nineteenth century, to the Commonwealth of Australia in 1900 and the Union of South Africa in 1909. Following the Anglo-Irish Treaty of 1921, the Irish Free State was granted Dominion status in accordance with the law, practice and constitutional usage relating to Canada.

In 1914, therefore, these Dominions (except the Irish Free State, which did not then exist) were by convention self-governing Colonies, and their *legal* status was that described in a previous chapter (*h*) for Colonies with representative institutions.

Dominion Autonomy.—The autonomy of the Dominions received a further impetus by reason of the contribution they made to the conduct of the war of 1914—18, and the seal was set on it by the recognition of Canada, Australia, New Zealand and South Africa as separate members of the British Empire delegation to the Peace Conference in 1919 and of the League of Nations.

Imperial Conferences.—Meanwhile, machinery for consultation and co-operation between the United Kingdom and the Dominions, and for formulating to some extent the conventions which governed their mutual relations, was established in the form of periodical meetings of Prime Ministers and their colleagues under the chairmanship of the

(*f*) Kennedy, *Constitution of Canada* (2nd ed.), p. 168.
(*g*) See Kennedy, *op. cit.*, chh. 12 and 21. (*h*) Chapter XXXVIII.

British Prime Minister. These Imperial Conferences had no executive authority, nor was it found practicable to arrange for regular meetings. The most important Imperial Conferences were those of 1926, with its Inter-Imperial Relations Committee, and 1930, the latter of which adopted the Report of the Conference on the Operation of Dominion Legislation, 1929 (cited hereafter as O. D. L. Report, 1929) (*i*).

General Description of Dominion Status.—The Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, thus described the position and mutual relation of the United Kingdom and the Dominions: "*They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*" The Report goes on to say: "The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever. . . . Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances of the world."

This description of Dominion status, especially the passage underlined in the Report, though carefully drafted by the Committee under

(*i*) *Report of the Inter-Imperial Relations Committee, Imperial Conference, 1926*, Cmd. 2768; *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929*, Cmd. 3479; *Report of the Imperial Conference, 1930*, Cmd. 3717. Among previous Conferences were those held in 1907 (Cd. 3523), 1911 (Cd 5741), 1917 (Cd. 8566), 1918 (Cd. 9177), 1921 (Cmd. 1474) and 1923 (Cmd. 1987). The more important passages of these Reports will be found in Keith, *Speeches and Documents on the British Dominions, 1918—1931*, and Dawson, *The Development of Dominion Status, 1900—1936*. Since 1930 there have been an Imperial Conference in 1937 (Cmd. 5482), a Conference of Commonwealth Prime Ministers in 1944 (*ante*, p. 203), and in 1945 a meeting of Commonwealth representatives preparatory to the San Francisco Conference of the United Nations.

the chairmanship of Lord Balfour, should not be treated as if it were a statutory definition settling the nature of Dominion status for all time, but rather as a description of the position so far reached and from which further developments may be made (*j*). As the Conference quoted above itself said: "No account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects."

Conventions in the British Commonwealth.—"The association of constitutional conventions with law," said the Committee on the Operation of Dominion Legislation a few years later, "has long been familiar in the history of the British Commonwealth; it has been characteristic of political development, both in the domestic government of these communities and in their relations with each other; it has permeated both executive and legislative power. It has provided a means of harmonising relations where a purely legal solution of practical problems was impossible, would have impaired free development, or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be" (*k*). It had been intended to formulate the framework of an Empire Constitution at the end of the last war, but this was found impossible as regards the Empire as a whole, and unnecessary—owing to the development of conventional autonomy—as regards the Dominions. It was only thought necessary that some matters connected with legislative power should be the subject of legislation by the Imperial Parliament, and this was done by the Statute of Westminster, 1931 (*l*).

Common Allegiance.—The Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and they

(*j*) Sir John Latham points out that the description was to some extent anticipated by the Anglo-Irish Treaty, 1921, and the Irish Free State Constitution Act, 1922, *Australia and the British Commonwealth*, pp. 9—10.
(*k*) O. D. L. Report, 1929, § 56.
(*l*) *Post*, Chapter XLI.

are united by a common allegiance to the Crown (*m*). Hence a special importance attaches to the law touching the succession to the Throne (*n*). Application had to be given to this principle on the abdication of Edward VIII in 1936 (*o*). It would seem that a Dominion could not *lawfully* secede from the Commonwealth *by unilateral action*. The Dominions are autonomous communities "within the British Empire" (*supra*), and their constitutions imply the connection with the Crown (*p*). By convention, however, it would probably not be proper for the United Kingdom or the other Dominions to withhold their consent to the secession of a Dominion (*q*).

Nationality.—The basis of this common allegiance is the common status of British subjects. The term "British subject" does not mean subject of Great Britain, but denotes generally all subjects of His Majesty to whatever part of the British Commonwealth they belong. The common status does not preclude the Dominions from defining their own "nationals" or "citizens" for such purposes as civil and political rights, diplomatic representation and treaty obligations, immigration, deportation, and the exercise of extra-territorial jurisdiction, and, in fact, Canada, South Africa, and Eire have done so.

The latter question was discussed by the Conference on the Operation of Dominion Legislation, 1929, and the Imperial Conferences of 1930 and 1937. It was recognised that the United Kingdom is in a special position as regards (i) the definition of British subjects by United Kingdom legislation owing to the variety of separate territories for which it legislates, (ii) its practice of not making any distinction between different classes of British subjects as regards civil and political rights, and the rights of entry and residence, and (iii) the fact that British diplomatic and consular representatives in a given country protect and assist British subjects belonging to all members of the British Commonwealth not separately represented there. As regards the Dominions, it was suggested at the Imperial Conference, 1937, that each Dominion should define its own nationals to avoid practical difficulties, but Australia and New Zealand had no wish to do so.

(*m*) *Post*, p. 594. (*n*) *Post*, p. 592.
(*o*) *Post*, pp. 600—601.
(*p*) This applied to the Irish Free State constitution of 1922, and the Treaty on which it was based.
(*q*) Keith, *The Dominions as Sovereign States*, pp. 100 *et seq.*; 324—325.

The principles which emerge from the discussions are that (a) it is for each Dominion to decide, either by legislation or by administrative action within the existing law, which persons, *being British subjects*, have with it that definite connection which would enable it to recognise them as "members of its community"; (b) it is desirable as far as possible to secure uniformity in principle and to avoid overlapping; and (c) any legislation on the matter in any part of the Commonwealth should be preceded by consultation with any other part which is likely to be affected, *e.g.*, by migration (*r*).

II. INTERNATIONAL RELATIONS.

Members of the League of Nations.—The Covenant of the League of Nations, incorporated in the Peace Treaties of 1919, was a multilateral treaty, which provided that it might be adhered to by any "fully self-governing State, Dominion or Colony." The signatories on behalf of the British Commonwealth were the British Empire (*i.e.*, the United Kingdom and such other parts of the British Empire as were not separately represented), Canada, Australia, South Africa, New Zealand and India (not merely British India). The Irish Free State, soon after its foundation, became a member in 1923. Newfoundland was not a member. The various signatories were grouped together under the heading of the British Empire, a device which symbolised their unity in diversity: although they were separate members as regards other members of the League, they did not consider that the obligations of the League Covenant governed their relations with each other (*s*).

The Dominions (except Newfoundland) also adhered to the Statute of the Permanent Court of International Justice, and are represented in the International Labour Organisation. Australia, New Zealand and South Africa also administer Mandates (*t*).

Members of the United Nations.—Invitations were sent to Canada, Australia, New Zealand and South Africa, as well as the British Empire and India, to attend the Conference of the United Nations at San Francisco in 1945 to discuss the formation of a new world security organisation on the basis of the Dumbarton Oaks plan.

(*r*) See further, *ante*, p. 504. Eire did not attend the conference of 1937; as to "Irish citizens," see *post*, p. 652.

(*s*) *Post*, p. 533.

(*t*) *Ante*, p. 567.

Eire was not invited as she was a neutral in the war against Germany.

A preliminary Conference held in London under the chairmanship of the Dominions Secretary was attended by the Prime Ministers of New Zealand and South Africa, the Deputy Prime Minister and the Minister for External Affairs of Australia, the High Commissioner of Canada and representatives of India. The Conference disclaimed the suggestion that had appeared in the foreign press that these delegates would present "a Commonwealth front" or a "British Empire *bloc*" at the San Francisco Conference. Dr. Evatt, the Australian Attorney-General and Minister for External Affairs, said that the Dominions would go to San Francisco as "separate, distinct, equal, and autonomous" members of the United Nations and of the world security organisation. The Dominions did not always pursue the same policy as the United Kingdom in the discussions of the League of Nations; for example, in July, 1936, the United Kingdom, Canada and Australia favoured the lifting of sanctions against Italy, which had invaded Abyssinia (a member of the League); South Africa favoured their retention, while New Zealand wanted them to be intensified.

Treaties.—*Negotiation.*—The Imperial Conference, 1923, laid down the following principles with regard to political treaties between Heads of States: "(a) It is desirable that no treaty should be negotiated by any of the Governments of the Empire without due consideration of its possible effect on other parts of the Empire, or if circumstances so demand, on the Empire as a whole. (b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other Governments of the Empire likely to be interested are informed, so that, if any such Government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations. (c) In all cases where more than one of the Governments of the Empire participates (*sic*) in the negotiations, there should be the fullest possible exchange of views between those Governments before and during the negotiations. . . . (d) Steps should be taken to ensure that those Governments of the Empire whose representatives are not

participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested" (*u*). The principle of consultation was explained by the Imperial Conference, 1926, as applying to *any* negotiations which any Government intends to conduct, so as to leave it to the other Governments to say, with reasonable promptitude, whether they are likely to be interested. "So long as the initiating Government," the 1926 Report continues, "receives no adverse comments and so long as its policy involves no *active* obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any *active* obligations, obtain their definite assent" (*x*).

The Imperial Conference, 1926, further recommended that the plenipotentiaries for the various British units should have Full Powers, *issued in each case by the King on the advice of the Government concerned*, indicating and corresponding to the part of the Empire for which they are to sign.

Form and Signature.—The Imperial Conference, 1923, resolved that (a) bilateral treaties imposing obligations on one part of the Empire only should be signed *by a representative of the Government of that part*, thus approving the manner in which Canada concluded the Halibut Fishery Treaty with the United States in the same year; (b) a bilateral treaty imposing obligations on more than one part of the Empire should be signed by one or more plenipotentiaries on behalf of all the Governments concerned; and (c) treaties negotiated at International Conferences should be signed by plenipotentiaries on behalf of all the Governments of the Empire represented at the Conference.

The Imperial Conference, 1926, resolved that a treaty signed on behalf of any or all of the Governments of the Empire should be made *in the name of the King as the symbol of the special relationship between the different parts of the Empire*, and that a treaty applying to only one part of the Empire should be stated to be made by the King *on behalf of that part*, *e.g.*, "for the Dominion of Canada." The

(*u*) *Quære* whether paragraph (d) would apply to a Peace Conference to which Eire, as a neutral, was not invited.

(*x*) These principles were confirmed by the Imperial Conference, 1930.

Imperial Conference, 1937, confirmed this form, and explained that "each Member takes part in a multilateral treaty as an individual entity, and, in the absence of express provision in the treaty to the contrary, is in no way responsible for the obligations undertaken by any other Member."

Ratification.—The procedure in relation to the ratification of treaties was thus explained by the Imperial Conference, 1923: "(a) The ratification of treaties imposing obligations on one part of the Empire is effected *at the instance of the Government of that part.* (b) The ratification of treaties imposing obligations on more than one part of the Empire is effected *after consultation between the Governments of those parts of the Empire concerned.* It is for each Government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that Government" (*y*).

If the Great Seal of the Realm is used, its use will require the formal intervention of a British minister, but a Dominion may have its own seal, as South Africa and Eire now have.

Treaties of a Technical Nature.—The above principles apply to treaties of a political character. Agreements of a technical or administrative nature are often made, not between Heads of States, but between Governments. These are made in the names of the signatory governments and signed by their representatives. They are not ratified by the Heads of States, though some form of confirmation by the Governments may be employed. Dominion Governments enter into such agreements, but the Imperial Conference, 1923, recommended that other parts of the Empire who might be interested should be kept informed of the proposed negotiations in order that they may have an opportunity of expressing their views.

The United Kingdom continues in its commercial and similar treaties to obtain advantages for all British subjects, even if they are nationals of the Dominions, whenever it can; and the Dominions derive the benefit of most-favoured-nation clauses in treaties between this country and foreign nations.

Foreign Affairs.—The Imperial Conference, 1926, recommended that the principles governing individual action, consultation and

(*y*) For the position in the United Kingdom, see *ante*, pp. 173—175.

co-operation in the negotiation of treaties should be applied to the conduct of foreign affairs generally, and this was confirmed by the Imperial Conference, 1930. It was, however, recognised in 1926, "that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain." All the Dominions, it was pointed out, are engaged to some extent in the conduct of foreign relations, particularly with foreign countries on their borders, *e.g.*, Canada and the United States. "The governing consideration underlying all discussions of this problem," however, "must be that neither Great Britain nor the Dominions could be committed to the acceptance of *active* obligations except with the definite assent of their own Governments."

The Imperial Conference, 1937, after confirming their loyalty to the League of Nations Covenant and the Pact of Paris, agreed that their several Governments were nevertheless bound to adopt such measures of defence as they deemed essential for their security, and declared their intention of continuing to consult and co-operate with one another in this as in other matters of common concern.

Diplomatic Representation.—The principle that a Dominion might exchange diplomatic representatives with a foreign country was admitted in 1920 in the case of Canada and the United States. It was first acted upon in the case of the Irish Free State and the United States in 1924, and since then the practice has been considerably extended. Otherwise, the British foreign (diplomatic and consular) service continues to be available for the benefit of the Dominions, as for the rest of the Empire and for British subjects and protected persons everywhere.

In matters of general and political concern, where a Dominion has no Minister accredited to a given foreign State the channel of communication generally is through the British Ambassador and the United Kingdom Government; but the Imperial Conference, 1930, pointed out two types of case where the channel of communication would conveniently be between the Dominion Government and the British Ambassador direct, *viz.*: (a) in matters not of general and political concern, *e.g.*, the negotiation of commercial arrangements affecting exclusively a Dominion Government and a Foreign Power, invitations to non-political conferences, and requests for technical or

scientific information; (b) in matters of political and general concern for reasons of urgency. In the latter case both the Dominion Government and the Ambassador would simultaneously communicate with the British Government if possible.

War and Neutrality.—It was formerly assumed that owing to the unity of the British Empire in International Law, the Dominions, along with the rest of the Empire, would be immediately placed in a state of belligerency if the King declared war merely on the advice of the United Kingdom Government (*z*). South Africa and Eire, however, in the period between the two Great Wars contended that a Dominion had the right to remain neutral in a war in which His Majesty was engaged, and that it could only be involved in the war by its own consent. It follows from the principles laid down above concerning the conduct of foreign affairs that a Dominion could not be compelled without its consent to give *active assistance* in such a war, but it was not generally admitted that a Dominion could remain technically *neutral*.

General Hertzog (South Africa) argued in favour of the right of a Dominion to remain neutral, both as a member of the League of Nations and as an autonomous member of the British Commonwealth equal in status with the United Kingdom (*a*). The Constitution of Eire, 1937, states that "war shall not be declared and the State shall not participate in any war save with the assent of Dáil Eireann" (the lower House). South Africa is to some extent compromised by the agreement to maintain Simonstown as a base for the Royal Navy; the similar obligation of Eire to maintain certain ports under the Anglo-Irish Treaty, 1921, was dissolved in 1938.

In September, 1939, Canada, Australia, New Zealand and South Africa separately declared war on Germany (*b*), though in South Africa the policy was only supported by a small majority until the German invasion of Holland in May, 1940. Eire did not declare war, and her neutrality was respected throughout by the belligerents on both sides. It is therefore settled that a Dominion has the *right* to remain neutral in a war in which His Majesty is engaged. It is

(*z*) Such advice would, of course, be required by United Kingdom convention.
(*a*) Dawson, *op. cit.*, pp. 432—436.
(*b*) Australia and New Zealand merely accepted the state of war brought about by the United Kingdom declaration, but in 1941 Australia made its own declaration of war against Japan.

irrelevant that the enemy might, and probably would, disregard this right if it suited him to do so.

III. INTER-IMPERIAL RELATIONS.

Not Governed by International Law.—The Report of the Inter-Imperial Relations Committee, 1926, confirmed the British view that the mutual relations between the members of the British Commonwealth are not governed by International Law. They are governed largely by conventions whose character is something midway between International Law and Constitutional Law in the ordinary sense (*o*). The Conference pointed out that "the making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King," adding that this principle underlies all international conventions (*i.e.*, multilateral treaties).

The obligations imposed by the League Covenant, for example, and its methods of settling disputes, never applied to members of the British Empire *inter se*. Again, the United Kingdom and the Dominions (except the Irish Free State), in signing the Optional Clause making compulsory the jurisdiction of the Permanent Court of International Justice, expressly reserved inter-Imperial disputes. In 1924 the Irish Free State applied for registration of the Anglo-Irish Treaty, 1921, with the League Secretariat under Art. 18 of the League Covenant, but the registration was opposed by the United Kingdom for the reason stated.

The Articles of Agreement for a Treaty between Great Britain and Ireland, 1921, commonly known as the Anglo-Irish Treaty, was a peculiar document, as according to British notions it was an agreement between the United Kingdom Government and the rebels in Southern Ireland. Most agreements between members of the British Commonwealth have been of a commercial nature, for example, the Ottawa agreement of 1932, and none have been registered at Geneva.

(*o*) The matter is discussed by R. T. E. Latham, in *Survey of British Commonwealth Affairs*, vol. I, pp. 595 *et seq.*

Proposed Commonwealth Tribunal.—The Conference on the Operation of Dominion Legislation, 1929, considered that it would be advantageous to establish a tribunal as a means of determining differences and disputes between members of the British Commonwealth (*d*). The suggestion was examined by the Imperial Conference, 1930, which made the following proposals:—

(i) *Ad hoc* arbitration proceedings would be more suitable than the constitution of a permanent Court.

(ii) In the absence of general consent to an obligatory system, a voluntary system should be adopted.

(iii) The competence of the tribunal should be limited to justiciable disputes between governments.

(iv)—(a) The tribunal should be constituted *ad hoc* in the case of each dispute to be settled.

(b) There should be five members, including a chairman, all drawn from within the British Commonwealth.

(c) One member with legal qualifications should be selected by each party to the dispute from outside its own country, and one member by each party from any part of the Commonwealth.

(d) The chairman should be selected by the four members so chosen by the parties.

Nothing has yet been done to set up a Commonwealth Tribunal.

Channels of Communication.—(i) *Between Prime Ministers.*—There is direct communication between the Prime Minister of the United Kingdom and the Prime Ministers of the Dominions, and between the Prime Ministers of the Dominions *inter se.* As to the former, the practice was confirmed by Resolution XIV of the Imperial Conference, 1921, together with the right of the Dominions to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom.

(ii) *Between Departments.*—For matters of routine and detailed administration there is communication between Government Departments, usually the Dominions Office in London (*e*) and the Departments of External Affairs in the Dominions.

(*d*) O. D. L. Report, 1929, § 125.
(*e*) For the Dominions Office, see *ante*, p. 221.

(iii) *Exchange of High Commissioners.*—The Imperial Conference, 1926, pointed out that as the Governor-General was no longer the representative of the British Government in the Dominions and communication no longer lay between him and the British Government (*infra*), there was no one in the Dominion capitals "in a position to represent with authority the views of His Majesty's Government in Great Britain." They therefore recommended that a system of personal contact should be developed, supplementary to the communication between Prime Ministers and between Departments. For this purpose the United Kingdom appointed High Commissioners to the various Dominions, first to Canada in 1928 and then to Australia and South Africa in 1931. The Dominions, beginning with Canada in 1879, had for some time appointed High Commissioners at London; their functions were originally commercial, but later—especially after 1926—their political importance was enhanced. The Dominions also exchange High Commissioners with each other. Eire, which has no Governor-General, maintains a High Commissioner in London, and a "British Representative" at Dublin was appointed in 1939.

Dominion High Commissioners in this country, unless Ministers from their Dominions are present, have precedence next after Secretaries of State. They have no diplomatic immunity from suit (*Isaacs & Sons* v. *Cook* (*f*)), but they are not liable to income tax (Finance Act, 1925), and are treated for taxation purposes generally in the same way as foreign ambassadors.

Defence.—The Dominions have, or may have, their own armies, navies and air forces. The Imperial Conference, 1937, noted with satisfaction that the members of the Commonwealth, in accordance with the recommendations of previous Conferences, had adopted a common system of organisation and training, and the use of uniform manuals, patterns of arms and stores. It is the practice to interchange officers and to exchange technical information. Concerted measures are taken for the defence of ports and communications. The Conference of 1937 laid particular stress on the importance of co-operation in the production of munitions and food supplies.

The Dominions may, if they wish, have permanent representation on the Committee of Imperial Defence. This offer has been accepted by

(*f*) [1925] 2 K. B. 391; for diplomatic privileges, see *ante*, pp. 175—176.

Australia and New Zealand, and ignored by Eire. Canada and South Africa prefer to submit definite points to the Committee, and do not agree to the setting up of an Imperial Defence Council. The facilities of the Imperial Defence College are available to Dominion officers. At the same time the Conference "recognised that it is the sole responsibility of the several Parliaments of the British Commonwealth to decide the nature and scope of their own defence policy."

The Army and Air Force (Annual) Acts (*g*) are expressed to apply to persons subject to military law or to the Air Force Act "whether within or without His Majesty's dominions," but by convention United Kingdom forces may not be stationed in the Dominions, except at their request and consent. Following the recommendations of the Conference on the Operation of Dominion Legislation, 1929, and the Imperial Conference, 1930, legislation was passed in the United Kingdom and in the Dominions (except Eire) in 1932—33, providing that the armed forces of one member of the Commonwealth, while stationed in the territory of another member, should remain under their own military, etc., law and be exempt from the jurisdiction of the local Courts. The United Kingdom statute is the Visiting Forces (British Dominions) Act, 1933 (*h*). There have been no permanent United Kingdom forces in South Africa since 1921, or in Eire since 1938.

IV. THE EXECUTIVE.

The King.—The Imperial Conferences of 1926 and 1930 resolved respectively that the King should act on the direct advice of his Dominion ministers in relation to reserved Bills (*i*) and the appointment of the Governor-General (*infra*).

South Africa has enacted that the executive government in domestic and external affairs is vested in the King acting on the advice of Union ministers, and may be administered by the King personally or by the Governor-General as his representative. (Status of the Union Act, 1934, s. 4.)

Eire.—At the time of the abdication of Edward VIII, the Irish Free State passed the Constitution (Amendment No. 27) Act, 1936, which deleted from the Free State Constitution all references to the King and the Representative of the Crown, and vested the internal functions

(*g*) *Ante*, Chapter XX.
(*h*) Cf. the Allied Forces Act, 1940; *ante*, p. 517.
(*i*) *Post*, p. 590.

of the Governor-General in the Executive Council; and the Executive Authority (External Relations) Act, 1936, which vested the external prerogatives in the Executive Council. The new Constitution of Eire, which came into force in 1937, institutes a President as Head of the State, and merely permits the Government to employ the Crown (not specifically referred to) for certain purposes.

The Governor-General before 1926.—The Governor-General was formerly in the same position as the Governor of a self-governing Colony. He was not only the representative of the King, in which capacity he was supposed to act with as strict a regard to Ministerial advice as the latter would, but he was also a paid servant of the Crown holding office for a fixed period, liable to recall at any time, and bound by instructions from the Colonial Office. While the King is bound by convention to assent to Bills passed by both Houses of Parliament, the Governor could reserve his assent in order to ascertain the royal pleasure, *i.e.*, the views of the Imperial Government. The Governor-General was charged with a general duty to protect the interests of the mother country or the Empire as a whole if these interests should be imperilled by the policy of the Dominion to which he was accredited.

Hence, before 1926, Governors-General did not consider themselves to be rigidly bound to act in all cases on the advice of their Ministers. A resolution of the Imperial Conference of that year condemned this attitude, and stated that the Governor-General's position is simply that of a representative of the King. This resolution was provoked by the action of Lord Byng, which caused considerable controversy in Canada. The general election of 1925 left Mr. Mackenzie King in a minority, but he determined to retain office, relying on the support of the Progressive Party. This support, at first forthcoming, was later withheld. Mr. King, faced with the certainty of defeat, asked for a dissolution. This request was refused by Lord Byng, who thereupon invited Mr. Meighen, the leader of the largest single Party—the Conservatives—to form a Government. It is believed that Mr. Meighen had been promised Progressive assistance sufficient to keep him in power, and that but for this fact Lord Byng would have granted Mr. King a dissolution. This Progressive assistance was not, however, forthcoming. Mr. Meighen's Government lasted only for a week or so. He asked for a dissolution and obtained it.

Lord Byng, then, had refused a dissolution to the defeated Mr. King

and granted one to the defeated Mr. Meighen. His action was hotly resented by the Liberals on the ground of its apparent partiality. Partial it would certainly have been but for the unfulfilled promise of Progressive support to Mr. Meighen. In view of that promise, probably all Lord Byng thought he was doing was to follow a custom not unusual in the Dominions, namely, that of not granting a dissolution to a Party which is placed in a minority if any other Party or group can command a majority in the Chamber and is willing to take office (*k*). Some confusion has been caused by the mistaken impression that Lord Byng was in communication with the British Government (*l*).

Present Position of the Governor-General (*m*).—The statement of the Imperial Conference, 1926, referred to above, was as follows: "In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."

There are, however, certain respects in which the position of a Governor-General still differs from that of the King. His office is not hereditary or for life; he is appointed for a fixed term. He cannot, therefore, have that traditional experience which resides in the Royal Family. If he is a native of the Dominion concerned, as has been the case recently in Australia and South Africa, he may have been previously involved in local politics. Further, it is doubtful how far the more important prerogatives in foreign affairs have been, or could be, delegated to a Governor-General apart from statute, such as the Status of the Union Act, 1934, passed under the authority of the Statute of Westminster: as has been seen, it is the practice for political treaties and for most commercial treaties to be made in the name of the King on behalf of the Dominion or Dominions concerned, and the same presumably applies to declarations of war and peace (*n*).

(*k*) *The Round Table*, December, 1929.
(*l*) *The Times*, 3rd, 9th and 14th August, 1940.
(*m*) This section does not apply to Eire after 1936.
(*n*) Cf. Keith, *The Dominions as Sovereign States*, pp. 203, 205—206, 209—211.

Although the Governor-General acts on the exclusive advice of the Dominion Government, he retains certain personal discretions (*o*). He is the custodian of the Dominion constitution, and may still in a proper case refuse a dissolution. Thus Sir Patrick Duncan (Governor-General of South Africa) refused a dissolution to General Hertzog after his defeat on the neutrality issue in September, 1939, on the ground that it would be highly deleterious to the interests of the State (*p*). The Royal Instructions delegate to the Governor-General the prerogative of pardon, which is to be exercised on the advice of a Dominion Minister; but, except in the Instructions to the Governor-General of South Africa (1937) (*q*), he is enjoined to take into his own personal consideration the interests of the Empire or of any foreign country which may be directly affected by a pardon or reprieve.

It has been suggested that the Governor-General should now be relieved by statute from all legal responsibility for his official actions, and become a Viceroy in the full sense (*r*).

Appointment.—The Imperial Conference, 1930, resolved as follows: "1. The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned. 2. The constitutional practice that His Majesty acts *on the advice of responsible ministers* applies also in this instance. 3. The ministers who tender and are responsible for such advice are *His Majesty's ministers in the Dominion concerned.* 4. The ministers concerned tender their formal advice after informal consultations with His Majesty. 5. The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. . . ."

(*o*) For the "reserve power" generally, see Evatt, *The King and His Dominion Governors.*

(*p*) (1940), Journal of Comparative Legislation, 3rd Series, vol. XXII, Pt. 1, p. 210.

(*q*) *The Constitutions of all Countries*, vol. I, *The British Empire*, p. 186.

(*r*) Kennedy, *The Imperial Conferences, 1926—1930: The Statute of Westminster* (1932), Law Quarterly Review, 191, at p. 201. For the legal liability of Colonial Governors, see *ante*, p. 536. As to the immunities of the former Viceroy of Ireland, see *Tandy* v. *Earl of Westmoreland* (1800), 27 St. Tr. 1246; *Luby* v. *Lord Wodehouse* (1865), 17 Ir. C. L. R. 618, *Sullivan* v. *Spencer* (1872), Ir. R. 6 C. L. 173; cf. *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102; and as to the position of the Governor-General of India, the Governors of Indian Provinces and the Governor of Burma, see *post*, p. 679 and p. 689.

CHAPTER XLI.

DOMINION STATUS—II.

1. LEGISLATIVE POWER.

(1) Conventions.—Reservation.—The Imperial Conference, 1926, commented on the practice of the reservation of Dominion legislation in certain circumstances for the signification of His Majesty's pleasure, which was signified on the advice of the British Government (*a*). It recorded that "apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, *it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.*"

The Conference on the Operation of Dominion Legislation, 1929, considered the matter further (*b*). After distinguishing between the provisions for discretionary reservation (*c*) and obligatory reservation (*d*) contained in various statutes, the Report confirmed and applied the resolution of 1926. The power of reserving Dominion legislation had in fact been very rarely exercised.

As regards discretionary reservation, (i) it can only be exercised, if at all, in accordance with the constitutional practice of the Dominion concerned; (ii) the British Government will not advise the King to give the Governor-General any instructions to reserve; and (iii) the British Government will not give any advice to the King concerning a reserved Bill against the views of the Government of the Dominion concerned. The exclusive right of the Dominion Government to

(*a*) For the reservation of Colonial legislation, see *ante*, p. 551.

(*b*) O. D. L. Report, 1929, §§ 26—36.

(*c*) New Zealand Constitution Act, 1852, ss. 56 and 59; British North America Act, 1867, ss. 55 and 57; Commonwealth of Australia Constitution, ss. 58 and 60; South Africa Act, 1909, ss. 64 and 66; Constitution of the Irish Free State, Art. 41.

(*d*) New Zealand Constitution Act, 1852, s. 65; Commonwealth of Australia Constitution, s. 74; South Africa Act, 1909, ss. 64 and 106, and 7th Sched. § 25. As to the Colonial Courts of Admiralty Act, 1890, and the Merchant Shipping Act, 1894, see *post*, p. 601.

advise the King also applies where reservation is obligatory, including cases where constitutional amendments are required to be reserved.

Some Dominions have the power to abolish reservation by constitutional amendment, and the Irish Free State did so in 1933 and South Africa in 1934. Where a Dominion has no such power, the British Government will, if so requested by the Dominion concerned, ask Parliament to pass the necessary legislation.

Disallowance.—The Imperial Conference, 1926, called attention to the existence of the power of the Crown in certain cases to disallow Acts passed by Dominion Legislatures (*e*), the practice at that time being for the Secretary of State for the Dominions to intimate that "His Majesty will not be advised to exercise his powers of disallowance."

The Conference on the Operation of Dominion Legislation, 1929, considered the matter further (*f*). It pointed out that the power of disallowance had become statutory in so far as it was incorporated into the constitutions of four of the Dominions (*g*); but it had not been exercised in relation to New Zealand since 1867 or Canada since 1873, it had never been exercised in the case of Australia and South Africa, and so such power was contained in the Irish Free State constitution.

The Conference resolved that "*the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation.*" Those Dominions which have power to abolish disallowance by constitutional amendment may do so if they wish. It was abolished by the Status of the Union Act, 1934, from a date to be fixed by proclamation. Where a Dominion has no such power, the British Government will, if so requested by the Dominion concerned, ask Parliament to pass the necessary legislation.

Colonial Stock Acts.—An exception was admitted in the case of Dominion legislation which appears to the United Kingdom Government to prejudice the interests of holders of Dominion stocks on the list of trustee securities in the United Kingdom. The Colonial Stock Act, 1900, makes it a condition of the admission of Dominion stocks to the

(*e*) For disallowance of Colonial legislation, see *ante*, p. 551.

(*f*) O. D. L. Report, 1929, §§ 18—25.

(*g*) New Zealand Constitution Act, 1852, s. 53; British North America Act, 1867, s. 56; Commonwealth of Australia Constitution, s. 59; South Africa Act, 1909, s. 65. The Constitution of Newfoundland rested on Letters Patent of 1876 and 1905.

list of trustee securities that the Dominion Government shall formally agree that any such Dominion legislation would properly be disallowed. Since then, however, the Colonial Stock Act, 1934, has provided an alternative precaution, *viz.*, that (i) a Dominion Government should undertake that such legislation would not be submitted for the Royal Assent except after agreement with the United Kingdom Government, and should ensure the passing of suitable amendments if requested by the latter, and (ii) such undertaking should be confirmed by Dominion legislation. South Africa, in abolishing the power of disallowance in 1934, gave this undertaking and confirmed it by legislation.

Succession to the Throne and the Royal Style and Titles.—It has already been mentioned that the Royal style and titles were changed as the result of a recommendation made by the Imperial Conference, 1926 (Royal and Parliamentary Titles Act, 1927) (*h*), and that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles made after 1931 requires the assent of the *Parliaments* of all the Dominions as well as of the Parliament of the United Kingdom (*i*). The latter convention was formulated by the Conference on the Operation of Dominion Legislation, 1929 (*k*), and is recited in the preamble to the Statute of Westminster, 1931. The reason is that "the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and . . . they are united by a common allegiance to the Crown." Formal consent need not necessarily be obtained prior to the making of the alteration.

Extension of United Kingdom Legislation.—The Conference on the Operation of Dominion Legislation, 1929, considered the method of reconciling the existence of "the legal power" in the United Kingdom Parliament to legislate for the Dominions with "the established constitutional position" that such legislation would only be passed at the request and with the consent of the Dominion concerned. As the result of their recommendation (*l*), adopted with slight amendment by the Imperial Conference, 1930, the Statute of Westminster recites the convention in the preamble, and enacts it as law in section 4 (*infra*). The recital in the preamble is that "it is in accord with the

(*h*) *Ante*, p. 145.
(*i*) O. D. L. Report, 1929, § 60.
(*l*) O. D. L. Report, 1929, §§ 54 and 55.
(*k*) *Ante*, pp. 28, 38.

established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." The consent required is presumably that of the Government of the Dominion concerned The convention applies to all the Dominions, including those which have not adopted sections 2—6 of the Statute, except Newfoundland so long as its Dominion status is in suspense. It must not be taken to imply that the United Kingdom Parliament *will* necessarily pass any legislation which a Dominion requests (*m*).

Legislation affecting more than one Member of the Commonwealth.—The Imperial Conference, 1926, resolved that "the appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is *previous consultation* between His Majesty's Ministers in the several parts concerned."

Uniform Legislation.—Uniformity of legislation throughout the present Dominions as well as the rest of the Empire was formerly secured in certain matters through the medium of United Kingdom Acts of general application. The Imperial Conference, 1926, suggested that "in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of *reciprocal Statutes based upon consultation and agreement.*"

The Conference on the Operation of Dominion Legislation, 1929 (*n*), confirmed this recommendation with reference to the law of prize, fugitive offenders (*o*), foreign enlistment (*p*), and certain aspects of extradition (*q*). Special consideration was given to merchant shipping legislation (*r*) and Admiralty Courts (*s*). The restrictions on the power of Dominion legislation in these matters are mentioned below in connection with sections 5 and 6 of the Statute of Westminster. With regard to merchant shipping, a draft Agreement was recommended by the Imperial Conference, 1930, and agreed in the following year.

(*m*) It would pass constitutional amendments on request, though the matter is not free from difficulty in the case of federal constitutions.
(*n*) O. D. L. Report, 1929, § 80.
(*o*) See *ante*, p. 450.
(*p*) See *ante*, p. 449.
(*q*) See *ante*, p. 436
(*r*) O. D. L Report, 1929, §§ 83—96, 120—123.
(*s*) *Ibid.*, §§ 110—123.

Nationality.—The Conference on the Operation of Dominion Legislation, 1929, pointed out that the common status of all British subjects, which is the basis of their common allegiance to the Crown, had been given a statutory basis through the operation of the British Nationality and Status of Aliens Act, 1914 (*t*). In view of the new constitutional position of the Dominions, any change in the law of British nationality would require reciprocal action to obtain the same recognition, which is desirable to facilitate freedom of intercourse and the mutual granting of privileges among the different parts of the Commonwealth. Although common agreement would be necessary for such legislation, however, "this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth (*u*)

These principles were confirmed by the Imperial Conference, 1930 (*x*), which further resolved: "(2) That, if any changes are desired in the existing requirements for the common status, provision should be made for the maintenance of the common status, and the changes should only be introduced (in accordance with present practice) after consultation and agreement among the several members of the Commonwealth. (3) That it is for each member of the Commonwealth to define for itself its own nationals, but that so far as possible, those nationals should be persons possessing the common status, though it is recognised that local conditions or other special circumstances may from time to time necessitate divergences from this general principle (4) That the possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status by the law of every other part of the Commonwealth" (*y*).

The Imperial Conference, 1937, recommended that each Dominion should define its own nationals or citizens so as normally to include (a) persons born or naturalized in, and still resident in, its territory; and (b) persons who, coming as British subjects from other parts of the Commonwealth, have (in accordance with the conditions prescribed

(*t*) See *ante*, p. 424. (*u*) O. D. L Report, 1929, §§ 72–79.

(*x*) But as to the law of Eire, see *post*, p. 652

(*y*) Consideration was also given to the nationality of married women in view of the Hague Conference, 1930. For the British Nationality and Status of Aliens Act, 1933, see *ante*, p. 428.

by the Dominion concerned) identified themselves with the community to which they have come. It was further suggested that British subjects resident but not born in the Dominion should be regarded as nationals of that Dominion, with the right to opt out. No definite agreement was reached about married women, but it was suggested that legislation should be passed to provide that the nationality of married women should not necessarily be dependent on that of their husbands.

(2) The Statute of Westminster, 1931 (*z*).—The chief matters with regard to which legislation of the United Kingdom Parliament was required in order to reconcile the law with the conventional status of the Dominions were: (i) the operation of the Colonial Laws Validity Act, 1865, which nullified Dominion legislation repugnant to United Kingdom statute law, (ii) the doubtful rule that the Dominions could not pass legislation having extra-territorial effect, and (iii) the legally unfettered power of the United Kingdom Parliament to legislate for the Dominions. Attention was drawn to these matters by the Imperial Conference, 1926. They were fully considered by the Conference on the Operation of Dominion Legislation, 1929, whose resolutions were adopted by the Imperial Conference, 1930. They determine the contents of the most important sections of the Statute of Westminster, which was passed by the Imperial Parliament in 1931 on the recommendation of the Imperial Conference, 1930, after the communication of resolutions of the Parliaments of the six Dominions (*a*).

The Preamble recites (i) the fact that the Imperial Conferences of 1926 and 1930 concurred in making certain declarations and resolutions; (ii) the convention relating to the law touching the Succession to the Throne and the Royal Style and Titles (*supra*); (iii) the convention with regard to legislation by the United Kingdom Parliament for the Dominions (*supra*); (iv) that "it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be

(*z*) Many questions relating to the detailed application of the statute to the various Dominions are discussed in Wheare, *The Statute of Westminster and Dominion Status* (2nd ed.).

(*a*) These Reports have been referred to by the Judicial Committee; see Jennings, *The Statute of Westminster and Appeals to the Privy Council* (1936), 52 Law Quarterly Review, 173, at pp. 175—177.

made and enacted in due form by authority of the Parliament of the United Kingdom", and (v) the request and consent of each of the six Dominions to the passing of the statute.

Definitions.—The statute defines the expression "Dominion" as mentioned above (section 1) (*b*), and provides that, notwithstanding the Interpretation Act, 1889, the expression "Colony" shall not, in any subsequent Act of the United Kingdom Parliament, include a Dominion or any Province or State forming part of a Dominion. (Section 11.)

Repugnance of Dominion Legislation to United Kingdom Statutes.—Section 2 provides as follows.—

"(1) *The Colonial Laws Validity Act*, 1865, *shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion* (*c*).

"(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

Sub-section (2) was inserted in case the mere repeal of the Colonial Laws Validity Act as affecting the Dominions should leave them in the position in which they would have been at common law before 1865 (*d*). It applies only to Dominion legislation passed after the commencement of the statute, but any void Act previously passed could be given validity by re-enactment. It covers "any existing or future Act" of the United Kingdom Parliament, but it is doubtful whether it extends to the amendment or repeal of the statute itself. The provisions of the statute in so far as they affect South Africa, however, were enacted as part of the law of the Union by the Status of the Union Act, 1934; and if Australia, New Zealand or Newfoundland adopts sections 2—6 of the statute, it can revoke the adoption of any section (*infra*).

(*b*) *Ante*, p. 571.
(*c*) For the Colonial Laws Validity Act, 1865, see *ante*, pp. 545—547.
(*d*) O. D. L. Report, 1929, §§ 46—53.

Section 2 may be construed in a narrow sense as merely abolishing the doctrine of repugnancy to United Kingdom statute law and as conferring no additional legislative power; or it may be construed in a wide sense (subject, in the case of Canada and Australia, to sections 7—9) as conferring full sovereign powers on Dominion legislatures The wider sense has been adopted by South Africa in the Status of the Union Act, 1934, declaring that the Union is "a sovereign independent state" and amending the South Africa Act, 1909, accordingly: and it would give validity to the new Constitution of Eire which came into operation in 1937.

This section, perhaps aided by section 3 (*infra*), enabled the Irish Free State to abolish appeals by special leave from Free State Courts to the Privy Council (*e*), and enabled Canada to abolish appeals in criminal cases to the Privy Council from Canadian Courts, including such appeals by special leave (*f*), in terms which had been held before the passing of the statute to be ineffective (*g*).

Extra-territorial Operation of Dominion Legislation.—Section 3 states: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation" This sets at rest, so far as Dominion legislation is concerned, any doubts that may have existed as a result of the decision in *Macleod* v. *Attorney-General for New South Wales* (*h*) and *dicta* in other cases (*i*).

In practice, territorial limitations on the operation of legislation of all Legislatures are quite common, and arise from the express terms of statutes or from rules of construction applied by the Courts as to the presumed intention of the Legislature, regard being had to the comity of nations and other considerations. What this section was designed to get rid of was any *constitutional* limitations there may have been which placed Acts of Dominion Parliaments in a *different position in this respect from Acts of the Imperial* Parliament (*k*). It does not mean that a Dominion can alter the law of the United Kingdom or of other Dominions or of foreign countries, but that it can pass legislation, *e.g.*, in criminal matters, "which

(*e*) *Moore* v. *Att.-Gen. for the Irish Free State*, [1935] A. C. 484, cf. *Performing Right Society, Ltd.* v. *Bray U.D.C.*, [1930] A. C. 377; *post*, pp. 606 and 651.
(*f*) *British Coal Corporation* v. *The King*, [1935] A. C. 500; *post*, p. 607.
(*g*) *Nadan* v. *The King*, [1926] A. C 482; *ante*, p. 556.
(*h*) [1891] A. C. 455.
(*i*) See *ante*, pp. 547—550.
(*k*) O. D. L. Report, 1929, §§ 37—43.

attaches significance for courts within the jurisdiction to facts and events occurring outside the jurisdiction" (*l*).

This is one of the adoptive clauses so far as Australia and New Zealand are concerned (*infra*), and it may be noted that section 5 of the Emergency Powers (Defence) Act, 1939, provided that the provisions of any Defence Acts passed by the Australian and New Zealand Parliaments which purported to have extra-territorial effect (*inter alia*) as regards ships and aircraft registered in those Dominions, should be deemed to have such operation (*m*) This provision was inserted, in accordance with convention, at the request and with the consent of the Dominions concerned, but such request and consent did not have to be expressly declared in accordance with section 4 of the Statute of Westminster

Extension of United Kingdom Legislation to the Dominions.—Section 4 provides as follows:—"*No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.*"

The request and consent required is that of the *Government* of the Dominion concerned, except that in the case of Australia section 9 (3) requires also the request and consent of the Commonwealth Parliament This exception was made at the request of Australia, owing to the contingency (which has in fact occurred) that the Senate might not be in agreement with the Government

Section 4 supplements three conventions relating to United Kingdom legislation mentioned above, *viz.*—(i) legislation by one part of the Commonwealth affecting other parts shall be preceded by consultation between the Governments concerned (*n*); (ii) any alteration in the law touching the Succession to the Throne or the Royal Style and Titles requires the assent of the Parliaments of all the Dominions (*o*); and (iii) the United Kingdom Parliament will not legislate for a Dominion except at the request and with the consent of its Government (*p*). It only applies to subsequent Acts of the United Kingdom Parliament,

(*l*) Wheare, *op. cit.*, p 167.
(*m*) The adoption of s 3 of the statute by Australia in 1942, however, dates back to the commencement of the war with Germany
(*n*) *Ante*, p. 593.
(*o*) *Ante*, p. 592.
(*p*) *Ante*, p. 592

but previous Acts may be repealed or amended by a Dominion legislature under section 2.

The words "as part of the law of that Dominion" were substituted as better draftmanship for the words recommended by the Imperial Conference, 1930, "as part of the law in force in that Dominion." The latter expression had been inserted in 1930 to the clause drafted by the Conference on the Operation of Dominion Legislation, 1929, lest the clause should prevent a future United Kingdom statute from having the operation which the legislation of one State normally has in relation to the territory of another. On the other hand, the Imperial Conference, 1930, recorded that the insertion of such expression does not imply that the United Kingdom Parliament has a right to legislate in relation to a Dominion (otherwise than at its request and with its consent) in a manner which, if the legislation related to a foreign State, would be inconsistent with the principles of international comity

Legal Effect of Section 4.—It has been suggested that section 4 is merely a rule of construction, and not a limitation of the sovereign legislative powers of the United Kingdom Parliament, in that it directs the Courts that, unless an Act of Parliament expressly declares that a Dominion has requested and consented thereto, the Act shall not be deemed to extend to that Dominion as part of its law (*q*). The section, however, goes further than that in expressing the intention of the Legislature, for it says, "No Act . . . *shall extend*, or be deemed to extend . . ." Nevertheless, the strict legal position was stated by the Judicial Committee in *British Coal Corporation* v. *The King* in these words: "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s 4 of the statute. But that is theory and has no relation to realities" (*r*). This means that Parliament could—in the unlikely event of its wanting to do so—either repeal section 4, or pass legislation inconsistent with it by a clear expression of intention. Whether the Courts of a Dominion to which the section applied would enforce such a repealing Act, let alone a measure which was clearly inconsistent

(*q*) Wheare, *op. cit.*, pp. 151, 153.

(*r*) [1935] A. C. 500, at p. 520, *per* Lord Sankey, L.C.

with section 4, is another matter (*s*). Professor Kennedy warns us that "any attempt by the Parliament of the United Kingdom to legislate for Canada apart from a request from and with the consent of Canada would simply mean a declaration of independence" (*t*).

The first Imperial Act affecting a Dominion passed after the Statute of Westminster was the Newfoundland Act, 1933 (*u*). Convention required the request and consent of the Newfoundland Government, but section 4 of the Statute of Westminster did not apply as Newfoundland had not adopted it (*infra*). The Newfoundland Act recites that "an address has been presented to His Majesty by the Legislative Council and House of Assembly of Newfoundland in the terms set forth in the first schedule to this Act."

Reference has been made above to section 5 of the Emergency Powers (Defence) Act, 1936.

The Abdication Act, 1936.—The preamble to His Majesty's Declaration of Abdication Act, 1936, recites that "the Dominion of Canada, pursuant to the provisions of section 4 of the Statute of Westminster, 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto." The Act made an alteration in the law touching the Succession to the Throne (*x*), and could, with the necessary consents, be made to extend to the Dominions. Section 4 of the Statute of Westminster only applied to Canada, South Africa and the Irish Free State (*infra*). South Africa was in a special position owing to the Status of the Union Act, 1934, by which Union legislation was required to extend a law to the Union as part of the law of the Union (section 2), the Statute of Westminster was enacted as Union law (section 3), and the King was defined as determined by the laws relating to the succession of the Crown of the United Kingdom. (Section 5.) The Parliamentary institutions of Newfoundland were in suspense.

The procedure in connection with the passing of the Abdication Act, so far as the Dominions were concerned, was therefore briefly as follows:—(i) The Canadian Government by Order in Council agreed to the proposed legislation, and that it should extend as part

(*s*) Wheare, *op. cit.*, pp. 155—156, and see *ante*, pp. 22 and 26.
(*t*) (1932), 48 Law Quarterly Review, at p. 206.
(*u*) See *ante*, p. 571.
(*x*) *Ante*, pp. 144—145.

of the law of Canada (*y*), and undertook to recommend confirmation by the Dominion Parliament, which was not in session. The Dominion Parliament subsequently passed an Act assenting thereto. (ii) The Australian Government agreed to the proposed legislation, and that it should extend as part of the law of the Commonwealth, and the Commonwealth Parliament passed resolutions similar to and contemporaneous with the Act. (iii) The New Zealand Government agreed to the proposed legislation, and that it should extend as part of the law of New Zealand, and undertook to recommend confirmation by the New Zealand Parliament, which was not in session. The New Zealand Parliament subsequently assented to the Act. (iv) The South African Government agreed that an alteration of the law was necessary in order to exclude the heirs of Edward VIII from the Throne, and agreed to its being made; but it did not think legislation was necessary to give effect to the abdication, and it did not wish the United Kingdom Act to extend as part of the law of the Union. The Union Parliament was not then in session, but it subsequently passed an Act assenting to the alteration and making the necessary changes in Union law, which it dated back to the signature of the Instrument of Abdication (December 10th), one day earlier than the United Kingdom Act. (v) The Irish Free State Government did not assent to, or dissent from, the proposed legislation, nor did it agree to its extension as Free State law. One day later (December 12th) the Oireachtas passed an Act making corresponding changes in the law of the succession as affecting the Free State. (vi) Owing to the suspension of its Parliamentary institutions, it was not practicable to observe the conventions as regards Newfoundland (*z*)

Merchant Shipping Legislation and Admiralty Courts.—The Conference on the Operation of Dominion Legislation, 1929 (*a*), drew attention to two matters on which specific legislation by the United Kingdom Parliament, in addition to the repeal of the Colonial Laws Validity

(*y*) Professor W. P. M. Kennedy suggests that it was not necessary *to recite* the request and consent of Canada, as laws touching the Succession to the Throne are entirely covered by § 2 of the Preamble to the Statute of Westminster (*University of Toronto Law Journal* (1937), vol. II, No. 1, pp. 117—119); but it is submitted that § 3 of the Preamble and s. 4 of the statute may also be relevant to the same case.

(*z*) For a fuller discussion of the application of the law and conventions to the Abdication Act, see R. T. E. Latham, in *Survey of British Commonwealth Affairs*, vol. I, pp. 616—630; and the articles by Professor K. H. Bailey in *Politica*, March and June, 1938.

(*a*) O D L. Report, 1929, §§ 83—123.

Act and the declaration with regard to extra-territorial legislation, was desirable in order to put Dominion legislatures on an equal footing with that Parliament.

Merchant Shipping Legislation.—Although it had been the practice since 1911 for United Kingdom Acts relating to merchant shipping and navigation to be so framed as not to extend to the Dominions, the law on this topic in the Dominions was still subject to the Merchant Shipping Act, 1894, which was mainly a re-enactment of the Act of 1854. Sections 735 and 736 of the Merchant Shipping Act, 1894, provided in effect that Bills passed by the Legislature of a British possession relating to ships registered in that possession, or regulating the coasting trade of that possession, should be reserved for the Royal pleasure. Following the recommendation of the Imperial Conference 1930, section 5 of the Statute of Westminster provides that, without prejudice to the generality of the foregoing provisions of the statute, sections 735 and 736 of the Merchant Shipping Act, 1894, "shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion." Instead of the Dominions severally repealing these sections under the power conferred by section 2 of the statute and enacting special laws under the authority of sections 2 and 3, the way was clear for contemporaneous and, subject to local conditions, uniform arrangements to be made to implement the draft British Commonwealth Merchant Shipping Agreement prepared by the Conference of 1930.

Admiralty Courts.—The Colonial Courts of Admiralty Act, 1890, abolished the former Vice-Admiralty Courts and constituted Colonial Courts in the various Colonies (*b*), with a jurisdiction equivalent to the Admiralty jurisdiction of the English High Court as it stood in 1890 (*c*) Sections 4 and 7 of the Act provided in effect that any Bill passed by a Colonial Legislature altering the jurisdiction, practice or procedure in such Courts, should be reserved for the Royal pleasure. Following the recommendation of the Imperial Conference, 1930, s. 6 of the Statute of Westminster provides that, without prejudice to the generality of the foregoing provisions of the Statute, section 4 of the Colonial Courts of Admiralty Act, 1890, and so much of section 7 of

(*b*) Ireland was not a Colony, but was subject to the Courts of Admiralty (Ireland) Act, 1867.

(*c*) *The Yuri Maru*, [1927] A. C. 906.

that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, "shall cease to have effect in any Dominion as from the commencement of this Act."

The Application of Sections 2—6.—Australia was not particularly keen on the passing of the Statute of Westminster, while New Zealand would probably have preferred it not to be passed The Imperial Conference, 1930, proposed the insertion of a clause whereby no provision of the Act should extend to New Zealand as part of the law of that Dominion unless that provision was adopted by the New Zealand Parliament. Australia subsequently asked for similar treatment, subject to the adopting Parliament being free to revoke the adoption of any provision (*d*).

These proposals, limited to the adoption of clauses 2—6, were then agreed by New Zealand and Newfoundland, with the result that clause 10 of the statute provides as follows "(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of that Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act. (2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section. (3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland."

Australia adopted sections 2—6 in 1942 by an Act (*e*) described as "An Act to remove doubts as to the validity of certain Commonwealth Legislation, to obviate delays occurring in its passage, and to effect certain related purposes, by adopting certain sections of the Statute of Westminster, 1931, as from the commencement of the war between His Majesty the King and Germany."

Newfoundland is not in a position to adopt these sections so long as her Parliamentary institutions are in suspense.

(*d*) Keith, *Speeches and Documents on the British Dominions, 1918—1931*, pp 271—272
(*e*) Statute of Westminster Adoption Act (No. 56 of 1942)

Saving for certain Dominion Constitutions.—*Canada.*—Canada is the only Dominion which has no power to amend its Constitution Act. This limitation is to be accounted for partly by the relatively early date of the British North America Act, 1867, and partly by the federal nature of its Constitution When the Conference on the Operation of Dominion Legislation reported in 1929 the Provinces had not been consulted about the proposed Imperial Act, and the Report of the Imperial Conference, 1930, shows that certain of the Provinces protested against the proposed legislation, *i.e.*, in particular, section 2, until they had had an opportunity to determine whether their rights would be adversely affected

The saving clause relating to legislation by the Dominion Parliament (section 7) eventually took the following form. "(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder. . . . (3) The powers conferred by this Act upon the Parliament of Canada shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada . " (*f*)

If Canada wishes for constitutional amendments or to have constituent power it is free, subject to consultation with the Provinces, to ask the Imperial Parliament to pass the necessary legislation, which the Imperial Parliament would by convention be bound to do.

Australia.—The Commonwealth of Australia Constitution Act, 1900, is necessary for the maintenance of the federation. Sections 1—8 can only be repealed or altered by Imperial Act. Section 9, which contains the Constitution, can be repealed or altered by the Commonwealth Parliament, but only after a referendum. This position is preserved by sections 8 and 9 (1) of the Statute of Westminster, which provide as follows: "8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia . . . otherwise than in accordance with the law existing before the commencement of this Act. 9 (1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the

(*f*) The passages omitted relate to legislation by the Provinces, see further, *post*, Chapter XLII.

authority of the Parliament or Government of the Commonwealth of Australia" (*g*).

New Zealand.—"The Constitution of New Zealand," said the Conference on the Operation of Dominion Legislation, 1929 (*h*) "is to a very considerable extent alterable by the Parliament of New Zealand; but the powers of alteration conferred by the Constitution are subject to certain qualifications, and it is apparently a matter of doubt whether these qualifications have been removed by section 5 of the Colonial Laws Validity Act" (*i*). As in the case of Canada and Australia, it is for New Zealand to make representations to the Imperial Parliament if it wishes for any further constituent power. Section 8 of the Statute of Westminster therefore provides that. "Nothing in this Act shall be deemed to confer any power to repeal or alter . . . the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act" (*j*).

II. APPEALS TO THE JUDICIAL COMMITTEE.

Appeals without Special Leave.—It has already been mentioned that appeal to the Judicial Committee of the Privy Council often lies in civil cases from the superior Courts of Colonies "as of right," *i.e.*, subject to regulations of the local Legislature or Orders in Council requiring either that the matter in issue should exceed a certain value or that the leave of the Court appealed from should be obtained (*k*). In so far as there is constituent power, such appeals can be abolished by the local Legislature.

Appeal lies without the special leave of the Judicial Committee from the Court of Appeal of New Zealand, in some cases directly from the Supreme Court of New Zealand with the leave of that Court, and from the Supreme Court of Newfoundland (*l*).

Appeals with Special Leave.—When the Statute of Westminster was passed, appeal lay to the Judicial Committee with the special leave

(*g*) See further, Chapter XLII.
(*h*) O D L. Report, 1929, § 65.
(*i*) Cf. *post*, p. 636.
(*j*) S. 8, of course, is not required until New Zealand adopts s. 2.
(*k*) *Ante*, p. 555.
(*l*) Appeal also lies without the special leave of the Judicial Committee from the superior Courts of the Canadian Provinces, and (in relation to their State jurisdiction) from the Supreme Courts of the Australian States; *post*, Chapter XLII.

of the Committee (*m*) from all the Dominions. Appeal by special leave from the Supreme Court of Canada had been expressly preserved by the Canadian Act of 1875 which established that Court; from the High Court of Australia by section 74 of the Constitution of the Commonwealth of Australia (but not on any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court certifies that the question is one which ought to be determined by the Privy Council); from the Supreme Court of South Africa by section 106 of the South Africa Act, 1909, and from the Supreme Court of the Irish Free State by Art. 66 of the Irish Free State Constitution. Australia and South Africa, however, by the sections quoted, may limit the matters in respect of which special leave may be asked, subject to the reservation of such Bills for His Majesty's pleasure.

Subject as above in the case of Australia and South Africa the Dominions in 1931 could not restrict or abolish the right of appeal to the Privy Council by special leave (i) by reason of the Colonial Laws Validity Act, 1865, because the jurisdiction of the Judicial Committee rested on Imperial legislation, *i.e.*, the Judicial Committee Acts, 1833 and 1844, and (apparently) (ii) because they could not legislate with extra-territorial effect (*Nadan* v *The King* (*n*).) In the case of the Irish Free State, the right of appeal by special leave was held to be implicit in the Anglo-Irish Treaty, which had been given statutory effect by the United Kingdom Parliament. (*Performing Right Society, Ltd* v *Bray Urban District Council* (*o*).)

The question of appeals to the Judicial Committee was discussed by the Imperial Conference, 1926, but no proposal was made beyond recording the understanding that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion."

(*m*) See *ante*, p. 556.
(*n*) [1926] A. C. 482, *ante*, p. 556.
(*o*) [1930] A. C. 377; *cf. post*, p. 649.

Effect of the Statute of Westminster, 1931.—The Imperial Conference, 1930, did not agree on any solution to the question of appeals to the Privy Council, and it seems fairly clear that the proposed Statute of Westminster was not intended to affect them. The Judicial Committee has, however, held that sections 2 and 3 of the Statute enable Dominions to which those sections apply to abolish appeals to the Privy Council by special leave (*p*).

In *British Coal Corporation* v. *The King* (*q*) the Judicial Committee upheld on this ground the validity of an amendment to the Criminal Code made by the Dominion Parliament in 1933 abolishing appeals in criminal cases from any Court in Canada (*r*) "to any Court of Appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard." Criminal law and procedure is within the powers of the Dominion Parliament by section 91 of the British North America Act, 1867 (whose operation was saved by the Statute of Westminster), and appeals to the Privy Council—even appeals by special leave—are part of the administration of justice in Canada, power to control which is an essential ingredient of self-government (*s*).

It is doubtful whether, in spite of the Statute of Westminster, the British North America Act allows the Dominion Parliament to abolish appeals to the Privy Council from Canadian Courts in civil cases, a question which was expressly left untouched by the Judicial Committee in *British Coal Corporation* v. *The King*. The majority of the Supreme Court found on a reference in 1940 that the Dominion has this power, but it has been intimated that the matter will not be referred to the Judicial Committee until after the war (*t*).

In *Moore* v. *Att.-Gen. for the Irish Free State* (*u*) the Judicial Committee similarly upheld the validity of the Constitution (Amendment No. 22) Act, 1933, repealing the proviso to Art 66 of the Irish Free State Constitution relating to appeals by special leave.

(*p*) Provided they have the necessary constituent power. In Australia it would require a referendum. The position in Canada as regards appeals in civil cases is doubtful (*infra*).

(*q*) [1935] A. C. 500.

(*r*) Including Provincial Courts.

(*s*) Cf. Jennings, *The Statute of Westminster and Appeals to the Privy Council* (1936), 52 Law Quarterly Review, pp. 173—183.

(*t*) *Reference as to Legislative Competence of Parliament of Canada to enact "An Act to amend the Supreme Court Act."* [1940] S. C. R. 49; cf. Keith in (1940) Journal of Comparative Legislation, 3rd Ser., vol. XXII, Pt. I, pp. 218—219.

(*u*) [1935] A. C. 484.

It was widely thought that this Act was repugnant to the Anglo-Irish Treaty, which the Oireachtas had no power to alter. But the Judicial Committee held that, whatever moral obligations might be imposed by the Treaty (*x*), the binding force of the Treaty and of the Constitution Act rested in law solely on United Kingdom legislation (the Irish Free State (Agreement) Act, 1922) (*y*), which the Statute of Westminster enabled the Oireachtas to repeal (*z*).

(*x*) The "Treaty" was not binding by International Law; see *ante*, p. 583

(*y*) Neither the official, nor the extreme republican, view in the Irish Free State considered that the Treaty or the Constitution Act owed their existence to United Kingdom legislation; see *post*, p. 649.

(*z*) For the attitude of the Judicial Committee towards hearing appeals from the Dominions, see *Hull* v. *M'Kenna*, [1926] I. R. 402, *per* Lord Haldane; *British Coal Corporation* v. *The King*, [1935] A. C. 500, *per* Lord Sankey, L.C.

CHAPTER XLII.

CANADA AND AUSTRALIA.

I. THE DOMINION OF CANADA.

The Federation.—The Dominion of Canada was created by the British North America Act, 1867, which was based on resolutions of conferences of representatives of the British North American Colonies held in Quebec in 1864 and in London in 1866. The federation originally comprised the Provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*. *British Columbia* joined the federation in 1871, and *Prince Edward Island* joined in 1873. The above Provinces were previously self-governing Colonies. The Provinces of *Manitoba* (1870), *Saskatchewan* (1905) and *Alberta* (1905) were created by the Dominion under the provisions of the Act, out of territories formerly administered by the Hudson's Bay Company. The Yukon and the North West Territories (Mackenzie) are administered directly by the Dominion Government at Ottawa, the federal capital. The British North America Act, 1867, has been amended from time to time by the United Kingdom Parliament, notably by a series of British North America Acts, of which the last is that of 1940.

The Provinces enjoy internal self-government and autonomy. Their constitutional, as opposed to international, status, is (subject to the federal distribution of legislative and executive powers) similar to that of the Dominions, though they are not invited to attend Imperial Conferences (*a*).

Structure of the Dominion Constitution.—*The Executive.*—The Governor-General is appointed by the Crown on the advice of the Dominion Government. The executive Council is called the Privy Council of Canada. The Cabinet is selected, in the same way as the British Cabinet, from members of the Privy Council. Responsible government rests on convention.

(*a*) See Evatt, *The King and his Dominion Governors*, ch. 22.

The Legislature.—The Dominion Parliament consists of the King, represented by the Governor-General (*b*); the Senate, nominated for life by the Governor-General; and the House of Commons representing all the Provinces and the Yukon, in proportion to their populations. Adjustments are made in the representation in the House of Commons every ten years, Quebec (sixty-five members) being taken as the standard. The maximum life of a Parliament is five years Financial measures may only be initiated in the House of Commons, but the Senate may amend or reject a money bill. There is no procedure for resolving a deadlock between the two Houses, but from four to eight additional senators may be appointed (*c*). The Dominion Parliament has the same privileges as the United Kingdom House of Commons (Parliament of Canada Act, 1875.) Since the Statute of Westminster, 1931, it has been free from the limitations on legislative power to which Colonial Legislatures are subject.

Courts and Appeals.—The Supreme Court hears disputes between the federal and provincial legislatures, and appeals in all kinds of matters from the Provincial Courts. It also has an advisory jurisdiction which is frequently called into use. Appeal lies from the Supreme Court to the Judicial Committee, except in criminal cases. (Cf *infra*.) There is also an Exchequer Court, from which appeal lies to the Supreme Court.

Structure of the Provincial Constitutions.—*Executive.*—Each Province has a Lieutenant-Governor and an Executive Council, and enjoys responsible government. The Lieutenant-Governors are appointed by the Governor-General in Council on the advice of the Dominion Government. They normally hold office for five years, but may be removed "for cause assigned," *e.g.*, if they abuse their office for political ends; but in practice they act generally in the same way as a constitutional sovereign, and their position is very similar to that of the Governors of the Australian States who are appointed directly by the Crown (*d*). A Lieutenant-Governor is as much the representative of the King for all purposes of provincial government as the Governor-General is for all purposes of Dominion Government (*e*).

(*b*) King George VI personally signified his assent to several Bills on his visit to Canada a few years ago.

(*c*) One or two senators for each of the four groups: (i) Ontario, (ii) Quebec, (iii) the Maritime Provinces (New Brunswick, Nova Scotia and Prince Edward Island), (iv) the Western Provinces (Manitoba, Alberta, Saskatchewan and British Columbia).

(*d*) Keith, *The Dominions as Sovereign States*, p. 433.

(*e*) *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437.

Legislatures.—Each Province has an elected Legislative Assembly. Quebec has also a Legislative Council, appointed for life by the Lieutenant-Governor (*f*). The provincial Legislatures may confer on themselves the privileges of the United Kingdom House of Commons (*g*). The Lieutenant-Governor may reserve Bills for the Royal pleasure signified by the Governor-General, and the Governor-General may disallow provincial Acts (*h*). Disallowance by the Governor-General is effected on the advice of the (Canadian) Privy Council acting on the report of the Minister of Justice. It has been resorted to where provincial Acts were wholly or partly unconstitutional, contrary to Imperial or Dominion policy, or unjust and improper. If such Acts are of doubtful validity the usual course is to invite the provincial Legislature to amend them, or to leave their constitutionality to be determined by the Courts; but reservation and disallowance were used in relation to certain measures of the Alberta Legislature which sought to introduce a system of social credit in 1937 (*i*).

Disallowance by the Governor-General of provincial legislation is one example of the subordination of the Provinces to the Dominion. The Provinces, unlike the Australian States, did not strictly have the *status of Colonies within the meaning of the Interpretation Act*, 1889 (*j*), and there is not generally direct communication between the Provinces and the United Kingdom (*k*). The provincial Legislatures were subject to the Colonial Laws Validity Act, 1865, but the Statute of Westminster, 1931, s. 7 (2), provides that section 2 of the Statute "shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces" (*l*).

Courts and Appeals.—Each Province has its own system of Courts, most of the Judges being appointed by the Governor-General. Appeal from the highest Court of the Province in civil and criminal cases lies to the Supreme Court of Canada, and thence, except in criminal cases, to the Judicial Committee if special leave is given. There is

(*f*) Legislative Councils formerly existed in Manitoba, New Brunswick, Prince Edward Island and Nova Scotia.
(*g*) *Fielding* v. *Thomas*, [1896] A. C. 600.
(*h*) British North America Act, 1867, s. 90.
(*i*) The invalidity of the reserved Bank Taxation Act was upheld by the Judicial Committee in *Att.-Gen. for Alberta* v. *Att.-Gen for Canada*, [1939] A. C. 117.
(*j*) *In re Maryon-Wilson's Estate*, [1911] 2 Ch 58; cf. Statute of Westminster, 1931, s. 11, *ante*, p. 591.
(*k*) Ontario and British Columbia now have Agents-General in London.
(*l*) For s. 2 of the Statute of Westminster, see *ante*, p. 596.

also, except in criminal cases, a right of appeal from the Provinces direct to the Judicial Committee (*m*).

Constitutional Amendment.—*The Federal Constitution.*—The British North America Act, 1867, and subsequent Acts give no power to the Dominion Parliament to alter the constitution. This can only be done by the United Kingdom Parliament. Section 7 (1) of the Statute of Westminster, 1931, provides that "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder" (*n*). The British North America Acts are amended from time to time by Imperial legislation, though both convention and section 4 of the Statute of Westminster require that this shall only be done at the request and with the consent of the Dominion. There is also a convention that the United Kingdom Parliament *will* pass such legislation if requested to do so by the Dominion, though it appears to be the usage that where provincial rights are affected the assent of all the provincial governments shall previously be obtained by the Dominion (*o*). In the same way the Dominion could ask the Imperial Parliament to confer upon it constituent power, but so far no satisfactory method of local amendment with the assent of the Provinces has been devised.

Provincial Constitutions.—A provincial Legislature has exclusive power to amend from time to time the Constitution of the Province, except as regards the office of Lieutenant-Governor. (British North America Act, 1867, s. 92) The introduction of the initiative and referendum in Alberta may be taken as an example (*p*).

Distribution of Legislative Powers.—The constitution of Canada differs from the earlier constitution of the United States of America and from the later constitution of the Commonwealth of Australia in assigning particular legislative powers to the individual members

(*m*) Wheeler, *Confederation Law of Canada*, p. 396, *cf. ante*, p. 607.

(*n*) There appears, however, to be nothing to prevent the Dominion Parliament from repealing or amending British North America Acts passed after the Statute of Westminster, *e.g.*, the Act of 1940.

(*o*) *Quære*, whether the Imperial Parliament is concerned to see that the Provinces have assented, or even that they have been consulted. The Provinces assented to the passing of the Statute of Westminster.

(*p*) See *R.* v *Nat Bell Liquors, Ltd.*, [1922] A. C. 128, where it was held that "exclusive power" in s 92 meant exclusive of the Dominion Parliament.

and vesting the residue of legislative powers in the federation (*q*). The object was to obtain unity as protection against the United States, without the danger of secession which the American civil war revealed; while preserving a minimum of local rights, especially in Quebec. For this purpose, the most important sections of the British North America Act, 1867, are sections 91 and 92, though sections 93, 94, 95 and 132 should also be noticed. The Statute of Westminster, 1931, s. 7 (3) provides that "The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters *within the competence* of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

Powers of the Dominion Parliament.—Section 91 of the British North America Act, 1867, authorises the Dominion Parliament to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures; and for greater certainty, but not so as to restrict the generality of the foregoing, it is declared that (notwithstanding anything in the Act, in particular, section 92) the *exclusive* legislative authority of the Dominion Parliament extends to all matters coming within twenty-nine enumerated classes of subjects, which include: the regulation of trade and commerce; the raising of money by any mode of taxation; the armed forces and defence; navigation and shipping; sea coast and inland fisheries; currency and coinage; banking and the incorporation of banks; bankruptcy and insolvency; naturalization and aliens; marriage and divorce; the criminal law, except the constitution of Courts of criminal jurisdiction, but including criminal procedure; and such classes of subjects as are expressly excepted in the enumeration (in section 92) of the classes of subjects assigned exclusively to the provincial Legislatures. The section concludes by stating that any matter coming within any of the classes of subjects enumerated therein shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration (in section 92) of the classes of subjects assigned exclusively to the provincial Legislatures.

Section 94 states that the Dominion Parliament may make provision for the uniformity of the laws of property and civil rights and judicial

(*q*) For the contrast with the Australian Constitution, see *post*, p. 632.

procedure in Ontario, Nova Scotia and New Brunswick; but such legislation shall not have effect in any Province unless and until it is adopted and enacted by the Legislature thereof.

Section 95 gives the Dominion Parliament and the provincial Legislatures *concurrent* legislative power in relation to agriculture and immigration, but where Dominion and provincial legislation conflict the former is to prevail.

Section 132 gives to the Parliament and Government of Canada all necessary powers for performing the obligations of Canada or of any Province, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

Exclusive Powers of Provincial Legislatures.—Section 92 gives *exclusive* power to each provincial Legislature to make laws in relation to matters coming within sixteen enumerated classes of subjects, which include, the amendment of the Constitution of the Province, except as regards the office of Lieutenant-Governor, direct taxation within the Province in order to the raising of a revenue for provincial purposes; the appointment and payment of provincial officers; municipal institutions in the Province; shop, etc., licences in order to the raising of a revenue for provincial, local, or municipal purposes; local works and undertakings other than (a) inter-provincial or extra-provincial transport and communications, (b) shipping lines to any British or foreign country, and (c) internal works declared by the Dominion Parliament to be for the general advantage of Canada or for the advantage of two or more Provinces, the incorporation of companies with provincial objects, the solemnisation of marriage in the Province; property and civil rights in the Province, the administration of justice in the Province, including the constitution of provincial Courts and including civil procedure; and generally all matters of a merely local or private nature in the Province.

Section 93 gives *exclusive* power to each provincial Legislature to make laws in relation to education, subject to certain safeguards in respect of the religion and language of minorities.

Interpretation of the Federal Constitution.—It has been said that the Canadian Constitution is not truly federal because, unlike the United States and Australian Constitutions, the existing units do not retain their powers subject only to those which are assigned to the

federation (*r*); but there may be more than one kind of federation, and the better opinion is that the Canadian Constitution is of the federal type. The Imperial Parliament, after withdrawing all powers to itself, distributed all powers of government and legislation between the Dominion and the Provinces, neither of which alone (*s*) can alter the distribution, and made provision for the exercise of the residue (*t*).

The Constitution, and in particular sections 91 and 92, has on many occasions been the subject of interpretation by the Judicial Committee on appeal from the Supreme Court of Canada and from the Supreme Courts or Courts of Appeal of the Provinces (*u*). The British North America Act must be interpreted as an Act of Parliament from its own language, and without reading into it implications derived from the interpretation of the American Constitution or general theories about federal constitutions. (*Bank of Toronto* v *Lambe* (1887) (*v*).) There is, for example, no *implied* immunity of federal instrumentalities to provide against the possibility of their functions being interfered with, and therefore a Province can impose a direct tax for provincial purposes on banks although banking and the incorporation of banks are within the federal power. Similarly, the Provinces may tax federal officers (*x*). On the other hand, the exercise of such power would be invalid if it *in fact* interfered with the functions of a governmental agency (*y*).

The federal and provincial powers together cover all matters necessary for the self-government of Canada (*z*) The British North America Act will be liberally interpreted as an organic constituent Act, and that construction will be adopted which gives the widest possible powers to the Dominion and the Provinces in their respective

(*r*) *Att.-Gen. for the Commonwealth* v *Colonial Sugar Refining Co.*, [1914] A. C. 237, *per* Lord Haldane at p. 252.

(*s*) At present the Dominions and Provinces together cannot alter the distribution; *ante*, p. 612.

(*t*) *Att.-Gen. for Ontario* v *Att.-Gen for Canada*, [1912] A. C. 571

(*u*) The trend of the Judicial Committee's decisions is strongly criticised by Professor Kennedy as unduly restricting the Dominion Parliament in favour of the provincial Legislatures: *The Interpretation of the British North America Act* (1943), 8 Cambridge Law Journal, pp. 146—160. Cf. Keith, *The Dominions as Sovereign States*, pp. 479 *et seq.*, Jennings, *Constitutional Interpretation—the Experience of Canada* (1937), 51 Harvard Law Review, 1, Tuck, *Canada and the Judicial Committee of the Privy Council* (1941), 4 University of Toronto Law Journal, p. 33

(*v*) 12 App. Cas. 575; and see *post*, p. 617.

(*x*) *Forbes* v. *Att.-Gen for Manitoba*, [1937] A. C. 260.

(*y*) *Caron* v. *The King*, [1924] A. C. 999

(*z*) *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1912] A. C. 571; *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario*, [1937] A. C. 326.

spheres (*a*); but this liberal interpretation does not apply where the question in issue is the distribution of powers between the Dominion and the Provinces. "While the ship of State," said Lord Atkin in one case (*b*), "now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."

The enumerated powers under sections 91 and 92 are mutually exclusive. The two sections must be read together. In many cases they appear to overlap, but that is because the same matter may be dealt with for different purposes. Subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91 (*c*). When the question is which legislative authority has the power to pass an Act, the first thing to do is to see whether the subject falls under section 92. If it does, the next question is whether it also falls under an enumerated head in section 91; if so, the Dominion has the paramount legislative power; if not, then (save in exceptional circumstances mentioned below) the Province has exclusive power. If the subject does not fall within section 92, the Dominion has exclusive power (*Citizens' Insurance Co. of Canada* v. *Parsons* (*d*); *Russell* v. *The Queen* (*e*); *Toronto Electric Commissioners* v. *Snider* (*f*).) It is now established that the concluding words of section 91 refer to all the sixteen heads of section 92, and not only to No. 16 (*g*).

While the residuary powers of the federal Parliament under section 91 relate to matters of common interest to Canada, the exclusive powers of the Provinces under section 92 are all expressly limited to local matters. One of the commonest apparent conflicts has been that between the trade and commerce and criminal law powers, together with the general power to legislate for the peace, order and good government of Canada on the one hand, and the provincial power

(*a*) *Edwards* v. *Att.-Gen. for Canada*, [1930] A. C. 124, at p. 136; *British Coal Corporation* v. *The King*, [1935] A. C. 500, at pp 518—519.
(*b*) *Att.-Gen. for Canada* v *Att.-Gen. for Ontario*, [1937] A. C. 326.
(*c*) *Citizens' Insurance Co of Canada* v. *Parsons* (1881), 7 App. Cas. 96, *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Att.-Gen. for Canada* v. *Attorney-General for Ontario, Quebec and Nova Scotia*, [1898] A. C. 700.
(*d*) *Supra.* (*e*) *Supra.*
(*f*) [1925] A. C. 396.
(*g*) *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330; *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia*, [1930] A. C. 111, 118; cf *L'Union St. Jacques* v. *Bélisle* (1874), L R 6 P. C. 31, *Citizens' Insurance Co. of Canada* v. *Parsons*, *supra.*

relating to property and civil rights in the Province on the other. (*E.g.*, *Russell* v. *The Queen* (*h*), Dominion legislation restricting the liquor traffic in Canada; explained and followed in *Hodge* v. *The Queen* (*i*), where it was held that Ontario could license the sale of liquor in the Province.) The expression "civil rights" in section 92 is to be taken in a wide sense as including, *e.g.*, contract, and not merely status (*k*). The federal power relating to navigation has come up against provincial property rights. (*Montreal Corporation* v. *Montreal Harbour Commissioners* (*l*).) Other occasions for dispute lie between the provincial franchise and naturalization; between the solemnisation of marriage in the Province and the law of marriage; and between the administration of justice in the Province, the constitution of civil and criminal Courts and civil procedure on the one hand and the federal power over criminal law and criminal procedure.

Where the same matter may be dealt with for different purposes, one has to consider what is the "pith and substance" or the "true nature and character" of the legislation in question. (*Russell* v. *The Queen, supra*; *Hodge* v. *The Queen, supra*; *Tennant* v. *Union Bank* (*m*).) Thus a certain tax imposed by a Province on banks was held invalid, although it was introduced under the guise of raising a provincial revenue (*n*); but a provincial Act which appeared to deal with the federal subject of bankruptcy and insolvency was held good as in pith and substance it related to municipal institutions in the Province (*o*). The federal Parliament cannot do indirectly, *e.g.*, by licensing, what it cannot do directly (*p*).

As has been said, the Dominion Parliament can trench upon the powers of the Provinces under section 92 in the exercise of the enumerated powers in section 91, but not in the exercise of its general power to legislate for the peace, order and good government of Canada. (*Toronto Electric Commissioners* v. *Snider* (*q*).) In very exceptional

(*h*) (1882), 7 App. Cas. 829.
(*i*) (1883), 4 App. Cas. 117.
(*k*) *Citizens' Insurance Co. of Canada* v. *Parsons* (1881), 7 App. Cas. 96.
(*l*) [1926] A. C. 299.
(*m*) [1894] A. C. 31
(*n*) *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*, [1939] A. C. 117; cf. *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.
(*o*) *Ladore* v. *Bennett*, [1939] A. C. 468; cf. *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*, [1943] A. C. 356.
(*p*) *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia*, [1930] A. C. 111 (fisheries); *Att.-Gen. for Quebec* v. *Att.-Gen. for Canada*, [1932] A. C. 41 (insurance).
(*q*) [1925] A. C. 396 (investigation of industrial disputes).

circumstances the general federal power may override provincial powers; thus it was held in *Fort Frances Power and Pulp Co.* v. *Manitoba Free Press* (*r*) that conditions created by the late war justified the Dominion in regulating the cost of newsprint in the national interest despite the interference with property and civil rights. The limits of this exception are narrow, and Dominion legislation has been held invalid as "trenching upon" the powers of the Provinces, especially in relation to property and civil rights, as regards such matters as price control, combines, marketing, social insurance (*s*), trade marks, company law and industrial disputes. A large part of the Canadian "New Deal" was invalid for this reason (*t*).

Dominion legislation may include provisions necessarily ancillary to laws enacted under its enumerated powers, even though such ancillary matters would otherwise fall within the provincial sphere (*u*). In such cases provincial legislation remains valid so long as the field is clear; but if the field is not clear and the two legislations meet, the Dominion legislation prevails (*x*).

The question has arisen whether the Dominion Parliament can implement treaties which deal with matters falling within the powers of the Provinces. It is clear that it can do so under section 132 where the treaty is an Empire treaty (*In re Regulation and Control of Aeronautics in Canada* (*y*)), or where the general residuary power under section 91 is applicable. (*In re Regulation and Control of Radio Communications in Canada* (*z*).) On the other hand, where the international convention was signed and ratified, not by and on behalf of the British Empire, but on behalf of Canada, and the matters (weekly rest in industrial undertakings, minimum wages, and limitation of hours of work) fell within the classes of subjects assigned to the Provinces by section 92 (property and civil rights), the Judicial Committee held that the Dominion Parliament by itself had no power to pass the legislation. (*Attorney-General for Canada* v. *Attorney-General for Ontario* (1937) (*a*).) The *Aeronautics* and *Radio* cases did

(*r*) [1923] A. C. 695.
(*s*) The British North America Act, 1940, has now transferred unemployment insurance to the Dominion Parliament
(*t*) *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario*, [1937] A. C. 326; *The Same*, [1937] A. C. 355, *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada*, [1937] A. C. 377.
(*u*) *Att.-General for Ontario* v. *Att.-Gen. for Canada*, [1894] A. C. 189.
(*x*) *Grand Trunk Railway* v *Att.-Gen. for Canada*, [1907] A. C. 65.
(*y*) [1932] A. C. 54.
(*z*) [1932] A. C. 304.
(*a*) [1937] A. C. 326

not mean that the federation could necessarily legislate on all matters affecting Canada as a whole (*b*).

II. THE COMMONWEALTH OF AUSTRALIA.

The Federation.—The Commonwealth of Australia was created by the Commonwealth of Australia Constitution Act, 1900, as a federation of States which had hitherto been separate Colonies, viz., *New South Wales*, *Victoria*, *South Australia*, *Queensland*, *Tasmania*, and *Western Australia* (*c*). The Act, which recites that their respective peoples "have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established," was drafted by Conventions held in Australia from 1891 onwards. Federation came gradually to be regarded as necessary owing to the growing power in the Pacific of Germany and Japan, and to some extent of France, and to remove trade barriers between the Colonies.

The first eight sections of the Act cover general preliminary matters, and it is only necessary to mention section 5, which superimposes on the existing law of the States the Act itself and federal legislation made under the Constitution. The *Constitution* is contained in section 9 of the *Act*, and consists of 128 sections divided into eight chapters.

The territories of the Commonwealth include, besides the six Original States, any new States which may be established or admitted into the Commonwealth; federal territories, viz., the Northern Territory (including Ashmore and Cartier Islands) and the Australian Capital Territory (Canberra); and dependencies, *viz.*, Papua and Norfolk Island. The federal territories and dependencies are administered directly by the Commonwealth Government, which also administers the Australian mandate over New Guinea and the British Empire mandate over Nauru (*d*).

The States enjoy internal self-government and autonomy. Their constitutional, as opposed to international, status is (subject to the federal distribution of legislative and executive powers) similar to that of the Dominions, though they are not invited to attend Imperial

(*b*) Cf. Kennedy, *loc. cit.*, pp. 157—160.

(*c*) Western Australia acceded reluctantly at the last moment, cf. *post*, p. 630.

(*d*) For the mandated territories, see *ante*, p. 567. As to the legislative power of the Commonwealth in relation to New Guinea, see *Ffrost* v. *Stevenson* (1937), 58 C. L. R. 528.

Conferences (*e*). In 1935 Western Australia, after a referendum, petitioned the King and the two Houses of the Imperial Parliament to pass an Act enabling the State to secede from the Commonwealth and resume the status of a self-governing Colony. The Commonwealth opposed the petition. A Joint Select Committee of the two Houses reported that the petition was not proper to be received, and that the initiative for altering the basis of the Australian federation must come from the Commonwealth (*f*).

Structure of the Commonwealth Constitution.—*The Executive.*—The executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as his representative. The Governor-General is by convention appointed on the advice of the Commonwealth Government. There is a Federal Executive Council corresponding to the Privy Council The Government consists of the Ministers of State, who must be members of the Federal Executive Council, and who are appointed and dismissed according to the conventional principles of responsible government. The constitution requires that a Minister of State shall be a senator or a member of the House of Representatives.

The Legislature.—The Commonwealth Parliament consists of the King (represented by the Governor-General), the Senate and the House of Representatives. Parliament must be summoned at least once a year, and not more than twelve months must elapse between one session and the next. There are thirty-six senators, six being elected for each State directly by the electors. They are elected for six years, half their number retiring every three years. The members of the House of Representatives, which consists of about twice the number of senators, are chosen by the electorate in the several States in proportion to their populations, but so that each Original State shall choose at least five members. The House of Representatives is elected for three years, unless sooner dissolved. Each House has the privileges of the United Kingdom House of Commons.

The Senate may not originate or amend money bills, but may return them to the House of Representatives with suggested amendments. Otherwise, the Senate has equal legislative power with the other House.

(*e*) See Evatt, *The King and his Dominion Governors*, ch. 22.
(*f*) (1935), H. C. Pap. 88.

Section 57 of the Constitution provides a means of resolving deadlocks between the Houses (*g*). If the House of Representatives passes a Bill twice in the same session or in succeeding sessions, and on each occasion the Senate rejects or fails to pass it or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve both Houses. If after such dissolution the House of Representatives again passes the Bill and the Senate rejects or fails to pass it, etc., as before, the Governor-General may convene a joint sitting of the two Houses. Then, if the Bill is passed, with or without amendments, by an absolute majority of the members of both Houses, it shall be presented to the Governor-General for the royal assent.

The Governor-General may assent or withhold his assent to Bills or reserve them for the royal pleasure (*h*), and he may also return Bills to the House from which they originated with recommendations for their amendment.

The Commonwealth adopted sections 2—6 of the Statute of Westminster, 1931, as from the commencement of the war with Germany by the Statute of Westminster Adoption Act (No. 56 of 1942) (*i*). The adoption of section 2, however, does not give the Commonwealth Parliament power to legislate on matters not expressly assigned to it by the Constitution (*k*), *e.g.*, regency. Nor does the adoption of section 4 necessitate the concurrence of the Commonwealth Parliament or Government in an Imperial Act with respect to any matter within the authority of the States, not being also a matter within the authority of the Commonwealth, in any case where such concurrence would not have been required by constitutional practice before 1931. (Statute of Westminster, s. 9 (2).) Otherwise, section 4 requires the request and consent of the Commonwealth Parliament, as well as of the Government, for the extension of Imperial legislation to Australia. (Statute of Westminster, s. 9 (3) (*l*).)

Courts and Appeals.—The judicial power of the Commonwealth is vested by the Constitution in the High Court of Australia, whose Judges are not removable except on an address by both Houses of

(*g*) Cf. s. 128 as regards constitutional amendments, *post*, p. 624
(*h*) But as to reservation and disallowance, cf. *ante*, Chapter XI..
(*i*) *Ante*, p. 603. (*k*) *Post*, p. 626.
(*l*) *Ante*, p. 598

the Parliament on the ground of proved misbehaviour or incapacity. The High Court has *original* jurisdiction in all matters (a) arising under a treaty; (b) in which the Commonwealth is a party; (c) between States, between residents of different States, or between a State and a resident of another State, (d) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The Parliament may also confer on the High Court original jurisdiction in questions concerning the Commonwealth Constitution and Admiralty jurisdiction (*m*). The High Court has *appellate* jurisdiction from (a) the High Court exercising its original jurisdiction; (b) any other federal Court or Court exercising federal jurisdiction; (c) the Supreme Courts of the States; (d) any other State Courts from which appeal lay before 1900 to the Privy Council.

Section 74 of the Constitution provides that no appeal from the High Court to the Privy Council shall be permitted on any question as to the limits *inter se* of the constitutional powers of (a) the Commonwealth and the States, or (b) two or more States, unless the High Court certifies that the question is one which ought to be determined by the King in Council. There is no appeal as of right from the High Court, but, save in "*inter se*" questions, appeals to the Privy Council by special leave are preserved (*n*). The Parliament may limit the matters in which such leave may be asked, but Bills for this purpose must be reserved for the royal pleasure.

It is the almost invariable practice of the High Court to refuse a certificate in the classes of cases specified in section 74, as that Court regards itself as the final interpreter of the Commonwealth Constitution (*o*); but there are constitutional questions, not falling into those classes, where special leave to appeal is sometimes granted, *e.g.*, the limits of the powers of the Commonwealth Parliament not involving the question of the distribution of powers (*p*)

(*m*) The Commonwealth Parliament may create other federal Courts and define their jurisdiction, and may confer federal jurisdiction on State Courts.

(*n*) This is a compromise; see J. G. Latham, *Australia and the British Commonwealth*, p. 114.

(*o*) The certificate was granted in *Att.-Gen. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A. C. 237, *post*, p. 629

(*p*) See, for example, *James* v. *Commonwealth of Australia*, [1936] A. C. 578, *W. R. Moran Proprietary, Ltd* v. *Deputy Commissioner of Taxation for New South Wales*, [1940] A. C. 838; *post*, p. 632.

Structure of the State Constitutions.—*The Executive.*—Each State has a Governor appointed directly by the Crown, and an Executive Council or Ministry. "The Governors of the States are as much the representatives of His Majesty for State purposes as the Governor-General of the Commonwealth is for Commonwealth purposes. For all purposes of self-government in Australia, sovereignty is distributed between the Commonwealth and the States" (*q*). Communication on State affairs lies direct between the United Kingdom and the States, each of which is represented in London by an Agent-General. Section 106 of the Commonwealth Constitution provides that the Constitution of each State shall, subject to the federal Constitution, continue as at the establishment of the Commonwealth until it is altered in accordance with the Constitution of the State.

The States enjoy fully responsible self-government, which rests on convention save in so far as certain principles may be embodied in the State Constitutions Owing to the vagueness of the "reserve power" vested in the Governor as the King's representative, disputes between the Governors and their ministries arise from time to time. Thus in 1926 Sir Dudley de Chair, Governor of New South Wales, refused to appoint a sufficient number of additional members of the Legislative Council to "swamp" the upper House, which would probably have led to its abolition at the behest of a government with only a small majority in the Assembly (*r*); and in 1932 another Governor of the same State, Sir Philip Game, dismissed the ministry, which then had a large majority in the Assembly, for persisting in committing breaches of the federal law (*s*).

Legislatures.—Each State has an elected Legislative Assembly and (except Queensland) an elected Legislative Council. The terms for which they are elected vary. State Parliaments retain the powers which they had as Colonial legislatures, save in so far as such powers are withdrawn from them or are exclusively vested in the Common-

(*q*) *New South Wales* v. *Commonwealth of Australia* (No. 1) (1932), 46 C. L. R. 155, at p. 230.

(*r*) See Evatt, *op cit*, ch. 14; Keith, *The Dominions as Sovereign States*, pp. 226—227.

(*s*) The fact that the alternative ministry was returned with a majority at the ensuing election is probably irrelevant in considering the correctness of the action taken by the Governor, which is supported by Keith, *op. cit.*, pp. 230—231, but doubted by Evatt (*op. cit.*, ch 13) as the ministry's conduct might have been tested in the Courts.

wealth Parliament; and, subject to the Commonwealth Constitution, the existing laws of the States relating to matters within the powers of the Commonwealth Parliament continue in force. (Commonwealth Constitution, ss. 106 and 107.) Except for section 11, which provides that in subsequent Imperial Acts the expression "Colony" shall not include the Australian States, the Statute of Westminster, 1931, does not affect the States, whose legislatures therefore remain subject to the Colonial Laws Validity Act, 1865.

Courts and Appeals.—Each State has its own system of Courts. Appeal, generally final, lies to the federal High Court from the Supreme Court of each State and from any other State Court from which at the establishment of the Commonwealth an appeal lay to the King in Council. The Commonwealth Parliament may confer federal jurisdiction on any State Court. As has been seen, appeal to the Judicial Committee from the High Court only lies in "*inter se* questions" if the High Court grants a certificate and in other questions on special leave (*t*). The federal Parliament, acting under the powers conferred on it by the Constitution, has abolished the right of appeal from the State Courts to the Judicial Committee in "*inter se* questions" (*u*), and has conferred federal jurisdiction on State Courts usually on condition that appeal to the High Court shall be final (*x*).

Constitutional Amendment.—*The Federal Constitution.*—Section 128 of the Constitution provides that the Constitution shall not be altered except in the following manner Within six months after the Bill has been passed in each House of the Commonwealth Parliament it must be submitted to a referendum of the electors in each State; but if either House passes the Bill and the other rejects it, and the former House passes it again in the same or the next session and the other again rejects it, the Governor-General may submit the Bill to a referendum of the electors in each State. Then, in either case, if in a majority of the States a majority of the voters approve the Bill, and if a majority of all the voters also approve the Bill, it shall be presented to the Governor-General for the royal assent.

There are a number of constitutional details, however, which by various sections of the Constitution the Commonwealth Parliament

(*t*) *Ante*, p 622.
(*u*) Judiciary Act, 1907; *cf. Webb* v. *Outrim*, [1907] A. C. 81 (on the Judiciary Act, 1903)
(*x*) Judiciary Act, 1903—1943.

has power to alter without a referendum, *e.g.*, the method of voting for federal Senators and (within limits) their number (section 7); the number of federal Representatives (section 27) and their qualifications (section 34); the privileges of its two Houses (section 49); the number of federal Ministers of State (section 65); the appointment and dismissal of federal civil servants (section 67); the creation of federal Courts (section 71); within limits, the conferring of additional original jurisdiction on the High Court (section 76); the jurisdiction of federal Courts other than the High Court, and the investing State Courts with federal jurisdiction (section 77); the admission or establishment of new States (section 121); the government of territories acquired or accepted by the Commonwealth (section 122); and the seat of Government (section 125).

Section 8 of the Statute of Westminster, 1931, provides that nothing in the Statute shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia otherwise than in accordance with the law existing before the commencement of the Statute. The Commonwealth Parliament appears to have no power to amend sections 1—8 of the *Constitution Act*, which preserve the principle of a Federation under the Crown of the United Kingdom (*y*).

State Constitutions.—Imperial legislation has conferred on all the States a general power to amend their Constitutions, but Bills to alter the salary of the Governor or to change the constitution of the Legislature or of either House must be reserved. (Australian States Constitution Act, 1907.) Constitutional amendments may be made by ordinary legislation, provided that the intention to alter the Constitution is clear (*z*); but section 5 of the Colonial Laws Validity Act, 1865, requires that such laws shall be passed in the manner and form prescribed by any Imperial or local law for the time being in force (*a*).

Distribution and Limitation of Legislative Powers.—The general principle of the distribution of powers in the federal Constitution is to

(*y*) See Keith, *The Dominions as Sovereign States*, p. 523.

(*z*) *McCawley* v. *The King*, [1920] A. C. 691.

(*a*) See *Att.-Gen. for New South Wales* v. *Trethowan*, [1932] A. C. 526; *ante*, pp. 24 and 547.

confer specific powers on the Commonwealth Parliament, and, subject thereto, to leave the States with their existing powers.

Section 51 of the Constitution provides that the Commonwealth Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the matters specified in thirty-nine "placita." These matters include foreign and inter-State trade and commerce; taxation, but so as not to discriminate between States; postal, telegraphic, etc., services; defence; currency and coinage; banking, other than intra-State banking; naturalization and aliens; marriage, divorce and family law; migration; external affairs; conciliation and arbitration in extra-State industrial disputes; and matters incidental to the exercise of the Federal legislative, executive and judicial powers.

Section 52 gives the Commonwealth Parliament exclusive power, subject to the Constitution, to make laws for the peace, order, and good government of the Commonwealth with respect to (i) the seat of the Commonwealth government; (ii) matters relating to the Federal government departments; and (iii) other matters declared by the Constitution to be within the exclusive power of the Parliament. Among these last are the imposition of customs and excise duties (section 90) and the maintenance of armed forces. (Section 114.) The federal Parliament has also wide powers of constitutional amendment (*supra*).

Certain restrictions and extensions of legislative power are contained in Chapter IV (Finance and Trade). Thus, trade within the Commonwealth is to be free (section 92); Commonwealth legislation must not give preference to one State over another in trade, commerce or revenue (section 99); the Commonwealth may not tax State property, and *vice versa* (section 114); a State may not coin money (section 115); and the Commonwealth may not establish any religion or restrict freedom of religion. (Section 116.)

The general powers given to the Commonwealth Parliament by section 51 do not necessarily exclude the States; but when a State law is inconsistent with a Commonwealth law, the latter prevails, and the State law is, to the extent of the inconsistency, invalid. (Section 109.)

The States retain all the legislative powers which they had as Colonies, except those which are by the federal Constitution *exclusively* vested in the Commonwealth Parliament or withdrawn from the

State Parliaments. (Section 107.) This distribution of powers is preserved by section 9 (1) of the Statute of Westminster, 1931 (*b*).

Interpretation of the Federal Constitution.—For reasons which will be apparent, the interpretation of the Constitution has fallen almost entirely to the High Court of Australia, aided occasionally as regards general principles of construction by the Judicial Committee (*c*).

With regard to section 51, which assigns certain specific powers to the Commonwealth Parliament, it has been held that the burden of proof that the Commonwealth has power rests on the party who asserts it (*d*), and the party who asserts that the power is limited must indicate it in the Constitution (*e*). Each of the powers under section 51 is "subject to this Constitution" and may be limited elsewhere, *e.g.*, by section 92 (*f*). Each placitum is to be construed separately from the others (*g*). Commonwealth legislation which is valid under one power may be valid although it also deals with a matter not specifically assigned, *e.g.*, "trade and commerce with other countries and among the States" may be bound up with labour and industry; but a Commonwealth Act may be partly valid and partly invalid (*h*). The effect of section 109, which invalidates State Acts to the extent of their inconsistency with Commonwealth law, is that State legislation is binding in the State when the field is clear, but it must give way as soon as it encounters repugnant Commonwealth legislation. The section gives supremacy to *every* Commonwealth Act over *all* State Acts, though passed under an exclusive power, if any provisions of the two conflict (*i*).

The original members of the High Court were familiar with the process of drafting the Commonwealth Constitution, and were strongly

(*b*) *Ante*, p. 604.
(*c*) See Evatt, *Constitutional Interpretation in Australia* (1939), 3 University of Toronto Law Journal, p. 1; Garran, *The Development of the Australian Constitution* (1924), 40 Law Quarterly Review, p. 202; Holman, *Constitutional Relations in Australia* (1930), 46 Law Quarterly Review, p. 502; Keith, *The Dominions as Sovereign States*, pp. 503 *et seq.*
(*d*) *Att.-Gen. for the Commonwealth* v. *Colonial Sugar Refining Co.*, [1914] A. C. 237.
(*e*) *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920), 28 C. L. R. 129; Jennings and Young, *Constitutional Laws of the British Empire*, p. 249.
(*f*) *James* v. *Commonwealth of Australia*, [1936] A. C. 578.
(*g*) *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, *supra*.
(*h*) *Huddart Parker, v. The Commonwealth* (1931), 44 C. L. R. 492.
(*i*) *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, *supra*; *cf. Baxter* v. *Commissioners of Taxation, N. S. W.* (1907), 4 C. L. R. 1087; Jennings and Young, *op. cit.*, p. 239.

influenced by American decisions on constitutional interpretation. They imported the doctrine of "implied prohibitions," in particular, "the immunity of instrumentalities" expounded by Marshall, C.J., of the United States Supreme Court in *McCulloch* v. *Maryland* (1819) (*k*). In *D'Emden* v. *Pedder* (1904) (*l*) the High Court held that a State law requiring the payment of stamp duty on the receipt of his federal salary by a Commonwealth official in Tasmania was invalid. In fact, the Tasmanian Stamp Act was construed as not being intended to apply to federal officers, but the Court laid down the doctrine of the immunity of Commonwealth instrumentalities from State interference in what was regarded as a leading case for the next fifteen years. Griffith, C.J., explained the doctrine as meaning that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent invalid and inoperative"; and he added that, in construing the Commonwealth Constitution, American decisions might be regarded "not as an infallible guide, but as a most welcome aid and assistance" (*m*). *D'Emden* v. *Pedder* was followed in *Deakin* v. *Webb* (1904) (*n*), where Deakin, the Commonwealth Attorney-General, refused on constitutional grounds to pay State income tax on his federal salary. In the *Railway Servants' Case* (1906) (*o*) the High Court applied the doctrine of the immunity of instrumentalities for the benefit of the States by holding that the Commonwealth Arbitration Act, passed under section 51 (xxxv) ("conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State"), was not binding on State-owned railways.

In order to test the decision in *Deakin* v. *Webb* the Victorian Commissioner of Taxes took similar proceedings against Outrim, another federal officer, and, being unsuccessful in the Supreme Court of Victoria, appealed directly to the Privy Council (*p*). The Judicial

(*k*) 4 Wheat. 316.
(*l*) 1 C. L. R. 91; Jennings and Young, *op. cit.*, p. 226.
(*m*) 1 C. L. R. at pp. 111—112. (*n*) 1 C. L. R. 585.
(*o*) *Amalgamated Government Railway and Association* v. *N. & W. Traffic Employees' Association*, 4 C. L. R. 448; cf. *Att.-Gen. for New South Wales* v. *Collector of Customs* (1908), 5 C. L. R. 818.
(*p*) Cf. Judiciary Act, 1907; *ante*, p. 624.

Committee denied the analogy between the Australian and American Constitutions. It was admitted that there was no *express* limitation of the kind asserted (*q*), and the Board held that there was no room for an *implied* prohibition. (*Webb* v. *Outrim* (*r*).)

The next question was, whether the High Court would review its decisions in *D'Emden* v. *Pedder* and *Deakin* v. *Webb* in the light of the Judicial Committee's decision. In *Baxter's Case* (1907) (*s*) proceedings for State income tax were taken by the New South Wales tax commissioners against Baxter, a Commonwealth official. The District Court followed the Judicial Committee's decision in *Webb* v. *Outrim*, and Baxter appealed. The High Court did not regard itself as bound in this class of constitutional question by a ruling of the Privy Council not given on appeal from the High Court, and by a majority of three to two it confirmed *Deakin* v. *Webb*.

The doctrine of the immunity of instrumentalities was regarded as a right of governments and not of individuals. The Commonwealth Parliament could therefore waive the right, as regards non-discriminatory State taxation of Commonwealth salaries, by the Commonwealth Salaries Act, 1907 (*t*). Further, an institution such as a municipality is not a State instrumentality merely because it is established by the State. (*Municipalities Case* (1919) (*u*).)

In *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (*x*), an "*inter se* question" on which the High Court granted a certificate under section 74, the Judicial Committee held the Royal Commissions Acts of the Commonwealth Parliament to be *ultra vires* so far as they purported to give Royal Commissions a general authority to compel answers and the production of documents in relation to matters not within the powers assigned to the Commonwealth or to assigned matters on which the Commonwealth had not yet legislated. Viscount Haldane, L.C., confirmed the Judicial Committee's attitude towards the interpretation of the Constitution

(*q*) Cf. s. 114, which provides that a State may not tax *property* belonging to the Commonwealth.

(*r*) [1907] A. C. 81. And see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *ante*, p. 615.

(*s*) *Baxter* v. *Commissioners of Taxation, N. S. W.*, 4 C. L. R. 1087; Jennings and Young, *op. cit.*, p. 239.

(*t*) *Chaplin* v. *Commissioner of Taxation* (1911), 12 C. L. R. 375.

(*u*) *Federated Municipal, etc. Employees* v. *Melbourne Corporation*, 26 C. L. R. 508.

(*x*) [1914] A. C. 237.

by saying that the question they had to decide "depends simply on the interpretation of the language of an Act of Parliament."

The *Engineers' Case* (1920) (y) marks a turning point in the development of the interpretation of the Commonwealth Constitution, for the High Court, by a majority of four to one, reversed its decision in the *Railway Servants' Case* (*supra*), and went on to attack the doctrine of implied prohibitions which underlay its decisions in *D'Emden* v. *Pedder* and *Deakin* v. *Webb*. Western Australia owned and controlled certain factories and mills, and the High Court held that the State was bound by the Commonwealth Conciliation and Arbitration Act where the State as employer was a party to an industrial dispute extending beyond its boundaries. Though American authorities assist in "secondary and subsidiary matters," it was now declared that the Constitution should be construed in accordance with the principles of interpretation marked out by the House of Lords and the Judicial Committee and applied by the latter in *Webb* v. *Outrim* and the *Colonial Sugar Company's Case*. The High Court, like the Privy Council, is not bound by its own decisions. The application of the doctrine of mutual non-interference had led to difficulties and confusion. There had long been a minority in the High Court opposed to the doctrine, and in the passage of time the composition of the Court had so changed that the opponents were now in a majority. The Court could have distinguished the *Railway Servants' Case* by adopting the American distinction between the governmental functions and the trading activities of a State, but it did not think it any longer practicable to define the proper sphere of State activity on the lines laid down by nineteenth century economists. On the other hand, if the doctrine of immunity were applied, it was difficult to see how the States could be prevented from encroaching on the Commonwealth powers by making almost any subject-matter a government instrumentality. The protection of the States lies in the limits to the express powers of the Commonwealth and in their own residuary powers.

The *Engineers' Case* does not deny *any* implications in the Constitution. The question is, whether the implication is *necessary*. It is possible to imagine extreme cases in which the doctrine of non-

(y) *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, 28 C. L. R. 129; Jennings and Young, *op. cit.*, p. 249.

interference would be applied on the ground of discrimination, for example, if the Commonwealth taxed members of State Legislatures at a higher rate than that applied to other Commonwealth citizens, or if a State taxed Commonwealth officials residing in the State at a much higher rate than State residents generally (*z*).

Since the *Engineers' Case* it has been decided that State officials are liable to federal income tax (*Davoren* v. *Commonwealth Commissioners of Taxation* (*a*)), and that federal military officers are subject to State law relating to motor-cars in the absence of inconsistent Commonwealth legislation. (*Pirrie* v. *McFarlane* (*b*).)

In *Whybrow's Case* (1910) (*c*) it had been held that an *award* of the Commonwealth Court of Conciliation and Arbitration could not override a State *statute*, but this was in effect reversed in *Cowburn's Case* (1926) (*d*).

There was no difficulty in holding that the Commonwealth power relating to "postal, telegraphic, telephonic, and other like services" covered radio broadcasting throughout Australia. (*R.* v. *Brislan* (*e*).) The Constitution does not give any express legislative power to implement treaties (*f*), but in *R.* v. *Burgess, Ex parte Henry* (*g*) the High Court held that the federal Air Navigation Act, 1920, implementing the international Convention of 1919, was valid throughout Australia under the power relating to "external affairs." As regards civil aviation in one State it seems that, apart from State consent, Commonwealth legislation is only valid if it exactly follows the Convention.

The general trend of judicial interpretation has been to preserve the balance between Commonwealth and State powers as intended by those who framed the Constitution. In time of war, however, the Commonwealth has been allowed much greater latitude. During 1914—18 the defence power was held to cover anything that might contribute towards winning the war, *e.g.*, control of the price of bread. (*Farey* v. *Burvett* (*h*).) A similar access of power was enjoyed by the

(*z*) Evatt (1939), 3 University of Toronto Law Journal, pp. 9—10.
(*a*) (1923), 29 A. L. R. 129. (*b*) (1925), 36 C. L. R. 170.
(*c*) *Australian Boot Trade Employees' Federation* v. *Whybrow*, 10 C. L. R. 266; cf. *Federated Engine Drivers' and Firemen's Association* v. *Adelaide Chemical and Fertiliser Co.* (1920), 28 C. L. R. 1.
(*d*) *Clyde Engineering Co.* v. *Cowburn*, 37 C. L. R. 466.
(*e*) (1935), 54 C. L. R. 262. For Canada, see *ante*, p. 618.
(*f*) For the position in Canada, see *ante*, p. 618.
(*g*) (1936), 55 C. L. R. 608; and see *Roche* v. *Kronheimer* (1921), 29 C. L. R. 329.
(*h*) (1916), 21 C. L. R. 433.

Commonwealth from 1939 under the combined headings of defence and external affairs (*i*). "External affairs" cover relations with foreign countries, the United Kingdom, and other members of the British Commonwealth; and this power was bound to assume increasing importance after Australia became a member of the League of Nations.

James v. *Commonwealth of Australia* (*k*) was an appeal by special leave to the Privy Council from the High Court in a question of the limitation of Commonwealth powers (not being an *inter se* question) on which the opinion of the High Court was divided. The question was whether the federal Dried Fruits Act was valid in view of section 92 of the Constitution which provides that trade and commerce among the States shall be "absolutely free." The Judicial Committee held that, on a true construction of the words used, section 92 bound the Commonwealth as well as the States. The Committee thus overruled *McArthur* v. *Queensland* (*l*), with which the majority of the High Court now disagreed but by which they considered themselves bound. In delivering the judgment of the Board, Lord Wright, M.R., said that a Constitution must not be construed in any narrow or pedantic sense. The general words used can often only be appreciated when considered, as the years go by, in relation to the vicissitudes of fact which from time to time emerge. The meaning of the words does not change, but the changing circumstances illustrate and illuminate the full import of that meaning (*m*).

Contrasts between the Canadian and Australian Constitutions.—It will now be convenient to summarise the main points of difference between the Canadian and Australian Constitutions.

(i) The Canadian Parliament has no power to amend the British North America Acts, 1867—1930: the Australian Parliament has power to amend the Commonwealth Constitution in the prescribed manner

(*i*) The Hon. Sir Owen Dixon, *Aspects of Australian Federalism* (1943), 5 University of Toronto Law Journal, 241.

(*k*) [1936] A. C. 578. The appellant was a fruit grower and processer of South Australia New South Wales, Queensland and Victoria intervened in favour of the Commonwealth, while Tasmania and Western Australia intervened in favour of the appellant.

(*l*) (1920), 28 C. L. R. 530.

(*m*) For a more recent appeal to the Privy Council by special leave, see *W. R. Moran Proprietary, Ltd.* v. *Deputy Commissioner of Taxation, N. S. W.*, [1940] A. C. 838.

(ii) While the extension of United Kingdom legislation to Canada requires the request and consent of the Canadian Government, its extension to Australia requires the request and consent of the Parliament as well as of the Government of Australia.

(iii) In Canada specific powers are assigned to the Provincial Legislatures, while the Dominion Parliament has residuary legislative power; in Australia specific powers are assigned to the Commonwealth Parliament, while residuary powers remain vested in the States.

(iv) The legislative powers of the Dominion and Provincial Parliaments respectively are exclusive: the legislative powers of the Commonwealth Parliament are largely concurrent with State powers.

(v) The British North America Acts do not expressly confer powers ancillary to specified legislative powers, though they are allowed by the Courts: the Australian Constitution expressly confers ancillary powers on the Commonwealth Parliament.

(vi) The British North America Acts do not provide for the settlement of deadlocks between the two Houses of the Dominion Parliament, except for a very limited power to appoint additional senators: the Australian Constitution contains ample provision for resolving deadlocks between the two Houses of the Commonwealth Parliament, according to whether they arise on ordinary legislation or on Bills to amend the Constitution.

(vii) Federal senators in Canada are appointed for life by the Governor-General on the advice of the Dominion Government: federal senators in Australia are elected by the States for six years.

(viii) The final Court for interpreting the Canadian Constitution is the Judicial Committee: the final Court for interpreting the Australian Constitution is in most cases the High Court of Australia.

(ix) Lieutenant-Governors of Canadian Provinces are appointed by the Governor-General in Council: Governors of Australian States are appointed directly by the Crown.

(x) Provincial Acts may be disallowed by the Governor-General on the advice of the Dominion Government: State Acts cannot be disallowed by the Governor-General of Australia.

(xi) The Legislatures of the Canadian Provinces are no longer subject to the Colonial Laws Validity Act, 1865: the Legislatures of the Australian States remain subject to that Act.

CHAPTER XLIII.

NEW ZEALAND AND SOUTH AFRICA.

I. THE DOMINION OF NEW ZEALAND.

Constitution and Territories.—New Zealand was ceded to Britain in 1840 by the Treaty of Waitangi. It was at first administered as a Crown Colony, but responsible government was granted by Instructions in 1856. From 1852, when representative institutions were established, until 1876 there were six Provinces each with its own legislature. New Zealand refused to join the Australian Federation at the end of the nineteenth century. It was given the title of "Dominion" by royal proclamation in 1907.

The Constitution, which is of a simple unitary type, is based on (i) Imperial Acts, in particular, the New Zealand Constitution Act, 1852, *as* amended from time to time; (ii) Acts of the New Zealand Parliament, *e.g.*, the Legislature Act, 1908, the Legislative Council Act, 1914 (operation postponed), and the Electoral Act, 1927; (iii) Letters Patent and Royal Instructions, especially those of 1917.

The Dominion Government administers various Dependencies. The Cook Islands are directly administered under a Dominion Act, and the Ross Dependency under an Imperial Order in Council of 1923. The administration of the Union Islands, by virtue of an Imperial Order in Council of 1925, has been delegated to the Administrator of Western Samoa. Western Samoa is a Mandate exercised on behalf of the League of Nations (*a*).

The Executive.—The title of Governor was changed to that of Governor-General by Letters Patent in 1917. The same instrument provides for an Executive Council. Responsible government rests on constitutional conventions and Royal instructions. It is not legally necessary, for example, that the Executive Council should consist entirely of Ministers, or that Ministers should have seats in the Legislature.

(*a*) *Ante*, p. 567.

The Legislature.—The New Zealand Constitution Act, 1852, provides that there shall be a General Assembly consisting of the Governor-General, a Legislative Council and a House of Representatives (section 32). The General Assembly has power "to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England . . ." (section 53). Money Bills are to be recommended by the Governor-General to the House of Representatives (section 54). The Governor-General may assent, refuse his assent, or reserve Bills, or return them with suggested amendments (section 56). The Crown may disallow Dominion Acts within two years (section 58). Any Bill altering the salary of the Governor-General or altering the sum described as for native purposes must be reserved for the royal pleasure (section 65). New Zealand has not adopted sections 2—6 of the Statute of Westminster, 1931, under section 10 of the Statute.

Under the Legislature Act (N.Z.), 1908, the members of the Legislative Council might be nominated by the Governor-General for life or for a term of years. There are at present about forty members, nominated for seven years. The Council acts by convention as a revising body, and does not oppose the lower House in matters of policy.

The Legislative Council Act (N.Z.), 1914, the coming into operation of which has been indefinitely suspended, makes the following provisions: (i) members of the Legislative Council to be elected for a term by the same electorate as the House of Representatives, but the Governor-General may nominate three Maoris; (ii) Money Bills not to originate in the Legislative Council; (iii) Money Bills may be passed over the head of the Legislative Council in a way similar to the Parliament Act, 1911; (iv) in the case of other Bills, if the Council rejects a Bill in two successive sessions the Governor-General may convene a joint sitting; then, if the Bill is affirmed by a majority at a joint sitting it shall be deemed to have been duly passed by both Houses, and if it is not affirmed by a majority at a joint sitting the Governor-General may dissolve both Houses.

Under the Electoral Act (N.Z.), 1927, seventy-six members of the House of Representatives are elected for four years, unless the House is sooner dissolved. In addition, four Maoris are elected for the

Maori electoral districts. A Maori may sit in the House for a European constituency, but a European may not sit for a Maori constituency.

Courts and Appeals.—The chief superior Court with a general jurisdiction is the Supreme Court, to which appeal lies from the inferior Courts and the Dependencies. Appeal lies to the Privy Council from the Court of Appeal in most cases, and in exceptional cases from the Supreme Court.

Constitutional Amendment.—The Statute of Westminster, 1931, s. 8, provides that nothing in the Statute (if and when sections 2—6 are adopted) shall be deemed to confer any power to repeal or alter the Constitution Act of the Dominion of New Zealand "otherwise than in accordance with the law existing before the commencement of this Act." The Constitution Act, 1852, itself contained no amending power. Section 2 of an Imperial Act of 1857 gave the General Assembly power to alter or repeal the Constitution Act except certain sections, *e.g.*, section 32 (establishment of bi-cameral Legislature), sections 46—47 (members' oath or affirmation), section 53 (general legislative power), sections 56 and 65 (reservation, etc.), and section 58 (disallowance). It was long doubtful whether these restrictions on the power of constitutional amendment were affected by the Colonial Laws Validity Act, 1865 (*b*), but a *dictum* of the Judicial Committee in a recent case (*c*) indicates that the Colonial Laws Validity Act gives the Dominion the widest measure of constituent power.

II. THE UNION OF SOUTH AFRICA.

The Constitution.—The Constitution is based on the South Africa Act, 1909, by which the four self-governing Colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony were united in a legislative union under the Crown of Great Britain and Ireland. The four Colonies became original Provinces of the Union under the names of *Cape of Good Hope*, *Natal*, *Transvaal* and *Orange Free State*. The main reasons for the Union were the desire for

(*b*) *Ante*, p. 605. The Report of the Conference on the Operation of Dominion Legislation, 1929, § 65, said the question was "apparently doubtful." See Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 74—75; cf. Keith, *Responsible Government in the Dominions* (2nd ed.), vol. I, pp 354—355.

(*c*) *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A. C. 308, at p. 326.

unification of railways and mutual free trade. It was also hoped to settle the two racial problems of the English and Dutch, and the Europeans and natives.

Proposals for union had been made fifty years before Lord Selborne, the High Commissioner for South Africa, in 1907 drew up his *Review of the Present Mutual Relations of the British South African Colonies*, accompanied by a *Memorandum* and *Dispatch*, which have been compared in importance with Lord Durham's Report on the British North American Colonies (*d*). Conventions of the four Colonies were held in South Africa in 1908 and 1909; and a draft South Africa Bill, approved by referendum of the people of Natal and by the Parliaments of the other three Colonies, was passed with slight amendments by the United Kingdom Parliament later in 1909.

The Union is not a federation, but, in order to preserve the identity of the former Colonies, the Act compromises with the unitary idea to the extent that certain powers are devolved on the Provinces. The Union was given full powers of legislation, including constitutional amendment, with certain qualifications as regards reservation and "entrenched clauses." These exceptions have been, or can be, swept away by the Union Parliament under the Statute of Westminster, 1931, which applies to the Union without restriction.

The South Africa Act does not contain the whole Constitution. Apart from Imperial Acts, there have been a series of Union Acts which expressly or impliedly amend or expand the Constitution. The Constitution is further supplemented by conventions similar to those which obtain in the United Kingdom. The South Africa Act is to be interpreted as an Act of Parliament, according to English principles of construction. That it creates a Constitution "is not a deciding factor, but only a factor to be taken into consideration in matters of ambiguity" (*e*).

Following up the powers conferred by the Statute of Westminster, 1931, the Union Parliament passed the Status of the Union Act, 1934, which by section 2 declared that "The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after

(*d*) *Ante*, p. 572.
(*e*) Kennedy and Schlesberg, *The Law and Custom of the South African Constitution*, p. 107.

the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union." The Act scheduled the Statute of Westminster, and provided by section 3 that the Statute should be deemed to be an Act of the Parliament of the Union. The preamble to the Act describes the Union of South Africa as "a sovereign independent state." Section 2 cannot affect the inherent power of the United Kingdom Parliament to legislate for the whole Empire (*f*), but it has been suggested that that section is partly contradictory to section 3 of the Act in that it amends section 4 of the Statute of Westminster (*g*).

The Union Government also proposed in 1934 to introduce a Union Constitution Bill which would similarly re-enact the South Africa Act (as amended) as Union law, but this has not yet been done (*h*).

English and Dutch are equal official languages. (South Africa Act, s. 137, amended in 1925 to include Afrikaans.) Section 136 of the Act declares that there shall be free trade throughout the Union.

The Executive.—The South Africa Act stated that the Executive Government of the Union was vested in the King, and should be administered by His Majesty in person or by a Governor-General as his representative. (Section 8.) The Status of the Union Act, 1934, repeals this section and provides that the Executive Government of the Union in regard to any of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative. (Sections 4, 11 (1).) Apart from enacting the convention that the Crown should act for the Union on the advice of Union Ministers, this provision is remarkable for allowing all external affairs to be administered by the Governor-General.

The Royal Executive Functions and Seals Act, 1934, passed by the Union Parliament, provides the machinery for carrying out the above provisions of the Status of the Union Act. It gives South Africa a

(*f*) *Op. cit.*, p. 101.
(*g*) Jennings and Young, *Constitutional Laws of the British Empire*, p. 266.
(*h*) The official view in Dublin was that the Irish Free State Constitution owed its existence to Free State legislation and not United Kingdom legislation; *post*, p. 649. The present Constitution of Eire is supposed to have been "enacted by the people"; *post*, p. 655.

Royal Great Seal and a Royal Signet, where previously there had only been a Great Seal used by the Governor-General. The King's executive acts are to be expressed under the royal sign manual, countersigned by a Union Minister, and confirmed where appropriate by the Royal Great Seal; but provision is made for the Governor-General to act for the King where for any reason the King's signature to any instrument requiring the royal sign manual cannot be obtained or when undue delay would be involved in obtaining the King's signature.

The South Africa Act provides that there shall be an Executive Council to advise the Governor-General. The members are to be chosen by the Governor-General, and to hold office during his pleasure. (Section 12.) The Governor-General may also appoint a limited number of Ministers of State to administer the departments of State. They are to be members of the Executive Council, and may not hold office for more than three months unless they are or become members of either House of Parliament. (Section 14.) The Executive Council consists of present and past Ministers of State. In fact the Governor-General only summons present Ministers of State, so that for practical purposes the Council is synonymous with the Cabinet. As the expression "Governor-General-in-Council" means the Governor-General acting with the advice of the Executive Council (section 13), in effect it means the Cabinet (*i*).

The seat of the Government of the Union is Pretoria. The conventions relating to responsible Parliamentary Government are similar to those in the United Kingdom.

Administration of Native Affairs.—The legal position of African natives and other non-Europeans differs from that of Europeans. The South Africa Act provides that the control and administration of native affairs and of matters specially affecting Asiatics shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration previously vested in the Governors of the Colonies or exercised by them as supreme chiefs. (Section 142.) The matter is now governed largely by the Native Affairs Act (South Africa), 1920, and the Native Administration Act (South Africa), 1927, the effect of which is that natives form as it were an indeterminate Crown Colony within a Dominion (*k*).

(*i*) Kennedy and Schlesberg, *op. cit.*, pp. 139—141.
(*k*) See Kennedy and Schlesberg, *op. cit.*, pp. 445 *et seq.*

The Legislature.—The Union Parliament consists of the King, the Senate, and the House of Assembly (South Africa Act, s. 19). The Parliament has "full power to make laws for the peace, order, and good government of the Union." (Section 59 (*l*).) There must be a session of Parliament at least once a year, and not more than twelve months must elapse between sessions. (Section 22.) The seat of the Legislature is Capetown. The maximum life of the House of Assembly is five years. (Section 45.) The Governor-General may dissolve both Houses simultaneously or the House of Assembly alone (section 20), and may dissolve the Senate within 120 days of a dissolution of the House of Assembly. (Senate Act (South Africa), 1926.)

Eight senators for each Province are elected by the members of the Provincial Council (*m*) and the members of the House of Assembly elected for that Province; and eight senators, of whom four must have special knowledge of native affairs, are nominated by the Governor-General. (South Africa Act, ss. 24—25.) Senators, whether elected or nominated, hold their seats for ten years unless the Senate is sooner dissolved, and nominated senators also vacate their seats when a change of government occurs (*ibid.*, as amended by the Senate Act, 1926) (*n*). The purpose of the latter provision is to ensure that nominated senators approve of the government's native policy; and also, perhaps, to enable the new government to obtain a working majority in the Senate without dissolving the whole of that body (*o*). The Representation of the Natives Act (South Africa), 1936, added four senators indirectly elected by the natives. Senators must be Union nationals. (Status of the Union Act, 1934, s. 6.)

The members of the House of Assembly are directly elected in the Provinces in proportion to their adult European populations. African natives in general never had the franchise, except for a high native franchise in the Cape. Subject to subsequent legislation, the existing franchise qualifications remained on the establishment of the Union (South Africa Act, ss. 32—36.) By Union legislation members of the House of Assembly and voters must be Union nationals.

(*l*) And see Status of the Union Act, 1934, s. 2; *ante*, p. 637.
(*m*) For Provincial Councils, see *post*, p. 643.
(*n*) A "change of government" is defined by the Senate Act, 1926, as taking place "whenever another person than the Prime Minister for the time being becomes Prime Minister and whenever the Governor-General has published a notice in the *Gazette* that such change of government has occurred."
(*o*) Kennedy and Schlosberg, *op. cit.*, p. 247.

Section 35 (1) of the South Africa Act provided that the Parliament shall not disqualify Cape electors by reason only of race or colour, unless the Bill is passed by both Houses sitting together and the third reading is agreed to by not less than two-thirds of the total number of members of both Houses (*p*). Sub-section (2) provides that no registered voter shall be disfranchised by reason only of race or colour. The basis of the Cape native franchise was changed, and an advisory Council representing the natives was set up, by the Representation of the Natives Act, 1936, passed by both Houses in joint session (*q*).

Money Bills must originate in the House of Assembly, and may not be amended by the Senate. (South Africa Act, s. 60.) Money votes must be recommended by the Governor-General. (Section 62.) If the Senate rejects a Bill sent up by the House of Assembly in two successive sessions, the Governor-General may convene a joint sitting of the two Houses; and if the Bill is passed by an absolute majority of those present at the joint sitting, it shall be taken to have been duly passed by both Houses. In the case of a Money Bill, such joint sitting may be convened during the same session in which the Senate rejects it. (Section 63.)

Section 64 of the South Africa Act empowered the Governor-General to assent or withhold assent or to reserve Bills for the royal pleasure, and required him to reserve all Bills repealing or amending this section or any of sections 32—58 (House of Assembly), and all Bills abolishing Provincial Councils or abridging the powers conferred on Provincial Councils under section 85. The power of reservation under this section was abolished by section 8 of the Status of the Union Act, 1934, which itself had to be reserved for the royal pleasure (*r*). Section 64 further allows the Governor-General to return a Bill to the House from which it came with suggested amendments. This power, which is, of course, exercised on the advice of the Government, has been found useful for the correction of drafting errors.

Section 65 of the South Africa Act entitled the Crown to disallow Acts within one year, but this section was repealed by the Status of the Union Act, 1934, s. 11 (2), as from a date to be fixed by the

(*p*) Not two-thirds of the number of members present or voting.
(*q*) Since the Statute of Westminster, 1931, the Courts would apparently accept an amendment of s. 35 (1) passed by the ordinary legislative procedure; see *Ndlwana v. Hofmeyr*, [1937] A. D. 229; *post* p. 646.
(*r*) See Kennedy and Schlesberg *op. cit.*, p. 617.

Governor-General. The Union Government had previously consulted the United Kingdom Government on this provision of the Status of the Union Act (*s*).

The privileges of the Union Parliament, including freedom of speech and debate, are defined in the Powers and Privileges of Parliament Act (South Africa), 1911.

Courts and Appeals.—The Supreme Court of South Africa is divided into Provincial Divisions to deal with matters arising in the four Provinces, while the Provinces have no Courts of their own. Appeal lies to the Appellate Division of the Supreme Court. Judges of the Supreme Court may not be removed except by the Governor-General-in-Council on an address from both Houses of the Parliament on the ground of misbehaviour or incapacity. (South Africa Act, s. 101.) The administration of the system of Roman-Dutch law, as modified by legislation, now shows the influence of the principles and technique of English law.

Section 106 of the South Africa Act provides that there shall be no appeal from the Supreme Court or from any Division thereof to the King in Council, but this shall not affect the right to grant special leave to appeal. Appeals by special leave were not abolished by the Status of the Union Act, 1934, but their abolition has for some time been under consideration. Section 106 further provides that the Union Parliament may limit the matters in respect of which such special leave may be asked, but Bills for this purpose must be reserved This provision was expressly preserved by section 10 of the Status of the Union Act. Special leave has rarely been granted, owing to the unitary nature of the Constitution and the Roman-Dutch basis of the law (*t*).

The Provinces.—*Administrators.*—Each Province has an Administrator appointed by the Governor-General-in-Council and in whose name all executive acts relating to provincial affairs are done. The Administrator holds office for five years, and may not be removed except by the Governor-General-in-Council for cause assigned and

(*s*) Wheare, *The Statute of Westminster and Dominion Status* (2nd ed.), p. 261

(*t*) One of the few cases was *Pearl Assurance Co.* v. *Government of the Union of South Africa*, [1934] A. C. 570, where the Judicial Committee differed from the Supreme Court on a point of Roman-Dutch law.

communicated to both Houses of Parliament . (South Africa Act, s. 68.) His salary is fixed, and may not be reduced during his term of office (section 69).

Provincial Councils.—Each Province has a Provincial Council consisting of the same number of members as are elected in the Province for the House of Assembly, with a minimum of twenty-five (section 70). Provincial Councillors are elected by persons qualified to vote for members of the House of Assembly (section 71). A Provincial Council continues for three years, and is not subject to dissolution within that period (section 73). The Council must be summoned by the Administrator at least once a year, and not more than twelve months must elapse between sessions (section 74). The Council elects from among its members a Chairman, and its rules of procedure may be disapproved by the Governor-General (section 75). Freedom of speech in Council is preserved (section 77).

Executive Committees.—Each Provincial Council elects four persons, who may or may not be Councillors, to form with the Administrator an Executive Committee (section 78). The Administrator and any other member of the Executive Committee who is not a Councillor may take part in the proceedings of the Council but may not vote (section 79). The Executive Committee on behalf of the Provincial Council carries on the administration of provincial affairs (section 80). Generally, all executive powers formerly vested in the Governors or Ministers of the Colonies are vested in the Executive Committee so far as such powers relate to matters in respect of which the Provincial Council is competent to make ordinances (section 81). The Administrator may be required by the Governor-General to act on his behalf in matters outside the powers of the Provincial Council, in which case he may act without reference to the Executive Committee (section 84).

The system of provincial administration was intended to be conducted free from party politics, but for various reasons this intention has not been realised (*u*).

The Powers of Provincial Councils.—Section 85 of the South Africa Act confers on the Provincial Councils power to make "ordinances" in relation to matters coming within certain specified classes of subjects.

(*u*) See Kennedy and Schlosberg, *op. cit.*, pp. 330—336.

The list is somewhat similar to the powers assigned to the Canadian Provinces (*x*), and includes taxation from specified sources in order to raise a provincial revenue (*y*); education, other than higher education; agriculture; municipal and other local authorities; local works and undertakings within the Province, other than railways, harbours and extra-provincial or national works; roads; all matters which, in the opinion of the Governor-General-in-Council, are of a merely local or private nature in the Province; and any other subjects in respect of which the Union Parliament shall delegate the power of making ordinances.

The powers of the Provincial Councils differ fundamentally from the legislative powers of the Canadian Provinces in that the former are not exclusive. The Union Parliament can legislate on matters assigned to the Provincial Councils (*Middelburg Municipality* v. *Gertzen*) (*z*), and section 86 declares that any ordinance shall have effect as long and as far only as it is not repugnant to any Act of the Union Parliament.

An ordinance passed by a Provincial Council must be presented to the Governor-General in Council for his assent; and he may assent, withhold assent, or reserve it for further consideration. (Section 90.) Yet Provincial Councils have full legislative authority within their sphere, and are not mere delegates. (*Williams and Adendorff* v. *Johannesburg Municipality* (*a*).) The Courts can only determine whether they have exceeded their powers, which include powers necessarily ancillary to those enumerated in section 85; they cannot question the reasonableness of ordinances as if they were merely bye-laws. (*Middelburg Municipality* v. *Gertzen*, *supra*.)

Acts prejudicial to the Provinces.—Section 149 of the South Africa Act provided that the Union Parliament might alter the boundaries of any Province, divide a Province into two or more Provinces, or form a new Province out of existing Provinces, on the petition of the Provincial Council of every Province whose boundaries were affected. The South Africa Amendment Act, 1934, repeals this section, and provides that the Parliament (a) shall *not* do any of these things

(*x*) *Ante*, p. 614.
(*y*) The taxing power is now defined in Acts of the Union Parliament.
(*z*) [1914] A. D. 544; Jennings and Young, *op. cit.*, p. 268.
(*a*) [1915] T. P. D. 106.

except on such petition, and (b) shall not abolish any Provincial Council or abridge the powers conferred on Provincial Councils under section 85 of the South Africa Act except by petition from the Provincial Council concerned. Bills for the latter purposes required to be reserved before 1934 (*b*). Strictly, the Union Parliament can alter these provisions just as easily as it passed them, but the Amendment Act is "a declaration of policy and is of great moral value to the people who attach any importance to the retention of the provincial system" (*c*).

Constitutional Amendment.—Section 152 of the South Africa Act provides that the Union Parliament "may by law repeal or alter any of the provisions of this Act," with certain restrictions, *viz.*:—(i) provisions for the operation of which a definite period of time is prescribed, may not be repealed or altered during such period (*d*); (ii) no repeal or alteration of sections 33 and 34 relating to the number of members of the House of Assembly (until the number of members has reached the prescribed limit or ten years have elapsed, whichever shall be the longer period) (*e*), or of section 35 relating to the qualification of voters—in particular, the native voters in the Cape (*f*)—or section 137 relating to the equality of the English and Dutch (or Afrikaans) languages, shall be valid unless the Bill is passed by both Houses sitting together and the third reading is agreed to by not less than two-thirds of the total number of members of both Houses. "A Bill so passed at such joint sitting," section 152 adds, "shall be taken to have been duly passed by both Houses of Parliament."

These "entrenched clauses," as they were called, could not be repealed or altered by the Union Parliament, except under the procedure prescribed by section 152, by reason of the Colonial Laws Validity Act, 1865. Unless there was some indication in the Act or proof *aliunde* that the Act was passed in the prescribed manner, the Courts would have assumed that an Act was passed by the ordinary procedure. (*R.* v. *Ndobe* (*g*).) Apart from the entrenched clauses, in view of the opening words of section 152 the Courts had no power even before

(*b*) *Ante*, p. 641.
(*c*) Mr. O. Pirow, K.C., introducing the Amendment Bill in the House of Assembly; quoted by Kennedy and Schlosberg, *op. cit.*, p. 621.
(*d*) These periods have now expired.
(*e*) This period has now expired.
(*f*) See *ante*, p. 641.
(*g*) [1930] A. D. 484.

1931 to declare an Act of the Union Parliament void as being unconstitutional. (*Krause* v. *Commissioner of Inland Revenue* (*h*).)

Since the Statute of Westminster, the Supreme Court has held, in an action arising out of the Representation of the Natives Bill, 1936, that the Union Parliament is a sovereign legislature unrestricted by section 152, even if it has not previously amended section 152 itself, and that it can alter or repeal any provisions of the South Africa Act by either joint or separate sittings. (*Ndlwana* v. *Hofmeyr* (*i*).) The resolution of the Union Parliament requesting the passing of the Statute of Westminster, however, was agreed to "on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act"; and it appears from statements in both Houses and by the Speaker of the House of Assembly that the method prescribed by section 152 is morally binding either as constitutional convention or as Parliamentary practice (*k*).

(*h*) [1929] A. D. 286; Jennings and Young, *op. cit.*, p. 68
(*i*) [1937] A. D. 229.
(*k*) See Kennedy and Schlosberg, *op. cit.*, pp. 102—103. Wheare, *op. cit.* pp. 241—242

CHAPTER XLIV.

EIRE.

I. THE CONSTITUTION OF THE IRISH FREE STATE, 1922.

The events leading up to the Anglo-Irish Treaty of 1921 and the foundation of the Irish Free State in 1922 have been briefly recorded (*a*).

The Anglo-Irish Treaty, 1921.—The Treaty was signed in December, 1921, by representatives of the British Government and an Irish delegation (*b*). It provided that Ireland should have the same constitutional status in the British Empire as the Dominions of Canada, Australia, New Zealand and South Africa, with responsible Parliamentary Government, under the name of the Irish Free State. (Art. 1.) More particularly, its position in relation to the United Kingdom was to be that of Canada as defined by law, practice and constitutional usage. (Art. 2.) The representative of the Crown was to be appointed in the same way as the Governor-General of Canada (Art. 3), and the oath "to be taken" by members of the Free State Parliament was specified. (Art. 4.) The defence by sea of Ireland was to be undertaken by His Majesty's Imperial Forces until an agreement should be made between the British and Irish Governments whereby the Irish Free State undertook her own coastal defence. (Art. 6.) The Free State was bound in time of peace to allow the harbour defences at Berehaven and Queenstown (Cobh) and Lough Swilly to remain in charge of British care and maintenance parties and to grant facilities in those districts for aerial defence, and in time of war or strained foreign relations to allow to His Majesty's Imperial Forces such harbour and other facilities as the British Government might require for the defence of Ireland. (Art. 7.) The Free State Army was to be limited in proportion to the British Army according to the ratio of the populations of their respective countries. (Art. 8.) The Treaty was to be submitted to the British Parliament and to the Provisional Irish Parliament for approval and legislative ratification. (Art. 18.) The six counties of Northern Ireland were

(*a*) *Ante*, p. 524.
(*b*) A vivid account of the negotiations is given in Pakenham, *Peace by Ordeal*.

allowed to contract out of this arrangement and to remain in the United Kingdom, and this right was exercised.

The Treaty was ratified by the United Kingdom Parliament by the Irish Free State (Agreement) Act, 1922, which scheduled the Treaty and provided for a Parliament to meet in Ireland as a constituent assembly to draw up a constitution for the Free State.

The Basis of the Constitution.—Such a Parliament, known as the "Third *Dáil*" (*c*), met and by a small majority passed the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. This Act consisted of a preamble, three short articles and two schedules. The preamble recited that the purpose of the statute was to enact a Constitution and to implement the Treaty, and that "all lawful authority comes from God to the people." Article 2 declared that the Constitution thereby enacted should be construed with reference to the Treaty which was thereby given the force of law, and that any provision or amendment of the Constitution and any law made thereunder should be void to the extent that it was repugnant to the Treaty. The Constitution was set out in the first schedule and the Treaty in the second schedule.

The United Kingdom Parliament then passed the Irish Free State Constitution Act, 1922, which recited in its preamble section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act, declared that the Constitution contained in the latter Act should be the constitution of the Irish Free State, and set it out in a schedule.

The two chief Irish protagonists of the Treaty, Arthur Griffith and Michael Collins, being dead, Mr. Cosgrave (*Finé Gael*) as Prime Minister guided the new State through the first ten years of its existence. Mr. De Valera, the heir of the Republican Declaration of 1916 (*d*), led the opposition to the Treaty, and for some years his party (*Fianna Fáil*) abstained from attending the *Dáil* and otherwise refused to co-operate with the régime. Later, Mr. De Valera changed his tactics and sought to achieve his aim—namely, an independent Republic for the whole of Ireland, in "external association" with the British Commonwealth—

(*c*) The "First *Dáil*" consisted of the Republicans elected to the United Kingdom Parliament at the general election in December, 1918. The "Second *Dáil*," which met in August, 1921, consisted of the Republicans and Nationalists elected to the Parliament of Southern Ireland under the Government of Ireland Act, 1920.

(*d*) *Fianna Fáil* should not, however, be associated with the "Irish Republican Army" referred to *ante*, p. 107.

by constitutional means. His party gained a majority in the *Dáil* in 1931; Mr. De Valera became Prime Minister, and has remained so ever since.

The complicated process outlined above, by which the Irish Free State came into existence, raised the difficult question, to what authority did the Constitution owe its existence? On this question there were several conflicting views.

(*i*) The Free State High Court and the majority of the Supreme Court stated *obiter* in *The State* (*Ryan*) v. *Lennon* (*e*) that the Treaty and the Constitution were given the force of law in Ireland by Free State legislation, *viz.*, the Irish Free State (Saorstát Eireann) Act, 1922, and that the *Oireachtas* was bound by that Act and the Treaty. This was the view acted on by Mr. Cosgrave's Government up to 1931.

(*ii*) Mr. De Valera's Government since 1931 have acted on the view that the power of the *Oireachtas* is legally unlimited, but that it is limited morally by the will of the people as expressed from time to time by general election or referendum. His party were originally doubtful how far the Irish people could enact a Constitution which was repugnant to the Republican Declaration of 1916.

(*iii*) The Judicial Committee held in *Moore* v. *Attorney-General for the Irish Free State* (*f*) that the Treaty, the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, and the Constitution all received the force of law in Ireland as well as in Britain by United Kingdom legislation, *viz.*, the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922, and that therefore the *Oireachtas* was originally bound by the terms of the Treaty and by the Colonial Laws Validity Act, 1865. Section 2 of the Statute of Westminster, 1931, which applied to the Irish Free State without any saving clause, abrogated these restrictions on Free State legislation, and thereafter the constituent and other legislative powers of the *Oireachtas* were unlimited. The English lawyer is naturally inclined to adopt the Privy Council's view.

Main Features of the Constitution.—As the Free State Constitution of 1922 is no longer in existence, it is only necessary here to mention

(*e*) [1935] Ir. R. 170; 69 Ir. L. T. 125; Hood Phillips, *Ryan's Case* (1936), 52 Law Quarterly Review, at pp. 244—246.

(*f*) [1935] A. C. 484; [1935] Ir. R. 472; cf. Jennings, *The Statute of Westminster and Appeals to the Privy Council* (1936), 52 Law Quarterly Review, at *pp.* 183 *et seq.*

some of its chief characteristics and to note the process by which the way was prepared for the present constitution of Eire (*g*).

Article 1 declared that the Irish Free State (*Saorstát Eireann*) was a co-equal member of the British Commonwealth of Nations. Article 2 declared that "all powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland . . ."

The Executive.—The executive authority of the Free State was vested in the King, and exercisable by the Representative of the Crown in accordance with the constitutional laws and practice obtaining in Canada. (Art. 51.) The Governor-General, who was to be appointed in the same way as the Governor-General of Canada (Art. 60), was given power to summon and dissolve the Legislature (*Oireachtas*), to assent or refuse his assent to Bills, and to reserve Bills for the King's pleasure. (Art. 41.) The powers of refusing assent and reservation were abolished by the Constitution (Amendment No. 21) Act, 1933.

An Executive Council was to be appointed by the Governor-General on the nomination of the President of the Executive Council (Prime Minister), who was himself to be nominated by the *Dáil* (Lower House). The members of the Executive Council, as Ministers sitting in the *Dáil* and as heads of Government Departments, were to be collectively responsible to the *Dáil*. These provisions enact some of the most important conventions of responsible government.

The Legislature was to consist of the King, a Senate (*Seanad Eireann*) and a Chamber of Deputies (*Dáil Eireann*), with "sole and exclusive power" to legislate for the Irish Free State. (Art. 12.) Members of the *Oireachtas* were to take an oath of allegiance to the King in a form identical with that prescribed or specified (*h*) in the Treaty. (Art. 17.) The oath was abolished by the Constitution (Removal of Oath) Act, 1933 (*i*). The general principles of responsible parliamentary government were enacted, but with certain modifications with regard to the granting of a dissolution on the defeat of a Government in the *Dáil*. The Senate was abolished without its consent by the Constitution (Amendment No. 24) Act, 1936.

(*g*) See further, Hood Phillips, *Principles of English Law and the Constitution*, pp. 525—532.

(*h*) *Ante*, p. 647. It is doubtful whether the wording of the Treaty made the oath obligatory.

(*i*) *Moore* v. *Att.-Gen. for the Irish Free State*, [1935] A. C. 484; [1935] Ir. R. 472.

Courts and Appeals.—The Constitution provided for a High Court with both original and appellate jurisdiction, and with exclusive original jurisdiction in questions relating to the validity of any law under the Constitution; and a Supreme Court to hear appeals from the High Court in constitutional and other matters. (Arts. 64—66.) Under Article 68 the Judges were to be appointed by the Governor-General on the advice of the Executive Council, and were not removable except for stated misbehaviour or incapacity and then only by resolutions passed by both Houses. By the Constitution (Amendment No. 24) Act, 1936 (*supra*), the resolution required was that of the *Dáil* alone, and it required the votes of not less than four-sevenths of the members of the *Dáil*. By the Constitution (Amendment No. 27) Act, 1936 (*infra*), the Judges were to be appointed directly by the Executive Council.

Article 66 provided that the decision of the Supreme Court should in all cases be final and conclusive and should not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever, with a proviso that nothing should impair "the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." In the few cases in which the Privy Council heard appeals from the Free State, however, the *Oireachtas* nullified the decisions by special legislation. The proviso relating to appeals by special leave was repealed by the Constitution (Amendment No. 22) Act, 1933, which provided that "no appeal shall lie from a decision of the Supreme Court or of any other Court in the Irish Free State (Saorstát Eireann) to His Majesty in Council, and it shall not be lawful for any person to petition His Majesty for leave to bring any such appeal." The existence of a right of appeal by special leave was greatly valued by the Protestant section of the community, and it was widely thought that its abolition was repugnant to the Treaty; but the Treaty did not expressly mention appeals to the Privy Council, and there is not the same need for such appeals where a Dominion Constitution is unitary as there is in the case of Canada. The Judicial Committee itself held the amendment to be valid under section 2 of the Statute of Westminster. (*Moore* v. *Attorney-General for the Irish Free State* (*k*).)

(*k*) *Supra.*

In spite of the many references in the Constitution to rights of person and property, the Supreme Court held, in *The State (Ryan)* v. *Lennon* (*l*), that there were no "fundamental" or "natural" rights which the *Oireachtas* could not restrict or take away.

Constituent Power.—Article 50 allowed the *Oireachtas* to amend the Constitution within the terms of the Treaty by the ordinary legislative process within eight years, and thereafter subject to a referendum. Within the eight years the *Oireachtas* extended the non-referendum period to sixteen years by the Constitution (Amendment No. 16) Act, 1929. This amendment was held valid by the Supreme Court in *Ryan's Case* (*supra*), since the Constitution *Act* had not expressly excepted from amendment Article 50 of the Constitution itself.

The Constitution (Removal of Oath) Act, 1933 (*m*), repealed section 2 of the Constitution *Act* requiring constitutional amendments and other Acts of the *Oireachtas* to be consistent with the Treaty (*n*), and deleted that part of Article 50 which required constitutional amendments to be within the terms of the Treaty.

Citizenship and British Nationality.—Article 3 of the Constitution conferred citizenship of the Irish Free State on every person domiciled in the Free State at the time of the coming into operation of the Constitution, who was born in Ireland or either of whose parents was born in Ireland or who had been ordinarily resident in the Free State for not less than seven years, provided that any such person being a citizen of another State might elect not to accept Free State citizenship. This definition was inadequate as it only applied to persons domiciled in the Free State when the Constitution came into operation, and made no provision for persons born in the Free State after that date.

The Irish Nationality and Citizenship Act, 1935 (No. 13 of 1935), defined Irish Free State citizenship in a way similar *mutatis mutandis* to the definition of British nationality contained in United Kingdom statutes (*o*). It repealed the British Nationality and Status of Aliens

(*l*) [1935] Ir. R. 170; 69 Ir. L. T. 125; Hood Phillips, *Ryan's Case* (1936), 52 Law Quarterly Review, at pp. 242—244.

(*m*) *Ante*, p. 650; *Moore* v. *Att.-Gen. for the Irish Free State*, *supra*.

(*n*) See *ante*, p. 648.

(*o*) *I.e.*, birth in the Free State after 6th December, 1922, or registered birth outside the Free State of father who was a natural-born citizen; but, of course, no reference was made to His Majesty's dominions or allegiance. Provision was also made for persons born in Ireland to acquire citizenship by permanent residence in the Free State or by registration, and for naturalization. See further, *post*, p. 661.

Acts, 1914 and 1918, and purported to abolish the common law relating to British nationality, if and so far as these laws were in force in the Free State. The Aliens Act, 1935 (No. 14 of 1935), defined an "alien" as any person who was not a citizen of the Irish Free State. The effect of these two Acts was that, by the internal law of the Free State, citizens of the Free State as such were not British subjects, and British subjects as such were aliens. By the former Act, however, reciprocal rights might be granted by convention or executive order where Free State citizens enjoyed the rights of citizens of another country by the law of that country; and a proviso in the latter Act permitted the exemption by executive order of the citizens of any particular country from any of the disadvantages of aliens. Such exemption was in fact immediately given to citizens of the United Kingdom, Canada, Australia, New Zealand, South Africa, Newfoundland and India.

The Transition Period.—By December, 1936, Mr. De Valera had gone some way to achieving his aims. The Statute of Westminster had been passed, the oath to the King had been removed and appeals to the Privy Council abolished, the Irish Nationality and Citizenship Act, 1935, had purported to snap the bond of allegiance to the King, and there was no Senate with *Finé Gael* or "ascendancy" proclivities to obstruct the measures of the *Dáil* he controlled. The abdication of Edward VIII forced his hand, and he immediately introduced into the *Dáil* two Bills which anticipated the long-awaited new Constitution by eliminating the Crown from the government of the State.

(i) *The Constitution (Amendment No. 27) Act, 1936*, deleted from the Constitution all references to "the King" and "the Representative of the Crown," and specifically distributed among the Executive Council, the Chief Justice and the Chairman of the *Dáil* the chief functions of *internal* government formerly exercised by the Governor-General. It then provided that it should be lawful for the Executive Council to avail itself, for the purposes of the appointment of diplomatic and consular agents and the conclusion of international agreements, of "any organ used as a constitutional organ for the like purposes" by the nations forming the British Commonwealth.

This periphrasis was understood to refer to the King. The Act was the last to be assented to by the Governor-General, and came

into operation on the same day as the Declaration of Abdication Act passed at Westminster.

(ii) The second measure, which was signed by the Chairman of the *Dáil* on the following day, was the ***Executive Authority (External Relations) Act, 1936***. This Act vested in the Executive Council the external prerogative of appointing diplomatic and consular agents and concluding international agreements; but provided that, so long as the Irish Free State was associated with the members of the British Commonwealth of Nations, the King recognised by those nations might act on behalf of the Free State for those purposes as and when advised by the Executive Council to do so. It was not in form a constitutional amendment, it being Mr. De Valera's thesis that, in so far as the King might be employed by the Free State, that was a matter outside the Constitution. The Act confirmed the abdication of Edward VIII and scheduled the Instrument of Abdication. It did not specifically vest the prerogatives of war and neutrality in the Executive Council, but Article 49 of the Constitution provided that "Save in the case of actual invasion, the Irish Free State shall not be committed to *active* participation in any war without the assent of the *Oireachtas*."

(iii) Meanwhile, the last Governor-General, Mr. Donal Buckley, was by a gentleman's agreement with Mr. De Valera living the life of a retired civil servant outside Dublin, shorn of everything except his salary (*p*). When his period of office expired in the following May the ***Executive Powers (Consequential Provisions) Act, 1937***, was passed, repealing the Act which provided for the Governor-General's salary. It further declared that every power, function, duty and jurisdiction whatsoever formerly exercisable by the King or the Governor-General should be deemed to be transferred to and exercisable by the Executive Council as from the passing of the Constitution (Amendment No. 27) Act, 1936 (*supra*), save in so far as it had been transferred to some other person. There was now no head of the State.

II. THE CONSTITUTION OF EIRE, 1937.

The instrument introduced by Mr. De Valera in the *Dáil* in March, 1937, went through the same stages as a Bill, though in form it was

(*p*). It is believed that in fact he only accepted a small part of his official salary.

neither an ordinary Bill nor a constitutional amendment, but a draft Constitution submitted to a constituent assembly (*q*). By the Plebiscite (Draft Constitution) Act, 1937, the draft Constitution approved by the *Dáil* was to come into force six months after its approval by a majority of the votes cast at a plebiscite. The draft was approved by a small majority at the plebiscite held on 1st July, 1937 (*r*), and the Constitution (*s*) came into force automatically on 29th December, 1937.

The preamble recites that "We, the people of Eire . . . do hereby adopt, enact, and give to ourselves this Constitution," and Article 6 declares that "all powers of government legislative, executive and judicial, derive, under God, from the people." This is in accordance with the theory that the people have the right to enact their own Constitution; so that the new instrument, which, by Articles 48 and 49, repeals the Free State Constitution and the Irish Free State (Saorstát Eireann) Act, 1922, effects a constitutional novation. The new Constitution would probably be held by a British Court to be based on enactment by the Free State legislature, and its validity to rest on the Statute of Westminster (*t*).

The Constitution purports to apply to the whole of Ireland (Art. 2), but "pending the re-integration of the national territory" the laws of the Parliament thereby constituted are to operate to the same extent as the laws of the Irish Free State (Art. 3). Irish is "the first official language," and English "a second official language" (Art. 8). The Constitution is published in Irish and English. Article 4 declares that "the name of the State is *Éire*, or, in the English language, *Ireland*," but for obvious reasons the Dominions Office prefers to call the State "Eire." Article 5 declares the State to be a "sovereign, independent, and democratic State."

The Constitution confines itself to the internal government, and leaves the external relations of the State to be arranged by international convention or regulated by ordinary legislation. There is no reference to the King or a Representative of the Crown or to membership of the British Commonwealth. On the other hand, the State is not described as a republic. Citizenship of Eire is to remain as it was on the coming

(*q*) *Dáil Debates*, vol. 65, col. 1428—1429 (10th March, 1937).
(*r*) For, 685,105; against, 682,843. The voting went more or less on party lines.
(*s*) *Bunreacht Na hEireann* (Government Publications Sales Office, Dublin).
(*t*) *Cf. ante*, p. 649; *Moore* v. *Att.-Gen. for the Irish Free State*, [1935] A. C. 484

into operation of the Constitution (Art. 9). Treason is defined by Article 39 exclusively in terms of the State, on the theory that the King is not affected as he is not part of the Constitution but merely an organ which may be used by the Government in external affairs (*u*). Article 28 (3) provides that "War shall not be declared and the State shall not participate in any war save with the assent of Dáil Eireann." As regards external affairs, Article 29 substitutes an even vaguer phraseology for that contained in the Constitution (Amendment No. 27) Act and the Executive Authority (External Relations) Act, 1936 (*x*), by providing that "for the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may . . . avail [itself] of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern."

The Executive.—*The President.*—There is a President (*Uachtarán*) (*y*) who takes precedence over all other persons in the State. He performs the functions of head of the State, though he is not so described. He is not the Representative of the Crown. The President is directly elected by the people for a term of seven years, and is eligible for re-election once. Candidates for election must be nominated by at least twenty members of the *Oireachtas* or by at least four County Councils. Either House of the *Oireachtas* may impeach the President for misbehaviour, and after investigation of the charge he may be removed by a resolution passed by two-thirds of the other House. He is not, however, answerable to any Court for the exercise of his official powers (Art. 12).

The President is to appoint the head of the Government or Prime Minister (*Taoiseach*) (*z*) on the nomination of the *Dáil*, and to appoint

(*u*) The Treason Act (No. 10 of 1939), which implements Article 39 by prescribing penalties for treason (death) and like offences, covers (*i*) treason committed within the State by anyone, and (*ii*) treason committed outside the State by citizens of Eire or persons ordinarily resident in Eire.

(*x*) *Ante*, p. 654.

(*y*) The title of the Prime Minister under the Free State Constitution of 1922 was President of the Executive Council. Hence, in the years immediately before the coming into force of the Constitution of 1937, when the office of Governor-General had been reduced to a cipher, Mr. De Valera was commonly, but erroneously, called "the President."

(*z*), Pronounced *tee-shock*.

the other members of the Government on the nomination of the Prime Minister with the previous approval of the *Dáil*. He is to summon and dissolve the *Dáil* on the advice of the Prime Minister, but a dissolution may be refused where the latter has lost the support of the *Dáil*. The supreme command of the Defence Forces and the prerogative of mercy are vested in the President. Except as otherwise provided in the Constitution, the President's powers and functions are exercisable only on the advice of the Government (Art 13)

The Government.—The executive power of the State is exercisable by or on the authority of the Government, which is to consist of from seven to fifteen members The Prime Minister, his Deputy (*Tánaiste*), and the Finance Minister must be members of the *Dáil*. All members of the Government must have seats in one or other House of the *Oireachtas* and may address both Houses. Although a declaration of, or participation in, war requires the assent of the *Dáil*, the Government may, in the case of actual invasion, take any necessary precautionary measures pending the summoning of the *Dáil*. (Art 28.)

Sub-section 3.2° of Art. 28, as amended (*a*), provides that nothing in the Constitution shall be invoked to invalidate any law created by the *Oireachtas* which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done thereunder in time of war or armed rebellion. For this purpose, "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant, but in respect of which both Houses resolve that a national emergency is created, and the sub-section has effect until both Houses resolve that the national emergency occasioned by the war, armed conflict, or armed rebellion has ceased to exist. The *Oireachtas* was thereby enabled to pass Emergency Powers Acts, 1939, etc., rather similar to the emergency legislation of the United Kingdom, although Eire was not participating in the war.

The Government Departments do not inherit the same position as the Crown as regards judicial proceedings (*b*) or priority claims for debt (*c*), unless such privileges have been incorporated into the law of

(*a*) First Amendment of the Constitution Act, 1939; Second Amendment of the Constitution Act, 1941; *In re McGrath and Harte*, [1941] Ir. R. 68.

(*b*) *Att.-Gen.* v. *Crawford*, [1940] Ir. R. 335.

(*c*) *In re Irish Aero Club*; *Gillic* v. *Minister for Industry*, [1939] Ir. R. 294.

Eire by statute; and it appears that a Court can grant a declaration of right against a Government Department that certain money is being withheld by an error in the exercise of a statutory duty, even though in the circumstances no decree for payment could be made (*d*).

Article 38 of the Constitution makes provision for the establishment of special Courts for the trial of offences where the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Special Criminal Courts, with appeal to the Court of Criminal Appeal, were set up by the Offences against the State Act (No. 13 of 1939) to deal with such offences as usurpation of functions of government; obstruction of government; interference with military or other employees of the State; possession of treasonable, seditious or incriminating documents; unauthorised military exercises; and secret societies in the army or police; and also with unlawful organisations. The establishment of a Special Criminal Court under this Act was held valid in *In re MacCurtain* (*e*). The Offences against the State (Amendment) Act, 1940, reversing the decision in *The State* (*Burke*) v. *Lennon* (*f*) provided that the discretion of the Minister with regard to the internment of suspects was exercisable on opinion and was not a judicial decision. The Amendment Act was held valid on a reference to the Supreme Court under Art. 26 (*infra*).

The Council of State.—This body is to consist of seven *ex officio* members, viz., the Prime Minister, his Deputy, the Chief Justice, the President of the High Court, the chairmen of the *Dáil* and Senate, and the Attorney-General; former holders of the office of President, Prime Minister, Chief Justice, or President of the Executive Council; and not more than seven other persons appointed by the President for the time being in his discretion. The Council is an advisory body, which the President must or may consult in certain cases, though he need not accept its advice. (Arts. 31—32.) The first meeting of the Council of State was held to consider whether the question of the repugnancy to the Constitution of the Offences against the State (Amendment) Bill, 1940, should be referred to the Supreme Court (*g*).

(*d*) *Macauley* v. *Minister of Education and Breen*, [1940] Ir. R. 213.
(*e*) [1941] Ir. R. 83.
(*f*) [1940] Ir. R. 136.
(*g*) *The Times*, 8th and 9th January, 1940.

The Legislature.—Article 15 sets out the composition and powers of the Parliament (*Oireachtas*), which consists of the President, the House of Representatives (*Dáil*) and the Senate (*Seanad*). The "sole and exclusive power of making laws for the State" is vested in the *Oireachtas*, and "no other legislative authority has power to make laws for the State." (Section 2.1°) (*h*). The *Oireachtas* is not to enact any law which is repugnant to the Constitution, and "every law enacted by the *Oireachtas* which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid." (Section 4.) The *Oireachtas* must not declare acts to be infringements of the law *ex post facto*. (Section 5.) The right to raise and maintain armed forces is vested exclusively in the *Oireachtas*. (Section 5.) There is to be at least one session every year. (Section 7.) Freedom of debate is preserved, as also is freedom of members from arrest except in case of treason, felony or breach of the peace. (Section 13.) In connection with the payment of allowances to members (section 15), it is interesting to note that the Ministerial and Parliamentary Offices Act (No. 38 of 1938) provides additional allowances to the leaders of the Second Party and (if its members are not fewer than seven) of the Third Party.

The *Dáil* is elected on a system of proportional representation by means of the single transferable vote. (Art. 16.) The Senate is composed of sixty members, of whom eleven are nominated by the Prime Minister, three elected by each of the two Universities, and the remainder elected by the *Dáil* from panels of candidates nominated by members of the *Dáil* and various organisations. The five panels consist of persons having knowledge and practical experience of (i) the Irish language and culture, literature, art, education and the professions; (ii) agriculture and fisheries; (iii) labour; (iv) industry and commerce; and (v) public administration and social services. (Art. 18.) Provision may be made for the direct election of senators by functional or vocational association. (Art. 19.)

With respect to Money Bills, the Senate merely has power to make recommendations, and such Bills may be deemed to have been passed by both Houses twenty-one days after being sent to the Senate.

(*h*) This does not prevent the creation of subordinate legislatures (s. 2.2°), or the delegation of legislative authority (*Pigs Marketing Board* v. *Donnelly (Dublin), Ltd.*, [1939] Ir. R. 413), but is presumably aimed at the United Kingdom Parliament.

(Arts. 20—21.) The certificate of the Chairman of the *Dáil* that a Bill is a Money Bill is not conclusive, for the Senate may request the President to refer the question, after consultation with the Council of State, to a Committee of Privileges of the two Houses. (Art. 22.) If a Bill other than a Money Bill is not returned to the *Dáil* in such form as the *Dáil* approves within three months after being sent to the Senate, it may, by a resolution of the *Dáil* passed within the next six months, be deemed to have been passed by both Houses. (Art. 23.) If the Prime Minister certifies that a Bill, other than a constitutional amendment, is designed to meet some public emergency, the President, after consulting the Council of State, may abridge this period; but a law so passed shall only remain in force for three months or for such longer time as both Houses may agree upon (Art. 24.)

The signature of the President is necessary for a Bill to become law, but he has no general power to refuse to sign. (Art. 25) He may, after consulting the Council of State, refer a Bill, other than a Money Bill or a Bill expressed to be a constitutional amendment or an emergency Bill, to the Supreme Court for a decision on the question whether it is repugnant to the Constitution, and he is bound by its decision. (Art. 26.) In the case of a Bill other than a constitutional amendment or emergency Bill, a majority of senators and not less than one-third of the members of the *Dáil* may jointly petition the President not to sign, on the ground that it contains a proposal of such national importance that the will of the people ought to be ascertained. If the President after consulting the Council of State (*i*) agrees to the petition, a referendum must be held. (Art. 27.)

Certain "fundamental rights" are declared in Articles 40—44, *e.g.*, equality before the law, the right of *habeas corpus*, inviolability of the dwelling, right of public meeting and freedom of speech and association "subject to public order and morality," protection of the family and private property (*k*), right to education, and the legality of existing forms of religious worship. These rights are all subject to the power of constitutional amendment (*infra*). Article 45 sets out certain "directive principles of social policy" for the "general guidance" of the *Oireachtas*, but the application of this Article "shall not be

(*i*) Whether the President shall consult the Council of State in this case is a matter for his discretion: *In re McGrath and Harte*, [1941] Ir. R. 68.

(*k*) The right of private property does not prevent the *Oireachtas* from limiting freedom of contract: *Pigs Marketing Board* v. *Donnelly (Dublin), Ltd.*, *supra*.

cognisable by any Court." Emergency Acts passed under Article 28 (*l*) must be expressed to be made for securing the public safety and the preservation of the State in time of war, etc., but they need not recite that the necessary resolutions have been passed if that is admitted (*m*).

The Courts.—The judicial system remains as it was before. The High Court has jurisdiction to determine the validity of laws having regard to the provisions of the Constitution, unless the Bill has been referred to the Supreme Court by the President under Article 26. The decisions of the Supreme Court are final in all cases, and a decision of the Supreme Court on the validity of any law is to be pronounced by one Judge only. (Art. 34 (*n*).) Judges are appointed by the President, and a Judge of the Supreme Court or the High Court may not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by the two Houses. (Art. 35.)

Constitutional Amendment.—Article 46 allows the *Oireachtas* to repeal or amend any provision of the Constitution. A proposal to amend the Constitution must be initiated in the *Dáil* as a Bill described as a constitutional amendment, and on having been passed or deemed to have been passed by both Houses it must be submitted to a referendum (*o*). Constitutional amendments must be approved by a simple majority of the votes cast at a referendum; while other Bills submitted to a referendum are deemed to be approved unless they are vetoed by a simple majority of the votes cast, such adverse votes representing at least one-third of the electorate. (Art. 47.)

Eire and the British Commonwealth.—In considering the general constitutional position of Eire and its relations with the British Commonwealth, it will be noted first that the Crown has been eliminated from the Constitution, though it may be made use of for external purposes.

Article 9 provides that existing citizens of the Free State should

(*l*) *Ante*, p. 657. (*m*) *In re McGrath and Harte, supra.*

(*n*) As amended by the Second Amendment of the Constitution Act 1941.

(*o*) Article 51 allowed the Constitution, except Article 46 and Article 51 itself, to be amended without a referendum within the first three years, and provided that this period might not be extended. The First Amendment of the Constitution Act, 1939, and the Second Amendment of the Constitution Act, 1941, passed in exercise of this power, extended the circumstances in which Emergency Acts might be passed under Article 28 (*ante*, p. 657). The second Act also made a number of detailed drafting alterations and corrections, especially in Articles 24, 25, 34 and 40.

become citizens of Eire (*p*), and that the future acquisition and loss of citizenship shall be determined in accordance with law. In *Murray* v. *Parkes* (1942) (*q*), the English Divisional Court had to consider whether Murray, who was born in 1908 in that part of Ireland which is now Eire and had resided in England since 1934, was a British subject. He was charged under the National Service (Armed Forces) Act, 1939, for failing to submit himself to medical examination. He sought to justify his refusal by claiming that he was a citizen of Eire and not a British subject. He contended that the Statute of Westminster gave a Dominion the right to secede, that the Irish Free State had by the Constitution of 1937 seceded, and that the independence of Eire had been recognised by the United Kingdom Parliament in the Eire (Confirmation of Agreements) Act, 1938 (*infra*). By the National Service Act, 1941, the onus was on Murray to prove that he was not a British subject. It was held that (a) Murray was a British subject; (b) his domicil of origin in Eire was irrelevant in determining his nationality (*r*); (c) the United Kingdom Act of 1938 did not confirm the secession of Eire; and (d) the decision of the Judicial Committee in *Moore* v. *Attorney-General for the Irish Free State* (*s*) did not mean that a Dominion legislature could deprive a British subject of his status wherever he might be (*t*). The position seems to be that persons born in Eire are by English law British subjects, at any rate outside Eire, though there may be some doubt about persons born in Eire after the coming into operation of the Constitution (Amendment No. 27) Act, 1936 (*u*), or, perhaps, of the Irish Nationality and Citizenship Act and the Aliens Act, 1935 (*x*). So far the problem has not impeded the flow to Britain of emigrants and recruits to the armed forces.

It has already been mentioned that Eire did not attend the Imperial Conference in 1937, nor, of course, the war conferences of Commonwealth representatives. She is a member of the League of Nations, but is not one of the United Nations.

When the new Constitution came into force, a statement was issued

(*p*) See *ante*, p. 652.
(*q*) [1942] 2 K. B. 123; Newark, *British Nationality and Irish Citizenship* (1943), 5 Northern Ireland Legal Quarterly, 76.
(*r*) See *Udny* v. *Udny* (1869), L. R. 1 Sc. & Div. 441.
(*s*) [1935] A. C. 484.
(*t*) [1942] 2 K. B. at pp. 126—131, *per* Viscount Caldecote, C.J.
(*u*) *Ante*, p. 653. (*x*) *Ante*, pp. 652—653.

from Downing Street that "His Majesty's Government in the United Kingdom . . . are prepared to treat the new Constitution as not effecting a fundamental alteration in the position of the Irish Free State . . . as a member of the British Commonwealth of Nations. His Majesty's Government in the United Kingdom have ascertained that His Majesty's Governments in Canada, the Commonwealth of Australia, New Zealand, and the Union of South Africa are also prepared so to treat the new Constitution." It added that the United Kingdom Government could not recognise that the new Constitution "affects in any way the position of Northern Ireland as an integral part of the United Kingdom of Great Britain and Northern Ireland" (*y*). Questions on Eire in the House of Commons are answered by the Dominions Secretary.

An Agreement was signed by representatives of the Governments of the United Kingdom and Eire in April, 1938, under which Articles 6 (defence by sea of Ireland) and 7 (use of Free State ports) of the Treaty of 1921 ceased to have effect. This Agreement was confirmed in the United Kingdom by the Eire (Confirmation of Agreements) Act, 1938, which defined "Eire" as meaning the former Irish Free State. Practically the only article of the Anglo-Irish Treaty which now remains in force is that which limits the size of the Free State army.

Until April, 1939, Free State and Eire passports invoked the name of the King. After that date they are issued in the name of the Minister for External Affairs (*z*). The British Diplomatic and Consular Services remain available for citizens of Eire, being British subjects, in countries where Eire has no representative.

Eire remained neutral when the rest of the British Empire and Commonwealth declared war on Germany in 1939, and remained neutral throughout the war. Shortly before "D Day," in March, 1944, the United States sent a note to Eire asking her to close the Axis legations in Dublin on security grounds (*a*). The United Kingdom supported the note, which was also approved by Canada

(*y*) *The Times*, 20th December, 1937. It was held by the Court of Appeal, in *Hume Pipe and Concrete Construction Co.* v. *Moorcrete, Ltd.*, [1942] 1 K. B. 189, that, for the purpose of serving a writ out of the jurisdiction, Eire is to be treated as a British possession.

(*z*) *The Times*, 20th April, 1939.

(*a*) The United States had large forces in Northern Ireland

and Australia. Eire refused to accede to the request, and unsuccessfully asked Australia to request the United States to withdraw the note (*b*).

It should be added that, not only is Eire not described as a republic in the Constitution of 1937, but Mr. De Valera has persistently refused in the *Dáil* either to affirm or to deny that Eire is a member of the British Commonwealth. Our general conclusion must be that his policy of independence with "external association" has been markedly successful from his own point of view (*c*), though he will not be satisfied so long as the "partition" of Ireland continues.

(*b*) *The Times*, 14th March, 1944.

(*c*) For the United Kingdom and the United Nations generally, however, the denial of the use of the southern ports greatly increased the difficulties of the Battle of the Atlantic.

CHAPTER XLV.

INDIA AND BURMA.

I. THE EMPIRE OF INDIA.

(1) British India before 1935.—*The East India Company*, 1600—1858.—The British went to India for the purpose of trade and commerce, especially in spices. Elizabeth granted a charter to the East India Company in 1600, and the Company had by statute an exclusive right of trading from 1698 until 1813. As the activities of the Company expanded they became increasingly subject to the supervision of the British Government and Parliament. A Governor-General, with a Council, was appointed in 1773. More and more territory was acquired by cession or conquest, still for the purpose of protecting European merchants and their trade, until the middle of the nineteenth century. According to common law principles, territory and jurisdiction were acquired on behalf of the Crown, though individuals might enjoy the benefit of personal gifts from native rulers. A halt was then called to further acquisition, the new policy being to make treaties and other arrangements with the remaining native States. The Charter Act of 1833, which created a Government of India, forbade the East India Company to transact commercial business (*a*).

The Queen-Empress.—After the so-called "Indian Mutiny" in 1857, a statute of 1858 substituted direct rule by the Crown for indirect administration through the East India Company. The Governor-General acquired the unofficial title of "Viceroy," and the supreme executive powers were vested in the Secretary of State for India and his Council. India had a legislative Council, as had the three Presidencies of Bombay, Madras and Bengal, and some of the Provinces, with limited legislative powers (*b*). (Indian Councils Act, 1861.) The High Courts Act, 1861, regularised the system of High Courts, and a number of legal codes were enacted at about this time. The Crown also took the opportunity of taking over from the East India

(*a*) Keith, *Constitutional History of India*, 1600—1935, chh. 1—5.
(*b*) Cf. *Reg.* v. *Burah* (1878), 3 App. Cas. 889, *ante*, p. 544.

Company the exercise of paramountcy over the native States (*c*). The Royal Titles Act, 1876, allowed Queen Victoria to assume the title of Empress of India, which she did by a proclamation which came into force in 1877 (*d*).

The Morley-Minto Reforms, 1909.—The reforms identified with the names of Lord Morley, Secretary of State for India, and Lord Minto, the Governor-General, were embodied in legislation in 1909. The Legislative Councils for the first time contained an elected minority, and there was no longer an official majority. Instead of being confined to enacting such measures as were submitted to them, the Legislative Councils could now pass resolutions concerning the budget and other general matters. Indians also were appointed to the Executive Councils and to the Council of the Secretary of State. The object of these reforms was to secure the co-operation of the Indian aristocrats and magnates in the administration, but there was as yet no intention of establishing parliamentary government (*e*).

The Government of India Act, 1919.—Many Indians were not satisfied with the stage reached in their constitutional development. A large number of Indian soldiers saw active service in the war of 1914—1918, and India was represented in the Imperial War Cabinet. The discontent in India and the contribution made by that country towards the war effort led Mr. E. S. Montagu, the Secretary of State, to make a declaration in 1917 that the policy of the British Government was "the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in India as an integral part of the British Empire." The *Montagu-Chelmsford Reforms*, which were proposals put forward by Mr. Montagu and Lord Chelmsford, the Governor-General, were embodied in the Government of India Act, 1919 (*f*). The preamble to the Act adopted Mr. Montagu's declaration, thus indicating that the purpose of the new Constitution thereby granted to India was to tide over the period before India should be granted full responsible government, but that the duration of this period was a matter for the United Kingdom Parliament.

(*c*) *Post*, pp. 683—688.
(*d*) Keith, *op. cit.*, ch. 6.
(*e*) Keith, *op. cit.*, ch. 7.
(*f*) *Ibid.*, ch. 8. The final form of the declaration quoted above is attributed to Lord Curzon, at p. 243.

Under the Government of India Act, 1919, the central Government remained with the Governor-General in Council, responsible only to the United Kingdom Parliament through the Secretary of State for India. The Central Legislature was enlarged, and a system of "dyarchy" was introduced in the Provinces.

Provincial matters, *i.e.*, matters not within the exclusive competence of the Central Government, were divided into "transferred subjects" administered by the Governor and the ministers responsible to the Legislative Council, and "reserved subjects" administered by the Governor and his Executive Council, the Governor retaining an overriding authority in both cases. The proportion of elected members in the Provincial Legislatures was increased to at least 70 *per cent.*, but their legislation could only deal with Provincial matters, and it required the assent of the Governor-General as well as of the Governor, while the Governor could secure legislation on reserved matters. In practice, only a small degree of responsible government in the Provinces was attained, and the demand for independence grew among Indian nationalists.

The Governor-General in Council, and not the Courts, had authority to decide whether a particular topic was a central matter or a provincial matter. Further, the Central Legislature had power to legislate on any matter, so that it was not possible to challenge the validity of central legislation.

The central Government was left by the Act unchanged, save that (a) the Governor-General's Executive Council might thereafter consist of more than six members (it consisted in 1930 of seven, of whom three were Indians), and (b) the central Legislature, thereafter called the Indian Legislature, was reconstituted on enlarged and more representative lines: it consisted in 1930 of the Council of State (the Upper Chamber), composed of sixty members, of whom thirty-four were elected, and the Legislative Assembly (the Lower Chamber), composed of 144 members, of whom 140 were elected. Officials had twenty-six seats in the Assembly: in the Council of State they could not exceed twenty.

The powers and duties of the Indian Legislature differed little in character within the central sphere from those of the Provincial Councils in the provincial sphere; but since in the Indian Legislature

there was no responsible Government, however, the Governor-General's power to disregard an adverse vote in either Chamber was not limited, as was that of provincial Governors, to certain specified subjects, but covered the whole field. The sphere of operations of both Chambers of the Indian Legislature was identical, except that the power to vote supply was confined to the Legislative Assembly. In respect of Money Bills the Chambers had equal powers.

It will be evidence from the foregoing account—brief and incomplete as it necessarily is—that the Indian Constitution established by the 1919 Act contained many features which, judged by commonly accepted standards, were anomalous. This was fully recognised by its authors who were, however, faced with the unprecedented task of devising a system which would provide at once an *instalment* of responsible government while maintaining some measure of the direct responsibility of the Imperial Parliament for the administration of Indian affairs which had been in theory complete and absolute since 1858; and at the same time of fashioning the nature of the instalment in such a way as to enable it to be expanded by stages without structural alteration until a complete transfer of control from the British Parliament and electorate to Indian Councils responsible to an Indian electorate had been effected

(2) The Government of India Act, 1935.—The system of provincial dyarchy embodied in the Montagu-Chelmsford reforms and summarised above operated not without success for fifteen years, but did not entirely fulfil the hopes built on it. Indian aspirations outran the measure of autonomy conferred by the 1919 Act and with growing insistence invoked the declaration contained in the preamble to that measure as a ground for further concessions.

The Government of India Act, 1935 (*g*), is a further step in pursuance of the policy contained in this declaration.

The genesis of the 1935 Act was as follows:—

(a) A Statutory Commission, presided over by Sir John Simon (the "*Simon Commission*"), visited India, made a comprehensive survey of the ground, and reported in 1929. The Report declared

(*g*) The original version was 25 & 26 Geo. 5, c. 42; this was reprinted, separately from the provisions relating to Burma, in 26 Geo. 5 & 1 Edw. 8, c. 2. Certain detailed amendments are made by the India and Burma (Miscellaneous Amendments) Act, 1940, ss. 1—12.

that dyarchy had outlived its usefulness and recommended a large extension of responsible government in the Provinces, and that, while no material change should be made immediately at the Centre, free institutions should ultimately be extended to India by way of a federation of units enjoying local self-government, which federation should if possible embrace the Indian Native States (*h*).

(b) The Simon proposals were thought by a powerful section of Indian opinion, and by the Government to which it was presented, to err on the side of caution; concurrently, the Indian Princes manifested an unexpected and welcome readiness to accede to a federal system; and after a "*Round Table Conference*" of representatives of His Majesty's Government, the Princes and British India, a Government White Paper was prepared embodying the outline of a bolder scheme (*i*).

(c) A Joint Select Committee of the Houses of Parliament was appointed under the Chairmanship of Lord Linlithgow (later, Governor-General) to make recommendations for a new Constitution for India. The Committee, though not tied to the White Paper proposals, used them as a basis for its deliberations.

(d) After prolonged sittings, the Joint Select Committee rendered an elaborate Report.

(e) A Government of India Bill was introduced embodying with few modifications the proposals put forward in the Joint Select Committee's Report.

(f) On August 2, 1935, the Bill, which had been extensively amended during its passage without any modification of principle, received the Royal Assent.

Probably no measure passed by Parliament has been the fruit of more prolonged, concentrated, and disinterested labour. Obviously no more than the barest summary can here be given of its 450 sections and multitudinous schedules.

Two leading features of the new Indian Constitution embodied in the Act are:—

(i) the proposed substitution of a federal for what was in substance a unitary system of Government; and

(ii) the extension of responsible Government, *i.e.*, of the responsibility

(*h*) (1930), Cmd. 3568 and 3569. (*i*) (1933), Cmd. 4268.

of Executives to Legislatures, or—to be more precise—to Ministers responsible to Legislatures.

(i) By section 2 the Act resumes into the hands of the King-Emperor all powers hitherto exercisable by any authority in or in relation to India, and redistributes those powers, or certain of them, direct to the new authorities established by the Act. Thus certain subjects are allocated to the exclusive legislative jurisdiction of the Provinces; others to that of the Central or Federal authority; over yet another part of the field the two have concurrent powers of legislation; while any unallocated residue is to be assigned by the Governor-General to the Provinces or the Centre as he may think fit. The respective spheres of Government of Centre and Province follow this demarcation of legislative powers.

So far we are dealing with British India. It is contemplated by the Act that in time many or most of the Indian States (*k*) will voluntarily accede to the Federation. The Federation will be brought into existence (when a sufficiency of States to command one-half of the States' seats in the Upper Chamber of the Federal Legislature and one-half of the total States' population have acceded) by Royal proclamation following an Address from both Houses of Parliament. The effect of their accession would be to render exercisable in relation to them some or all (according to the terms of the instrument of accession (*l*)) of the legislative powers vested exclusively in the Federal (or Central) Authority by the Act. The Crown's rights of paramountcy would not be exercised by or through the Federal Authority, but would continue to be exercised directly by the Crown, through the office—created by the Act—of Crown's Representative (*m*). This office may be held by the Governor-General, who would thus have a dual capacity.

(ii) By the extension of responsible government is meant the enlargement of the sphere within which the Executive acts on the advice of Ministers responsible to the Legislature. Under the 1919 Act, responsible Government only existed in the Provinces, and in them only in relation to "transferred" subjects, "reserved" subjects being administered by the Governor in Council. The Central Executive

(*k*) *Post*, p. 683.

(*l*) A specimen draft Instrument of Accession is given in Joshi, *The New Constitution of India* (2nd ed.), p. 490.

(*m*) "His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States."

—the Governor-General in Council—was responsible not to the Central Legislature but to the Secretary of State, and through him to the Imperial Parliament.

The Council of the Secretary of State is now abolished. Instead, he is to appoint from five to twelve advisers (*n*).

The Governors' Provinces.—The Governors' Provinces, whose number may be increased, are *Bengal*, *Bombay*, *Madras*, the *United Provinces*, *Bihar*, *Assam*, *Punjab*, the *Central Provinces* (*o*), the *North-West Frontier Province*, *Sind*, and *Orissa*, the last two being added by the Act of 1935. Under the Act, the Governors of the Provinces become amenable over practically the whole of the provincial sphere to the advice of non-official Ministers selected from and responsible to the Provincial Legislature.

This principle is subject to two important limitations:—

(i) For certain purposes, as to which the Act places on him a "special responsibility," the Governor is not bound by the advice of Ministers, but must "exercise his individual judgment" (*p*). These matters include the following (see sections 12 and 52):—

(a) the prevention of any menace to the peace and tranquillity of the Province (*q*);

(b) the safeguarding of the legitimate interests of minorities;

(c) the protection of the public services;

(d) the prevention of commercial discrimination;

(e) the protection of the rights of the Indian States;

(f) the administration of areas declared to be Partially Excluded Areas; and

(g) the enforcement of orders lawfully issued by the Governor-General in discharging his "special responsibilities," and bringing to them, as he is bound to do in regard to these matters, the exercise of

(*n*) The minimum number was reduced by the India (Miscellaneous Provisions) Act, 1944.

(*o*) The Central Provinces may, by agreement with the Nizam of Hyderabad, be administered jointly with Berar as one Governor's Province.

(*p*) It should be noted that the expressions quoted acquire a precise and technical meaning under the Act; as has also the expression "in his discretion" as applied to the Governor or Governor-General, *infra*.

(*q*) In respect of law and order in general, he acts on the advice of Ministers subject, however, first, to (a) above; secondly, to a provision that the Police Acts, and regulations made thereunder, shall not be amended without the Governor's consent; and, thirdly, to the protection of the records of the Intelligence and Special Branches of the Police (so far as affiliated against terrorism) against the risk of looting.

his "individual judgment." In the exercise of his special responsibilities the Governor is answerable to the Governor-General, and through him to the Secretary of State and Parliament.

In regard to the matters enumerated above, while the initiative remains with Ministers, the Governor is free to act on their advice, but free equally to disregard that advice, and this he should do where his individual judgment so prescribes. When this part of the Act came into force in 1937, the Congress Party had a majority in six of the Provincial Legislatures, and were at first unwilling to form ministries. Lord Linlithgow, the Viceroy, explained that in matters for which the Governor has a special responsibility he must try to secure the support of the Ministers if he can; but if he decides that he must issue an order of which they do not approve, the Ministers can repudiate responsibility In that case the Governor may dismiss the Ministry or the Ministry may resign, though resignation is to be preferred to dismissal as being more consonant with constitutional government; but this last question should only arise where there has been serious disagreement on an important issue. At about the same time it was announced in the House of Commons that the Secretary of State would not in future answer questions in Parliament concerning matters for which Governors were responsible to the Provincial Legislatures. Provincial governments are ultimately responsible to Parliament, but only in the last resort.

In connection with (f) (above), the special responsibility for *Partially* Excluded Areas, it should be explained that the Act provides for another category of "Excluded [*i.e.*, wholly Excluded] Areas," over which the Governor is to exercise an exclusive control, the Governor's powers in relation to this category being exercised at his discretion.

(ii) There remains a second and more stringent limitation upon the operation of responsible Government both in the Provinces, with which we are primarily concerned here, and at the Centre. Certain subjects are placed by the Act entirely outside the sphere of ministerial control, and delegated to the absolute discretion of the Governor (or, in the case of the Central Government, of the Governor-General), subject only to the supervision of the Secretary of State and the Imperial Parliament.

At the Centre this exclusion of the right of Ministers to tender advice extends to the whole of the business connected with three

Departments of State:—External Affairs (r), Defence, and the Ecclesiastical Department. In respect of these matters the Governor-General is not amenable to ministerial advice at all. In the Provinces the discretionary powers of the Governor do not extend to the administration of a whole Department, except in the case of the "Excluded Areas" referred to above. The powers of the Governor exercisable "in his discretion" are, therefore, specific powers relating to such matters as the dissolution of the Legislature. The Governor-General also possesses "discretionary" powers of this nature in addition to his powers relating to the Departments referred to.

We have in some degree anticipated our observations on the constitutional position at the "Centre." It may, however, be said in regard to both, that in respect of the Governor's or Governor-General's dependence on or independence of ministerial advice, three classes of matters fall to be distinguished, namely:—

(a) matters "in the discretion" of the Governor or Governor-General, in regard to which he acts in complete independence of Ministers;

(b) matters relegated to his "individual judgment," in respect of which Ministers are entitled to tender advice, but the Governor acts on that advice or not, as he chooses; and

(c) matters in respect of which he has no option but to act on ministerial advice.

The Act defines and regulates these matters precisely (and they are to be further regulated and explained by the Instruments of Instructions to be issued by the Crown), instead of leaving them to be defined and regulated, as in the United Kingdom, by constitutional convention. The Instructions require the approval of Parliament (s).

Provincial Legislatures.—The following six Provinces are to enjoy a bicameral system:—Bengal, Bombay, Madras, the United Provinces, Bihar and Assam. Where there is an Upper House, it is not to be subject to dissolution, but one third of its Members are to retire periodically. The other five Provinces are given a Single Chamber.

The franchise for territorial constituencies in respect of the Lower Houses is defined in the Sixth Schedule to the Act. The general

(r). "External affairs" do not include relations with the British Commonwealth

(s) The Instructions are set out in Joshi, *op. cit.*, Appendix A.

effect of it, in regard to the eleven Provinces, in the aggregate, is to increase the electorate from 7,000,000, including 315,000 women, to 29,000,000 men and 6,000,000 women, viz.: from 3 per cent. to 14 per cent. of the population (equivalent to 27 per cent. of the adult population). In a country in which over 90 per cent. of the population can neither read nor write, universal suffrage has been judged impracticable. A representative suffrage is the most that is feasible, and it is assumed, rightly or wrongly, that the 27 per cent. will prove a microcosm of the whole.

The distribution of legislative powers is contained in sections 99—107 of the Act. The Provincial Legislatures have exclusive power to make laws for the Province with respect to fifty-four matters set out in "the Provincial Legislative List" (List II in the 7th Schedule), while the Federal Legislature will have exclusive power to make laws for British India and (subject to the instruments of accession) for Federated States with respect to fifty-nine matters set out in "the Federal Legislative List" (List I in the 7th Schedule). There is also a "Concurrent Legislative List" (List III) of thirty-six matters. Provincial laws are void to the extent of their repugnancy to valid Federal legislation.

The Central or Federal Authority.—*The Executive.*—The Central Executive in India before the Act was the Governor-General in Council, responsible not to the Indian Legislature, but solely to the Secretary of State and Parliament. Under Part II of the Act, if and when it comes into force, the Central (Federal) Executive will be the Governor-General advised by a Council of Ministers responsible (except in regard to matters left to the Governor-General's discretion) to the Central (or Federal) Legislature. The Governor-General, like the Governors of Provinces, would be bound to act on the advice of such Ministers in certain defined matters; entitled, but not bound, to act on their advice in matters left to his "individual judgment" and within his "special responsibility" (*t*); and entirely independent of their advice in matters relegated by the Act to his "discretion." In so far as he acts on his "individual judgment" or at his "discretion," he remains subject to the Secretary of State and Parliament.

(*t*) Which matters would be the same as those left to the special responsibility of Governors, *plus* the financial stability and credit of the Federation.

The Governor-General's Executive Council was extended in 1940 to include several Indians; and an Advisory Council was created, including representatives of the Indian States and of other Indian interests, to consider the problems raised by the proposed federation.

In relation to the matters relegated to his "discretion"—External relations, Defence and Ecclesiastical affairs—the Governor-General is to be assisted by three Counsellors, who are not to form part of the body of advisory Ministers but are to be encouraged nevertheless to deliberate jointly with them. In regard to the discretionary topic of Defence, it is to be noticed that the separate office of Commander-in-Chief is retained, though its holder will no longer be, as at present, a member of the Government. The Governor-General's functions are more precisely formulated in an "Instrument of Instructions" (*u*).

The Legislature.—The Federal Lower House is to consist of 375 Members, 125 representing the Indian States. Members cannot be directly elected: if they were, constituencies might contain 300,000 electors. They are accordingly to be elected indirectly by Provincial Assemblies, the various communities voting separately for their own representatives. The Lower House is to have a life of five years, unless earlier dissolved by the Governor-General. The 125 seats allotted to the States in the Lower House have to be distributed among some 600 units, and are allocated mainly with reference to population, with the assistance of a system of pooling or grouping.

The Federal Upper House is to consist of 260 Members. Of these, 104 will represent the Indian States (seats being allocated with reference to the relative rank and importance of the States), and six will be nominated by the Governor-General. Of the remaining 150, 128 will be directly elected by territorial communal constituencies (on a high franchise—probably the same as for Provincial Upper Houses), and twenty-two seats will be set apart for the smaller minorities, depressed classes, and women. The Federal Upper House is not to be dissoluble, but elected for nine years, one-third of its Members being replaced every three years.

The Constitution, however, of the Central Legislature on these lines

(*u*) The Instructions issued to the Governor-General in 1937 are set out in Joshi, *Op. cit.*, pp. 420 *et seq.* Draft Instructions to be issued under Federation are set out *ibid.*, pp. 427 *et seq.*

is not immovably fixed. The Indian Legislature can suggest to Parliament modifications at a later date.

The two Chambers of the Federal Legislature will possess, in theory at all events, as near as may be equal powers, and will differ in this respect from the Chambers in the bicameral Provinces, where the Upper Chamber is designed to perform the functions of a revisory and delaying body. The Act contains detailed provisions (which differ slightly for the Centre and the Provinces on account of the difference in the relations between the Chambers) for the settlement of disputes by means of joint sessions.

General Considerations.—The Act contains no affirmation of fundamental rights of the subject, after the manner of many Continental Constitutions; but it declares that no British subject domiciled in India should be disabled from holding public office, or from practising any trade, profession or calling by reason only of his religion, descent, caste, colour, or place of birth. (Provisions intended to prevent discrimination, of an elaborate character, are embodied in Pt. V, Chapter 3 of the Act.)

No general power is given to any authority in India to modify the Constitution; but resolutions of the Indian Legislature proposing modifications may be laid before both Houses of the Imperial Parliament.

Different parts of the Act are to come into operation at different dates laid down in the Act. The accession of the Indian States to the Federation will necessarily take time. Part II, therefore, which deals with the Federation, is not to take effect until after the rest of the Act has done so—the interval to be determined by Parliament. Part III, relating to the Governors' Provinces, came into operation on 1st April, 1937. Part XIII and the Ninth Schedule contain transitional provisions regulating the powers of the Central Government during this unavoidable interregnum.

The unallocated residue of powers, owing to strong differences of opinion in India as to whether it should reside in the Federation or in the Provinces, is left for allocation in particular cases as each case arises to the impartial arbitrament of the Governor-General.

The Act provides for an unusual form of Federation, inasmuch as the units proposing to enter into Federal relations are under

separate Sovereigns: the British Indian section under the King, the section represented by the Indian States under their respective Princes or Rulers.

The system, being Federal, involves a distribution of legislative and other powers between a Federal Authority and the units constituting or entering into the Federation.

Viewed apart from its Federal character as an example of the devolution of Sovereign powers or of the extension of responsible Government, the system embodied in the Act is in several respects unusual, for (i) the devolving or delegating authority reserves to itself, and withholds from the ambit of responsible government, control of certain vital matters, *e.g.*, defence and foreign policy—itself retaining seisin of these matters through the Governor-General and Governors acting as its representatives; (ii) that authority reserves in part to its representatives control of certain other matters: those in respect of which the Governor and Governor-General are directed to exercise their "individual judgment"; (iii) that authority makes over other matters to the practical control of democratically appointed Ministers responsible to their Legislatures; (iv) the constitutional relations involved in (i), (ii) and (iii) above are regulated by Statute and not by convention.

The Chief Commissioners' Provinces.—The following are called Chief Commissioners' Provinces: British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and Panth Piploda. They are administered by the Governor-General acting through Chief Commissioners as his agents (section 94).

Courts and Appeals.—Generally speaking, the organisation and functions of the Provincial High Courts will remain unaltered. The Central and Provincial Legislatures are indeed given powers which would enable them to modify the relative jurisdiction of the various Courts, and in so doing to derogate from the powers of the High Courts; but any Bill which so derogates as to deprive a High Court of the position and functions which the Act assigns to it must be reserved.

The Federal Court.—Section 200 of the Act provides for the establishment of a Federal Court, the first all-India Court. It consists of a Chief Justice and not more than six puisne Judges. Judges of the

Federal Court are appointed by warrant under the Royal Sign Manual. A Judge may be removed in the same way on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee, on reference by His Majesty, report that the Judge ought on any such ground to be removed.

The Federal Court has exclusive original jurisdiction in any dispute between any two or more of the following parties: the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. Where a State is a party, however, the jurisdiction only extends to a dispute which (i) concerns the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of that State; or (ii) arises under an agreement relating to the administration of Federal legislation in that State or otherwise concerns some matter with respect to which the Federal Legislature has power to make law for that State; or (iii) arises under an agreement, made after Federation, between that State and the Federation or a Province, which agreement is expressly made subject to such jurisdiction. In exercising its original jurisdiction, the Federal Court may only issue declaratory judgments (section 204).

Appeal lies to the Federal Court from any High Court in British India if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or Order in Council made thereunder (*v*). Where such a certificate is given, no direct appeal lies to the Privy Council, either with or without special leave (section 205).

The Federal Legislature may by Act provide for appeals from a High Court to the Federal Court without such certificate in specified civil cases (*w*), provided that either the subject-matter is not below 15,000 rupees or the Federal Court gives special leave to appeal. If the Federal Legislature makes such provision as above, it may also wholly or partly abolish appeals in civil cases from High Courts in British India to the Privy Council either with or without special leave.

(*v*) See *Punjab Co-operative Bank Ltd., Amritsar* v. *Income-Tax Commissioner, Lahore*, [1940] A. C. 1055.

(*w*) See *Aberele* v. *Regem*, [1943] A. C. 255.

A Bill for either of these purposes may not be introduced without the previous sanction of the Governor-General in his discretion (section 206).

Appeal by way of special case stated will lie to the Federal Court from a High Court in a Federated State on a question of law concerning the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of that State, or arising under an agreement relating to the administration of Federal legislation in that State (section 207).

By section 208 appeal lies from the Federal Court to the Judicial Committee: (a) without leave from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the instrument of accession of any State, or arises under an agreement relating to the administration of Federal legislation in any State; and (b) in any other case, by leave of the Federal Court or of the Judicial Committee.

The Act provides that the law declared by the Federal Court and by any judgment of the Privy Council shall be binding on all Courts in British India, and, so far as respects the application and interpretation of the Act or any Order in Council thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State (section 212).

The Governor-General may in his discretion refer to the Federal Court for consideration a question of law which appears to him to be of such a nature and of such public importance that it is expedient to obtain the opinion of the Court upon it (section 213). A dissenting opinion may be given, and it is not stated that the Governor-General is bound to accept the opinion of the majority.

Immunity of Representatives of the Crown.—Section 306 of the Act provides that no legal proceedings may be taken *in India* (*x*), even for personal debts or criminal offences, against the Governor-General, His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, Governors of Provinces, or the Secretary of State for India while they are in office. Nor may

(*x*) Cf. *ante*, p. 536.

proceedings be taken in India against former holders of these offices in respect of their official acts, save with the sanction of the King in Council. Under sections 177—180, claims may be brought against the Federation, the Provinces and the Secretary of State on contracts made in England, but all costs are to be met out of local funds.

Interpretation of the Constitution.—The principles which the Federal Court will apply in interpreting the new Indian Constitution were fully stated by Sir Maurice Gwyer, Chief Justice, in a special reference from the Governor-General as to the validity of the Sales of Motor Spirit and Lubricants Taxation Act, 1938, passed by the Central Provinces and Berar Legislature (*y*). The Federal Court will seek to ascertain the meaning and intention of Parliament from the language of the statute itself, but a Constitution is not to be construed in any narrow and pedantic sense. The ordinary rules of statutory construction apply, though their application is conditioned by the subject-matter of the enactment itself. A "broad and liberal spirit" should inspire those who interpret the Constitution, but they are not free to stretch or pervert the language in the interests of any legal or constitutional theory (*z*).

The decisions of Canadian and Australian Courts are not binding on the Federal Court of India; still less are those of the United States; but they will be listened to with respect, and if the Federal Court finds itself in agreement with them its opinion will be thereby strengthened and confirmed. There are, however, "few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting . . ."

The Chief Justice added that the Court is entitled to refer to preparatory materials which preceded the passing of the Government of India Act, 1935, such as the Government White Paper and the

(*y*) *Special Reference re Legality of Central Provinces Taxation Act, 1938* (1939), 1 F. C. R. 18: approving *Citizens' Insurance Co. of Canada* v. *Parsons* (1882), 7 App. Cas. 96, 108; *Att.-Gen. for New South Wales* v. *Brewery Employees' Union* (1908), 6 C. L. R. 469, 611; *Att.-Gen. for Ontario* v. *Attorney-Gen. for Canada*, [1912] A. C. 571, 583; *James* v. *Commonwealth of Australia*, [1936] A. C. 578, 614; and *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario*, [1937] 355, 367.

(*z*) The Judicial Committee has reversed a decision of the Federal Court on this ground: see *The King-Emperor* v. *Benoari Lal Sarma*, [1945] A. C. 14, 26 *et seq.*

Report of the Joint Select Committee thereon (*a*). The proposals they contain "are historical facts and their relation to the Constitution is a matter of common knowledge." Lastly, the Court is entitled to look at the previous practice of Indian Legislatures, "for Parliament must surely be presumed to have Indian legislative practice in mind, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

External Relations of India.—All-India was one of the original members of the League of Nations, and was one of the United Nations which met at the San Francisco Conference in 1945. At international conferences the representatives of the States and of British India form part of the British delegation.

Representatives of the States and of British India are invited periodically to attend meetings of War Cabinets.

British India, although not a Dominion, is for some purposes regarded as a member of the British Commonwealth, and is invited to Imperial Conferences.

Events since 1939.—Section 45 of the Government of India Act, 1935, provides that if at any time a Governor is satisfied that a situation has arisen in which the government of the Province cannot be carried on in accordance with the provisions of the Act, *e.g.*, because he is unable to form a ministry, he may, in his discretion, by proclamation, (a) declare that his functions shall to such extent as may be specified in the proclamation be exercised by him in his discretion, and (b) assume to himself all or any of the powers vested in any Provincial authority other than the High Court. Such a proclamation remains in force for six months, but may be extended for annual periods by resolutions of both Houses of Parliament up to three years: the proclamation then ceases to have effect, and an Act of Parliament is necessary to continue the powers thereby assumed. The Governor-General under section 93 will have a corresponding power in relation to the government of the Federation, but not so as to interfere with the functions of the Federal Court. The Government of India (Amendment) Act, 1939, adds to the Constitution section 126A, which gives the Federal Executive and Legislature certain overriding

(*a*) *Ante*, p. 669.

powers in the Provinces if the Governor-General issues a proclamation declaring that the security of India is threatened by war (*b*).

At the beginning of the war in September, 1939, the Governor-General announced that the coming into operation of the Federal part of the Constitution would be indefinitely postponed. Meanwhile, the Central Government of British India continues to be carried on under the transitional provisions of the Government of India Act, 1935, that is to say, on similar lines to the Act of 1919, as modified to take account of the operation of Part III of the Act of 1935.

The Congress Party was not satisfied with the British Government's statement of its war aims, with the result that from 1939 the government of five or six of the Provinces has had to be carried on by proclamation under section 45.

The Cripps Mission, 1942.—Early in 1942 Sir Stafford Cripps was sent out by the British Government to discuss with Indian leaders a draft declaration regarding the steps to be taken for the earliest possible realisation of self-government (*c*). The object was stated to be the creation of a new Indian Union, which should constitute a Dominion, associated with the United Kingdom and the other Dominions by a common allegiance to the Crown, but equal to them in every respect, in no way subordinate in any aspect of its domestic or external affairs.

The proposals were as follows: (a) On the cessation of hostilities, a constitution-making body should be elected to frame a new Constitution; (b) the Indian States should participate in the constitution-making body; (c) His Majesty's Government should undertake to accept and implement forthwith the Constitution so framed, subject only to: (*i*) the right of any Province of British India to contract out and to retain its present Constitutional position, provision being made for it to accede later if it wishes. A non-acceding Province might ask for a new Constitution giving it the same full status as the Indian Union and arrived at by analogous procedure; (ii) the signing of a treaty between His Majesty's Government and the constitution-making body. This treaty would cover matters arising out of the complete transfer of responsibility, and make provisions for the protection of racial and religious minorities, but would not impose any restrictions on the

(*b*) And see the India and Burma (Emergency Provisions) Act, 1940.
(*c*) (1942), Cmd. 6350.

power of the Indian Union to decide in the future its relationship to the other members of the British Commonwealth. It would involve a revision of the treaty arrangements of the Indian States. (d) As regards the composition of the constitution-making body, it was provisionally suggested that the representatives of British India should be elected by proportional representation by the members of the Lower Houses of the Provincial Legislatures voting as a single electoral college, and that the Indian States should appoint representatives in the same proportion to their population. (e) Until the new Constitution can be framed, which could not be done during the continuance of hostilities, His Majesty's Government must bear the responsibility for and retain the control and direction of defence.

Sir Stafford Cripps explained that this was not itself a declaration by the British Government, but a declaration they would be prepared to make if it met with general acceptance from the various sections of Indian opinion. The term "Union" was merely the name given by the War Cabinet to the proposed new Constitution, the form of which was at present unknown. It would be an Indian Constitution, framed by Indians. The right of the Union to secede from the Commonwealth under the Statute of Westminster was admitted. The new Dominion, or Dominions, would be entirely free to remain within or go out of the Commonwealth; if Indians wanted no Governor-General there would be none. A Union embracing all was the aim, but more than one Dominion was possible under the scheme. As regards acceding Indian States, their terms of agreement with the Union would imply the disappearance of British paramountcy over the States concerned (*d*). On taking up office as Governor-General in February, 1944, Lord Wavell said that the offer contained in the Cripps proposals was still open.

(3) The Indian States.—There are about 560 Indian States, which comprise one-quarter of the population and nearly half the area of India. They vary considerably in size, from a few square miles to great States like Baroda, Bhopal, Gwalior, Hyderabad, Indore, Kashmir, Mysore, Patiala, Rajputana and Travancore. The Indian States were formerly defined by statute as States under the suzerainty of His Majesty exercised through the Governor-General of India, but the

(*d*) *The Times*, 30th March, 1942.

definition contained in section 8 of the India and Burma (Miscellaneous Amendments) Act, 1940, is "any territory, not being part of British India, which His Majesty recognises as being such a State, whether described as a State, an Estate, a Jagir or otherwise." The Indian States are not British territory, and their subjects within their States are not British subjects. Their subjects may, however, be guilty of treason to the King-Emperor, and this applies to the Rulers themselves. (*Manipur Case* (1891) (*e*).)

The States may be described as an anomalous class of Protected States (*f*), and their subjects when abroad are treated as British protected persons. (Foreign Jurisdiction Act, 1890, s. 15.) Having internal sovereignty, the States are regarded for purposes of constitutional law as sovereign States. (*Nabob of the Carnatic* v. *East India Co.* (1792) (*g*).) Geographically they form part of India. Their existence is recognised by other nations, but they have not that degree of independence as to be persons in International Law. For many purposes other nations treat State territory as being in the same position as British territory, and State subjects as being in the same position as British subjects.

Indian Rulers are exempt from the jurisdiction of the English Courts (*Statham* v. *Statham and the Gaekwar of Baroda* (*h*)); and they are exempt from the jurisdiction in British India, except with the assent of the Governor-General and except in their capacity as owners of land in British India (Civil Procedure Code). Issues of State succession are acts of State: hence the recognition or otherwise of proprietary rights, existing before a treaty ceding sovereign rights, is not cognisable by the Courts. (*Secretary of State for India* v. *Sardar Rustam Khan* (*i*).) Parliament does not legislate directly for the States or their subjects. In matters like extradition, Orders in Council are issued under the Foreign Jurisdiction Act, 1890. Similarly, the Indian Legislature and British Indian Courts do not exercise jurisdiction over the States, but authority over European British subjects and Crown servants in the States is exercised by way of delegation from the Rulers.

It has been seen that the Government of India Act, 1935, provides

(*e*) Lee Warner, *The Native States of India*, pp. 179—183.
(*f*) See *R.* v. *Earl of Crewe, Ex p. Sekhome*, [1910] 2 K. B. 576, at pp. 619—620.
(*g*) 2 Ves. Jr 56, at p. 60.
(*h*) [1912] P. 92.
(*i*) [1941] A. C. 356.

for the *voluntary* federation of individual States, their precise relations with the Federation to depend on the instrument of accession in each case. Draft instruments of accession were issued by the Governor-General early in 1939. The administration in Federated States of Federal laws would be a matter for arrangement, and where the Federal Court required the aid of the civil or judicial authorities in a Federated State it would issue "letters of request." The main difficulty in bringing about federation is to reconcile State autocracy with government responsible to the Federal Legislature.

The Paramountcy of the Crown.—The Crown has been in possession of full paramount powers at latest since 1858. Two factors contributing to this were the extinction of the Mogul Emperors, or Kings of Delhi, and the assumption by the Crown of all governmental powers formerly exercised by the East India Company as its agent. Paramountcy is exercised through the Governor-General and his Residents or Agents in the States. For this purpose he has the assistance of a Political Department, which executes the decisions of the Governor-General and the Secretary of State.

The powers of the Crown vary in different States, owing to their varying sizes, the terms of treaties and the operation of usage and sufferance. Paramountcy in all cases covers: (i) control of foreign affairs, and the exclusive right of maintaining diplomatic relations with other States and with foreign countries, and of declaring war and peace; (ii) responsibility for internal order, and the welfare of British subjects and foreigners in the States; (iii) the obligation to co-operate in resisting invasion; (iv) the construction of railways and telegraphs for the purpose of defence, and the delegated power of administering railway areas. The Crown also normally claims (v) the right to intervene (a) to decide a disputed succession, (b) to supervise the administration during the minority of a Ruler, (c) to suspend or depose a Ruler for crime or serious misgovernment not amounting to disloyalty, (d) if the Ruler is absent for an unreasonable time, and (e) to suppress barbarous practices. Thus the Crown has deposed a Nawab of Tonk (1867) and a Ruler of Baroda (1875), has compelled the abdication of a Maharajah of Kashmir (1889) and a Ruler of Nabha (1923), and has ordered a Ruler of Alwar to leave his State (1934).

The internal administration of the States, *e.g.*, legislation, taxation, justice and police, is generally conducted by the Rulers, with the help and advice of a British Resident or Agent. In defence and the control of military forces the Rulers and the Crown act in partnership.

The Crown is its own interpreter of the nature and extent of paramount powers, both generally and in relation to particular States. Paramountcy is not, however, unlimited, for the Crown regards its powers as confined to enabling it to act in the interests of the States themselves, of India as a whole, and of the British Empire.

The Basis of Paramountcy.—There are two main theories as to the basis of the relationship between the Crown and the Indian States, and consequently as to the extent of paramount powers. The narrower theory, which is more favourable to the Princes, has been summarised by Sir William Holdsworth as follows: "All the Indian States were originally independent. They retain all their rights as independent States, except so far as they have ceded their rights to the Crown by agreement express or implied. The Paramountcy of the Crown depends wholly on cessions of their rights which all the States have made, or must be assumed to have made; and, unless a particular treaty gives to the Crown greater rights, it extends only to 'foreign relations and external and internal security.' Neither usage, except such a usage as evidences an agreement between a particular State and the Paramount Power, nor a political practice based on decisions of Secretaries of State or of the Government of India, are operative to confer any rights upon the Crown" (*j*). Against this theory, which is associated with the name of Sir Leslie Scott, K.C. (now Lord Justice Scott), and commands some support from Indian opinion (*k*), it is contended that not all Indian States were originally independent, that there is not always a treaty, that the weight of authority is against the view that usage and political practice cannot confer any rights on the Crown, and that it does not account for the right to intervene to suppress barbarous practices or to punish for the personal misconduct of a Ruler.

The theory adopted by the Indian States Committee ("the Butler Committee"), which reported to the Secretary of State in 1929 (*l*),

(*j*) *The Indian States and India* (1930), 46 Law Quarterly Review, p. 407, at p. 410.
(*k*) See, *e.g.*, Sirdar D. K. Sen, *The Indian States*, ch. 2, and pp. 206—211.
(*l*) Cmd. 3302. The Chairman was Sir Harcourt Butler.

is that "usage and political practice have been and are as important, perhaps more important, elements in the creation of the relationship between the Paramount Power and the States, as the provisions of treaties, engagements, and sanads" (*m*). In the eighteenth century, though not later, treaties with the States were made on a basis of equality: hence the relationship has a quasi-international character. The need for the exercise of general control in the interests of the States, India as a whole, and the British Empire, led to usage and the practice of the Political Department. The Crown intervened in cases of disputed succession, minority or gross incompetence, even where there was no treaty to that effect. In course of time the stage is reached when treaties, engagements and *sanads* must be construed subject to the Crown's paramountcy. Yet, although the Crown is paramount and the States subordinate, the relationship is now that of senior and junior partner in the work of government.

Usage, sufferance and the practice of the Political Department may be said to be based on acceptance or implied consent, and the paramount power is the Crown acting through agents responsible to the British Parliament. This consensual basis means that the Crown acting unilaterally cannot cede its rights and duties as paramount power to any other State, in particular, to a Government responsible to the Indian Legislature. An attempt by Parliament acting unilaterally to cede paramount powers could have no effect on the States, except perhaps to extinguish paramountcy. Hence the provision in the Government of India Act, 1935, for the office of the Representative of His Majesty distinct from that of Governor-General. The same person may hold both offices, but as His Majesty's Representative he would not be responsible to the Federal Legislature.

It was definitely declared by the Government of India in the *Manipur Case* (*supra*) that the relations between the Crown and the Indian States are not governed by International Law. They form a special branch of British Constitutional Law, as does *lex et consuetudo Parliamenti* (*n*). The powers of paramountcy are part of the Royal prerogative; but they are peculiar because—like the privileges of Parliament—they were not created, but are merely recognised, by the

(*m*) Holdsworth, *loc. cit.*, at p. 413. Engagements are unilateral contracts. *Sanads* are documents of title embodying the terms of an agreement; they may operate either as grants or as treaties: Sen, *op. cit.*, pp. 1—4.

(*n*) *Ante*, p. 98.

common law. Paramountcy extends only over Indian States, and Indian States are subject only to that part of the prerogative which is included in "paramountcy."

II. BURMA.

British Burma before 1935.—British Burma was acquired piecemeal by cession, conquest and annexation in the nineteenth century. For administrative convenience it was governed as a Province of India, although the peoples are quite distinct. The system of dyarchy was not applied in Burma until 1923. The separation of Burma from India was recommended by the Simon Commission (*o*); the matter was discussed at a Burma Round Table Conference in 1931 (*p*), and the separation was effected by section 46 (2) of the Government of India Act, 1935.

The Government of Burma Act, 1935.—This Act (*q*), which came into force on 1st April, 1937, gives to Burma a Constitution which is a replica of the Indian Constitution of 1935 without the federal element.

The office of Secretary of State for Burma was created. It may be, and in fact it has so far been, held by the Secretary of State for India. The Secretary of State for Burma is to appoint not more than three Advisors, but he is not generally bound to accept their advice.

The status of Burma is *sui generis*. It is not a Colony, and not a member of the League of Nations. It sent an observer to the Imperial Conference in 1937.

The Executive.—The Governor of Burma has the powers, absolute discretions and special responsibilities of an Indian Governor-General and Provincial Governor. He has a Council of ten Ministers, and also the advice of three counsellors for discretionary matters. The Governor's Instructions must be approved by Parliament. The Executive is responsible to the Legislature in the same way as in India.

The Legislature.—The Legislature, whose powers are subject to the same restrictions as the Indian Legislature, consists of an elected House of Representatives, and a Senate one half of which is appointed

(*o*) *Ante*, p. 666. (*p*) (1932), Cmd. 4004.

(*q*) Originally Part XIV of the Government of India Act, 1935 (25 & 26 Geo. 6, c. 42), but reprinted for convenience as the Government of Burma Act, 1935 (26 Geo. 5 & 1 Edw. 8, c. 3). Certain detailed amendments were made by ss. 13—16 of the India and Burma (Miscellaneous Amendments) Act, 1940.

by the Governor and one half elected by the lower House. The Legislature may legislate for any part of British Burma, and for British subjects and Crown servants anywhere in Burma. It has no power of constitutional amendment, but it may after ten years request changes by Order in Council in its own composition, elections and the franchise.

The Judicature.—The existing High Court of Burma was retained. The Act further provides for appeals in questions of constitutional interpretation to the High Court, and from the High Court to the Judicial Committee.

The Government of Burma may be sued in Burma, and the Secretary of State may be sued in contract in England. The Governor himself may not be proceeded against *in Burma*, even for crimes or on personal contracts (*r*).

Miscellaneous Territories.—*Salween* is a Partially Excluded Area, which comes within the Governor's special responsibility.

The *Shan States* are Excluded Areas, whose administration falls within the Governor's absolute discretion. They are ruled by their Chiefs, with the advice of a Commissioner. Most of them form a federal unit, and, although they are part of British Burma, their position is somewhat like that of Federated Indian States.

The *Karenni States* are not British territory. They are ruled by their Chiefs under the supervision of the Commissioner. Orders in Council are applied to them under the Foreign Jurisdiction Act, 1890.

Events since 1942.—Section 139 of the Act gives the Governor power, similar to that given by sections 45 and 93 of the Government of India Act (*s*), to assume by proclamation all powers of government other than those of the High Court. Such a proclamation was issued when the Japanese overran the country in 1942, and its operation has been extended by Parliament until 1948.

In May, 1945, when the Japanese had been driven out of most of Burma, the British Government issued a White Paper (*t*) confirming the Government's policy of promoting full self-government in Burma. For the present the system of administration authorised by section 139

(*r*) Cf. *ante*, p. 536.

(*s*) *Ante*, p. 681. And see the India and Burma (Emergency Provisions) Act, 1940.

(*t*) (1945). Cmd. 6635.

will have to continue, but it will be liberalised by the provisions of the Burma (Temporary Provisions) Bill which was introduced in Parliament in June, 1945. The latter will enable Orders in Council to be issued establishing an Executive Council, at first mainly official but later including non-official Burmans, and eventually also a small interim Legislative Council

When the operation of section 139 is terminated, which it is hoped will be before the end of 1948, steps will be taken for representatives of the Burmese people to draw up their own agreed Constitution, which would be endorsed by Parliament, subject to agreements between the Burmese representatives and the British Government to enable the latter to fulfil their continuing obligations and to safeguard any outstanding financial advances The Shan States and tribal areas would remain subject to a special régime under the Governor until they were able and willing to amalgamate with Burma proper

The Burma (Temporary Provisions) Bill was described by the Secretary of State, Mr. Amery, as providing for the transition from military administration to the wide measure of self-government formerly enjoyed under the Government of Burma Act. The second stage, when that had been reached, would be what Mr Amery called " Commonwealth Status." This he described as not one of independence *minus* certain rights and privileges, but of independence *plus* the rights and privileges and the practical advantages accruing from a world-wide free partnership.

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