THE

LAW AND CUSTOM OF THE CONSTITUTION

ANSON

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THE LAW AND CUSTOM OF THE CONSTITUTION

PART I

PARLIAMENT

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PREFACE

I HAVE endeavoured in this book to state the law relating to existing institutions, with so much of history as is necessary to explain how they have come to be what they are. The student of constitutional law realises at every turn the truth of Dr. Stubbs' saying, that 'the roots of the present lie deep in the past.' Nevertheless a writer who wishes to describe our present constitution and its relations to the past, finds himself involved in difficulty, if he begins at the beginning. It is impossible to keep our institutions abreast along the course of history, from the Witenagemot to the Redistribution Act, without putting a severe strain upon the attention of the reader, and probably, in the end, sacrificing law to history, the present to the past. The lawyer primarily wants to know what an institution is, and then, the circumstances of its growth. I have tried to satisfy his first requirement, and, as to his second, to put him in the way of obtaining more knowledge than I can pretend to possess.

Nor, again, have I attempted to delineate the law of our constitution after the manner of Professor Dicey. He has drawn with unerring hand those features which distinguish our constitution from others, and has given us a picture which can hardly fail to impress itself on the mind with a sense of reality. I have tried to map out a portion of its surface and to fill in the details. He has done the work of an artist. I have tried to do the work of a surveyor.

I have dealt, in this volume, solely with Parliament, and hope in a subsequent volume to deal with the Executive. Writing for students, I have treated some matters more

fully and others less fully than the practical lawyer may think necessary; but where I have been brief I do not pretend to have written with a reserve of knowledge, and I have often said no more because I had no more to say.

W. R. A.

All Souls College,
March 1886.

The second edition of this book contains, I hope, some improvements on the first in point of fulness and accuracy of detail, especially in matters of Parliamentary Procedure. In these points, owing to the kindness of friends, I have been able to correct some errors and shortcomings.

Legislation has necessitated some few changes, and the new rules of procedure made for itself by the House of Commons in 1888 have required a careful revision of Chapter vii.

I have also thought it desirable to treat more fully the subject of the relations of the two Houses where their views are divergent, and of the relations of the Houses to the Executive, especially as regards the prerogative of dissolution, and as regards Committees of inquiry. On some points I have been able to supplement and complete what I say in this volume by reference to the volume on the Crown.

W. R. A.

All Souls College,
June 1892.

I have endeavoured to make this edition clearer and more accurate than its predecessors, and have somewhat enlarged the chapters on the House of Lords and on Parliamentary procedure.

W. R. A.

All Souls College,
August 1897.

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CHAPTER I.

THE PLACE OF CONSTITUTIONAL LAW IN JURISPRUDENCE.

The need to define the subject,

At the outset of a treatise on the English Constitution it is well to attempt some limitation or definition of the subject. If the law and custom of the Constitution is to be laid before the reader in an intelligible form, the writer has constantly to keep in mind the fact that, though nearly every law and every custom of the Constitution has a history—sometimes a long and interesting history—yet it is the Constitution as it now exists, and not the history of Constitutional law, with which he has to deal. And, again, although the operation of these laws and customs has to be explained as a matter of present living interest, it must be borne in mind that we are dealing with law and practice, and not with political science or political criticism.

as distinct from constitutional history

and political science.

At starting, therefore, I have to distinguish the subject of which I propose to treat from the topics dealt with on the one hand in the classical constitutional histories of Mr. Hallam and Dr. Stubbs, and on the other in the admirable account of the practical working of the English Constitution by Mr. Bagehot. I have to make it clear that I am dealing with rules of law, and with customs which have grown up around

these rules, obscuring in some departments the rules themselves. It may be—indeed it is—practically impossible to explain existing Law and Custom without some reference to its history, or to state existing practice without some account of the reasons for the divergence of the legal and the conventional Constitution; but such matters are illustrative and subordinate. The Laws and Customs, not their history or their political value, are what I am concerned with.

Constitutional Law in Jurisprudence

To define my subject, it is necessary to determine the place of constitutional law in the *Corpus Juris* of the country, and to distinguish, once for all, those topics with which constitutional law is apt to be confused.

In order to find the place of constitutional law it is needless to go further than Dr. Holland's analysis and classification of rights. A right is 'a capacity residing in one man of controlling with the assent and assistance of the State the actions of another.' Rights which may be enforced by one citizen against another constitute the body of Private Law. Rights which the State asserts to itself against the citizens, and rights which it permits to be exercised against itself, constitute Public Law. But inasmuch as the State is an artificial person, and, as such, assumes to itself the right to maintain order, to enforce the rules of conduct which it lays down, to possess property and compel the performance of contracts made with itself, and inasmuch as it is willing to incur proprietary and contractual liabilities, we need to inquire how this artificial person is constituted, and in this inquiry lies the chief labour of the constitutional lawyer.

is a branch of Public Law;

has to do with rights and duties of the Sovereign

and structure of State.

The Sovereign body or State is the power by which rights are created and maintained, by which the acts or forbearances necessary to their maintenance are habitually enforced. This power in our community is diffused among a number of persons; in other words, our State is of complex construction. It consists of a number of persons or groups of persons who, in virtue of the part which they play in the working of the constitution, possess rights one against the other, and

against the citizens in general. Their status is coloured by the fact that they are a portion of the machinery of Government.

The Crown is not Sovereign, nor is either House of Parliament, still less are the ministers or servants through whom the Crown conducts the executive business of Government; but each of these stands in established relations to the others, and to the general body of citizens, and of these relations some are fixed by law and some by custom. For the State machinery may be said to consist of all who take part in the making or changing of the laws by which rights are created and protected, in the maintenance of order and settled rules of conduct within the community, in preserving its independence or representing it in its dealings with other communities. The connection and relations of these persons form the constitution of the country.

The analysis of this constitution, which forms the working machinery of the State, the consideration of its various parts and the relation in which they stand to one another, is what I propose to undertake in respect of our own country.

We need to know what we mean by the State.

But when we talk of the State, its rights or its structure, we are necessarily led to the inquiry, What do we mean by the State? The expression is sometimes used as equivalent to an entire community or independent political society; sometimes it is limited to the sovereign body in that society. When we say that a man has deserved well of the State, we generally mean that all persons in the community ought to be grateful to him. When we say that such and such things should be provided or attended to by the State, we mean that the law-making force of the community or its administrative force should compel the observance of a certain course of conduct in certain matters.

The State begins

It is the more important for the purposes of a constitutional lawyer to ascertain what is meant by the State, because, as I have already said, he is concerned with its structure; and further, his province cannot be precisely defined

without some pains. And we may help ourselves to a clearer conception of the matter by looking at the early history of societies.

when rules of conduct are enforced by a central power.

We need not trouble ourselves with the shifting groups of men who form the lowest types of savage life; it is early enough to begin with aggregates bound together by ties of real or supposed kinship and by common customs. And when these customs begin to be observed in deference to some other authority than the individual violence or general ill-will that arises from their breach, we are able to trace the first germs of the State. Whether it is a council of priests, or of elders, or an individual habitually exalted above the rest by his strength or his cunning, so soon as conduct is enforced by some sanction, the fear of some evil or the hope of some good, however indeterminate or occasional, which is not the arbitrary will of the casual bystander, or the general inclination of the crowd, we see the humble beginnings of the State or Sovereign.

Such power at first is slight,

The action of the State is at first inconsecutive and uncertain. It dares not depart from custom. It waits to be appealed to, and does not constrain conduct by fixed rules enforced by uniform penalties; it cannot always compel obedience to its own decisions. But in proportion as its power is weak its sphere is wide; religious observance and moral action, as well as the maintenance of order and the performance of promises, are its concern. The laws of the people of Israel cover every department of life—diet, cleanliness, domestic relations, religious observance, and many rules of general conduct which are observed in more highly organised communities either as matters of habitual morality, or by a few who aim at a life higher than that of the crowd. But set in the midst of this elaborate code are provisions which show the difficulty of bringing its enforcement under State control. The people are earnestly exhorted not to depend upon themselves for the decision of matters of controversy, each within his gates, but to make use of the courts

but its sphere wide.

As in the Jewish polity.

indicated by the lawgiver, and, having there obtained judgment, to abide by the decision of the judge [1].

The Roman.

Again, it is impossible in looking at the laws of the Twelve Tables not to be struck, not merely by the variety of detailed provisions as to the breadth of roads and the conduct of funerals, but by the position and importance assigned to Procedure. The first two tables are occupied with the rules for getting parties before the court and keeping them there till the dispute is settled. The third regulates the mode in which the successful suitor may put into execution the decision of the court. The whole is a good illustration of the extent of State interference, of the misgivings of the State as to its powers of action, and of the desire of the State to obtain for its tribunals the settlement of disputes. The Roman State was at this time a community sufficiently well organised to have a reasonable prospect of enforcing the sentence of its tribunals if it could once obtain submission to them; but our own history furnishes us with an instructive illustration of the difficulties of a society which had no machinery for carrying out the decisions of its courts and could at best provide for the settlement of quarrels by some general rules, the observance of which might confine disturbance within reasonable limits. Mr. Green gives a vivid picture [2] of the course of proceedings by which an offender was put outside the protection of the folk and ceased to be within its peace. But the folk could do no more than withdraw its protection; it had no means of enforcing a punishment; this was left to the individual. All that the community could do was to say that the injured man might apply a violent remedy without incurring its wrath; and it was the want of central force to strike at the offender, the incompatibility of the private feud with public order, that reconciled the Saxon people to the substitution of the king's peace for the folk's peace, of the strong arm of the executive for the general disapproval of the community, of State interference for *laissez faire*.

The Anglo-Saxon.

[1] Deuteronomy xvii. 8.

[2] Conquest of England, p. 22; and see Pollock and Maitland, History of English Law, ii. 448.

Growth of the State.

So soon as we find a community entrusting to some person or body of persons among its members the task of maintaining and enforcing its customs, we may say that we have found the beginnings of the State; but in all communities which have attained to a high degree of political development, no sooner does this force manifest itself in definite and systematic working than its functions become more various and there takes place among those who have the exercise of it a separation into what in modern States we call the departments of Government. The maintenance of order and custom ceases to be dealt with by those who lead the armed forces of the society; the functions of the warrior are no longer combined with those of the judge; custom needs change as time goes on, or new customs, superseding the old, need to be checked by some general commands; a lawgiver is then required or a legislative assembly. To fight, to do justice, to assess and collect money, to make laws, is a heavy burden for an individual monarch or even for a body of men who have to act jointly in such matters. These duties come to be discharged by different servants of the same king, or by persons or bodies whom the popular choice elects. The original central force passes into more numerous hands, but its action becomes more constant and vigorous.

This dispersion of the forces which make up the Sovereign is one difficulty in the way of the Austinian analysis of Sovereignty. There is another which Austin made for himself by the arbitrary and unhistorical assumption that the Sovereign was at all times, and for all purposes, omnipotent: that there never was a time when it could not alter at will such rules of conduct as it habitually enforced.

The State enforces but does not change custom,

For Legislation, in so far as it means the breaking up of customs and the introduction of new rules of conduct, is a thing almost inconceivable to an early state of society. The maintenance or restoration of the *status quo ante* in personal freedom and property was the object alike of the Jewish land law and of the Solonian Seisachtheia; the ideal states of the

Greek philosophers were so constructed as to avert, if possible, the chance of development or change. To look nearer home, the earlier volumes of our Statutes are full of minute regulations on matters of local or social custom, but when an important change in the law is contemplated the long and apologetic preambles, such as we read in the Statute of Wills, show how much explanation was needed to make it acceptable to Parliament. To a modern House of Commons it is almost enough that a practice has prevailed for a long time to create an impression that such a practice must need examination and revision. But the step is a long one from the time when the State first enforces custom vigorously and constantly, to the time when it takes upon itself without fear or hesitation to recast or alter custom.

till late in history.

And we must further note that in proportion as the State becomes stronger, more complex, more active, so does it define its sphere of action in such a way as to exclude from its operation those rules of conduct which are better left to the guidance of the moralist and the priest. The State, as conceived by the lawgiver of Deuteronomy, swept with its intermittent action the whole area of human conduct; but the modern legislator, who can apply constant uniform pressure to procure the acts and forbearances which he desires to enjoin, strives hard to set limits to State interference, to keep religion and morals wholly outside these limits, to ascertain with precision what it is best to leave to the individual and what must be enforced by the central authority.

And as it gets stronger its sphere narrows.

We are not so much concerned with the sphere of State action, or, in other words, the amount and direction of the forces which the State brings to bear upon individual conduct, as with the existence, the strength, and the complexity of these forces. For these forces *are* the State; their strength makes it sovereign; their complexity is what the constitutional lawyer has to unravel. The power to strike at offenders within and without gives to States and maintains in them an individual existence: it preserves them from inward collapse,

The strength of the State is the basis of Jurisprudence.

and from absorption into the existence of other States outside them. We do not allow that because the collective force of the community—in other words, the State—narrows its sphere of action, it thereby admits a diminution of its power; nor do we allow that because the machinery for setting it in motion is complicated—in other words, that political power is vested in many hands—its action is therefore less regular and certain in the enforcement of such rules of conduct as are essential to its existence. Rather we should say that as the State defines the rules of conduct which it will enforce, and employs a uniform constraint for their enforcement—regular judicial process backed by the strong arm of the executive—it creates the Law with which alone the jurist can profitably deal.

Its rules are the Law of the jurist.

What is Law.

All constraint which produces uniformity of human conduct by human agency, may be regarded as creating Law. But so long as the constraint is wrought by public opinion which may act differently in different cases; or so long as the State cannot or will not use a regular machinery to ensure that penalty follows upon offence, the analytical jurist has no rules precise enough or stringent enough for him to work upon.

What is Positive Law.

When the State has attained to regularity in definition and enforcement of rules of conduct, then we get the Positive Law with which Austin delighted to torment himself and his readers, and then the sanctions of conduct or springs of human action fall into the four groups indicated by Bentham.

The physical sanction,

Thus a violent wind may blow a man against another in the street, or a stronger than he may take his hand and compel his signature to a document, or a fear of personal injury may prevent him from telling what he knows; and this is the physical sanction.

the religious sanction,

Or a fear of wrath to come, or a desire for the growth within him of a spiritual life, may determine a man's conduct; this is the religious sanction.

Or a desire to obtain the good opinion, or avoid the active dislike of others, many or few; or to conform to a standard

of conduct which he conceives to be good for himself or for the world at large, may make a man give up pleasure or endure pain; this is the moral sanction. the moral sanction,

Yet although a man may be deterred from picking a pocket because the man whose pocket he was going to pick turns round and catches his wrist; or by fear of God's anger or care for the spiritual life; or by the knowledge that his neighbours will condemn him: yet, at any rate, this sanction must be present to his mind that the State, or the community in its political character, has taken to itself the right to maintain order and to prevent violent and involuntary transfers of property by punishing offenders; and that if he is detected he will be punished by such process and in such ways as the State may provide. the political sanction or Law proper.

The absolute strength of the State is a conception necessary to the foundation of any jurisprudence which is not merely a speculative and ideal arrangement of rules of conduct, but the complex structure of the State is the matter of difficulty to the student of constitutional law.

The king, who decides quarrels, declares customs, and leads his people in war, ceases after a while to discharge these duties as they become more elaborate and cover a wider surface. The community extends by absorbing others in conquest or by a natural process of growth, and can no longer assemble in its entirety to express its assent or dissent on matters of common interest. The various duties of the king pass into the hands of ministers, sometimes with the result, noticeable in our constitution, that he comes to be regarded as incapable of discharging these duties for himself. Thus we find in our own country that though every act in the State is in theory the act of the Queen or of the Queen in Council, there is scarcely an executive act which the Crown can perform without the intervention of a minister. The specialising of political functions.

And as the Crown has lost the power of independent action in matters administrative, so it has lost independence and

initiative in legislation. First, the community demands to be represented when money is granted, to assent to the amount and incidence of the tax; then the representatives claim to state grievances, departures from custom or need of change, before they grant the tax; then, instead of leaving it to the king and his council to make and promulgate the required law, the representatives undertake to frame and settle the law. The king's legislative power sinks to a formal right to assent or dissent from a law submitted to him, and this again to a merely formal expression of assent. Though statutes are nominally enacted 'by the Queen's most excellent Majesty,' and the Lords and Commons do but advise and consent and give their authority thereto, the legislative power of the Crown has shrunk to a shadowy veto.

From what has been said it will appear that the complexity of a modern State, and in particular the complexity of modern English institutions, gives enough work to the constitutional lawyer if he is to disentangle and set out in their various relations the institutions of his country. It is the more important to keep his province clear of other fields of study which have been touched upon in what has just been said. The history of the conception of the State, its sphere of duty, the best possible disposition of forces in it, the mode in which they are or have been disposed at different times—all these topics are more or less susceptible of confusion with the topic of constitutional law.

Matters to be distinguished from Constitutional Law:.

Let us try to sever them.

Legal Antiquities;

(α) There is the growth and development of the State in its rudimentary forms, the mode in which Law parts company with morals and religion, and becomes specialised as a code of conduct enforceable by a central power within the community —this is the department of historical jurisprudence, and is matter for the student of legal antiquities.

Political Economy and the limits of

(β) The determination of the rules which should be enforced by the State, as opposed to such as should be left to the moralist and the priest or preacher, is matter for the political

economist and the student of political science: it is for them to discuss and settle the limits of State interference. State interference;

(γ) But when once it is determined what rules of conduct the State shall enforce, the business of the jurist and of the legislator begins. For when the State enforces acts and forbearances, it at once creates rights; the analysis and arrangement of these rights is the business of the jurist. Jurisprudence;

Moreover, it is one thing to say that certain acts and forbearances shall be made obligatory, and another thing to determine the mode in which they shall be so made, in what form, and with what sanctions for disobedience. The theory of punishment (using the term punishment as including all forms of penalty or remedy for rights infringed), and the business of making laws, make up the province of the legislator. the theory of legislation;

(δ) There yet remains for consideration the actual structure of the State. We may ask, after determining the due limits of State interference and the objects of State control, how the forces of the community may best be disposed with a view to the attainment of these objects; and this is a part of the business of the student of political science[1]. Political Science;

Or, we may ask how the forces of the community have been disposed in the past, noting the displacement and change of balance from time to time; and this is the business of the constitutional historian. Constitutional History;

Or, lastly, we may consider how the forces of the community are disposed here and now; what are the legal rights and duties of the various parts of the sovereign body against one Constitutional Law.

[1] I may seem to have suggested under three different headings three matters, all of which might be included within the term 'political science.' It is not my business to find a terminology for the political philosopher, but his studies would seem to include three distinct things: the ascertainment of the limits of State Interference, so that he may know what the State should undertake; the theory of Legislation, so that he may know how the State should set about what it undertakes; and the Analysis and Comparison of Constitutions, so that he may know how the State may be best constructed and political forces best disposed with a view to the work of the State being done.

another and against the community at large; and how the whole works together. If in our own constitution we find that law and custom diverge, we must note first what is the law, and then how it has been overgrown by custom; and in so doing we shall do the duty of the constitutional lawyer, and stray as little as need be into the domain of other studies.

CHAPTER II.

HISTORICAL OUTLINE.

Object of an historical outline.

THE great difficulty which presses on the student of the English constitution, regarded as a set of legal rules, is that he can never dissociate himself from history. There is hardly a rule which has not a long past, or which can be understood without some consideration of the circumstances under which it first came into being. And yet, if we are ever to understand the constitution as it is, we must needs limit its historical aspect to the narrowest dimensions. In order that we may be able to do this, I propose at the outset to note the various phases through which our Parliamentary institutions have passed, so that it may be possible to fit the rules into their historical origin as each comes to be dealt with. A historical outline will clear the ground and enable me to confine the rest of the book, as far as possible, to the law and custom of the constitution as it now is.

The Saxon Constitution.

Character of Saxon polity:

The Anglo-Saxon or early English constitution was of the ordinary type of what Mr. Bagehot calls 'that common polity or germ of polity which we find in all the rude nations which have attained civilisation—a consultative and tentative absolutism.' There was a king the chosen representative of the race, their leader in war and their judge in the last resort, an assembly of the wise, and the concourse of the people. But whatever may have been the rights of the popular assembly or its position in the smaller kingdoms of the early Saxon times, it seems

clear that when England became a united kingdom its government was conducted by king and witan. If the king had a strong will, and a good capacity for business, he ruled the witan, if not, the witan was the prevailing power in the State.

its weakness.

But the Anglo-Saxon kingdom was always unstable. Perhaps from the mode in which the country was gradually acquired by the various conquering tribes, and from the gradual amalgamation of diverse kingdoms into one, the England of Saxon times was wanting in a sense of national unity. 'The cohesion of the nation,' says Dr. Stubbs[1], 'was greatest in the lowest ranges. Family, township, hundred, county held together when ealdorman was struggling with ealdorman, and the king was left in isolated dignity.'

The Norman Administration.

Saxon government and Norman centralisation.

The local organisation was strong and formed the substantial contribution of the Anglo-Saxon polity to our constitutional growth. When the Norman kings came over, bringing with them the formulated feudalism of the continent, the strength of local custom was a powerful assistance to them in face of the efforts of the barons to break up the kingdom into a number of small principalities. They bound the people to themselves by reserving to the king the allegiance of every landowner and excepting it from the fealty which he swore to his lord: they used the local customs and institutions as a machinery for the administration of justice and the assessment and collection of revenue, and they worked this machinery from a strong central government over which they watched with personal and incessant care.

The Norman central and administrative system was brought into contact with Saxon local and representative institutions by the sessions of the royal justices in the shire moot. At these sessions offenders were presented to the king's justices by the twelve lawful men of the hundred, and the aid or tallage

[1] Const. Hist. i. 211.

imposed by the king in council was assessed and collected. So long as taxation fell upon land only, the liability of the tax-payer was settled by the sheriff, the justice, or the declaration of the tenant in chief[1]: but personal property, when under Henry II it came to be taxed, required a closer system of assessment. Thus, for the collection of the Saladin Tithe representative men of each township were chosen to determine the liabilities of the tax-payers, and here we get the beginning of the connection between taxation and representation. Shortly, one may state the whole history of the process which now begins. First, the representatives calculate the amount due from each individual of a tax fixed by the crown; next, they determine the total amount which shall be granted to the crown; finally, they determine not merely the amount which the crown is to receive, but the way in which the crown shall spend it.

Growth of representation in connection with taxation.

But this is at present far off. The king of the twelfth century judged and taxed, and commanded his feudal levies in war; he also issued edicts declaratory of custom or enacting changes of administration. This he did with the counsel and consent of the *Commune Concilium Regni*, a body which, in theory, consisted of all the tenants in chief, in practice, of the great noblemen and officials habitually attendant upon the king. But the system of administration was largely based on local representation for purposes of taxation and judicial procedure, and so we get a connection of the local and central power, which paved the way for parliamentary institutions and for the share in the government of the country which was given to all classes by the constitution of Edward I.

Counsel and consent.

The Great Charter is partly a declaration of rights, partly a treaty between crown and people: it contains a statement of the legal limits of the power of the crown in two matters of paramount importance. It put on record—first the right at any rate of all tenants in chief, personally or by their representatives, to be parties to the grant of any scutage or aid other

The Charter.

[1] Stubbs, Const. Hist. i. 505.

than the three customary aids; and next the right of every free man to the free course of justice, 'the legal judgment of his peers or the law of the land.' That representation is a condition precedent to taxation, and that the law is the same for all freemen [1] may be regarded as the cardinal principles of the charter.

The Constitution of Edward I.

When Edward I came to the throne in 1272, the feudal assemblage of tenants in chief had already given place, for important purposes of deliberation, to a body representative of barons, clergy and commons: and in this last Simon de Montfort had included the town as well as the shire. Here is the Parliament of to-day, for this assemblage received from Edward I the form which, with many changes in spirit and many more in detail, it still retains. The executive is the Crown in Council, the king acting with the advice of the wise men and magnates of the realm. The representative body, which at first only assents to taxation and afterwards makes laws, consists of the clergy, the baronage, and the commons, the three estates of the realm. The baronage come in response to a summons addressed by writ to each individually; the clergy are included in a like writ addressed to each bishop; the commons are summoned by a writ addressed to the sheriff of each county, commanding the election of two knights for each shire, two citizens for each city, two burgesses for each borough. The machinery of the county court, which had already been used for the choice of persons who should assess the taxation levied by the Crown, was now used for the choice of persons to represent the shire, and for the confirmation of the choice of their representatives by the towns. And these representatives, the choice of whom is notified from the sheriff in the County Court to the Crown, meet in Parliament

Parliament: its constitution.

[1] The charter was not for the villein class, and the liberties were granted on a freehold tenure—omnibus *liberis* hominibus regni nostri, habendas et tenendas, eis et heredibus suis, de nobis et heredibus nostris.

'to enact such things as shall of our common council be ordained[1].' The Crown in Parliament begins to be distinguishable from the Crown in Council, but it was a long time before the respective functions of legislature and executive were clearly defined, and longer still before the two bodies found a means of working in some sort of habitual correspondence.

The Commons as a Political Power.

Voice of the Commons in legislation,

There was at first no clear recognition of the right of the commons to a voice in legislation; the king in council had been wont to declare customs and make administrative changes; he sometimes continued to do so with the concurrence of the Magnates only, and without waiting for the assent of the Commons. Such was the case with the Statute Quia Emptores, passed *instantia magnatum*. If they wanted new laws the Commons did not frame them, but asked for them; the Crown in Council legislated on petition of the Commons.

in administration.

Nor were the Commons always willing to recognise their position as critics if not advisers of the Crown and its Ministers. When their opinion was asked on matters of executive government they were reluctant to give it, lest their advice should lead to expense for which they might be held responsible.

But the strength of the Commons lay in this, that when once the Crown had acknowledged its inability to lay taxes on the people without their consent, that consent could only be obtained through the representatives of the people in Parliament; and further, in days when there was no press, nor means of getting at public opinion by organised demonstrations, it was only through the assemblage of the Commons that the king could ascertain the feeling of the country. And though the Commons might be reluctant to express opinions which would compromise them in the matter of taxation, yet a capable king would learn without much difficulty whether

[1] Stubbs, Charters, 486.

the country was with him or not, and a wise king would not act in grave matters unless he knew that the country was at his back.

So the Commons became necessary to the Crown: they were also necessary to the Baronage, for the Barons were frequently in an attitude of resistance to the Crown; it was upon them that feudal liabilities lay heaviest, and to have the Commons on their side was important to them. In the great Constitutional struggles of the middle ages, which ended in the acknowledgment by the Crown of the right of Parliament to grant supply, we find the Barons leading and the Commons following their lead.

But though money could only be got through the Commons, and information of the state of public feeling could hardly be got elsewhere, yet it was long before they were able to exercise a substantial influence on the action of the executive, and some time before they could even acquire a hold upon legislation.

The Commons and the Executive.

Independence of the executive.

For in their relations to the executive the criticism of the Commons was occasional, their control remote. They could denounce, but they could not denounce in time or complain before the mischief was done. If grants of money had been required at more regular intervals, or could have been appropriated more specifically to the purpose for which they had been asked, the Commons might at any time have stayed the hand of the executive by tightening the purse strings. But the Crown had an hereditary revenue from various sources which satisfied many of the needs of government. If the king wanted more, he asked for and obtained a grant of a tenth or a fifteenth on real or personal property. No means existed of assigning portions of the grant to particular services, or indeed of providing that the king should not spend the entire subsidy on purposes quite different from those for which it was asked. So when their grant was made the virtue had gone out of the Commons, they could exercise no control over policy

till money was wanted again. Their efforts to keep a hold on the king's ministers show that they knew their weakness in this respect. The oath of office and the practice of impeachment were attempts to impose upon the servants of the Crown a sense of duty by fear of more or less remote contingencies. Checks devised by Commons.

The demand sometimes made that the officers of state should be chosen or at any rate nominated in the Commons is a curious anticipation of modern practice[1]. Only the Commons desired in the middle ages to do directly and formally what in the modern constitution they do indirectly. The mediaeval Parliament wanted to be able to elect for the Crown the minister of its choice. The modern Parliament is content with the power of making it impossible for the Crown to employ others than those whom Parliament favours for the time.

The Commons and Legislation.

The control which the Commons exercised over legislation was acquired two hundred years sooner than its control over the executive. But it was not acquired without a struggle.

The Confirmatio Chartarum (1297) made them necessary parties to taxation; and a statute of 1322 enacted that laws should not be made without their consent. But the consent thus required was of a vague and general sort. When asked for money they could claim that grievances should precede supply: but for such grievances as needed legislation for their redress the Commons had to be content with the king's promise that the necessary laws should be made. When Parliament had dispersed, the statute required was drafted and engrossed in the statute roll, or an ordinance issued to the same effect. But the Commons had no opportunity of seeing that their wishes were really carried out, or that if carried out they were not rendered liable to be defeated by saving clauses and the reservation of a dispensing power to the Crown. Parliamentary control over legislation.

Nevertheless the process of legislation took much less time

[1] Stubbs, Const. Hist. ii. 559.

to acquire its modern aspect than did the connection of the executive and the legislature. It was not till after the Revolution that party government began to grow up, and the relation of ministers to Parliament came to be something like what it is now. But by the end of the fifteenth century statutes had assumed the form which they still retain, and as early as the reign of Henry VI the framing of laws was undertaken and conducted by the Houses, and the king had ceased to do more than express a formal acceptance or rejection of the measure submitted to him.

By this means the mediaeval Parliament acquired a close and effective control over legislation, while its control over the action of the Crown, or of the ministers of the Crown, remained uncertain and at best intermittent. But we must not therefore suppose that the king was free to do as he would either in the determination of general policy or in the details of administration, or that the only check upon him was the need of a reference to Parliament when money was wanted.

The Feudal King.

Feudal royalty did not possess the indelible sacredness which came to be attached to the kingly office in the seventeenth century. The liabilities of allegiance might be renounced as they were in the case of Edward II, or the right to allegiance resigned as it was by Richard II. Feudalism was based upon contract, and a hopeless failure in performance of his part by the king was held to discharge his subjects from their corresponding duties.

Contractual character of Feudalism.

But there was a stronger curb upon the action of the king than this last appeal to the mutual undertakings of sovereign and subject. The executive was not the king but the king in council, and the Council were the great officers of state. Although it might be difficult for Parliament to keep an adequate control over the king's choice of ministers, or over the action of the ministers whom he chose, such ministers were themselves powerful representatives of two estates of the realm,

The Council a check upon the Crown.

the baronage and the clergy. The nobles and bishops who, for the most part, composed the Council could influence the royal policy in other ways than by their knowledge of the business of state. The nobles by their great estates and local influence could treat with the king on an independent footing; the bishops could speak for the clergy, who were taxed separately from the laity, and often on a larger scale. The Council therefore was a counterpoise to the power of the Crown, unless the king was a man of exceptional vigour and capacity, who could seize a policy in which he would have the nation at his back and carry it out with a skill and firmness which would secure the obedience of the Council. Nor did the Council hesitate to control the action of the Crown in details. The history of the royal seals shows the care taken that no official expression of the royal pleasure should be unauthenticated by an officer of state.

Elsewhere I have described the position of the feudal king[1]. He was an essential part of the mechanism of state; he enacted laws in Parliament, issued writs, granted patents, commanded armies, and yet the part he played might be real or formal as the king might be strong or weak, the Council vigorous or disunited, the Parliament interested or apathetic. And the possible checks upon his power throughout the middle ages were such as to reduce it at times to little but a form.

The Reformation and the Tudor Monarchy.

Sources of Tudor power.

Under the Tudor monarchy all this was changed. The Wars of the Roses left the baronage reduced alike in numbers and in power, the Commons exhausted and anxious only for a rule strong enough to give them peace, the Crown rich with the forfeited lands of those barons who had taken the wrong side in the dynastic quarrels of York and Lancaster. The Church was the only great power in the State which could cope with the Crown; and the reform of the Church, whether

[1] The Crown, ch. i. sect. iii.

it was to take place from without or from within, was now imminent.

Political effect of the Reformation.

The Reformation in England was the result of many conflicting currents of interest. But we must look at the matter from the point of view of Parliamentary history. By the dissolution of the monasteries the Church lost much besides wealth; it lost social influence, for the monasteries had been the great educational centres and the great dispensers of charitable relief; it lost political influence when the mitred abbots no longer formed, as they had previously formed, a large number of the House of Lords.

Thus many things combined to enhance the power of the Crown. The destruction of the baronage not only freed the king from men who might control his policy and action, but enabled him to fill the great offices of state with new men. The Council was changed in composition; the great nobles bore a small proportion to the officials on their promotion; it was changed in its mode of working, split into departments with special business assigned to them; it ceased to be a check upon royal power; it became instead a formidable instrument in the hands of the Crown. The breach with Rome placed the king at the head of the national church, and the spoils of the monasteries gave him an immense accession of wealth.

Maintenance of constitutional forms by the Tudors.

And yet in other ways the growing importance of Parliament was noticeable. The two great Tudor monarchs, Henry VIII and Elizabeth, showed their statesmanship in nothing more conspicuously than in their acceptance of all the forms of the constitution. When Henry VIII obtained for his Proclamations the force of law, and was permitted to devise the Crown by will, these extraordinary powers were in each case conferred by Parliament and in statutory form. When Elizabeth desired to control the growing interest of the House of Commons in public affairs she packed the House with subservient members, representing small boroughs upon which she had conferred the franchise in order that they might return persons who would be under the influence of the court

or its ministers. The Tudors were content with the substance of power, and left to Parliament everything but the reality of control over legislation and policy.

The issues between the Stuarts and Parliament.

But this expedient for harmonising the wishes of the House of Commons with the action of the executive is of itself an indication that a new struggle was beginning on the old ground. The Commons had begun to demand a voice in the general policy of the country, and to criticise the action of the executive in modern fashion. The first two Stuarts chafed at constitutional forms, and were incapable of a generous acceptance of a policy they disliked. Disregard of them by the Stuarts.

The practical issue between the Crown and the Commons came to this, that the Crown claimed to tax without consent of Parliament, and to administer justice without the forms of law. Both parties appealed to the letter of old statutes, and neither seemed to see that with the change of times, and after the long lapse of political interest under the Tudors, the mediaeval constitution needed to be restated, or even recast, if the Commons were to resume their old place in political life. Ship money and the Star Chamber.

The Petition of Right was the first attempt to restate the rules of constitutional liberty laid down in the Great Charter, but in defiance of its provisions Charles tried to dispense with Parliament in matters of taxation, and with the Courts of Law in matters of criminal justice. The Star Chamber, which acquired the coercive judicial powers of the Privy Council, had once been a useful means of bringing great offenders within the reach of the law by the strong arm of the executive. It now became an instrument of political and ecclesiastical tyranny, enabling the king to dispense with the forms of law where they were inconvenient, and to get the course of criminal justice into his hands. 1628.

Want of money brought the king back to Parliament at last, and the first acts of the Long Parliament were to sweep

away the criminal jurisdiction of the Privy Council, and to close every avenue against the raising of money by the Crown without the consent of the Commons. But the executive and the representative parts of the constitution had by this time drifted too far apart, and the monarchical policy of the first Stuarts ended in the catastrophe of the Civil War and the premature reforms of the Commonwealth.

Relations of Crown and Parliament, 1660–1688.

The Restoration did not give back what the Long Parliament had taken away—the criminal jurisdiction of the Privy Council; nor did it revive what the Long Parliament had set at rest—the right of the Crown to raise money, whether by direct or by indirect taxation, without Parliamentary grant. The executive was weakened for the purposes of conflict with the legislature, but nothing was done to bring the ministers of the Crown into closer relation with the power which was fast becoming paramount in the constitution, the House of Commons.

In the reigns of the last two Stuarts one may summarise the relations of Parliament and the Crown somewhat as follows:–

Revenues of the Crown in 1660.

The king could set up no claim to raise money without consent of Parliament: he possessed a revenue roughly calculated at £1,250,000 a year arising from the crown-lands and the proceeds of certain duties; he employed such ministers as he pleased, subject to the risk of their being impeached by the House of Commons if they and the House came to hopeless variance; and he conducted the business of government in concert with an inner circle of the Privy Council, consisting of such persons as he might think likely to promote the despatch or enliven the progress of business. Any increase in the productive power of the sources of the revenue went to the benefit of the Crown, which might to that extent become independent of Parliament. Any increase in the liabilities of government beyond the ordinary revenue had to

Appropriation of supplies.

be met by a subsidy, or extraordinary grant, from the Commons, and such grants were for the first time in the reign of Charles II *appropriated* to the specific purposes for which they were made; that is to say, their use was limited to such purposes, and the money granted was not issued except under precautions that it should be so used. The Commons drew closer their control upon the action of the executive, but the periodical catastrophes of Charles the Second's reign—the exile of Clarendon, the impeachment of Danby—show how easy it was for a minister and a House of Commons to drift so far apart that no means were left for settling their disputes except recourse to violent measures.

Attempt to harmonise executive and legislature.

The abortive Privy Council scheme of Sir William Temple in 1679 showed some consciousness of the risk arising from the slight correspondence between ministers and the Commons. The attempt to create an executive which should represent all classes and opinions could hardly have been expected to succeed, but it was something that the constitutional problem should have been recognised though the solution was inadequate.

The dispensing power.

Taxation in Parliament and the free administration of justice had been secured by the Long Parliament; the last of the Stuarts revived an earlier claim of the Crown to independent legislative powers. The final struggle arose out of the attempt of James II to annul, of his own authority, statutes which had been thought essential to the security of the Protestant religion. The issue between the first Stuart and his subjects turned on the security of person and property, the right of the king to tax without Parliament and imprison without legal sentence. The issue between the last Stuart and his subjects turned on the king's right to suspend the law at his pleasure and by his individual act. The offer of the crown to William and Mary, their acceptance of it, and the codification in the Bill of Rights of the limitations on the royal prerogative, mark the beginning of the modern constitution.

The Modern Constitution.

1688. The Bill of Rights, how far a code.

But the Bill of Rights is more than a summary of constitutional rules; it practically settles a number of disputed questions of principle. In opposition to the doctrine that the Crown was a piece of real property which could never be without an owner, it declares the throne vacant. In opposition to the doctrine that the succession to the throne was a matter of divine indefeasible hereditary right, it regulates that succession. In opposition to the doctrine of passive obedience, it affixes conditions to the tenure of the Crown.

The Bill of Rights is perhaps the nearest approach to a constitutional code which we possess, but it does not profess to be a written constitution. It merely states the points which had been from time to time in issue between the Crown and its subjects since the reign of Edward I, and on all points it declares in favour of the nation and against the Crown.

The Act of Settlement, which provided that the judges should no longer hold office at the pleasure of the Crown, and so took the control of justice from the hands of the king, was a fitting supplement to the constitutional provisions of the Bill of Rights.

Altered conception of royalty.

This summary of constitutional rules, setting at rest matters which had long been a source of difference, represents the legal result of the Revolution. The process by which the crown was offered to William and Mary by the representatives of the estates of the realm is evidence of an altered conception of royalty which has practically determined the development of constitutional usage since 1688. It is worth considering how this conception of royalty has gradually been arrived at.

Mediaeval royalty.

Feudalism, which linked political power with the holding of land, had found the king a tribal chief, had made him the ultimate landlord of every man, and had turned sovereignty into a piece of real property, the rights to which were regulated by the feudal land-law. The practice of Commendation, where fealty was to be rendered on one side and

protection on the other, gave to feudalism that element of personal loyalty which made treason the unpardonable sin of the middle ages. At the head of the feudal hierarchy, the lord of kings was the Emperor, but his shadowy lordship lost all practical meaning when the kingdoms of Europe became definite and compact; and the Reformation, which broke up the unity of Western Christendom, destroyed for ever the feudal conception of society, secular and spiritual, tending upwards to the Emperor and the Pope. And as the dependence of the king upon an earthly power was thus exploded, kingship obtained a higher place than it had occupied as a link in the feudal chain. For the connection of sovereignty with property was still assumed, and the personal allegiance of feudalism remained, and when men sought for some theory of political duty they found it in the conception of Divine Right. The king held the kingdom as property, his subjects owed him their fealty, and his tenure was of God.

Divine right.

And this theory of Divine Right grew into definite shape in opposition to a new conception of kingship. When, after the Reformation and with the rise of Puritanism, men began to regard the king rather as the official exponent of the wishes and aims of his people, the opponents of this view sought in the divine right of kings a basis of sovereignty and a theory of political duty which seemed to them surer than the convenience of a nation, or the need of having some outward embodiment of the State.

Representative royalty.

The act of the Convention Parliament which gave the crown to William and Mary was the recognition of the official and representative duties of the Crown of England. Whether, with the utilitarians, we say that government exists for the common good, or with Locke, that it exists for the purpose of securing to us natural rights, or with Hobbes, that it exists for the restraint of lawlessness and the protection of men from their own inclinations to rapine and revenge, we come to the same conclusion—that the State exists for our advantage,

Result of new idea of royalty.

that the king is a part of the State, that he, like the rest of the State machinery, is not there of right except in so far as he fulfils his functions.

This practical view of the relations of the Crown and people had immediate effects.

The Mutiny Act.

The king was leader of the armed force of the nation, but the feudal levy was now extinct, the national levy or militia was inadequate, and the Bill of Rights had declared the maintenance of a standing army in time of peace without consent of Parliament to be contrary to law. Apart from this general proposition the maintenance of discipline in a standing army involves a departure from the ordinary course of law. The Commons were determined that such a power should not pass out of their control, and every year, for a year, they legalise the existence of a standing army and make provision for its discipline.

The appropriation of supplies.

Again, the Crown had conducted the business of government on the resources supplied by the proceeds of crown lands and of taxes settled on the king for life. If the revenue was in excess of the needs of government the king could do as he liked with the balance; if it was deficient the king asked the Commons to make good the deficiency. But it was left to the king to conduct the entire financial business of state from year to year. After the Revolution this was changed. The king was not entrusted with the payment of all the charges of government; he was placed upon an allowance called the Civil List, calculated to meet the cost of the royal household and of the civil departments. The House of Commons took over the naval and military expenditure, and annually voted and paid the sums required. They thereby acquired a power of constantly reviewing the conduct of the king's ministers.

Dependence of ministers on Parliament.

But most important of all was the new relation in which the ministers of the Crown stood towards Parliament. With the increased control which the House of Commons acquired over the business of government, came the necessity that the

king's ministers should be able to work in harmony with a majority of the House. The king might choose his servants, but the House of Commons might make it difficult, if not impossible, for them to carry on the business of government.

Cabinet and Party Government.

The Cabinet.

And this newly acquired power of the House of Commons did more than limit the king's choice of ministers; it was incompatible with the discussion of matters of general policy by the Privy Council. The Privy Council was too large a body, and of too various political opinions, to act together or to guide its action by the wishes of a Parliamentary majority.

1. A committee of heads of departments.

Already a smaller group within the Council had come to transact the business of the country, and this had arisen from the dislike of Charles II to the formalities of a full meeting of the Council, and of William III to the communication of his policy to more than a few trusted statesmen.

2. United in holding the political opinions of the majority in the Commons.

It remained that this committee of the Council, made up of the chiefs of the various departments of government, should consist of persons of the same way of thinking in politics, and that way in accordance with the opinion, for the time, of the majority in the House of Commons. The necessity for this became clear so soon as the increase in the power of the Commons became realised.

Sunderland showed this to William III, and as early as the beginning of the last century Cabinet and party government existed in a rudimentary form. That is to say, the policy of the country was not determined by the Crown with the whole of the Privy Council, but with a limited number consisting for the most part of the heads of departments; and this limited number were men of identical opinions on the chief matters of political interest, and their opinions were the same as those of the majority of the House of Commons.

3. Not severed from House of Commons.

Thus the House of Commons obtained the control which mediaeval Parliaments had sought in vain over the selection of the executive and the policy of the country. It could, by

a process of indirect election, determine whom the Crown should employ for the conduct of affairs of state. It nearly sacrificed this power to a fear lest the presence in its body of ministers and placemen should affect its independence. A clause in the Act of Settlement excluded from the House of Commons all who held offices or places of profit under the Crown. Happily this clause was repealed before it came into operation; and the parties in the House of Commons have gradually acquired the power of indicating, by a process which is somewhat indefinable in its action, though perfectly clear in its results, the ministers to whom they are respectively willing that the conduct of affairs should be entrusted.

There were two principles which needed to be established before Cabinet government, as we understand it, came into effect. The first was that the Cabinet should be wholly severed from the Council, except in so far as the members of the Cabinet are also members of the Council. Throughout the reign of Anne the policy of the country was settled at small meetings of the Council, attended by the chief ministers of departments and presided over by the Queen. The supersession of the Council by the Cabinet as the deliberative body wherein the policy of the executive was discussed and settled was nearly, though not quite, complete by the close of the reign of Anne[1]. The disuse of the royal presence at Cabinet meetings dates from the accession of George I, who probably found it disagreeable to attend discussions which he could not understand; and the absence of the king, while it enhanced the power of the ministers and their leader, completed the severance of the Cabinet from the Council. It ceased to be a meeting of the Lords of the Privy Council; it became a meeting of 'the king's servants,' leaders of the party in power. Whatever may be the individual liabilities of the members of the Cabinet as heads of departments or members of the Privy Council, the collective Cabinet has no legal existence or legal liability. It is summoned by the Prime Minister,

Disuse of royal presence.

[1] See The Crown, ed. 2. pp. 109–112.

also unknown to the law, through his private secretary; and its proceedings are unrecorded, save in communications to the Crown in the form of a Cabinet minute.

Joint responsibility of ministers.

The second, and this was of slow growth, was the modern theory of the joint responsibility of ministers. If a body of ministers stand or fall together, the influence of the Crown upon the working of government is obviously much diminished, and that of the Commons is increased. If the Queen should disapprove of the conduct of a particular department she cannot now, as the king frequently could and did during the last century, dismiss the individual minister of whose conduct she disapproves unless he has lost the confidence of his colleagues as well as of herself; if she did so she would lose the services of her entire ministry. The Crown has to deal with a body of men who stand or fall together, because they represent common interests and the opinions of a party. They have become ministers because a majority of the House of Commons was willing to support their policy, and was not willing to support any other; they are collectively the nominees of that majority, and though they have been summoned, and continue, to hold office by the pleasure of the Crown, it is to the majority of the House of Commons, and not to the will of the Crown, that they look as the real source of their power. The dismissal of one would, as a rule, be regarded as an attack upon the policy which all represent.

The United Kingdom and its dependencies.

The Acts of Union.

The constitution of Parliament, and of the various departments of government, the relations of the Crown to its ministers, and of the Crown and its ministers to Parliament, do not by any means exhaust the topics of constitutional law in history or in fact. So far I have traced the development of the Parliamentary institutions in England alone. It has to be borne in mind that the Acts of Union with Scotland and Ireland were treaties by which in each case two independent Parliaments merged their identity in a new Parliament

upon certain terms as to representation in the two Houses; treaties by which two States, one enjoying complete independence, the other a legislative independence of England, were formed into a United Kingdom of Great Britain and Ireland.

Constitution of the colonies and their connection with the United Kingdom.

And this United Kingdom, the terms of whose union have to be studied by the constitutional lawyer, has accumulated around itself a number of dependencies, some the result of conquest, some of colonisation, very variously constituted in themselves and standing in various relations to the central government. Our work is not done until we have made out the nature of the connection of England, Scotland and Ireland, and the working of the central executive in the United Kingdom and the various parts of the Empire which lie scattered over the habitable surface of the earth.

CHAPTER III.

SOME CHARACTERISTICS OF THE ENGLISH CONSTITUTION.

Our constitution a gradual adaptation of rules to convenience.

THE brief survey which I have made of the leading features of our constitution may serve at least to bring out one remarkable characteristic of the topics with which we have to deal. A constitution which began with the rude organisation of a group of settlers in a hostile country has been adapted not only to the wants of a highly civilised race, but to the government of a vast empire, and has been so adapted by an insensible process of change, without any attempt to recast it as a whole, or to map it out in a written form.

There are, in consequence, many features of our constitution for which it is hard to account. We find one practice prevailing at one time, and quite a different practice, in the same matter, at another; and it is sometimes difficult, if not impossible, to indicate the moment at which the change occurred. For changes have most often been unconscious adaptations of practice to convenience; where they have been deliberate they have seldom been comprehensive; they have seldom dealt with more than the matter which needed change at the time.

It follows then that our constitution is a somewhat rambling structure, and that, like a house which many successive owners have altered just so far as suited their wants at the time of their possession, it bears the marks of many hands, and is convenient rather than symmetrical.

Hence theory and practice diverge

One result of these piecemeal changes in our constitution is the divergence, in many important matters, of law and custom, of theory and practice. We are constantly embarrassed by finding power vested by law in hands which never exercise it in fact, and power exercised in fact by persons unknown to the law. A student who rose from the perusal of the latest edition of Stephen's 'Commentaries' to study the working of our institutions at the present day, would wonder what had become of the prerogative of the Crown, and who were meant by the Prime Minister and the Cabinet.

It is necessary, therefore, before dealing with the law and custom of the Constitution, to note some of these divergences of theory and practice, that we may be prepared for them when we are confronted with them in the detailed part of our inquiries.

First compare the process of legislation in theory, that is, according to the strict rules of law, and in practice.

in the legislature:

Legislation is effected by the Crown in Parliament; it is the ~~Queen~~ King who makes laws with the assent of Lords and Commons, and by the authority of the same. But in fact the Commons have an exclusive initiative and control over one branch of legislation, the laws by which taxes are imposed; they have a preponderating influence over all other legislation; and the enacting power of the Crown has, since the reign of Henry VI, been reduced to a right to express assent or dissent when measures are submitted by Lords and Commons; even the veto which is all that custom has left to the Crown has not been exercised for nearly 200 years. X E.

in the executive.

Or, take again the Executive in its relations to Parliament. The Crown in Council is the executive; the Queen appoints the various ministers who conduct the business of government; legally, they are only heads of departments acting under the orders of the Queen. Ministers hold their offices during pleasure; they may be dismissed, one or all, at any moment; they are not in any way legally obliged to be in

Parliament; their relations to Parliament are a matter with which the law is wholly unconcerned, except that the acceptance of office necessitates as a rule the re-election of the member taking office, and that the emoluments of ministers depend upon a Parliamentary grant.

It seldom, if ever, occurs to any one but a student of constitutional law that the business of the various departments of government might be transacted by men who were not in Parliament, and that there is no legal necessity that the heads of departments should be responsible for the general policy of the country, still less that they should initiate and control it.

The Cabinet, the departments, and Parliament.

This severance, which is possible in law, between the controlling executive, the departmental executive, and Parliament is now impossible in fact.

Practical convenience, amounting to necessity, assigns to party leaders the headship of departments, and therewith a joint and general control of the policy of the country. Parliamentary criticism and the many ways in which an adverse majority in the House of Commons may thwart and embarrass the departments of government make it necessary that those who are responsible for such departments should not only act together, but should act in harmony with the majority in the House. And so it comes about that if our constitution were stripped bare of convention and displayed in its legal nakedness, it would be found not only unrecognisable, but unworkable.

The constitution unwritten,

There is another point in which our constitution differs from many. It is not written, and it never has been written out for the information of those who live under it, for the guidance of those who have to work it. Doubtless a written constitution may suffer imperceptible changes as well as one which is not written. Use alters the shape of things so pliable as political institutions: an inconvenient rule is not observed; a convenient practice creeps in. M. Boutmy, in his admirable 'Études de Droit Constitutionnel,' has shown how the written

American constitution has undergone this insensible modification in some of its most important parts. He points out how not only has the whole machinery of the Presidential election, in practice, worked away from the constitutional theory; but how the Senate beginning as a council of delegates, whose duties were mainly executive, and who were bound by the instructions, when given, of those whom they represented, has come to be a Second Chamber, the members of which exercise their discretion freely as critics and moderators of the action of the House of Representatives.

and so more easily changed by custom

If a written constitution can thus by mere force of usage depart from its original lines, a constitution which is nowhere set forth in a written form must inevitably be more liable to change. For custom cannot so easily encrust institutions which are ever present in black and white to those who live under them. And, again, where a constitution is set forth in writing it is rarely changeable by the ordinary process of legislation. Law-making is only possible within the limits of the constitution, and this can only be altered by some assemblage other than the legislature. With us Parliament is omnipotent, and statute law is constantly acting upon one or another of our institutions, here removing a form once thought essential, such as the use of the Privy Seal, there extending the franchise to classes hitherto excluded from the full rights of citizenship[1].

and by legislation.

Omnipotence of Parliament.

The fact that Parliament can change the constitution in the ordinary course of legislation does not necessarily operate to produce a divergence of law and custom, but it tends to do so. For the constitution of a State is something like a human organism. It is difficult to change or destroy one part without producing effects not easily estimated or foretold upon the whole structure. When the clause in the Act of Settlement which excluded placemen from the House of Commons was repealed, Parliament might have seemed to do no more than run a risk of the corruption of its members and

[1] 47 & 48 Vict. c. 30; 48 Vict. c. 3.

of their subservience to the Crown. In reality our modern system of government would have been impossible, but for this repeal.

I have tried to show first that law and custom are often at variance in our constitution, and I have done this because the variance creates a difficulty in setting out the rules of our constitution in a clear form. I have also tried to show why it is that law and custom are at variance, and that one reason is the unwritten and indeterminate character of our constitution, and that another is its susceptibility to change, owing to the absolute power which Parliament possesses over every institution in the country.

But I would be careful to limit this part of my subject to a statement of difficulties and an indication of their source.

The fact that our constitution has to be collected from statutes, from legal decisions, from observation of the course and conduct of the business of politics; that much of what is written is of a negative sort, stating what the Crown and its ministers can *not* do; that there is no part of it which an omnipotent Parliament may not change at will; all this is a puzzle not only to foreign jurists who are prepared to say, with De Tocqueville, that the English constitution does not exist, but to ourselves who are prepared to maintain that it is a monument, if only we can find it, of political sagacity. Those who praise it call it flexible; those who criticise it, call it unstable. We are not concerned with praise or blame, but only with the difficulty of putting such a medley of political rights and duties into an intelligible form.

The omnipotence of Parliament cannot stop change.

Parliament can alter the constitution by an exercise of its ordinary legislative process, but the omnipotence of Parliament, thus strikingly shown, avails only for change, and cannot stereotype constitutional rule or practice. It is a present power and cannot be projected into the future so as to bind the same Parliament on a future day or a future Parliament, whether differently or similarly composed. This limitation may be illustrated from the Acts of Union with Scotland and with

Ireland, each of which contained provisions designed and declared to be fundamental and unalterable. In each case these fundamental conditions have been altered by subsequent legislation.

Illustrated by the Acts of Union.

The process of union is instructive in itself and is further instructive as illustrating this limitation upon the powers of Parliament.

Each Act was preceded by a settlement of the terms of Union which is described as a treaty. In the first case the Parliaments of England and Scotland, in the second the Parliaments of Great Britain and Ireland, respectively, approved of terms in these treaties, which put an end to their own existence and their independent sovereignty. In each Act of Union the assenting Parliaments surrendered their sovereign powers to a new body, the United Parliament of the two countries concerned in the transaction. In each case it seems to have been forgotten that what might be a vital condition of the treaty of Union could not be made an unalterable term binding on the newly constituted Parliament. Each Parliament might have remembered that, as it could not have made a law unalterable by its successors, it could not make a law binding on the new Parliament; for this when constituted would possess all the powers, neither more nor less, for making, altering, and amending laws which the two extinct Parliaments had enjoyed. A Parliament which was in the act of terminating its own existence by the surrender of its sovereignty to a new body could not limit the sovereignty of that body unless it altered the character of the constitution. A Parliament may surrender the whole of its sovereignty, as was done by the English and Scotch, Irish and British Parliaments at the time of the Acts of Union; or it may surrender its sovereignty over a country wherein that sovereignty was previously exercised, as did the Parliament of Great Britain in respect of Ireland in 1782. It cannot bind its successors, nor limit the power of a Parliament similarly constituted. This could only be done by the enactment of laws which would call into existence a new body, whether

representative or not, to whom alone should be given the power of changing those provisions which the two countries at the moment of Union desired to make unalterable by future Parliaments.

There is another matter of difficulty in understanding the English constitution arising from its gradual development and piecemeal construction. It is impossible to state in a form satisfactory to the analytical jurist, it is difficult to state in a clear and coherent form to the practical inquirer, the relations between the executive and the legislature.

The relations of executive and legislature.

'It is absurd,' says Austin[1], 'to say that the Parliament has legislative sovereign powers, but that the executive sovereign powers belong to the king alone. If the Parliament be sovereign or absolute, every sovereign power must belong to that sovereign body or to one or more of its members as forming a part or parts of it.'

Austin's view

Having thus assumed what he desires to prove—that there can be no severance, or placing in the hands of distinct parties, of the sovereign powers of the executive and the legislature, he goes on to describe the king as merely an emanation of the sovereignty of Parliament.

But it is impossible so to regard the Crown either in fact or in history.

unsuited to complex political societies.

Theoretically, there is no reason why legislative and executive duties should not be discharged by the same person or body of persons. It would be perfectly possible for such person or body to make laws binding on the whole community, to work the machinery of government, to determine the policy of the country in its foreign relations, to make peace and war. But, as M. Laveleye has pointed out[2], the construction of

[1] Lectures on Jurisprudence, vol. i. p. 257.

[2] 'On pourrait même formuler ce principe, que plus un régime politique est simple, plus il se rapproche de l'absolutisme; au contraire, plus il donne de garanties à la liberté, plus il est compliqué. Rien n'est aussi simple que le despotisme oriental, rien n'est plus compliqué que les institutions des États-Unis.' *Essai sur les formes de gouvernement*, p. 59.

free and highly-organised states is complex, and the complexity increases with the guarantees for liberty which the constitution affords. Laws and taxes, which affect all, are, in such societies, agreed upon by a body large enough to be representative of the whole community, too large for prompt and united action such as is required of an executive which is to be vigorous and efficient.

It would seem to follow that the picture which Austin presents, of a legislature issuing commands which alone inspire the action of the executive, is remote from fact. The cohesion and good government of a state depend upon the promptitude with which the laws made by the legislature are enforced by the executive: but the executive has something else to do besides enforcing obedience to law. The business of government has to be carried on, and unless every act of the executive is to be done in obedience to a command of the legislature, the executive must be able to do things which are beyond recall, things which were never expressly ordered, perhaps never even contemplated by the legislature. That such things are daily done in free States is matter of common knowledge, and unless we are, like Austin, to be enslaved by a conception of sovereignty which can only be realised in an Oriental despotism, we must admit that there is in our constitution, as in others, a legislative sovereign or supreme law-making power, and an executive sovereign whose constitution may be changed, but whose acts are not, or cannot be, habitually controlled, by the other.

Executive and legislature distinct in English constitution.

In our constitution we can say not only that the executive and legislative powers are distinct to the extent above described, but that we can trace the process by which their powers have become distinct. The common element in both is the Crown; the Crown in Council once made laws and also conducted the business of government, and its powers in these matters have gradually and for different reasons passed into the hands of two different bodies. The need of money which the Commons alone could supply, gave them, as we have

seen, a hold upon legislation: while the jealousy of the great feudal lords who made up the Council, and the inevitable increase of business beyond the capacity of an individual to transact, tended to place the conduct of the executive in the hands of servants or ministers of the Crown. The legislative and executive powers of the Crown have, as it were, bifurcated, and there is a real dualism in our constitution, the Crown in Parliament, and the Crown in Council. The severance took place so soon as Parliament arose, a body outside the executive, but necessary to the executive, by reason of its control over supply. Centuries of experience were needed to demonstrate the inconvenience of this dualism and to suggest the remedy.

They are distinct powers of the Crown

lodged in different hands,

We see the *de facto* executive, the ministers of the Crown, living their political lives in the midst of the legislature, and acting necessarily in close harmony with the majority of the representatives of the people. We forget that the executive *de jure* is the Crown in Council, that the Crown in this capacity is wholly outside Parliament, that the part which the Crown plays in Parliament is to receive the advice of its people and to make laws; not to submit, formulate or defend a policy. We shall understand our constitution better if we remember that the Crown in Council was once the sole repository of sovereign power, whether executive or legislative; and that this power has now passed into two different sets of hands, Ministers and Parliament. The Crown, through its Ministers, does the acts of State; the Crown, in Parliament, enacts laws. A happy combination of circumstances has linked in intimate connection the two bodies to whom the real power in these matters has passed.

brought into harmony by Cabinet and party government.

But really twofold.

We shall find it best to fix the attention upon what has happened, and what does happen, instead of ignoring, like Blackstone, the unwritten constitution; or, like Austin, wresting facts into harmony with an abstract conception of sovereignty in order to work out a theory of the source of law.

CHAPTER IV.

THE MEETING OF PARLIAMENT.

Topics dealt with.

I HAVE endeavoured to define what I mean by the words 'Constitutional Law': I have given a brief sketch of the mode in which Parliament obtained the place and power which it possesses in our constitution; and I have pointed out some characteristics in which our constitution differs from others, not only in the actual rules of which it consists, but in the process of its development, and the shape in which it presents itself to the student.

Topics to be dealt with.

I now propose to deal, first, with the Legislature, and then with the Executive of this country. I have given reasons in the last words of the preceding chapter for treating the two as distinct parts of the sovereign body, and for holding that it is impossible to subordinate the one to the other. But Parliament, though it does not habitually control the executive, might exercise a practical control by legislation, and does exercise a moral control as the representative of public opinion. It is the supreme power in the state and should be dealt with first.

Parliament and the Crown.

So I propose to divide the general subject-matter of my treatise into Parliament and the Crown, or the Legislature and the Executive, and to devote the rest of this volume to the consideration of Parliament.

The subjects which fall under the head of Parliament may conveniently be arranged thus:—

First, we must get Parliament together and regard it as

a whole, in respect of its summons, the setting in motion of its business, its adjournment, prorogation, and dissolution. The meeting of Parliament.

Secondly, we must consider in detail the constituent parts of the two Houses of Parliament, the Commons and the Lords, in respect of the process by which the members of either House attain to membership, and the privileges which such membership confers upon the individuals, or which the Houses collectively enjoy. Constitution and privileges of the Houses.

Thirdly, we must trace the process of legislation in so far as it is effected by the joint action of the two Houses. Legislation.

Fourthly, we must consider the part played by the Crown and its ministers in making laws and in communicating with the two Houses. The Crown in Parliament.

Fifthly, we must note as a matter of history, necessary to be dealt with in order that we may understand the present relations of the Houses of Parliament and the Crown, the attempts which the Crown has made to interfere with, or to influence the action of the Houses, and the attempts which one branch of the Legislature has made to control the action of the rest. Interference of executive with legislature.

Lastly, we must deal with certain functions of Parliament, other than legislative, which may be conveniently included in the term 'the High Court of Parliament.' The High Court of Parliament.

§ 1. *Parties to Legislation.*

There are three necessary parties to legislation—the Crown, the Lords, and the Commons. Nominally the Crown makes laws, the Lords and Commons advise as to the making, and their assent is necessary to give validity to the enactment of the law thus made. And so the enacting clause of every statute runs thus :— The parties to legislation.

'Be it enacted by the Queen'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 actual process by which laws are made, and the part

which the Crown bears in making them, will be dealt with later. It is enough here, to state that laws can only be made by an assembled Parliament, and by the concurrence of the two bodies of which Parliament consists, and of the Crown.

And first we must ascertain who are invited to attend upon this Parliament, for what purposes and in what manner it is brought together, how its business is set in motion, and how it may be dismissed for a time or dissolved for good.

The duties of Parliament.

We shall find in the end that, as regards the functions of Parliament, the bodies of which Parliament consists are not summoned mainly, or even primarily, for purposes of legislation; that legislation is only one of various functions which they discharge; that they discuss all matters of national or imperial concern; that they criticise the conduct of ministers; that they may address the Crown on matters of general policy, that they may institute inquiries, in the public interest, into the conduct of persons or public bodies; and in the last resort may bring to justice a great political offender. But what we are concerned with here is the legal constitution of the Houses of Parliament, the legal rights of their members, and of each House in its entirety, and their power, in conjunction with the Crown, of making laws which can affect all private and public rights within the United Kingdom.

The right to discuss matters of general interest, the right to criticise the conduct of ministers, is also matter of constitutional law and must be dealt with under the head of Parliamentary privilege and otherwise. But we must first construct our Parliament, and it is necessary, in order to understand its constitution, that we should glance, however briefly, at its early history.

The constitution of Parliament.

§ 2. *Who are summoned to Parliament.*

We need not consider the Assembly of the Wise under the Saxon monarchy, nor the Council of the Magnates under the Norman kings; it is enough that in times when the

business of State was rather the declaration and enforcement of custom than the enactment of new laws or the changing of old ones, and when the King discharged in person the executive duties of government, he acted in concert with a body which, whether the qualification for membership was wisdom or property, advised, and to some extent controlled, his action.

The Council of Magnates was expanded, upon occasion, into the Commune Concilium Regni, or the entirety of the tenants-in-chief, and the first formal provision for the summons of this assembly is to be found in the Magna Charta of 1215. In mode and object of summons we note some approach to the later Parliament.

The assembly of tenants-in-chief.

In the twelfth section of the Charter, John promises that he will not levy scutage or aid other than the three recognised feudal aids, 'nisi per commune consilium regni.' And in the fourteenth section, the process of holding this Common Council is described. Archbishops, bishops, abbots, earls, and greater barons are to be summoned individually, 'sigillatim per literas nostras.' The tenants-in-chief are to be summoned 'in generali' by writs addressed to the sheriffs. The writs in all cases are to name the day and place of meeting, and the cause of summons. Forty days' notice, at least, is to be given, and on the day named the Council is to transact the business for which it has been summoned, whether or no it is attended by all to whom the summons is addressed.

Magna Charta, s. 12.

s. 14.

How far this clause of Magna Charta expressed and formulated existing practice is not clear. It was omitted from subsequent confirmations of the Charter, and it may have been omitted as unnecessary because it was merely declaratory; or as unpopular with the barons who procured these confirmations because it was too stringent; or lastly, it may have been omitted from no special design, but because other matters were more pressing at the time of the confirmations.

But though it provided for a systematic assemblage of a large body of persons interested in the matter of taxation,

and though it exhibits, in the two modes of summons, the germ of the distinction between Lord and Commons, yet the assembly for which it provides differs obviously from the later Parliament.

How far different from the Parliament of Edw. I.

It differed, firstly, in that it was not representative. The clergy are not summoned as an estate, nor are the Commons; the inferior clergy, the towns, and those freeholders of the shires who held of *mesne* lords have no place in the *commune concilium* of the Angevin kings.

It differed, secondly, in the mode in which matters were submitted to it: the *commune concilium* was not summoned to advise the king generally, but merely to assent to the imposition of taxes.

In fact the representative system had already begun, and the provisions of 1215 described an assembly of a type which was already passing away. The constitution of the shire moot or county court had always been representative, and the practice of representation had been applied to the kingdom at large in 1213. For to a council held in that year had been summoned 'four discreet men' of each county, to be sent up by the shire moot without reference to their tenure.

Shire representation, as opposed to representation of the tenants-in-chief, does not recur until 1254, when the regents of the kingdom (Henry III being in Gascony) summoned four knights from each shire, and representatives of the clergy from each diocese. The towns were first represented in the famous Parliament of Simon de Montfort; and then through various assemblies, more or less completely representative of the various interests of the country, we reach 'the great and model Parliament,' summoned by Edward I in 1295[1].

The model Parliament, and who were summoned.

This Parliament, both as to causes of summons, and as to constitution, may be justly regarded as the ideal of a representative assembly for the age in which it existed. It was, in fact, to the kingdom what the full county court was to the

[1] Stubbs, Const. Hist. ii 128.

shire, an assemblage in which every class and every interest had a place.

And so it was intended to be by the great king who had the skill and courage to adapt the organisation of the county court to the requirements of the kingdom. 'As it was a just rule,' he says, 'that what concerns all should by all be approved, so it is very plain that we should meet common dangers by remedies in common.'

Summons of estate of clergy; baronage; commons.

To this Parliament were summoned by special writ the archbishops, bishops, and abbots, and to the writ of summons of the two former was attached the *praemunientes* clause directing the attendance of the heads of cathedral chapters, of the archdeacons, and of proctors to represent the chapters and the parochial clergy. Special writs of summons were directed to seven earls and forty-one barons. And writs were addressed to the sheriffs bidding them cause to be elected two knights of each shire, two citizens of each city, two burgesses of each borough.

Thus we get a representation of the three estates of the realm, the clergy, baronage, and commons, and their respective duties are defined in the writs which summon them. The clergy and baronage are summoned 'ad tractandum ordinandum et faciendum,' the commons 'ad faciendum quod tunc de communi concilio ordinabitur.'

Parliament, then, was in its origin, and is still in law, a representative assembly of the three estates of the realm; for all three are still summoned to Parliament.

The clergy drop out from legislation,

But, in fact, the attendance of the clergy was always given reluctantly; they preferred to meet in their provincial convocations: there they granted taxes for their own estate, and the kings, since they got what they wanted from these assemblies, ceased to press for the attendance of the clergy in Parliament. They attended the Parliament of 1322 by which the sources of legislative power were defined, and yet they do not fall within the number of persons or bodies in whom that power was declared to reside. There is no evidence of their

from taxation.

attendance from the end of the fourteenth century onward. In 1664 the mode of granting money by subsidies to meet the extraordinary needs of State was abandoned [1], and the clergy ceased to offer separate subsidies to the Crown. In 1663, for the last time, they granted separate subsidies; in 1664 the Act which imposes the taxation of the year includes the clergy, but saves their right to tax themselves [2]; and henceforth no distinction is made in taxing clergy and laity, though the clergy are still summoned in the writs addressed to archbishops and bishops at the commencement of every Parliament. The change in the mode of taxing the clergy was not made with any general assent of Convocation; it was the result of an informal agreement between Archbishop Sheldon and Lord Chancellor Clarendon. The clergy acquired in return, by tacit consent, what they had not before enjoyed, the right to vote for knights of the shires, as freeholders, in respect of their glebes [3].

It has been necessary to trace the change from the early councils of the magnates and tenants-in-chief to the full representation of the estates of the realm, because it is not easy to understand some parts of our Parliamentary constitution without reference to their history.

Survival of early constitution of Parliament.

The ancient council of the king passed into the House of Lords, and carried with it certain privileges and duties attributable to its earlier stage of existence. It is not as a representation of the baronage but as members of the *magnum concilium* that the Peers are the hereditary counsellors of the Crown, and in their judicial capacity form an ultimate court of appeal. It is because they were once members of the *magnum concilium* that the judges are now summoned to advise, though not to sit as Peers of Parliament. The clergy

[1] See vol. ii. p. 317 (ed. 2).

[2] 15 Car. II, c. 10; 16 & 17 Car. II, c. 1. s. 36.

[3] See as to the right of the clergy to vote, Commons' Journals, 9th May, 1624, 3rd November, 1641; Hatsell Precedents, vol. ii. p. 10 and note. The right was questioned as late as 1696. See Commons' Journals, 15th December, 1696.

are still summoned as an estate of the realm, though for centuries their summons has been a mere form. And the connection of the representation of the Commons with the county court and the organisation of the shire is still indicated by the part which the sheriff takes in county elections, while, down to the year 1872, such elections still took place in the county court, and the identity of the member and the powers conferred on him were testified by indentures to which the sheriff and the men of the county were parties.

We have now glanced as briefly as may be at the historical beginnings of Parliament, so as to learn what a Parliament is. It is an assemblage of the three estates of the realm, which one of the estates persistently declines to attend. It consists, therefore, of the baronage and commons summoned by the Crown.

§ 3. *Objects of Summons.*

Objects of summons:

It will be best to consider next for what purposes Parliament is summoned, and in what manner.

in the middle ages;

The king, when he summoned a Parliament at the beginning of our Parliamentary history, had two distinct objects in view, neither of which would have been adequately attained without a representation of the estates as complete as was possible at that time. He wanted money, and he wanted to ascertain that the nation was with him in matters of general policy. It was for this reason that the writs to the sheriffs desire that the representatives of the commons may have ample power, 'ita quod pro defectu hujusmodi potestatis negotium infectum non remaneat.' Labour would be thrown away if the representatives granted an aid which their constituents repudiated. It was for this reason, too, that the Commons were consulted on questions of general administration and of peace and war, though they endeavoured to adopt the position of critics and advisers without incurring the responsibilities of the executive, and wisely declined to advocate a policy which, if followed,

money;

opinion.

might involve pecuniary liabilities to themselves and their representatives[1].

At the present day: financial

At the present time the Commons have entire control over the finances of the country; the revenues with which the Crown can deal without the intervention of Parliament would hardly suffice to carry on the business of government for a single day. No doubt there is a considerable revenue derived from taxes which do not depend on Statutes annually enacted; but little of this revenue can be applied without the consent of Parliament. Parliament appropriates, in the course of every session, to the services for which it is required, the money which stands to the credit of Government at the Bank of England.

legislative;

And there is another necessity for the meeting of Parliament which is comparatively modern. The machinery of government has become infinitely complex: it requires to be renewed or remodelled by almost continuous legislation. Some Acts of Parliament are temporary, either because they are experimental, or because they confer powers on the executive which it is thought expedient for the legislature to control by annual enactment. Instances of the first of these kinds of legislation are the Ballot Act (1872) and the Employers' Liability Act (1880), of the second the Army (Annual) Act. Some Acts give power to executive departments to carry their provisions into effect by rules or orders which must first be laid upon the tables of the two Houses, and so submitted to the criticism of Parliament. And besides these, there are incessant demands upon Parliament for new legislation, to regulate trades, to confer powers upon public bodies or to impose checks upon the use of powers already conferred, to control the exercise of the rights of property or even of contract. Mediaeval legislation, where it was not simply declaratory of custom, was scanty, and, to judge from the preambles of statutes, timid and even apologetic. Modern legislation is restless, bold, and almost inquisitorial in its dealings with the daily concerns of life.

[1] Stubbs, Const. Hist. iii. 603.

But the Queen, when she calls a new Parliament, makes no mention of the financial or legislative duties which that Parliament is summoned to discharge. She calls it, 'being desirous and resolved as soon as may be to meet her people, and to have their advice in Parliament.' It is in fact for purposes of discussion primarily that Parliament is summoned. Its legislative activity has developed, since the form of the Royal Proclamation which calls it has become settled by custom. but, in form, deliberative.

§ 4. *Forms of Summons.*

The existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same Royal Proclamation issued by the Queen on the advice of the Privy Council under the Great Seal. The Proclamation discharges the existing Parliament from its duties of attendance, declares the desire of the Crown to have the advice of its people, and the royal will and pleasure to call a new Parliament. It further announces an Order addressed by the Crown in Council to the Chancellors of Great Britain and Ireland to issue the necessary writs, and states that this Proclamation is to be their authority for so doing.

Until recent times it was the practice for a warrant under the sign manual to be given by the Crown to the Chancellor to issue the necessary writs. This has ceased to be done: an Order in Council is made directing that writs shall be issued, but, as a matter of fact, the Royal Proclamation is treated by the Crown Office in Chancery as the authority for the issue. These writs I will presently describe. Order in Council.

It may be convenient to set out here the form of Proclamation above described and of the Order in Council following upon it:—

By the Queen.

A Proclamation for Dissolving the present Parliament and Declaring the calling of Another.

VICTORIA R.—Whereas We have thought fit, by and with the advice of Our Privy Council, to dissolve this present Parliament,

which stands prorogued to Tuesday, the 13th day of April next, We do for that end publish this Our Royal Proclamation, and do hereby dissolve the said Parliament accordingly; and the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses, and the Commissioners for shires and burghs, of the House of Commons are discharged from their meeting and attendance on the said Tuesday, the 13th day of April next; and We, being desirous and resolved, as soon as may be, to meet Our people, and to have their advice in Parliament, do hereby make known to all Our loving subjects Our Royal will and pleasure to call a new Parliament; and do hereby further declare, that, with the advice of Our Privy Council, We have given order that Our Chancellor of that part of Our United Kingdom called Great Britain, and Our Chancellor of Ireland, do, respectively upon notice thereof, forthwith issue Our writs in due form, and according to law, for calling a new Parliament; and We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our United Kingdom, require writs forthwith to be issued accordingly by Our said Chancellors respectively, for causing the Lords Spiritual and Temporal and Commons, who are to serve in the said Parliament, to be duly returned to, and to give their attendance in, Our said Parliament; which writs are to be returnable on Thursday, the 29th day of April next. Given at Our Court at Windsor, this 24th day of March, in the year of our Lord 1880, and in the 43rd year of Our Reign. God save the Queen.

Order in Council for the Issue of Writs.

At the Court at Windsor, the 24th day of March, 1880.

Present, The Queen's Most Excellent Majesty in Council.

Her Majesty having been this day pleased by Her Royal Proclamation to dissolve the present Parliament and to declare the calling of another, is hereby further pleased, by and with the advice of her Privy Council, to order that the Right Honourable the Lord High Chancellor of that part of the United Kingdom called Great Britain, and the Right Honourable the Lord Chancellor of Ireland, do respectively, and upon notice of this Her Majesty's order, forthwith cause writs to be issued in due form and according to law for the calling of a new Parliament, to meet at the city of Westminster; which writs are to be returnable on Thursday, the 29th day of April, 1880.

The writs were returnable, according to the provisions of Magna Charta, within forty days of their issue; this period was extended after the union with Scotland to fifty days, and has been reduced, in view of the greater ease of communication, by an Act of the present reign, to thirty-five days. 15 Vict. c. 23.

The writs issued from the Crown Office are addressed to five different classes of persons (1) to the temporal peers of England (2) to the spiritual peers of England (3) to the twenty-eight temporal peers of Ireland (4) to the judges of the High Court of Justice, the Attorney and Solicitor-General, and the Queen's Ancient Serjeant, and (5) to the returning officers of places entitled to elect members to serve in Parliament. Five classes summoned.

The writs are in the following forms:—

Writ of Summons to a Temporal Peer of England.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to Our —— —— Greeting. Whereas by the advice and consent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the —— day of —— next ensuing, and there to treat and have conference with the Prelates, Great Men, and Peers of our Realm. We strictly enjoining command you *upon the faith and allegiance by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in no wise do you omit. Witness Ourself at Westminster the day of in the year of our Reign. Writ to Temporal Peer.

To ——. A writ of summons to Parliament the day of next.

Writ of Summons to a Spiritual Peer (with Praemunientes clause).

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to —— Greeting. Whereas by the advice and assent of Our Council for certain Writ to Spiritual Peer.

arduous and urgent affairs concerning Us the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the —— day of —— next ensuing, and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm, We strictly enjoining command you *upon the faith and love by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in nowise do you omit.

Praemunientes clause.

Forewarning the Dean and Chapter of your Church of —— and the Archdeacons and all the Clergy of your Diocese that they the said Dean and Archdeacon in their proper persons and the said Chapter by one and the said Clergy by two meet Proctors severally, having full and sufficient authority from them the said Chapter and Clergy, at the said day and place to be personally present to consent to those things which then and there by the Common Council of Our said United Kingdom (by the favour of the Divine Clemency) shall happen to be ordained. Witness Ourself at Westminster the —— day of —— in the —— year of our Reign.

To ——. A writ of summons to Parliament, to be holden the —— day of —— next.

The writ of summons to an Irish Representative peer follows the form of the writ addressed to the peer of Great Britain, after first reciting the fact that the peer summoned had been duly elected in pursuance of the provisions of the Act of Union.

Writ of attendance addressed to the Judges, the Attorney and Solicitor General, and the Queen's Ancient Serjeant.

Writ to judge, &c.

Victoria, &c., to Our trusty and well beloved Esq^r^, Greeting. Whereas by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the —— day of —— next ensuing and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm.

We strictly enjoining command you that (waiving all excuses) you be at the said day and place personally present with Us and with the rest of Our Council to treat and give your advice upon the affairs aforesaid, and this in no wise do you omit.

Witness Ourself at Westminster, &c.

Writ addressed to the Sheriff or Returning Officer of a county or borough for the election of a member of the House of Commons.

Statutory writ to Sheriff.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to —— Greeting. Whereas by the advice of Our Council We have ordered a Parliament to be holden at Westminster on the —— day of —— next, We command you that, notice of the time and place of election being first duly given, you do cause election to be made according to law of [*one*] member to serve in Parliament for ——. And that you do cause the name of such member when so elected, whether he be present or absent, to be certified to Us in Our Chancery, without delay.

Witness Ourself at Westminster the —— day of —— in the —— year of Our Reign and in the year of our Lord One thousand eight hundred and ——.

35 & 36 Vict. c. 33.

To ——. A writ of a new election of —— member for the said ——.

As to these writs it is desirable to note the following points:—

1. Proclamations, writs of summons and attendance, and writs for the election of members to serve in Parliament, are authenticated by the Great Seal. But in Great Britain the Great Seal is for these purposes represented by 'an impression to be taken in such manner, and of such size or sizes, on embossed paper, wax, wafer, or any other material' as a Committee of the Privy Council may from time to time prescribe [1].

Scotch peers.

2. The Scotch representative peers do not receive a writ of summons; their election is made in pursuance of a separate Proclamation, in a manner which I will describe hereafter; it

[1] This is done in pursuance of rules made under the provisions of the Crown Office Act, 1877. Commons' Papers, 1878 (87), lxiii. 177. Irish writs are still authenticated by a solid piece of wax bearing a portion of an impression of the Great Seal in use in Ireland.

is certified by the Lord Clerk Register of Scotland to the clerk of the Crown in Chancery, and by him to the clerk of the House of Lords.

Irish peers.

3. The mode of election of the Irish representative peers will be dealt with hereafter.

Temporal and Spiritual peers.

4. The temporal peers are summoned as in the mediaeval writs 'on their faith and allegiance,' and the spiritual peers in like manner 'on their faith and love,' and in other respects the writs of to-day differ little if at all from those of four hundred years ago.

Praemunientes clause.

5. The Praemunientes clause by which the Bishop is instructed to summon the clergy of his diocese to be present and consent to that which Parliament may ordain still recognises the position of the clergy as an estate of the realm, and it must be distinguished carefully from the summons to Convocation, an exclusively clerical assembly, of which more hereafter.

Judges' summons.

6. The Judges, together with the Queen's Ancient Serjeant (when that office is filled) and the Attorney and Solicitor General, are summoned, but in an inferior capacity. Their writs are writs 'of *Attendance*' not 'of *Summons*.' They are not invited to be present '*with* the said Prelates, Peers, and Great Men,' but 'with Us and with the rest of Our Council to treat and give your advice.'

It is in virtue of this writ of attendance that the Judges are called upon to give their opinions on difficult points of law which come before the House of Lords as a Court of Appeal. But they do not come as Peers of Parliament, and recent procedure in the matter of their summons shows that it is regarded rather as an obligation than as a dignity.

For before the Judicature Act the summons, by long custom, was limited to the judges of the old Common Law courts, the Chief Justices and puisne judges of the Queen's Bench and Common Pleas, and the Chief Baron and Barons of the Exchequer.

Since the Judicature Act the summons is extended to all the judges of the High Court of Justice, but not to the Lords

Justices of Appeal, whose higher rank exempts them from the liability to a summons[1]. Nor would this writ in any case be issued to a judge who was entitled to be summoned as a temporal peer.

Despatch of writs.

7. The writs addressed to returning officers for the election of members of the House of Commons must be delivered by the messenger of the Great Seal or his deputy to the General Post Office (except such as are addressed to the sheriffs of London and Middlesex), and must be despatched free of charge, by post[2].

8. The writs are in a modern form provided by the Ballot Act of 1872. But the form of writ which was in use until that date, shows how near we still are to the constitutional forms of the middle ages, and indicates, more clearly than the abbreviated modern writ, the objects of summons.

Writ addressed to the Sheriff of Middlesex 17th July, 1837.

Common law writ to Sheriff.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of the County of Middlesex, Greeting. Whereas by the advice and assent of Our Council, for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the 4th day of September next ensuing. *And there to treat and have conference with* the Prelates, Great Men, and Peers of Our Realm, We command and strictly enjoin you (Proclamation hereof, and of the time and place of election being first duly made) for the said COUNTY *two Knights of the most fit and discreet, girt with swords,* and for the *City* of Westminster, in the same County, *two Citizens,* and for each of the *Boroughs* of the Tower Hamlets, Finsbury, and Marylebone, in the same County, *two Burgesses* of the most sufficient and discreet, freely and indifferently by those who at such election shall be present according to *the form of the Statutes* in that case made and

[1] This is no longer true. The Lords Justices received writs of attendance in March, 1897, when the judges were summoned to assist the House of Lords in the case of *Allen* v. *Flood*.

[2] 53 Geo. III, c. 89. This prevents a returning officer from sending for the writ in order to accelerate the nomination and poll.

provided, you cause to be elected; and the names of such Knights, Citizens, and Burgesses so to be elected, whether they be present or absent, you cause to be inserted in certain Indentures to be thereupon made between you and those who shall be present at such election, and then at the day and place aforesaid you cause to come in such manner that the said Knights for themselves, and the Commonalty of the same County, and the said Citizens and Burgesses for themselves, and the Commonalty of the said City and Boroughs respectively, may have from them *full and sufficient power to do and consent to those* things which then and there by the Common Council of Our said United Kingdom (by the blessing of God) shall happen to be ordained upon the aforesaid affairs, So that *for want of such power* or *through an improvident election* of the said Knights, Citizens, or Burgesses the aforesaid affairs may in no wise remain unfinished. Willing nevertheless that *neither you nor*
Post, p. 79. *any other Sheriff of Our said Kingdom be in any wise elected.* And the election so made distinctly and openly under your seal and the seals of those who shall be present at such election, *certify you to Us in Our Chancery*, at the day and place aforesaid, remitting to Us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness Ourself at Westminster the 17th day of July in the 1st year of our reign.

To the Sheriff of the County of Middlesex. Writ of election to Parliament to be holden the 11th day of September next.

The Sheriff thereupon issued precepts to the bailiff of the 'Liberty of the Dean and Chapter of the Collegiate Church of St. Peter at Westminster,' and to the Returning Officers of the boroughs, and the precepts were returned to him when the elections were duly made; the county election took place in the county court, and the return was sent, together with the returns from the city and boroughs, to the Crown Office in Chancery.

Indentures.

These returns were in all cases accompanied by indentures, to which the Returning Officer and a number of electors were parties. These indentures were required by Acts of Henry IV and Henry VI[1], and their object was to secure that the persons returned by the Sheriff were in truth the persons elected by

[1] 7 Hen. IV, c. 15; 23 Hen. VI, c. 14.

the constituencies. They follow closely the terms of the writ, and the terms of the writ, being the same or nearly the same as in the early days of representation, are express in the requirement that the person returned should have full power to bind the constituency. The indenture therefore at first sight creates the impression that it was designed to constrain the electors to abide by the acts and promises of their representative done on their behalf. But in fact the object of the indenture, as may be seen from the statute which requires it, was to secure the identity of the person elected with the person returned.

These indentures are still in use in the University constituencies, for these are not governed by the Ballot Act, and voting takes place by voting papers.

Thus much as to the mode in which a Parliament is summoned. We have next to see how it is brought together and its business set in motion.

§ 5. *The opening of Parliament.*

The assembling of the House.

The Parliament meets on the day appointed in the Proclamation of summons. The Sovereign is not usually present at the opening of a new Parliament, but issues a commission under the Great Seal for that purpose. The Houses assemble in their respective chambers, and the Commons are summoned to the House of Lords. There the letters patent constituting a commission for the opening of Parliament are read, and the Lord Chancellor desires the Commons to choose a Speaker.

Of the Speaker we shall have more to say presently. It is enough here to note that he is not only chairman of the Commons for the purpose of maintaining order and declaring or interpreting the rules of the House, but also the spokesman and representative of the House for the purpose of communications made in its collective capacity to the Crown.

Election of Speaker.

The Commons retire to choose their Speaker, the formal business of the chair being, for the purposes of the election, discharged by the clerk of the House. On the election being

made the Speaker takes the chair, and the mace, the symbol of his office, is laid before him on the table.

The House adjourns until the following day, and then the Speaker takes the chair until summoned by the officer of the Lords to the presence of the Lords Commissioners. He goes to the bar of the House of Lords with the members of the Commons, announces his election, and 'submits himself with all humility to her Majesty's gracious approbation.'

The Lord Chancellor expresses the approval by her Majesty of the choice of the Commons, and confirms him as Speaker. After this is done he demands the 'ancient and undoubted rights and privileges of the Commons.' These are granted, and the Speaker with the Commons returns to the Lower House.

There are two things to consider before we come to the declaration by the Queen of the objects of summons in the speech from the Throne.

Evidence of membership.

(*a*) The first is the evidence by which the members of the two Houses can establish their rights to membership.

(*b*) The second is the perfecting of the title to sit.

(*a*) In the Lords those who have received writs of summons present them at the table of the House, the roll of those entitled, as hereditary peers of England, to receive writs, being delivered by the Garter King at Arms. The title of the representative peers of Scotland is evidenced by a certificate delivered by the clerk of the Crown [1] of a return made to him by the Lord Clerk Register of Scotland. Garter King at Arms delivers at the table of the House a list of the Lords Temporal, and the list is ordered to lie upon the table. A new peer presents his patent to the Lord Chancellor at the Woolsack, and this, together with his writ of summons, is read by the clerk of the House.

In the Commons the clerk of the House receives from the clerk of the Crown a book containing a list of the returns made to the writs issued, and this is the sole evidence furnished to the House. The returns themselves are retained in

[1] For an account of this officer, see Part ii. The Crown, p. 156.

the Crown Office during the continuance of a Parliament in case reference should be required to be made to them. After this they are transferred to the Record Office.

(*b*) The second is the perfecting of the title of a member to discharge the duties of his office, and for this it is necessary in both Houses that an oath of allegiance should be taken or a declaration made to the same effect. Perfecting of title to sit.

It had been customary for members of both Houses of Parliament to take the oath of allegiance from the year 1534 onwards, and the oath of supremacy from the year 1558. The oath.

The oath of supremacy was required to be taken by the Commons in the fifth year of Elizabeth, and the oath of allegiance in the seventh year of James I, but these oaths were taken before the Lord Steward sitting in the Court of Requests. It was not until the thirtieth year of Charles II that they were prescribed to be taken by both Houses and in Parliament. By an Act of that year the Lords and Commons in their respective Houses were to take and subscribe the oaths of allegiance and supremacy before they were entitled to sit and vote[1]. The form of the oath has undergone various changes. As provided by 31 & 32 Vict. c. 72, it runs thus:— 1562-3 1609-10 1678 *Post*, p. 86.

I —— do sware that I will be faithful and bear true allegiance to her Majesty Queen Victoria her heirs and successors according to law. So help me God. Its form.

But Acts have been passed from time to time for the relief of persons to whom the form of oath, or the taking of an oath, was objectionable: and finally, since 1888, the Oaths Act[2] enables any person to make affirmation in all cases wherein an oath is required, on stating either that he has no religious belief or that it is contrary to his religious belief to take an oath.

As regards the time of taking the oath: when a new Parliament meets, the Lords take the oath as soon as the Parliament has been opened; the Commons as soon as the

[1] The Statutes are 5 Eliz. c. 1. s. 16; 7 James I, c. 6; 30 Car. II, st. 2. c. 1.
[2] 51 & 52 Vict. c. 46. s. 1.

Speaker has been approved by the Crown, and has himself taken the oath. On the election of a member during the continuance of a Parliament he is entitled to take the oath as soon as the certificate of his return has reached the Clerk of the House.

The time for taking the oath is in the House of Lords limited to the hours between 9 a.m. and 5 p.m. In the Commons it may be taken at any time of the day that a full House is sitting, and before it has commenced business.

Result of failure to take it.

It should be noted that a failure to take the oath prevents a member of the House of Commons from sitting and voting as a member of the House, but that he is none the less a member as regards his constituency, and that he is for some purposes a member of the House of Commons. His seat is not vacant, and he is capable of discharging all the duties and enjoying all the rights of a member short of sitting within the bar of the House, taking part in its debates, and voting in its divisions. When the Houses are duly constituted by the completion of the forms described, Parliament is prepared to hear the causes for which it is summoned.

At the commencement of a session which is not also the commencement of a Parliament the proceedings relating to the election of a Speaker and the taking of the oath are not needed, and the Houses are at once informed of the causes of summons.

The speech from the Throne.

The Queen, if she meets Parliament in person, goes down to the House of Lords, and takes her seat upon the throne; the Lord Chamberlain is bidden to desire the usher of the black rod, the officer of the House, to *command* the attendance of the Commons. The Commons, with the Speaker at their head, come to the bar of the House of Lords, and the Queen reads her speech to the House, in which she informs them of the business to be laid before them.

When Parliament is opened by commission, the Lords Commissioners in like manner bid the officer of the House to *desire* the attendance of the Commons, and the speech is read

by the Lord Chancellor acting under the commands of the Crown. The Houses adjourn, and when they re-assemble proceed to the consideration of the Speech from the Throne; but before doing so they assert their right to deal with other matters than those referred to in the speech, by reading a Bill for the first time *pro formâ*. The speech is then read again in each House, and in each House it is moved that an address be made in answer.

To this address amendments may be moved, and thus the general policy of the Government, as indicated by the Speech from the Throne, is brought under discussion.

Each House, when its address has been agreed to, orders it to be presented to the Queen, but the formalities as to the mode of presentment need not be dealt with here[1].

It may give more reality to the details of procedure if I set out extracts from the Journals of the Houses describing the forms of opening Parliament in the year 1880.

On the first assembling of the House of Lords[2],

The Lord Chancellor acquainted the House, that it not being convenient for Her Majesty to be personally present here this day, she has been pleased to cause a Commission under the Great Seal to be prepared in order to the holding of this Parliament.

The House adjourned during pleasure, to robe.

The House was resumed.

Summons of Commons.

Then five of the Lords Commissioners, being in their robes, and seated on a form placed between the Throne and the Woolsack, the Lord Chancellor in the middle, with the Lord Privy Seal and the Earl Sydney on his right hand, and the Earl Granville and the Earl of Northbrook on his left, commanded the Gentleman Usher of the Black Rod to let the Commons know, the Lords Commissioners 'desire their immediate attendance in this House, to hear the Commission read.'

Who being come, with their Speaker; the Lord Chancellor said—

'My Lords and Gentlemen,

'We are commanded by Her Majesty to let you know, that it

[1] May, Parliamentary Practice (ed. 10), 172.

[2] 112 Lords' Journals, 123.

Powers of Commission.

not being convenient for Her to be present here this day, in Her Royal person, She hath thought fit, by Letters Patent under the Great Seal, to empower His Royal Highness the Prince of Wales and several Lords therein named to do all things, in Her Majesty's name, which are to be done on Her Majesty's part in this Parliament, and by Letters Patent will more fully appear.'

Then the said Letters Patent were read by the Clerk. * * *

Then the Lord Chancellor said—

'My Lords and Gentlemen,

Direction to elect Speaker.

'We have it in command from Her Majesty to let you know, that as soon as the members of both Houses shall be sworn, the causes of Her Majesty's calling this Parliament will be declared to you; and it being necessary a Speaker of the House of Commons should be first chosen, it is Her Majesty's pleasure that you, gentlemen of the House of Commons, repair to the place where you are to sit, and there proceed to the choice of some proper person to be your Speaker; and that you present such person whom you shall so choose, here, to-morrow, at two of the clock, for Her Majesty's royal approbation.'

We will now change the scene to the House of Commons, to which the members of that House returned [1].

Election of Speaker.

Sir Thomas Dyke Acland, addressing himself to the Clerk (who, standing up, pointed to him and then sat down), proposed to the House, for their Speaker, the Right Honourable Henry Bouverie William Brand; and moved, 'That the Right Honourable Henry Bouverie William Brand do take the chair of this House as Speaker'; which motion was seconded by Sir Philip de Malpas Grey Egerton.

The House then calling Mr. Henry Bouverie William Brand to the chair, he stood up in his place, and expressed the sense he had of the honour proposed to be conferred upon him, and submitted himself to the House.

The House then again unanimously calling Mr. Henry Bouverie William Brand to the chair, he was taken out of his place by the said Sir Thomas Dyke Acland and Sir Philip de Malpas Grey Egerton, and conducted to the chair, where, standing on the upper step, he returned his humble acknowledgments to the House for

[1] 135 Commons' Journals, 123.

the great honour they had been pleased to confer upon him, by unanimously choosing him to be again their Speaker.

And thereupon he sat down in the chair; and then the Mace (which before lay under the table) was laid upon the table.

Then Lord Frederick Cavendish, having congratulated Mr. Speaker elect, moved, 'That the House do now adjourn'; and Sir Stafford Northcote, having also congratulated Mr. Speaker elect, the House accordingly adjourned till to-morrow.

On the following day, the 30th of April, the Lords met, and five of the Lords Commissioners being seated as before again sent to the Commons to desire their immediate attendance in this House.

Who being come;

The Right Honourable Henry Bouverie William Brand said—

'My Lords,

'I have to acquaint your Lordships that in obedience to Her Majesty's commands, the Commons have, according to their undoubted rights and privileges, proceeded to the election of a Speaker, and that their choice has fallen upon myself. I now present myself at your Lordships' bar, and submit myself with all humility to Her Majesty's gracious approbation.'

Then the Lord Chancellor said—

'Mr. Brand,

'We are commanded to assure you that Her Majesty is so fully sensible of your zeal for the public service, and of your ample sufficiency to execute the arduous duties which Her faithful Commons have selected you to discharge, that she does most readily approve and confirm you as their Speaker.' Approval of Speaker.

Then Mr. Speaker said—

'My Lords,

'I submit myself with all humility and gratitude to Her Majesty's most gracious commands, and it is now my duty in the name and on behalf of the Commons of the United Kingdom, to lay claim by humble petition to Her Majesty to all their ancient and undoubted privileges, particularly to freedom of speech in debate, to freedom from arrest of their persons [and servants][1], to Demand of privileges.

[1] This privilege formerly extended to the *estates* and the *servants* of members. The claim for estates was abandoned by Mr. Speaker Denison in 1857, the claim for servants by Mr. Speaker Peel in 1892.

free access to Her Majesty when occasion shall require; and that the most favourable construction should be put upon all their proceedings; and with regard to myself I pray that if any error should be committed it may be imputed to myself, and not to Her Majesty's loyal Commons.'

Then the Lord Chancellor said—

'Mr. Speaker,

'We have it further in command to inform you that Her Majesty does most readily confirm all the rights and privileges which have ever been granted to or conferred upon the Commons by any of her royal predecessors.

'With respect to yourself, Sir, although Her Majesty is sensible that you stand in no need of such assurance, Her Majesty will ever put the most favourable constructions upon your words and actions[1].'

Then the Commons withdrew.

We will again follow them to their own House, whither being returned:—

Report of Speaker.

Mr. Speaker reported—That the House had been in the House of Peers, where Her Majesty was pleased by Her Commissioners to approve of the choice the House had made of him to be their Speaker; and that he had in their name and on their behalf, by humble Petition to Her Majesty, laid claim to their ancient and undoubted Rights and Privileges, particularly to freedom from arrest and all molestation of their Persons [and Servants][2]; to freedom of Speech in Debate; to free access to Her Majesty when occasion shall require; and that the most favourable construction should be put upon all their proceedings; which, he said, Her Majesty, by Her said Commissioners, had confirmed to them in as full and ample a manner as they have been heretofore granted and allowed by Her Majesty, or any of Her Royal Predecessors.

And then Mr. Speaker repeated his most respectful acknowledgments to the House for the high honour they had done him.

Mr. Speaker then put the House in mind that the first thing to be done was to take and subscribe the oath required by law.

Taking of Oath.

And thereupon Mr. Speaker, first alone, standing upon the upper step of the Chair, took and subscribed the oath.

[1] 112 Lords' Journal 126.

[2] See note on preceding page.

Then several Members took and subscribed the oath, and several Members made and subscribed the Affirmation required by law.

And then the House adjourned till to-morrow[1].

The fact of a change of ministry having taken place in consequence of the result of the elections in 1880 caused a delay in the announcement of the causes of summons. The new ministers were obliged to offer themselves for re-election, and therefore on the 3rd of May the Commons were again summoned to the House of Lords to be told that so soon as the seats vacated by acceptance of office were filled they might proceed to the consideration of 'such matters as will then be laid before them.'

Adjournment for re-election.

The Houses therefore proceeded with merely formal business, broken by adjournments for several days at a time. In the Commons orders were made for the Speaker to issue warrants to the Clerk of the Crown directing new writs to be made out for the election of members for the constituencies whose representatives had vacated their seats by the acceptance of office; members took the oath or made the affirmation required by law; despatches and papers were presented to the House. In the Lords formal business of a like character was transacted, and the judicial business of the House continued without interruption.

On the 20th of May the Commons were summoned in the form already described, and her Majesty's speech was read. The Commons, retiring to their House, transacted various matters of formal business, and read a first time the Clandestine Outlawries Bill, after which

Speech from the Throne.

Bill read a first time.

Mr. Speaker reported that the House had been at the House of Peers at the desire of the Lords Commissioners appointed under the Great Seal for holding this present Parliament, and that the Lord High Chancellor being one of the said Commissioners delivered Her Majesty's most gracious Speech to both Houses of Parliament in pursuance of Her Majesty's commands, and of which Mr. Speaker said he had for greater accuracy obtained a copy which he read to the House[2].

[1] 135 Com. Journ. 123.

[2] 135 Com. Journ. 132.

Address in answer.

The address as made in answer to the Queen's Speech in either House calls for no comment. When settled and approved the Lords ordered their address to be presented to Her Majesty by 'the Lords with White Staves [1],' the Commons' address was to be presented 'by such members of this House as are of Her Majesty's most honourable Privy Council.'

§ 6. *Adjournment, Prorogation, Dissolution.*

We have now brought Parliament to the stage at which it is fully constituted, opened, and ready to transact business. The nature of this business and the mode in which it is transacted shall be dealt with later. But having brought our Parliament into existence, it is important to know how that existence can be terminated; having put it into a position to transact business, it is important to know how that business can be stopped.

A dissolution brings the existence of Parliament to an end; a prorogation brings the session of Parliament to an end; an adjournment brings about a cessation of the business of one or other House for a period of hours, days, or weeks.

Adjournment.

The adjournment of either House takes place at its own discretion, unaffected by the proceedings of the other House. Business pending at the time of the adjournment is taken up at the point at which it dropped when the House meets again. The Crown cannot make either House adjourn: it has sometimes signified its pleasure that the Houses adjourn, but there is no reason why its pleasure should also be the pleasure of the Houses. The Crown has, however, a statutory power [2] to compel the resumption of business before the conclusion of an adjournment contemplated, where both Houses stand adjourned for more than fourteen days. The power is exercised by Proclamation declaring that the Houses shall meet on a day not less than six days from the date of the Proclamation.

Prorogation.

Prorogation takes place by the exercise of the royal prero-

[1] The lords who hold office in the royal household.

[2] 39 & 40 Geo. III, c. 14, amended by 33 & 34 Vict. c. 81.

gative; it ends the session of both Houses simultaneously, and terminates all pending business. A bill which has passed through some stages, but is not ripe for the royal assent at the date of Prorogation, must begin at the earliest stage when Parliament is summoned again, and opened by a speech from the throne. Prorogation is effected at the end of a session either by the Queen coming to Parliament and the Royal commands being announced in her presence to both Houses by the Speaker of the House of Lords, or by a like announcement being made by Royal Commissioners. When prorogation postpones the meeting of a new Parliament to a later date than that for which it had been summoned, a Writ was formerly addressed to both Houses. When the Crown extends the prorogation of a Parliament which has already met, it was the practice to issue a Commission for the purpose. The writ or commission was read by the Chancellor to a clerk who represented the House of Commons. Since 1867[1] a postponement as well as an acceleration[2] of the meeting of Parliament is ordered by Proclamation.

Form of.

The form of such a proclamation runs thus :—

VICTORIA R.,

Whereas Our Parliament stands prorogued to the twelfth day of November instant; We, by and with the advice of Our Privy Council, hereby issue Our Royal Proclamation, and publish and declare that the said Parliament be further prorogued to Wednesday, the nineteenth day of December, One thousand eight hundred and ——.

Given at Our Court at —— this —— day of —— in the year of our Lord 18— and in the —— year of Our reign.

God save the Queen.

When Parliament is further prorogued to a date at which the session is intended to commence, the following words are added :—

And We do hereby further, with the advice aforesaid, declare Our royal will and pleasure that the said Parliament shall on the said

[1] 30 & 31 Vict. c. 81. [2] 37 Geo. III, c. 127, and 33 & 34 Vict. c. 81.

—— the ——th day of —— 189—, assemble and be holden for the despatch of divers urgent and important affairs: and the Lords spiritual and temporal, and the knights citizens and burgesses and the Commissioners for shires and burghs of the House of Commons are hereby required to give their attendance accordingly on the said —— day of —— 189—.

Dissolution.

The dissolution of a Parliament may be effected either by an exercise of the royal prerogative, or by efflux of time.

By prerogative.

When the Crown exercises its prerogative it may do so in person, should Parliament be sitting, or if not in person by Royal Commission. If Parliament is not sitting, but stands prorogued, it is dissolved by Proclamation in the manner described on an earlier page.

The usual practice, if Parliament is sitting, is for the Queen to prorogue it first and then issue a proclamation in the form above mentioned.

Ante, p. 51.

Thus on the 24th of March, 1880, Parliament was prorogued by Royal Commission until the 13th of April, and on the evening of the same day a proclamation was issued discharging the members of the two Houses from attendance on the 13th of April, and dissolving the Parliament.

By efflux of time.

Efflux of time dissolves Parliament. This was not so until 1694. The king could keep a Parliament in existence as long as he pleased, and Charles II retained for seventeen years the Parliament called at his accession. Events showed that a House of Commons, if it was kept in being for so long a time after its election, might cease to represent the people; and that if the House depended wholly on the Crown for the continuance of its existence it might be too ready to favour the policy of the Court. For this and other reasons the Bill for Triennial Parliaments was passed by both Houses in 1693, but William withheld his assent until the Bill came before him again in the following year. It then became law, and so until the beginning of the reign of George I the law stood. Within six months of the death of Anne—that is, early in the year 1715—the Parliament which had been in existence at the

The Triennial Act.

date of her death was dissolved; but when the new Parliament had been in existence little more than a year, it became clear that the operation of the Triennial Act might produce serious inconvenience, if not actual disaster. The succession to the Crown was in dispute, rebellion was still smouldering in the north, and there was risk of an invasion. Under these circumstances, and not perhaps from any theoretical preference for septennial over triennial elections, Parliament prolonged its own existence to a term of seven years. This was done by the Septennial Act, 1 Geo. I, st. 2, c. 38; and is the rule at the present day. Parliament, if not sooner dissolved by royal prerogative, expires by efflux of time at the end of seven years.

The Septennial Act.

Until 1867 the existence of Parliament was affected by the demise of the Crown. The king summoned the estates of the realm, by writ, to confer with him; when he died the invitation lapsed, and the Parliament was dissolved. The theory was not unreasonable, though the practice was inconvenient. For whatever may have been the law or the practice of early Teutonic societies as to the assemblage of the people, our representative institutions took their origin from the king's invitation to the three estates to appear in person, or by their representatives, to advise, assent, or enact. It was natural that the invitation should lapse and the assembly disperse when he who summoned it had died; for the mediaeval Parliaments came together, not so much because the people wanted to take part in public affairs, as because the king wanted money and information; and the theory that Parliament owed its existence to the king's writ was true to this extent, that the writ was the recognised means by which the three estates could be brought together.

Effect of demise of Crown.

The inconvenience was met by a series of statutes. 7 & 8 Will. III, c. 15, enacted that Parliament should last for six months after the demise of the Crown, if not sooner dissolved by the new sovereign; and this rule was applied, after the union with Scotland (6 Anne, c. 40 (7 Ruff.) § 4) and with Ireland, to Parliaments of the United Kingdom. Provision

was made for a demise of the Crown during a dissolution by 37 Geo. III, c. 127, s. 4. In such a case the new Parliament is to 'convene and sit' for six months, unless sooner prorogued or dissolved by the new sovereign. If the demise took place on or after the day named in the writs of summons for assembling the new Parliament, then this new Parliament was to meet under similar conditions. The Representation of the People Act, 1867, makes the *duration* of a Parliament independent of a demise of the Crown, but might arise occasions when the Act, 37 Geo. III, c. 127, would be of practical use.

Inconveniences of the theory.

The inconveniences to which the doctrine while it prevailed might give rise may best be illustrated in the case of the flight of James II, when the country was left without a king, and with no means of satisfying the legal requirements of form for summoning a Parliament.

The Prince of Orange summoned the peers, such members of the last three Parliaments of Charles II as happened to be in London, and some citizens; by their advice he issued letters, not in the form of writs, but of the same purport, addressed to the Lords Spiritual and Temporal, being Protestants, to the Coroners, or in their default to the Clerks of the Peace of the counties, to the Vice-Chancellors of the Universities, and the chief Magistrates of the towns, summoning a Convention. When at the request of this Convention William and Mary had accepted the crown and all the elements of a legislature were present, a Bill was passed which turned the Convention into a Parliament. It was dissolved at the end of the year, and its acts were declared to be valid by the next Parliament.

It is interesting to consider how much of all the procedure which I have just described is law, and how much is custom. I would include under the term 'law' not only statute law, but that which is sometimes called the law of Parliament, a set of rules which are really part of the common law; and under the term 'custom' those conventions a departure from which would

not affect the validity of any parliamentary proceedings or touch any public or private right.

How much of this chapter is Statute Law:

Statute law determines the number and indicates the mode of election of the representative peers of Scotland and Ireland, it determines the number of the spiritual peers and the number and status of the Lords of Appeal. It provides a form of writ to be addressed to the returning officers of counties and towns. It fixes the form of oath to be taken or declaration made, and the penalty for non-observance of this rule. It determines the duration of Parliament subject to the prerogative right of the Crown to dissolve, and it has abolished the common law rule as to the effect of the demise of the Crown upon the existence of Parliament.

how much is Common Law:

Common law governs all that relates to the prerogative of the Crown; its right to summon Parliament and to summon it in the form of proclamation; to open, prorogue, and dissolve it, and to do so either in person or by Commission [1].

The whole of the rights of the Peerage, except in so far as they are touched by Statute, are matter of Common Law, and these include the right of summons, and of summons in a certain form.

The existence of the privileges of the House of Commons (for we are not here concerned with their nature and extent) is also a part of the law of the land, although the form is used of asking and receiving them by favour of the Crown; so too is the right of adjournment exercised by both Houses, independently of one another or of the Crown, and without affecting the resumption of pending business.

how much is Custom.

From these rules, by which rights and liabilities public and private may be affected, we must distinguish conventions and formalities which are legally immaterial. The mode of elect-

[1] The statutory and the practical limits to the right and power of the Crown to conduct the business of the country without a Parliament will come to be dealt with later. The statutory limits are too wide to be worth mentioning here, and the practical limits too narrow to be easily explained till I have set out the process of legislation in respect of the appropriation of supply.

ing a Speaker could be altered at pleasure by the House of Commons; the approval of the Speaker-elect by the Queen is not seemingly a legal necessity[1]; the claim of privilege made by the Speaker might probably be omitted without affecting the recognition of parliamentary privilege by the Courts of law. The speech from the throne setting forth the causes of summons may be necessary to put in motion the business of the Houses, but the addresses in answer are non-essential forms: for Parliament is not limited in legislation or discussion by the topics set forth from the throne, and each House is at pains to show its independence of those topics by reading a Bill for the first time before entering upon the consideration of the Queen's speech.

[1] Sir E. May cites three cases of Speakers who acted as such without the royal approval; they occurred in the Convention Parliament which restored Charles II, in that which elected William III and Mary, and on one occasion during the insanity of George III in 1789. May, Parliamentary Practice (ed. 10), 154.

CHAPTER V.

THE HOUSE OF COMMONS.

We have dealt so far with the mode in which a Parliament is brought into existence, its business set in motion, its session terminated by a prorogation, or its existence by a dissolution. We are now in a position to deal in detail with the various elements of which a Parliament is composed, with the Crown, the Lords, and the Commons. It is convenient to reverse the order of these in inquiring into the law respecting them; the Commons, though not the most ancient, are the most important part of the Legislature, and the most complex; for we have here to consider not only who may be members of the House of Commons and what are their privileges as such, but who may vote, and in what manner, at an election of members to serve in that House.

This part of the subject then resolves itself into four topics: (1) who may be chosen for the House of Commons; (2) who may choose; (3) how they may choose; (4) what are the special privileges possessed by the House of Commons collectively, or by its members individually.

Section I.

Who may be chosen.

Disqualifications for House of Commons.

First, then, we must consider who may be chosen to serve in the House of Commons, or rather who are disqualified for membership by some incapacity, whether inherent, as in the case of an infant or lunatic, or acquired by profession or office, or incurred by felony, bankruptcy, or corruption.

Infancy.

§ 1. Infants are disqualified by the law of Parliament according to Sir Edward Coke, but the rule was not unfrequently broken [1] until the disqualification was made statutory by 7 & 8 Will. III, c. 25, s. 8. It was applied to the Scotch members by the Act of Union with Scotland, and to members returned for Irish constituencies by 4 Geo. IV, c. 55, s. 74.

There have been cases since the passing of 7 & 8 Will. III, c. 25, in which a minor has been elected and has taken his seat without objection. Charles James Fox was returned, took his seat, and spoke while yet under age, and Lord John Russell was returned a month before attaining his majority. But there are no instances of such an infringement of the law since the passing of the Reform Bill of 1832.

Unsoundness of mind.

§ 2. Lunacy or idiocy is a disqualification at Common Law, and, under certain conditions, by Statute [2].

The history of the law on this subject may be collected from the report [3] of a Committee appointed to inquire into the case of Mr. Alcock in 1811.

Cases were not unusual, in times when a seat in the Commons was not so much an object of ambition as it now is, of members asking the House to relieve them from their duties on the ground of sickness or other infirmity. A further reason for such requests in the case of ill-health would seem to be that office was not a disqualification before the beginning of the eighteenth century; consequently a member could not vacate his seat by accepting the stewardship of the Chiltern Hundreds or other nominal office under the Crown [4]. But the House would not declare a seat vacant on such grounds, unless

[1] 'Many under the age of 21 years sit here by connivency but if questioned would be put out;' 1 Com. Journ. 681; and see Hatsell, ii. 6.

[2] 49 Vict. c. 16.

[3] 66 Com. Journ. 687.

[4] In 1604 the borough of Dorchester petitioned that one of its members, Matthew Chubbe, might be relieved from his duties on the ground of bodily infirmity. The burgesses acknowledge that Mr. Chubbe did at the time of his election 'intreat us that he might be spared therein, offeringe to some other to be chosen five pounds towards his charges to serve therein.' They beg that 'he may not seem contemptuous by his absence, that it will please you to dismisse the saide Chubbe and to graunt a writ for the election of another.' It does not appear that this petition was granted.

Oldfield, iii. 346.

it was satisfied that the malady was incurable, nor would it interfere in more recent times except in such a malady as insanity, which would make the request and acceptance of the Chiltern Hundreds impossible. Insanity.

In the case of Mr. Alcock his constituents petitioned [1] the House complaining that the insanity of their member deprived them of his services. He had been found a lunatic upon commission, and was in confinement. A committee was appointed, which, after taking evidence and searching for precedents, reported that his case was not so hopeless of cure as to justify the House in declaring the seat vacant.

In the more recent case of Mr. Stewart, attention was called, as a matter of privilege, to the fact that he had attended the House and voted in a division while under medical treatment for insanity as a certified lunatic. A motion for a committee to inquire into the circumstances of the case was rejected [2].

The disqualification of a member on the ground of insanity might thus be brought before the House in two ways: by petition from the constituency which is deprived of the services of its member, if the member is in confinement: or by a question of privilege being raised if a person certified to be of unsound mind should take part in the business of the House.

But a third and more effectual way of dealing with the matter is provided by 49 Vict. c. 16. Any authority concerned in the committal or reception of a member into any house or place as a lunatic must certify the same, as soon as may be, to the Speaker. The Speaker must obtain a report from specified authorities in lunacy, at once, and again after an interval of six months. If the member is still of unsound mind the two reports must be laid on the table of the House, and the seat is then vacated.

§ 3. Aliens are incapable of sitting in Parliament both by common law and by statute. Aliens.

Previous to the year 1700 an alien could acquire capacity

[1] 66 Com. Journ. 226.

[2] Hansard, vol. 162, p. 1941.

Aliens. for election by becoming naturalised; but 12 & 13 Will. III, c. 2 disqualified all persons born out of the king's dominions, even though naturalised or made denizens, unless they had been born of English parents. 33 & 34 Vict. c. 14, s. 2 excepts political capacity (together with the right to own the whole or any part of a British ship) from the general concession which it makes to aliens of equal rights with natural-born British subjects. But the same Act (s. 7) enables an alien to acquire by naturalisation the political rights and obligations of a British subject, and thus to qualify for Parliament.

Peers. § 4. A peerage is a disqualification [1]. An English peer may not sit in the House of Commons, nor may a Scotch peer, although he be not one of the representative peers of Scotland.

But an Irish peer may sit for any county or borough of Great Britain so long as he is not one of the twenty-eight representatives of the Irish peerage in the House of Lords [2].

The sons of English peers have been eligible since an order made by the House on the 21st January, 1549, but the eldest sons of Scotch peers, not having been eligible to the Scotch Parliament, were held to be ineligible to the Parliament of Great Britain [3]. Their disability was removed by the Scotch Reform Bill of 1832, 2 & 3 Will. IV, c. 65, s. 37.

Clergy. § 5. Clergy of the Established Church and ministers of the Church of Scotland were disqualified in 1801 [4], and clergy of the Roman Catholic Church in 1829 [5].

Until 1801 the capacity of the clergy to be elected to Parliament was a matter of doubt. In that year the question was raised by the election of the Rev. J. Horne Tooke for the

[1] It has been contended that a peer of the United Kingdom is not disqualified as such, and that until he has received a writ of summons as a Lord of Parliament he may sit in the House of Commons. In 1895 this point was raised by Lord Wolmer, member for West Edinburgh, on succeeding to the Earldom of Selborne; but the House, upon receiving a report from a Select Committee that Lord Wolmer had succeeded to a peerage of the United Kingdom, at once directed that a new writ should be issued. Hansard 4th Series, xxxiii. 1058, 1728.

[2] 39 & 40 Geo. III, c. 67, art. 4.

[3] Hatsell, ii. 12.

[4] 41 Geo. III, c. 63.

[5] 10 Geo. IV, c. 7, s. 9.

borough of Old Sarum. On inquiry it seemed that the authorities were not clear[1]: in 1785 a committee of the House had decided in favour of the eligibility of a person in deacon's orders, and elections already made were therefore excepted from the operation of the Act, and Mr. Horne Tooke was allowed to retain his seat.

An Act of 1870 (33 & 34 Vict. c. 91) makes it possible for the clergy of the Church of England, whether priests or deacons, to divest themselves of their orders, and thereby to free themselves from this disqualification. (b)

Unless divested of orders.

§ 6. Office of various kinds is a disqualification at common law or by statute.

Office.

Sheriffs appear to have been excluded generally by the terms of the old form of writ, which directs that 'neither you nor any other sheriff of our said kingdom be in anywise elected.' But the restriction was in practice confined to the county for which the sheriff held office, so that the sheriff of Hampshire was held eligible to sit for the borough of Southampton, which was a county of itself[2]; it was extended by a resolution of the House, passed in the case of the borough of Thetford[3], so as to exclude any officer of a borough to whom the writ or precept might be directed.

Sheriffs (a) at Common law.

The disqualification of the sheriff was narrowed by 16 & 17 Vict. c. 68, s. 1, by which writs for cities and boroughs are no longer addressed to the sheriff of the county in which they are situated, but directly to their returning officers; one may now say shortly that at Common Law no returning officer in England or Ireland may sit for the place where he is bidden to cause an election to be made, and that the Scotch Reform Act of 1832[4] enforces the same rule in Scotland.

The Judges of the three Common Law courts were declared to be disqualified by a resolution of the House in 1605, they being 'attendants as Judges in the Upper House.' But recent legislation has taken the place of this rule[5].

Judges. (b) by Statute.

[1] 35 Parl. Hist. 1349. [2] 4 Douglas, 87. [3] 9 Com. Journ. 725.
[4] 2 & 3 Will. IV, c. 65, s. 36. [5] 38 & 39 Vict. c. 77, s. 5.

The history of the statutory disqualifications is voluminous and intricate. They begin soon after the Revolution, when the strength and irresponsibility of the House of Commons made the Crown as anxious to obtain some influence over its members as the House was to exclude persons who held office at pleasure of the Crown.

Commissioners of Stamps and of Excise were excluded by Acts of 1694 and 1699, and in 1700 came the sweeping provision in the Act of Settlement that 'no person who has an office or a place of profit under the king shall be capable of serving as a member of the House of Commons.'

Fortunately this clause in the Act of Settlement was repealed, before it could take effect, by 4 Anne, c. 8, s. 28. Two years later was passed the statute which forms the groundwork of the present law upon the subject.

The Act of Anne.

6 Anne, c. 7 (41 in revised statutes), s. 24, enacts firstly that no one shall be capable of being elected who has accepted from the Crown any *new* office created since the 25th October, 1705; secondly, that the holders of certain specified offices are incapable of election; and thirdly, it extends the incapacity to persons having pensions from the Crown during pleasure.

New office.

S. 25 enacts that the acceptance of any office of profit under the Crown by a member of the House of Commons shall avoid his election, but that he may be re-elected. This section must be construed to refer to *old* offices, otherwise it would repeal a part of s. 24.

Old office.

S. 27 excepts from the operation of the statute commissions in the army and navy.

Commissions in army and navy.

Since the Act of Anne many statutes have been passed subjecting old or new offices to the total disqualification of § 24, or the partial disqualification of § 25. I have endeavoured to summarise the disqualifying statutes, and, up to a certain point, to divide them into groups, but, inasmuch as the extent of the disqualification and not the nature of the office is the matter which it is important to have in mind, I will confine myself in the text to a general statement of the law.

(α) Offices which disqualify.

(α) There are certain offices the acceptance[1] of which is wholly incompatible with a seat in the House of Commons.

Such are *new* offices *under* the Crown within the meaning of the Act of Anne. Among these we must include all offices under the Crown created since 1705, and not specially exempted by statute. In the case of many new offices the disqualification has been reimposed by statute. A paid Charity Commissionership or a place on the Council of India would afford an instance of such offices.

Such are also certain *old* offices which fall under the 25th section, and which by subsequent statutes have been made to carry with them a total instead of a partial disqualification. Instances of such an office are afforded by the Mastership of the Rolls, or the offices about court abolished in Burke's measure of economical reform with a provision that, if revived, they were to be regarded as *new* offices[2].

Such, lastly, are offices not technically *under* the Crown, but made into statutory disqualifications. Such an office would be that of a fifth Under Secretary of State, when four Under Secretaries are already in the House[3].

(β) Offices which necessitate re-election.

(β) There are certain offices the acceptance of which vacates a seat, but leaves the holder of the office re-eligible.

Such are all *old* offices, that is, offices in existence before the 25th of October, 1705, except those which have been made an absolute disqualification by subsequent statutes. And such are certain new offices created by statutes, which contain provisions that their acceptance shall vacate a seat, but that the holder is re-eligible. An instance of such a provision is to be found in the case of the President and one of the secretaries of the Local Government Board[4].

[1] It has been doubted whether 'acceptance' in this sense means the completion of the formalities of an appointment—or kissing hands—or the informal notification of an intention to accept, by letter or word of mouth. It would seem that a vacancy is created by any proof, however informal, of an intention to accept. Report on Vacating of Seats. House of Commons, 1894 [278].

[2] 22 Geo. III, c. 82. [3] 27 & 28 Vict. c. 34. [4] 34 & 35 Vict. c. 70, s. 4.

(γ) Offices which do not disqualify.

(γ) There are certain offices the acceptance of which, though they are concerned with the administration of departments of State, does not either disqualify from sitting, or necessitate re-election.

Such are offices which are not considered to be held from or under the Crown, as the office of Under Secretary of State[1].

Such, too, are the offices included in Schedule H of the Representation of the People Act[2], if taken by a person who has been returned to Parliament since his acceptance of another office in the same schedule. He may then be transferred from one to another of these offices without further re-election.

And such, too, are new offices specially freed from disability by statute, as commissions in the militia[3].

Effects of disqualification.

In some cases the election is simply avoided. In others a heavy penalty is imposed in addition if the office-holder has sat and voted. The law upon the subject is extremely intricate and perplexing; it might well be reduced into the compass of a single statute, since the principles involved are very simple, and would lose nothing if, with the cases to which they are applicable, they were crystallised in a code.

Its practical objects.

It may be noted that the original ground for the disqualification of permanent officials is no longer the actual ground. It is not because of any fear of the excessive influence of the Crown in Parliament that Charity Commissioners or Permanent Under Secretaries in the various departments of government are rendered incapable of sitting in the House of Commons. The need of securing the best men for the public service apart from political considerations, the converse need of a harmony between the head of a department and his subordinates, which could not exist if they were habitually opposed in debate, have come to be the acknowledged reasons for the exclusion of the various officials whom I have enumerated in a note. But these reasons, which make it desirable to exclude permanent members of the Civil Service from the House of Commons, do not apply to

[1] Hansard, clxxiv. 1237.

[2] 30 & 31 Vict. c. 102.

[3] 45 & 46 Vict. c. 49, s. 38.

s. 25 of the Act of Anne, which requires the re-election of the Parliamentary heads of departments on their acceptance of office. The effect of this rule is now to create a needless and vexatious delay in the conduct of public business when a new ministry takes office, or a new member is introduced into a ministry.

Pensions.

§ 7. Persons who hold pensions at the pleasure of the Crown are disqualified by 6 Anne, c. 7 [41], s. 24. This disqualification was extended by 1 Geo. I, st. 2, c. 56, to pensioners of the Crown for terms of years whether held in the name of the pensioner or by another in trust for him; and the word 'pension' is construed by 22 Geo. III, c. 82, s. 30, to mean a grant of royal bounty repeated more than once in three years. But civil service and diplomatic pensions are exempted from disqualification by Acts of the last and present reign, 32 & 33 Vict. c. 15; 32 & 33 Vict. c. 43, s. 17.

Government contracts.

§ 8. A person who directly or indirectly, himself or through the intervention of a trustee, holds or undertakes any contract or commission, for or on account of the public service, is incapable of being elected: if elected, the election is void, and there is a penalty of £500 imposed for every day in which a person labouring under such a disability shall sit and vote.

This disqualification is created by 22 Geo. III, c. 45; it is made applicable to contracts with the Irish government and generally to Irish members by 41 Geo. III, c. 52, but does not extend to contributions or subscriptions to government loans [1].

Convicted felons.

§ 9. A person attainted or adjudged guilty of treason or felony who has not received a pardon, or served his term of punishment, is incapable of election.

Mitchel's case.

The common law on this subject is most clearly laid down in the case of John Mitchel, who, having been sentenced to transportation after conviction of treason-felony, escaped before his sentence had expired, and was subsequently elected for Tipperary. The House of Commons declared the seat vacant, there being no petition against his election. A new writ was issued, Mitchel stood again, was elected, and upon a petition

[1] 110 C. J. 325 Report, 1855 (401).

9 I. R. C. L. 217.

being lodged against his return, the Court held that votes given to him were thrown away, and that his opponent who claimed the seat was entitled to it.

The ground on which the disqualification would seem to rest was that, as was argued by Sir John Holker in the debate in the House of Commons on the case of John Mitchel, a person convicted of treason or felony was not 'a fit and proper person' within the meaning of the old form of writ addressed to the Sheriff[1]. But it had always been held that one so convicted, if he had served his term of punishment or received a pardon under the great seal, or (since 5 Geo. IV, c. 84) by sign manual warrant, was eligible, subject to some doubt as to the effect of a resolution of the House of Commons declaring him still to be ineligible.

All doubts on the subject are set at rest by 33 & 34 Vict. c. 23, s. 2, providing that any person 'hereafter convicted of treason or felony, for which he shall be sentenced to death, penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall become and (until he shall have suffered the punishment to which he shall be sentenced, or such other punishment as may by competent authority be substituted for the same, or shall receive a free pardon from Her Majesty) shall continue thenceforth incapable of being elected, or sitting, or voting as a member of either House of Parliament.'

A member convicted of misdemeanour, or sentenced to a shorter term of imprisonment, without hard labour, than twelve months, is not thereby disqualified. It rests with the House to deal with such cases.

Bankruptcy.

§ 10. A bankrupt is disqualified for election, or, if elected, for sitting and voting. Unless the disqualification is removed by the annulment of adjudication in bankruptcy, or by a grant of discharge, accompanied by a certificate that the bankruptcy was not caused by misconduct[2], the seat will fall vacant in six months from the date of the adjudication.

[1] Speech of Sir John Holker (Solicitor General), Hansard, vol. 222, p. 511.
[2] 46 & 47 Vict. c. 52, s. 32.

§ 11. One who is found guilty of corrupt practices at a Parliamentary election within the meaning of 46 & 47 Vict. c. 51, is for ever disqualified from sitting for the place at which his offence was committed; and is disqualified for seven years from sitting for any other place. Corrupt practices.

If the corrupt practice was the unauthorised act of an agent employed for the general purposes of the election, the employer is disqualified for seven years from sitting for the place at which the offence was committed.

There are certain extinct forms of disqualification which still possess an interest for us as a part of recent Parliamentary history. Extinct disqualifications.

The first and most important is the requirement to take one or more oaths as a condition precedent to the right to sit and vote. Shortly the history of the Parliamentary oath may be stated as follows. (a) The Parliamentary oaths.

The oath of supremacy was required to be taken before the Lord High Steward, by knights and burgesses, in the fifth year of Elizabeth. One who entered the parliament-house without having taken the oath was to be regarded as though he had not been elected and returned, and to suffer such pains and penalties as if he had presumed to sit in the House 'without election return or authority.' Oath of Supremacy.

The oath of allegiance was required to be taken by the same persons, and in the same manner, before they 'shall be permitted to enter the said house,' by 7 Jas. I, c. 6, s. 8. In the 30th year of the reign of Charles II these oaths were required to be taken by both Houses, and no longer before the Lord Steward but by the Lords and Commons at the tables of their respective Houses. Of allegiance.

To these oaths was added a declaration against transubstantiation, of which I may say shortly that it was maintained as a condition precedent to the right to sit and vote until the Roman Catholic Relief Act of 1829. Declaration against transubstantiation.

The penalties for 'doing anything contrary to this act' were very heavy, involving among other things a penalty of £500 for each offence, and a permanent disability for holding

any office civil or military or for sitting in either House of Parliament.

Oath of abjuration.

The forms of the oaths were altered and shortened, but the declaration and the penalties were retained after the Revolution, by 1 Will. & Mary, c. 1, and in 13 Will. III, c. 6 an additional oath was required, the oath of abjuration.

This oath, the omission to take which constituted a disability to sit and vote by the Act of 1701, was by 1 Geo. I, st. 2, c. 13 required to be taken before sitting and voting under pain of a penalty of £500 for each offence, of disability to sue in any court, to hold office, vote at a parliamentary election, or take a legacy.

Thus the law remained, with some exemptions in favour of Quakers, until 1829.

Purport of the oaths.

The oath of allegiance was a declaration of fidelity to the reigning sovereign: the oath of supremacy was a repudiation of the spiritual or ecclesiastical authority of any foreign prince, person or prelate, and of the doctrine that princes deposed or excommunicated by the Pope might be murdered by their subjects: the oath of abjuration was a repudiation of the right and title of the descendants of James II to the throne. To these was added the declaration against transubstantiation.

This declaration, and the oath of supremacy, stood in the way of the Roman Catholics, while the oath of abjuration which concluded with the words *'on the true faith of a Christian'* could not be taken by a Jew.

Whether the tremendous penalties imposed by the Act of Charles II were regarded as applicable to one who sat and voted without taking the oaths of allegiance and supremacy does not seem clear from the wording of 1 Geo. I, stat. 2, c. 13, §§ 16, 17. In the reign of William III, a refusal to take the oaths led to no worse consequences than a declaration by the House of Commons that the seat was vacant[1]. Yet these penalties were not directly taken away until the 29 Vict. c. 19 (1866), which left only the liability to pay £500

[1] 10 Commons' Journals, 131; 5 Parl. Hist. 254.

for every occasion on which a member sat and voted without taking the oath.

Roman Catholics.

The Roman Catholic Relief Act, 1829, provided a single form of oath, acceptable to Roman Catholics and available to them only: it further abolished, in all cases, the necessity for the declaration against transubstantiation.

Jews.

The Jews were still excluded by the concluding words of the oath of abjuration. These were held to be an integral part of the oath [1], and thus, though the seat was not vacated, a Jew could not vote except under a ruinous penalty.

But in 1858 an Act was passed enabling either House to dispense with the use of the words 'on the true faith of a Christian' by resolution in individual cases: and in 1860 another Act gave power to either House to make a standing order to the same effect. Meantime in 1858 a single form of oath had been prescribed instead of the three oaths of allegiance, supremacy and abjuration, and finally in 1866 the words which caused the difficulty were omitted from the statutory form required.

The only difficulty which now existed was in the case of those persons who declined to take an oath, either because they objected on religious grounds to any form of oath, or because they had no such religious belief as would make an oath binding upon them.

Quakers, &c.

The first was the case of Quakers, Moravians, and others to whom it was objectionable to take an oath. These were exempted expressly by various statutes, and were permitted to make affirmation in terms prescribed.

Atheists.

The second case gave rise to the mass of litigation to which the late Mr. Bradlaugh was a party.

The case of Mr. Bradlaugh.

Mr. Bradlaugh, at the meeting of Parliament in 1880, demanded to be allowed to affirm instead of taking the oath, alleging that he, having no religious belief, was 'a person for the time being permitted by law to make a solemn affirmation or declaration instead of taking an oath [2].'

[1] *Miller* v. *Salomons*, 7 Exch. 475; 8 Exch. 778.

[2] 31 & 32 Vict. c. 72, s. 11.

The House allowed him to make affirmation, and he was sued by an informer for the penalties due from him as having sat and voted without taking the oath.

The Court of Appeal, affirming the judgment of the Queen's Bench Division [1], held that Mr. Bradlaugh was not exempt from the liability to take the oath. The fact that under the Evidence Acts of 1869 and 1870 he would have been enabled to make a promise and declaration to tell the truth, did not bring him into the class of persons indicated in the Parliamentary Oaths Act of 1866, and the Promissory Oaths Act of 1868. These were not persons on whom an oath would have no binding force, but persons who had a conscientious objection to taking an oath.

When the case of *Clarke* v. *Bradlaugh* reached the House of Lords it was there held that the statutory penalty was not recoverable by a common informer; but Mr. Bradlaugh was held not to be entitled to make affirmation in lieu of the oath.

He then endeavoured to take the oath, but the House resolved that he should not be allowed to do so, and the Queen's Bench Division refused to make a declaration to the effect that he was entitled to do so [2].

On the 11th of February, 1884, Mr. Bradlaugh entered the House; came to the table without being called upon by the Speaker; read from a paper in his hand the words of the oath, and having kissed a book which he brought with him, signed the paper and left it on the table. He subsequently voted in a division, and an action was brought against him, this time at the suit of the Crown, for the penalty which he had incurred by so voting.

The Court of Appeal, when the matter came before it [3], held not only that the manner in which Mr. Bradlaugh had taken the oath was insufficient to meet the requirements of the Parliamentary Oaths Act; but that his want of religious belief,

[1] *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38.
[2] *Bradlaugh* v. *Gossett*, 12 Q. B. D. 281.
[3] *Attorney General* v. *Bradlaugh*, 14 Q. B. D. 667.

if proved to the satisfaction of a jury, made it impossible for him to satisfy the requirements of the Act even if he had taken the oath in due form.

On the 13th of January, 1886, Mr. Bradlaugh took the oath among other members elected to the new Parliament. The Speaker refused to intervene, holding that the resolution of the former House of Commons had lapsed with the dissolution in 1885; that the Speaker had no authority to prevent a member from taking the oath: and that he should not permit (as a former Speaker had permitted) a motion to be made restraining a member from taking the oath. 'The honourable member,' he said, 'takes the oath under whatever risks may attach to him in a court of law.'

Mr. Bradlaugh therefore sat and voted subject always to the risk that the law officers of the Crown might proceed against him for penalties incurred and prove to the satisfaction of a jury that having no religious belief he had not taken the oath within the meaning of the Parliamentary Oaths Act.

Affirmation in lieu of oath.

The last stage in the history of this test of the political or religious creed of persons elected to serve in the House, was reached in 1888, when the Oaths Act, 51 & 52 Vict. c. 46, was passed. By this Act it is provided that in all places and for all purposes where an oath is or shall be required by law an affirmation may be made if the person who should be sworn objects to take an oath either on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief.

The affirmation is made in the following form: 'I, A. B., do solemnly, sincerely and truly declare and affirm,'—the words of the oath required by law are then proceeded with.

Object of disabilities political not religious.

It should be noticed that all the express disabilities created by the form of oath have been imposed for political purposes, and so far as they were directed, as they mainly were directed, at Roman Catholics, their object was to exclude from Parliament persons who were disloyal to the reigning sovereign, because they desired to see a Roman Catholic on the throne,

or because they recognised, behind the throne, the supreme authority of the Pope.

The words which excluded Jews were not introduced for that purpose, nor would it seem that the question of the quality or religious belief apart from its political significance was ever raised before the case of Mr. Bradlaugh.

It does not appear that nonconformists were ever disqualified as such, except in so far as their religious convictions prevented them from taking any form of oath. The Acts exempting Quakers and others who were in this way of thinking were designed 'to put Quakers on a footing with all other dissenters in England [1].'

(b) Residence.

Residence is another of the extinct grounds of disqualification: for residence in their constituencies was required of the knights and burgesses who represented shires and towns by 1 Henry V, c. 1. This requirement had fallen out of use as early as the reign of Queen Elizabeth, but the Act of Henry V was not repealed till 1774.

(c) Property.

A property qualification was created by 9 Anne, c. 5, consisting of an estate in land which, in the case of a knight of the shire, must be worth £600 a year, in the case of a burgess £300 a year; and this qualification had to be affirmed upon oath, and later by declaration made by the candidate upon the request of two electors, or of a rival candidate, at any time before the day fixed in the writ of summons for the meeting of Parliament.

This Act was modified by some subsequent statutes, but all the provisions relating to the qualification were repealed in 1858 [2].

(d) Profession of the law.

An Act of 1372 provides that 'no man of the law following business in the King's Court, nor any sheriff for the time that he is a sheriff, be returned nor accepted knight of the shire.' This statute was not repealed until 1871 [3], though its provisions had long been forgotten.

But apart from the disqualifications which I have described

[1] Hansard, 3rd series, vol. xv. p. 639.
[2] 21 & 22 Vict. c. 26. [3] 34 & 35 Vict. c. 116.

as voiding an election, a member once elected can only cease to represent his constituency by reason of his death, or of the dissolution of Parliament. A seat cannot be resigned, nor can a man who has once taken his seat for one constituency throw it up and contest another. Either a disqualification must be incurred, or the House must declare the seat vacant; and, as we have seen, the House has not shown itself very willing to declare a seat vacant on the ground of physical incapacity, or personal unwillingness to serve.

Resignation of a seat impossible.

The disability attaching to office is thus of great practical convenience. Certain old offices of nominal value in the gift of the Treasury are now granted, as of course[1], to members who wish to resign their seats in order to retire from Parliament or to contest another constituency. These are the stewardship of the Chiltern Hundreds, of the manors of East Hendred, Northstead, or Hempholme, and the escheatorship of Munster. The office is held during pleasure and merely operates to vacate the seat.

The use of official disability.

It is curious to note that a good many years elapsed after the passing of the Act of Anne, before it was discovered that the acceptance of one of these small offices was a means of vacating a seat which a member desired to resign. The earliest use of a Stewardship of a royal manor for this purpose was in 1740. In that year Sir Watkin Wynn accepted the Stewardship of the king's lordship and manor of Bromhild and Gale in the county of Denbigh in order to vacate his seat for the county. In 1742 the Stewardship of the manor of Otford in Kent was used for the same purpose. In 1751 the Chiltern Hundreds first appears, in 1752 the manor of Berkhamstead. Since then the Chiltern

[1] In 1775 Lord North refused the Chilterns to a political opponent, but the Chancellor of the Exchequer does not now make any inquiry into the objects for which the office may be sought, unless an election petition has been instituted or criminal proceedings taken against the member who applies. Since 1880 the words which expressed the confidence of the Crown in the fidelity of the person appointed have been omitted from the warrant. Report (Vacating of Seats), 1894 [278] p. 4.

Hundreds and the other royal manors specified above have been most commonly used for the purpose required.

Form of warrant of appointment to the Stewardship of the Manor of Northstead[1].

To all whom these Presents shall come, the Right Honourable Chancellor and Under-Treasurer of Her Majesty's Exchequer, sendeth greeting. Know Ye, that I, the said have constituted and appointed, and by these presents do constitute and appoint to be Steward and Bailiff of the Manor of Northstead,

with the returns of all writs, warrants, and executions of the same, (in the room and place of whose constitution to the said offices I do hereby revoke and determine,) together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said offices of Steward and Bailiff belonging, or in any wise appertaining, with full power and authority to hold and keep Courts, and to do all and every other act and acts, thing and things, which to the said offices of Steward and Bailiff of the Manor aforesaid, or either of them, do belong or in any wise appertain, in as full and ample manner as any former Steward or Bailiff of the said Manor hath lawfully had, received, or enjoyed the same, to have and to hold the said offices of Steward and Bailiff of the said Manor, together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said during Her Majesty's pleasure; and I do hereby authorize and empower the said to demand and receive for Her Majesty's use all Court Rolls and other writings relating to the said Manor from any person or persons having the same in their hands or custody. And all and every such person and persons having the same in their hands or custody are hereby required to deliver up the same to the said provided, nevertheless, that the said shall enter these presents in the office of the proper Auditor within forty days next after the date hereof, and shall yearly return the Court Rolls of the said Manor into the

[1] The warrant for the Chilterns is identical *mutatis mutandis*.

said office of the said Auditor, and account with the said Auditor for all such sum and sums of money as he, the said shall receive for and to Her Majesty's use, within forty days next after the feast day of Saint Michael the Archangel, which shall happen in every year, or else these presents and everything herein contained to be void. In Witness whereof, I have hereunto set my hand and seal the day of in the year of the Reign of Her Majesty Queen Victoria, and in the year of our Lord One Thousand Eight Hundred and

Downing-street, }

NOTE I.

Official Disqualifications created by Statute[1].

i. *Persons concerned with the Administration of Justice.*

1. Judges of the High Court and Court of Appeal in England. (38 & 39 Vict. c. 77, s. 5.)
2. Registrars or other officers connected with any Court having jurisdiction in Bankruptcy in England. (46 & 47 Vict. c. 52, s. 116.)
3. County Court judges in England. (25 & 26 Vict. c. 99, s. 4.)
4. Commissioners of Metropolitan Police. (19 & 20 Vict. c. 2, s. 9.)
5. Stipendiary magistrates for various towns are disqualified in the Acts which provide for their appointment.
6. A Recorder for his borough in England. (45 & 46 Vict. c. 50, s. 163.)
7. A Revising Barrister is disqualified for the county, cities, and boroughs comprised in his district. The disqualification lasts during his term of office and for eighteen months after. (6 & 7 Vict. c. 18, s. 28.)
8. A Corrupt Practices Commissioner. (15 & 16 Vict. c. 57, s. 1.)
9. A barrister appointed to try municipal election petitions. (45 & 46 Vict. c. 50, s. 92.)
10. Judges of Court of Session, justiciary or baron of the Exchequer in Scotland. (7 Geo. II, c. 16, s. 4.)

[1] The following summary contains only such offices as disqualify absolutely either for certain constituencies or for all. I have not thought it necessary to set out a list of offices which entail a re-election.

11. Sheriff depute in Scotland. (21 Geo. II, c. 19, s. 11.)
12. Judges of the High Court and Court of Appeal in Ireland, including the Chancellor. (40 & 41 Vict. c. 57, s. 13.)
13. Masters in Chancery in Ireland. (1 & 2 Geo. IV,[1] c. 44, s. 1.)
14. Judge of Landed Estates Court, Ireland. (21 & 22 Vict. c. 72, s. 7.)
15. Assistant barristers in Ireland. (14 & 15 Vict. c. 57, s. 2.)
16. Justices and police officers in Dublin. (6 & 7 Will. IV, c. 29, s. 19.)
17. Magistrates and inspectors of constabulary, Ireland, appointed under the provisions of 6 & 7 Will. IV, c. 13, s. 18; 48 Geo. III, c. 140, s. 14.
18. A Recorder for his borough, in Ireland. (3 & 4 Vict. c. 108, s. 166.)
19. A member of, or person holding office under, the Irish Land Commission. (44 & 45 Vict. c. 49, s. 54.)
20. Registrar of deeds, Ireland. (2 & 3 Will. IV, c. 87, s. 36.)
21. Chairman or deputy chairman of London Quarter Sessions. (51 & 52 Vict. c. 41, s. 42.)

ii. *Persons representing the Crown or holding Offices at Court or under the chiefs of the great Departments of State.*

1. Colonial governors and deputy governors. (6 Anne, c. 7 [41], s. 24.)
2. The governors or deputy governors of any of the settlements, presidencies, territories, or plantations of the East India Company. (10 Geo. IV, c. 62, s. 1. This Act would appear to be continued 'mutatis mutandis' by the 'Act for the better Government of India,' 21 & 22 Vict. c. 106, s. 64.)
3. Members of the Council of India. (21 & 22 Vict. c. 106, s. 12.)
4. A number of court places were abolished in 1782, and it was provided that, if revived, they should be *new* offices within the meaning of the Act of Anne. (22 Geo. III, c. 82, §§ 1, 2.)

[1] This statute disqualifies the judges of the old Common Law and Chancery Courts in Ireland, and by subsequent Acts the judges in the Irish Courts of Admiralty, Probate, and Bankruptcy were also disqualified. These provisions, except in so far as vested interests are concerned, are merged in the general disqualifying clause of the Irish Judicature Act, 40 & 41 Vict. c. 57.

5. Deputies or clerks in the departments of the Treasury, Exchequer, Admiralty, of the principal Secretaries of State, and a number of other Government offices. (15 Geo. II, c. 22; 41 Geo. III, c. 52, s. 4.)
6. Fifth Under-secretary of State while there are four in the House. (21 & 22 Vict. c. 106, s. 4; 27 & 28 Vict. c. 34.)
7. Commissioners of Public Works, Ireland. (1 & 2 Will. IV, c. 33, s. 11.)

iii. *Persons concerned with the Collection of Revenue, or Audit of Public Accounts.*

1. Farmers, collectors, and managers of money duties, or other aid. (5 Will. & Mary, c. 7, s. 59.)
2. Farmers, managers, and collectors of customs. (12 & 13 Will. III, c. 10, §§ 87, 88.)
3. Commissioners and officers of excise in England and Ireland. (7 & 8 Geo. IV, c. 53, s. 8.)
4. Auditor of the Civil List. (56 Geo. III, c. 46, s. 8.)
5. Comptroller and Auditor-general, and assistant. (29 & 30 Vict. c. 39, s. 3.)
6. Collector-General of rates for Dublin, or any officer or servant in his employment for purposes of the Act. (12 & 13 Vict. c. 91, s. 24.)

iv. *Persons concerned with the Administration of Property for Public Objects.*

1. The Commissioners of Woods and Forests. (14 & 15 Vict. c. 42, s. 10.)
2. The Charity Commissioners (paid), their secretary and inspectors. (16 & 17 Vict. c. 137, s. 5.)
3. The Irish Church Temporalities Commissioners. (32 & 33 Vict. c. 42, s. 9.)
4. The Land Commissioners. (4 & 5 Vict. c. 35, s. 5.) [The Land Commissioners, who represented in respect of duties and of disabilities the Tithe Enclosure and Copyhold Commissioners (45 & 46 Vict. c. 38, s. 48), are now made a part of the permanent staff of the Board of Agriculture to which their duties are transferred.]
5. Paid officers of a County Council, in England. (51 & 52 Vict. c. 41, s. 83.)

v. *Miscellaneous disqualifying enactments.*

6 Anne, c 7 [41], s. 24, includes commissioners or subcommissioners of prizes, comptrollers of the accounts of the army, agents for regiments, commissioners for wine licences and other incongruous offices.

41 Geo. III, c. 52, s. 4 disqualifies a number of holders of office in Ireland from sitting in the Parliament of the United Kingdom, and

57 Geo. III, c. 62 abolishes a number of Irish offices making provision for a new regulation of their duties and for the disqualification of persons holding any offices created in consequence of such regulation.

NOTE II.

Summary of principal Statutes concerning the Parliamentary Oath.

Oath of supremacy required to be taken before the Lord Steward by knights and burgesses. (5 Eliz. c. 1, s. 16.)

Oath of allegiance by the same persons in the same manner. (7 Jac. I, c. 6, s. 8.)

Oaths of allegiance and supremacy to be taken and subscribed and declaration against transubstantiation to be made by Lords and Commons in Parliament. (30 Car. II, st. 2, c. 1.)

The forms of these oaths altered. (1 Will. & Mary, c. 8.)

Oath of abjuration required of Lords and Commons as a condition precedent to sitting and voting, this oath containing the words 'on the true faith of a Christian.' (13 Will. III, c. 6.)

The form of oath altered in some respects, but the concluding words of the abjuration oath retained and penalty imposed (£500). (1 Geo. I, st. 2, c. 13.)

Forms of affirmation provided for Quakers. (8 Geo. I, c. 6, amending or embodying earlier provisions in their favour. 22 Geo. II, c. 46.)

Oath suited to Roman Catholics provided by Roman Catholic Relief Act. (10 Geo. IV, c. 7, s. 2.)

Quakers and Moravians allowed to affirm. (3 & 4 Will. IV, c. 49.)

Ex-Quakers, ex-Moravians, and Separatists allowed to affirm. (1 & 2 Vict. c. 77.)

A single oath substituted for the oaths of allegiance, supremacy, and abjuration. (21 & 22 Vict. c. 48.)

Power given to either House by resolution in case of individual members of Jewish religion to omit the words 'upon the true faith of a Christian.' (21 & 22 Vict. c. 49.)

Power given to the House of Commons to make Standing Order to the same effect. (23 & 24 Vict. c. 63.)

Form of oath prescribed omitting these words, and also form of affirmation to be taken by every person 'for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath.' (29 Vict. c. 19, ss. 1, 4.)

Promissory Oaths Act shortens the previous form. (31 & 32 Vict. c. 72.)

Oaths Act 1888 enables any person who objects to being sworn, on the grounds either that he has no religious belief or that the taking of an oath is contrary to his religious belief, to make a solemn affirmation when and wheresoever the taking of an oath is required by law. (51 & 52 Vict. c. 46.)

Section II.

Who may choose.

The right to vote for members to serve in the House of Commons is called the Franchise. The term Franchise is used indifferently for the right to vote and the qualification which confers the right. Strictly its meaning should be confined to the right. There is a third and distinct meaning in which the word signifies an incorporeal hereditament, and is defined by Blackstone as 'a royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject[1].' The Franchise.

The possession of this franchise now depends, except in some few surviving instances, upon certain qualifications of property, occupation, or residence. Until very recently the qualifications which gave the right to choose a member for a county differed in many respects from those which gave

[1] Stephen's Commentaries, (ed. 12) i. 608.

the right to choose a member for a borough. They are now nearly though not wholly assimilated.

A mediaeval election.

The link between the borough and county representation is to be found in the form of writ, which until 1833 was addressed to the sheriff, commanding him to cause the election of two knights of his shire, together with two citizens of each city, and two burgesses of each borough, within the shire. The election took place 'in pleno comitatu,' and, from the year 1406 onwards, at the next meeting of the county court after the writ was received. So soon as the writ was received from the office of the Crown in Chancery, the sheriff issued his precept to the returning officers of the cities and boroughs, and announced the holding of a special county court for the purpose of the election. The towns made their election in accordance with the custom and procedure which had settled the franchise in each borough. The county court, when it met, was adjourned from day to day during such time as the poll might legally be kept open. At the close of the poll for the county election the result of that election was declared, and the knights of the shire were girt with swords in compliance with the terms of the writ. By this time the returns to the precepts had come in from the towns, the notification of their choice was made, and the formal election took place accordingly.

By 7 Hen. IV, c. 15 (1406), the sheriff was required to return the writ to Chancery, and not, as heretofore, to the Parliament, and he was further required to append to the writ indentures in which the names of the persons chosen were to be written 'under the seals of them that did choose them.' These indentures ensured that the persons returned were the persons elected by the county, and were not the arbitrary choice of the sheriff. A like precaution was taken in 1444[1] in respect of the towns.

Supra, p. 59.

So, after the declaration of the poll for the county election, a certain number of the electors present set their hands and

[1] 23 Hen. VI, c. 15.

seals to the indentures containing the names of those elected, and these, fastened to the writ, were returned, together with the precepts and indentures relating to the towns, to the Clerk of the Crown in Chancery.

Such was the form of a Parliamentary election down to 1853, when it was enacted [1] that the writs for cities and boroughs should be sent direct to the returning officers of those places, and should no longer pass through the hands of the sheriff.

The old procedure.

This outline of the procedure of an election may serve to show that county and borough members were held together not merely by the interests which they had in common against the Crown and the magnates, nor by the representative character which they alike possessed, but also by the fact that they were all returned to Parliament through the same local machinery, that of the county court.

its effect on the franchise.

And from this procedure one may also understand how it was that, before the Reform Act of 1832, the county franchise was simple and uniform, the borough franchise complicated and various, that it was to the county elections that one looked for a genuine expression of political opinion, when the electoral rights of a large number of the boroughs had so far become pieces of private property that a man might, by purchase or inheritance, acquire the right of returning one or more members to Parliament. But I will not deal further at present with the mode of conducting an election. It is necessary first to ascertain who may choose members to serve in Parliament, or in other words what constitutes the qualification of an elector. How the electors may choose, in what constituencies and by what process, will form matter for a separate section.

The modern Franchise.

The Franchise now rests mainly, though not entirely, upon the Act of 1884; but since this Act comprehends various older Statutes and requires to be read in connection with them, and

[1] 16 & 17 Vict. c. 68, s. 1.

leaves in existence various ancient and modern franchises to which it makes no reference, we must inquire what electoral rights have been, as well as what they are.

The three grounds on which a man may nowadays rest his right to vote, are Property, Occupation, Residence; that is to say, under various conditions, to be dealt with hereafter, he has a vote in respect of a tenement which he owns, which he uses, or which is his dwelling. But it is certain that when our representative system began, the right to vote was conditional upon residence: for it was coincident in the counties with the right to attend the County Court [1], while amid the obscurity which rests on the early history of the borough franchise this much is clear, that whether the right to vote depended on the holding of land or on contribution to local burdens, residence was in either case required, or perhaps it might be more true to say that non-residence was not contemplated. By 1 Henry V, c. 1, residence was required of electors as well as of members; the fact that this statute had fallen out of use long before it was repealed in 1774 is only an illustration of the tangled growth of our representative system before 1832. But what I have to say on this part of the subject may be conveniently divided as follows:—

Divisions of subject.

1. The English county franchise,
2. The English borough franchise,
3. The Scotch franchise,
4. The Irish franchise,

} before 1884.

5. The effect of 48 Vict. c. 3.
6. Disqualifications and incapacities.

§ 1. *English County Franchise before* 1884.

The suitor to the County Court.

I will take first the modifications of the county franchise before 1884. The right to vote for the representative knights of the shire was vested originally in those who were entitled to attend the county court. But when the county

[1] See Stubbs, Const. Hist. ii. 205, as to constitution of county court.

court had lost much of the business which gave it importance, the attendance was apt not to be representative. The next meeting of the county court might occur too soon after the receipt of the writ by the sheriff for a full meeting to be summoned, and so it might happen that the election would fall into the hands of the sheriff, or of a few interested persons or of a disorderly crowd.

In the year 1430 was passed the Act[1] which determined the county franchise for 400 years, limiting its exercise to residents possessing a freehold worth forty shillings a year. The sheriff was empowered to examine voters upon oath as to their qualification, and an Act of 1432 required that the freehold should be situate and the voter resident in the county for which the vote was claimed. The last requirement fell into disuse, and was abolished by 14 George III, c. 58.

The forty-shilling freeholder.

The Act of Henry VI was not, as it has been sometimes described, an aristocratic revolution. It was designed to secure orderly elections, and impose such a qualification as should exclude the casual crowd which attended the county court. At any rate it does not seem to have altered the character of the representation in the mediaeval Parliaments[2]; the forty-shilling freeholder chose the same class of representative as the suitors at the county court had chosen. But the forty-shilling freehold is now only one of several property qualifications restricted to counties and to towns which are counties corporate; and the reforms of 1832 and 1867 introduced other qualifications confined to counties and depending not upon property but upon occupation.

The qualification by Property.

First as to Property. The Reform Act of 1832 confined the effect of the forty-shilling freehold qualification to cases in which the property was in occupation of the voter; or where it was an estate of inheritance; or, if a life estate and not in occupation—then, where it had been acquired by marriage, marriage-settlement, devise or promotion to a benefice or office.

Act of 1832.

Besides the retention of the ancient freehold qualification

[1] 8 Hen. VI, c. 7.

[2] Stubbs, Const. Hist. iii. 111.

in this limited form, the Reform Act introduced four other property and non-residential qualifications into counties. These were (*a*) freehold for life not occupied, nor acquired as described, of the clear yearly value of £10; (*b*) copyhold, or land held on any other tenure but freehold, of the same value; (*c*) leasehold of the same value and for a term originally created for not less than sixty years; and (*d*) leasehold of £50 clear yearly value, and for a term originally created for not less than twenty years.

Act of 1867.

The Representation of the People Act of 1867 reduced the value required for the first of these three franchises to £5; the Act of 1884 leaves them alone. I will return to them presently when I come to summarise the qualifications now existing.

By Occupation.

Next as to Occupation. Besides the property qualifications just mentioned, the Reform Act created an Occupation franchise in counties for the occupier 'as tenant of any lands or tenements for which he should be liable to the clear yearly rent of £50[1].'

Act of 1832.

Act of 1867.

Alongside of this was created a new occupation franchise in counties by the Act of 1867. This depended not upon rental but upon rating, and the qualifying land or tenement had to be of the rateable value of £12. The holding must have been rated, and the occupier must have paid his rates[2].

Such was the county franchise before the Act of 1884.

§ 2. *English Borough Franchise before* 1884.

Qualifications in boroughs before 1832.

The condition of the borough franchise before 1832 exhibits a curious medley of political rights: for the boroughs were left free from all legislative interference as to the mode in which they should elect their representatives: all that was required was that the persons returned should be the persons really chosen, and that they should be fully empowered to

[1] The clause creating this qualification (2 & 3 Will. IV, c. 45, s. 20) known as the 'Chandos clause' is expressly repealed by the Act of 1884.

[2] This qualification is extinguished by necessary implication from 48 Vict. c. 3 s. 5.

bind their constituents. To this end an Act of 1444[1] required that the return made by the mayor, or bailiff of the borough, to the sheriff's precept, should be accompanied with indentures, similar to those which accompanied the return of the county election, made under the seals of those that chose the member. As the boroughs were thus left to choose their own mode of election, the result was, as one would naturally expect, a great variety of custom, amid which it is not easy to frame any certain or coherent scheme of electoral rights. Nevertheless, though modified in themselves, and combined with one another in various ways, four sorts of franchise appear distinct in character if not in origin.

Tenure.

The first of these was based on tenure. This was probably the most ancient, and in most cases represented the right of the members of the township, as evidenced by the holding of land, to take part in the management of the affairs of the community.

Residence.

The second was dependent on residence, in almost all cases coupled with payment of 'scot and lot,' that is, contribution to charges for local or national purposes. This would seem to be an extension of the land-holding qualification to those who bore their share of the burdens of the community.

Incorporation.

The third was incorporation, and seems to connect political with trading privileges by the assignment of the franchise to the freemen of the chartered town either exclusively or jointly with voters otherwise qualified. The freeman, by his admission to membership of the Corporation, acquired rights but did not of necessity incur liabilities. He need not hold land nor incur the obligations laid upon land, nor contribute in his character of freeman to the local charges.

Corporate office.

The fourth qualification was corporate office, a narrower form of the right arising from incorporation. This was the latest of the qualifications, and vested in the officers of the chartered town the right to return representatives to Parliament. It will be found that in all the cases in which the franchise

[1] 23 Hen. VI, c. 15.

was thus limited, the town in question was either chartered or summoned in the reigns of the Tudors, or the limitation fixed by a resolution of the House of Commons, subsequent to the Restoration, based upon an interpretation of the charter. In the case of such a resolution, the inhabitants sometimes urgently contested the right with the corporation, as in the case of Bath, Malmesbury, and Salisbury[1]. Sometimes, as in the case of Wilton and Winchester, they acquiesced without a struggle.

Varieties in qualification by tenure.

But each of these kinds of qualification admitted of many varieties. The qualification by tenure in some towns which were also counties, as Nottingham and Bristol, was the forty-shilling freehold, in others it was land held on burgage tenure; in some cases it was limited to particular tenements, as at Richmond, where they only might vote who held burgage tenements carrying with them the right to have pasture on a certain common field. At Cricklade the qualification was not only freehold, but copyhold of lands held within the borough; or leasehold of a term of not less than three years. At Clitheroe, the franchise was in the *owners* of burgage tenements though non-resident; but if they did not choose to exercise their rights, then the *occupiers* of the tenements became entitled to vote.

Varieties in qualification by residence.

The qualification by residence extended, at Preston, to all the inhabitants; at Taunton to those who had a parochial settlement and were self-supporting, the 'potwallers' who boiled their own pot: in a great majority of cases it was a necessary feature of the qualification that the voter should be a householder and contribute to local rates and taxes, 'scot and lot'; but it would seem that in some cases the contribution to local burdens, coupled with residence, might give a vote to one who was not a householder.

Varieties in qualification of freeman.

The qualification of the freeman might be acquired in various ways,—by birth, by marriage with the daughter or widow of a freeman, by apprenticeship or servitude, by purchase, or by

[1] I have taken these facts, and others which follow, as to particular boroughs from Oldfield's History of Representative Government, checking his statements by reference to the Commons' Journals.

gift. The mode of acquisition was different in different towns, and where it lay in the power of the Corporation to give the freedom to whom it pleased, the creation of freemen for election purposes was unlimited [1]. In some boroughs the freemen were required to be resident in order to obtain the franchise; in others they were scattered over the country. In the first case they were usually corruptible on the spot, in the second the cost of carriage was added to the cost of the vote.

Where the right to return members lay with the officers of the Corporation, the constituency would depend on the composition of the Governing Body created by the charter.

Complexity of borough franchise.

From what has been said it will be seen that neither the condition of the borough franchise in the middle ages, nor the mode of its exercise, is very easy to determine. When the House of Commons began to determine disputed returns, we get such knowledge of the franchise in the seventeenth century as makes it clear that it could never have been uniform; and such accounts as we have of mediaeval elections [2] seem to show that the whole body of electors not unfrequently entrusted the choice of their representative to a committee, sometimes consisting of the municipal officers, sometimes selected from them or from the whole electorate, or from both.

As we approach the time when political interest grows stronger, and a seat in Parliament becomes a thing to be desired, we find three influences acting upon the condition of the franchise, all tending indirectly to narrow, to confuse, and to corrupt the right of voting in the towns.

Effect of charters of incorporation:

First, we may put the increase of charters of incorporation granted to towns from the time of Henry VI onward. From this period the object of such charters was not so much to confer new privileges as to define the rights of the townsmen *inter se*, and to organise the corporate government. The process by which the merchant guild of a town became identified with the older town community is part of municipal history

[1] Municipal Corporations Commissioners' Report, i. 35.

[2] Stubbs, Const. Hist. iii. 415–419.

with which we are not here concerned, except in so far as the Parliamentary franchise came thereby to be vested, either exclusively or jointly with other voters, in the freemen of a corporate town.

But it is to this influence that we must attribute the acquisition by the official members of the corporation of the exclusive right to elect the representatives of the borough. In some cases this was directly conferred by charter, in others it was assumed by the governing body of the corporation, but here too the claim was based upon the charter and was admitted by committees of the House of Commons.

of the Tudor boroughs:

Next, we must put the grant, either by summons or by charter followed by summons, of the right of representation to towns which were never meant to represent anything but the influence of the Crown in Parliament. Thus, at the commencement of the Tudor additions to the representation, six Cornish boroughs returned twelve members; at their conclusion twenty-one Cornish boroughs returned forty-two members. In the majority of these towns the franchise was vested in the corporation, and they would indirectly affect the condition of the franchise elsewhere, for they would offer analogies and precedents, in other cases where rights of election were in issue, to election committees of the House of Commons. Such precedents would operate with the more force, because some of those who judged of the returns themselves owed their seats to this corrupt and restricted franchise.

of decisions of House of Commons. *Infra*, p. 163.

And this brings me to the third influence exercised upon elections—the decision of disputed returns in election committees of the House of Commons. The history of this privilege of the House and the mode of its exercise are described elsewhere. Here we need only note the effect upon electoral rights, in the different boroughs where they were called in question, of the decisions of a tribunal unsuited for judicial work, often animated by partisan or personal feelings, and inclined from self-interest to narrow the franchise. When once a Committee had declared an election to be

invalid on the ground that the votes of a particular class of voters had been accepted or rejected, the right of that class was settled and the custom of the borough fixed. In 1729 an Act was passed providing that 'the last determination in the House of Commons' should settle the legality of votes. 2 Geo. II, c. 24, s. 4.

It is not necessary, nor would it be desirable here, to discuss the merits and demerits of the borough franchise such as it had become by the year 1832. That franchise had developed absolutely free from legislative interference. Except in the case of boroughs convicted of notorious corruption, whose right to return representatives had, in consequence, been extended by Act of Parliament to the freeholders of the adjacent hundreds, custom and common law, interpreted by the resolutions of Parliamentary committees, alone determined the right to vote.

That the representation was inadequate and corrupt there can be no doubt. When the qualification depended on tenure it would often happen that the qualifying tenements were very few in proportion to the population, or sometimes that the population had entirely disappeared, leaving the constituency to consist in the owner or owners of a few plots of land. Where the qualification was residence, or freedom, bribery was largely practised, and, where the freedom was in the gift of the corporation, freemen were created in great numbers to turn an election. It is hardly necessary to note the illusory character of a franchise vested in the officials of a corporation; one can only wonder that the mere absurdity of the representation of a town like Bath by members chosen by a body of twenty-four officials of the corporation should not have condemned a system which in the unchecked growth of centuries had assumed a form so grotesque.

The Reform Act of 1832 made a clean sweep of these anomalies. It preserved all individual electoral rights vested at the date of the passing of the Act: but beyond this it abolished the old franchises with two exceptions. It retained Reform Act, 1832.

Retention of old,

the forty-shilling freehold qualification in towns which were counties, subject to the limitations imposed on the like qualification in counties. It further retained the qualification by reason of being a freeman of a chartered town in those towns wherein the qualification had heretofore prevailed, but it limited the modes of acquiring freedom, for this purpose, to birth and servitude, and made residence in or within seven miles of the city or borough a part of the qualification.

creation of new qualifications.

Apart from these survivals of the old qualifications, the right to vote in cities and boroughs was made to rest uniformly upon *Occupation*. By s. 27 a qualification is given to the occupier, as owner or tenant, of any house, warehouse, counting house, shop, or other building which either separately or jointly with other land occupied by him in the same city or borough is of the clear yearly value of £10. The occupier must have been rated in respect of his tenement, must have paid his rates, and must have resided, during six months before his registration as a voter, in or within seven miles of the place for which he claims to vote. By an Act of 1878 the qualification extends to any *part* of a house separately occupied under the above conditions.

2 & 3 Will. IV, c. 45, s. 27.

41 & 42 Vict. c. 26, s. 5.

Such was the borough franchise from 1832 to 1867. The Representation of the People Act introduced the Household and the Lodger franchise.

Residence.

To be entitled to the Household franchise a man must occupy as owner or tenant, for twelve calendar months before the 15th [1] of July in the year in which he claims to be registered, a dwelling-house in the borough. He must have been rated to the poor-rate, and have paid by the 20th of July so much rate as had accrued up to the preceding 5th of January.

The householder.

It is important to note two points; for the Act of 1884 while extending the area has not altered the character of this franchise.

[1] The 31st was the date fixed for Householder and Lodger by the Act of 1867. The 15th is fixed by 41 & 42 Vict. c. 26, s. 7.

(*a*) The word 'dwelling-house' was defined in the Act of 1867 as any part of a house occupied as a separate dwelling and *separately rated to the relief of the poor*. The definition has been altered by an Act of 1878 in such a way as not to include separate rating as part of the qualification. An obvious difficulty arises, and one which courts of law have acknowledged to be almost insuperable, in distinguishing the householder from the lodger. The householder's tenement must be rateable though it need not be separately rated, and rates must be paid in respect of it, but, as will be seen, such rates need not be paid by the householder. If he occupies a part of a house, not separately rated, he must be deemed a householder or a lodger according to his relations with the owner of the entire building [1].

Definition of dwelling-house. 41 & 42 Vict. c. 26, s. 5.

(*b*) The Act of 1867 required not merely that the dwelling-house should be rated but that the occupier should be rated and should pay the rates. In fact the Act intended the household franchise to depend upon the personal payment of rates by the voter, thereby preventing it from being acquired where the practice of compounding prevailed. 'Compounding' meant that the owner was rated in lieu of the occupier and made his own terms with the overseer and the occupying tenant.

Requirements as to payment of rates.

But the Poor-rate Assessment and Collection Act, 1869, provides that (1) an owner may agree, in certain cases, with the overseers, or (2) may be compelled by the vestry to be rated instead of the occupier, or (3) may make his own terms with the tenant as to paying the rates, and in no case is the tenant to lose his vote by means of such a transaction between his landlord and the overseers or between his landlord and himself. The overseer is bound to enter on the rate-book every occupier of rateable premises, and the occupier is not to lose his vote by reason of an omission to do this on the part of the overseer. These provisions, 'ex abundanti cautela,' are made of general application by 41 & 42 Vict. c. 26, s. 14. Such was and is

32 & 33 Vict. c. 41, s. 3. s. 4. ss. 7, 8.

[1] *Bradley* v. *Baylis*, 8 Q. B. D. 219.

the Household, or as it is more commonly called the 'Inhabitant occupier' franchise.

The lodger.

The Lodger franchise was given by the Act of 1867 to one who has resided in the same lodgings as a sole tenant for twelve months next preceding the 31st of July[1] in the year in which he claims to be registered, such lodgings being of the clear yearly value unfurnished of £10. By the Act of 1878 the lodger may during his period of residence have occupied different lodgings in the same house without invalidating his vote, and may be a joint occupier with another if the total rent is equivalent to £10 apiece.

41 & 42 Vict. c. 26, s. 6.

§ 3. *The Scotch Franchise before* 1884.

Scotch franchise in counties:

Until the year 1832 the Scotch representative system was in a condition even more strange and anomalous than the English. The county qualification was twofold, (1) a 'forty-shilling land of old extent' held of the Crown; or (2), if not of old extent, then rated in valuation books at £400 of valued rent.

The qualification was thus a purely freehold qualification under conditions more exacting than were required of the English freeholder.

in boroughs.

The boroughs elected their representatives on a still less popular franchise. Those entitled to be represented were the sixty-six royal burghs, of which Edinburgh alone had a member to itself. The others were divided into fourteen groups, of which each group was entitled to a member. On the occasion of an election the sheriff gave notice to the town council of each burgh; they each elected a delegate; the delegates met in their respective groups, and so elected the representatives of the burghs.

2 & 3 Will. IV, c. 65.

The legislation of 1832 altered the distribution of seats and swept away the old franchises except in so far as individual vested interests were affected. It created property and occupation franchises in counties, and an occupation franchise in boroughs, following the model of the English franchises of

[1] The date was altered to the 15th by the Act of 1878.

that nature both in character and amount, except in so far as Scotch property law compelled differences of detail[1].

In like manner did the Scotch Reform Act of 1868 reduce the property and occupation franchise in counties and introduce the household and lodger franchise in boroughs, leaving existing borough franchises intact. 31 & 32 Vict. c. 48.

§ 4. *The Irish Franchise before* 1884.

The Irish borough and county franchise before the Reform Bill exhibited much the same features as the English representative system. The forty-shilling freehold had qualified for the franchise in counties from the earliest days of Irish Parliaments, but from the beginning of the reign of George I the exercise of the franchise had been confined to Protestants. In 1793 the Irish Parliament removed this, with other disabilities, and the forty-shilling freeholders became so important an element in the Parliamentary constitution that their action was mainly instrumental in securing the admission of Roman Catholics to Parliament in 1829.

But in the year in which the Roman Catholic Relief Bill was passed a disfranchising bill also became law, by which no freeholder was entitled to vote for a county unless he had an estate of £10 a year.

The legislation of 1832 swept away the old borough qualifications except, as in England, in certain cases of freemen, and of freeholders in towns which were counties, and introduced the occupation qualification and extended the qualification in counties to leaseholders and copyholders: this last a somewhat idle boon, since there is no copyhold in Ireland. 2 & 3 Will. IV, c. 88.

The franchise was further extended by an Act of 1850 to £12 occupiers and £5 freeholders in counties, and to £8 occupiers in towns. In 1868, the lodger qualification was introduced in boroughs, as in England and Scotland; never- 13 & 14 Vict. c. 69.

[1] The clause in the Scotch Act of 1832 which creates a £50 occupation qualification on the analogy of the Chandos clause in the English Act of 1832 is expressly repealed by the Act of 1884.

theless the household qualification was only reduced from £8 to £4.

§ 5. *The Representation of the People Act*, 1884.

We are now in a position to consider the Act of 1884. It has been necessary to go through the details of some of the franchises created by previous Acts, because the Act of 1884 retains them, and they form a part of it. It must be borne in mind that the Act of 1884, though it has simplified the franchise, has not simplified the law relating to the franchise; the rules relating to electoral rights must still be sought in the clauses of various statutes, some of which are left in existence, and must be read into the Act, while others are repealed and their provisions embodied in it.

Effect of 48 Vict. c. 3.

But we can now set forth our electoral law for England, Scotland, and Ireland as uniform, with some few exceptions, in town and county, throughout the three kingdoms.

It will be simplest to group the existing franchises under the three great heads of qualification—Property, Occupation, Residence—and to point out in each case the statutory authority for the qualification. I think it well to keep these three kinds of qualification apart, for the difference between Occupation and Residence is a real difference: but it is common to describe the last two under the term Occupation, distinguishing three sorts of voters as comprised under this term, the *occupier*, the *inhabitant occupier*, and the *lodger*.

Property.

Property qualifications are the great exception to the uniformity created by the Act. They are limited in all cases to counties, and, in England, to certain towns which are counties [1]. They are untouched by the Act of 1884, except in respect of the multiplication of votes by fictitious qualifications. They

[1] There are now four, Bristol, Exeter, Norwich, and Nottingham, in which freeholders exercise the borough franchise. In other cities and towns which are counties corporate, 15 in number, this usage does not prevail.

are therefore more various throughout the three kingdoms than are the qualifications by Occupation and Residence.

They are as follows.

In England :—

Freehold, of forty shillings clear yearly value, if an estate of inheritance, or in occupation, or acquired by marriage settlement, devise, benefice or office. 8 Hen. VI, c. 7. 2 & 3 Will. IV, c. 45, s. 18.

Freehold, of £5 clear yearly value, if an estate for life, not in occupation or acquired as above described. 30 & 31 Vict. c. 102, s. 5.

Copyhold, or any tenure other than freehold, of £5 clear yearly value. 30 & 31 Vict. c. 102, s. 5.

Leasehold ; (1) of £5 clear yearly value, if originally created for a term of not less than sixty years ; (2) of £50 clear yearly value, if originally created for a term of not less than twenty years. 30 & 31 Vict. c. 102, s. 5. 2 & 3 Will. IV, c. 45, s. 20.

A sub-lessee or assignee of leasehold of this value is entitled to vote if in occupation [1].

In Scotland :—

Lands and heritages in proprietorship of £5 yearly value as appearing in the valuation roll. 31 & 32 Vict. c. 48, s. 5.

Leasehold of £10 clear yearly value if for life or originally created for a term of fifty-seven years ; of £50 clear yearly value if originally created for a term of not less than nineteen years.

In Ireland :— 13 & 14 Vict. c. 69, s. 2.

Freehold of £5 net annual value.

Rentcharges (subject to the provisions of 48 Vict. c. 3, s. 4) *and leases for life or lives* of £20 clear annual value. 35 Geo. III (Irish Act), c. 29, ss. 25, 30.

Leasehold of £10 clear annual value if created originally for a term of sixty years ; of £20 clear annual value if originally created for a term of fourteen years.

Occupation.

Throughout the United Kingdom there is a uniform qualification given to the occupier for twelve months before 48 Vict. c. 3, s. 5.

[1] *Chorlton* v. *Stretford*, L. R. 7 C. P. 201.

Qualification uniform in value.

registration—in England, Ireland, and in Scotch burghs, as owner or tenant, in Scotch counties as tenant, of any land or tenement within the county or borough of the value of £10.

These qualifications differ in three ways.

Difference in mode of assessing value,

(1) As to the mode of ascertaining the value of the qualifying tenement, it is—

In England, clear yearly value;

In Scotland, annual value appearing in valuation roll;

In Ireland, net annual value according to last poor-rate.

in requirements of residence;

(2) As to residence required of the occupier:—

In English and Scotch counties, and in Irish counties and boroughs, none is required.

In English boroughs residence during six months of the qualifying year in or within seven miles of the borough.

In Scotch burghs residence during the whole of the qualifying year, in or within seven miles of the burgh.

and of rate-paying.

(3) As to rating and payment of rates and taxes:—

In England the county and borough occupier must alike occupy land rated to the poor-rate, and by the 20th of July in the year of his claim to vote, all such rates as were due on the preceding 5th of January must have been paid.

The borough occupier must further have paid all assessed taxes due from him up to that date.

In Scotland the *county* occupier must have paid by the 20th of June in the year of his claim all poor-rates due from him up to the 15th of May: the *borough* occupier must have paid by the 20th of July all assessed taxes[1] due from him up to the 6th of July.

In Ireland the county and borough occupier must alike have been rated to the poor-rate, and must have paid by the 1st of July in the year of his claim all rates due up to the 1st of January.

[1] The change of assessed taxes into establishment licenses would seem to have greatly reduced the requirement of assessment. The house-tax is now the only tax to which the occupier can be assessed.

Statutory authorities.

The English occupation franchise depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, in counties, on 30 & 31 Vict. c. 102, s. 6; in boroughs, on 2 & 3 Will. IV, c. 45.

The Scotch depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, in counties, on 31 & 32 Vict. c. 48, s. 6; in burghs, on 2 & 3 Will. IV, c. 65, s. 11.

The Irish depends, as to *value*, on 48 Vict. c. 3, s. 5: as to *conditions*, on 13 & 14 Vict. c. 69, ss. 1, 5.

Residence.

The Householder.

The Household qualification is now uniform throughout the United Kingdom, and is given to the *inhabitant* occupier (whether he occupies as owner, as tenant, or in virtue of any office, service or employment) of a dwelling-house, or any part of a house occupied as a separate dwelling, which has been rated, and for which rates have been paid by certain dates in the year of claim, which dates differ in England, Scotland, and Ireland. Actual inhabitancy during every part of the year is not necessary, in point of fact a small period of actual residence will suffice, but where actual inhabitancy is discontinuous there must be 'constructive inhabitancy,' and this involves the 'intention of returning after a temporary absence, and a power of returning at any time without a breach of a legal obligation [1].' For want of such constructive inhabitancy a soldier occupying quarters from which he is required to be absent from time to time on duty is not entitled to vote though his quarters would otherwise have qualified him. For the same reason an undergraduate occupying college rooms from which he is excluded in vacation is not entitled to vote in respect of his rooms. But if a man let his premises for a term not exceeding four months his occupation is not so broken as to deprive him of his vote, though he reserve no power of returning at will to any part of the house during that period.

41 & 42 Vict. c. 3.

The creation of the household franchise dates from the Act of 1867, which applied it to English boroughs, and the Act

30 & 31 Vict. c. 102, s. 3.

[1] See *Atkinson* v. *Collard*, 16 Q.B.D. 254; *Tanner* v. *Carter*, 16 Q.B.D. 231.

31 & 32 Vict. c. 48, s. 3.

of 1868 which applied it to Scotch burghs. Its extension to counties in Scotland and England, to counties and boroughs in Ireland, and its application to dwellings occupied in virtue of any office, service, or employment was the work of the Act of 1884. But the qualification in this last case depends upon the house not being inhabited by the employer of the person claiming to vote.

48 Vict. c. 3, ss. 2, 3.

32 & 33 Vict. c. 41.

The provisions as to rating are complicated. The Act of 1867 made the franchise depend on the personal payment of rates. The Poor-rate Assessment and Collection Act of 1869 altered the law in the mode described on a preceding page. Its provisions were extended by the Registration Act of 1878; and were made applicable to Ireland by the Act of 1884; it is made the duty of the overseers throughout the United Kingdom to ascertain with respect to every dwelling-house who is entitled to vote in respect of it.

Supra, p. 109.

41 & 42 Vict. c. 26, s. 14.

48 Vict. c. 3, s. 9, sub-s. 7.

The Lodger.

The Lodger qualification is also uniform throughout the United Kingdom, and is given to every occupier, as lodger, of lodgings of the clear yearly value, if let unfurnished, of £10 for twelve months before a certain date in his year of claim, which date differs in England, Scotland, and Ireland. The lodger is not disqualified, in England and Ireland at least, because he has occupied different lodgings of the requisite value in the same house, nor because he occupies them jointly with another lodger if the aggregate value is sufficient. The lodger franchise was created for English boroughs by the Act of 1867, for Scotch and Irish boroughs by the Act of 1868, and for counties in England, Scotland, and Ireland in 1884.

30 & 31 Vict. c. 102, s. 4.

31 & 32 Vict. cc. 48, 49.

48 Vict. c. 3, s. 2.

Ancient franchise reserved.

There still exist two ancient franchises reserved by the successive Reform Acts of the century: the 40*s.* freehold qualification in certain towns which are counties under conditions laid down in § 18 of the Reform Act; and the qualification as burgess or freeman in those towns in which, prior to 1832, such a qualification gave a right to vote. But the Reform Act of 1832 imposed restrictions as to residence and the mode of acquiring the freedom which have not been relaxed. The

freeman must have acquired his freedom by birth or servitude, and must during the year preceding the date of his claim to registration have resided in or within seven miles of the borough.

The City of London. In the City of London this franchise still holds, but with some variations from the above rule. It is not enough to be a freeman of the City; in order to qualify, the voter must also be a liveryman of one of the City Companies. He may further acquire the freedom by purchase, and may reside within twenty-five miles of the place of poll. 30 & 31 Vict. c. 102, s. 46.

The Universities. The only qualification which remains to be noted is that which confers the right to vote for a University constituency. Graduates on the electoral roll of Oxford, Cambridge, Dublin, and London; the Chancellor, the Professors, the members of the University Court and General Council of Edinburgh, Glasgow, St. Andrews, and Aberdeen are qualified to vote for their respective Universities if of full age and not subject to any legal incapacity.

Summary. It remains to summarise the effect of recent legislation on the franchise.

Property constitutes a qualification in counties only, and, in England, in certain towns which are counties. As this qualification is wholly untouched (except in the provisions relating to fagot votes) by the Act of 1884, the rules respecting it have to be sought in various statutes ranging from 1429 to 1884.

Occupation is now required to be of lands or tenements of a uniform value in towns and counties throughout the United Kingdom, but the conditions of the qualification have to be sought in the previous Acts which deal with the representation of the people; they differ in towns and counties, and the test of value is different in each of the three kingdoms.

Residence, as a householder or lodger, is now a uniform qualification in counties and boroughs throughout the United Kingdom; the difficulties respecting these franchises consist in the ascertainment of the law respecting rating, on which

the household franchise depends, and in the distinction of a householder from a lodger.

§ 6. *Incapacities and Disqualifications.*

Sex. 1. The franchise is limited in the first instance to persons of the male sex. The question of the common law disability of women to exercise the franchise arose incidentally upon the interpretation of s. 3 of the Representation of the People Act, 1867. The word 'man' is there used to describe the persons entitled to vote; the Reform Act, 1832, has used the words 'male person' for this purpose, and in the mean time an Act (13 & 14 Vict. c. 21) had provided that 'in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary is expressly provided.' But the Court of Common Pleas held firstly that since the Acts of 1832 and 1867 were to be read together, the words used in the Act of 1832 amounted to an express provision that 'man' did not include 'woman' in the Act of 1867; and secondly that the qualification was conditional on the absence of legal incapacity, and that women were at Common Law incapable of exercising the Parliamentary franchise [1].

Age. 2. Infancy, whether or no it be a disqualification at Common Law, is made a disqualification by 7 & 8 Will. III, c. 25, s. 7, and by subsequent Acts extending the franchise to persons who were not capable of exercising it when that Act was passed.

A man is supposed to attain full age at the end of the last day of his 21st year; and, as the law takes no account of parts of a day, he may thus exercise the franchise on the day before his 21st birthday.

Peerage. 3. No Peer other than a Peer of Ireland who has been actually elected and is serving as a member of the House of Commons has a right to vote. This disability appears to have rested on usage, and on repeated resolutions of the House of Commons, which though they could not make the law must be regarded as high authority on the rules of electoral law;

[1] *Chorlton* v. *Lings*, L. R. 4 C. P. 374.

it is now finally settled by a decision of the Court of Common Pleas in 1872 upon the appeal of Earl Beauchamp against the overseers of Madresfield [1]. 'Upon the authorities as well as upon principle,' said Bovill C. J., 'I am clearly of opinion that a peer of Parliament has no right to vote in the election of members of the House of Commons [2].'

Returning Officer.

4. Returning officers are not entitled to vote unless the votes for two candidates should be equal, in which case the returning officer has a casting vote.

Employment.

5. Employment of certain kinds is a disqualification.

The disabilities formerly imposed on revenue, excise, and stamp officers were removed in 1868 and 1874, those which attached to the police in England and Scotland were removed in 1887. But there are still in Ireland disqualifications attaching to police and police officials. (6 & 7 Will. IV, cc. 13, 29.) The disabilities connected with employment may now however be said to rest, at the present day, almost entirely on employment for the purpose of an election.

At elections. 35 & 36 Vict. c. 33, s. 25.

An agent, canvasser, clerk, messenger, or person in any sort of employment for purposes of an election, may not vote: his vote may be struck off on a scrutiny, and the voter commits a misdemeanour. This disqualification is created by the Representation of the People Acts of 1867 and 1868.

19 & 20 Vict. c. 58, s. 8. 24 & 25 Vict. c. 84, s. 13.

In Scotland the assessors of burghs and counties, a part of whose duties it is to attend to the registration of voters, are disqualified from voting for the constituency in which they are so employed.

[1] L. R. 8 C. P. 252.

[2] This disability must be distinguished from the convention by which peers take no part in the election of members to serve in the House of Commons. A *sessional* order of the House of Commons declares that it is 'a high infringement of the liberties and privileges of the House for any Lord of Parliament or other peer or prelate . . to concern himself in the election of members to serve for the Commons in Parliament.' A sessional order of the House of Commons cannot of course affect the legal rights of persons outside the House, and would be in abeyance during a prorogation or dissolution of Parliament. The abstention of peers from political action at such times must be regarded as an act of courtesy extended by one House to the other.

Aliens.

6. An alien is disqualified from voting by the rules of Common Law; and from the rights conferred upon aliens by the Naturalisation Act of 1870 are expressly excepted the right to qualify, unless naturalised, for any office, or parliamentary or municipal franchise.

33 & 34 Vict. c. 14.

Mental unsoundness.

7. The right of a person of unsound mind to vote must depend upon the kind and degree of his mental infirmity. An idiot would unquestionably be disqualified; a lunatic, if so found upon commission, would probably be held to be disqualified; the question has not arisen, and the cases decided appear to relate to persons of known unsoundness of mind who were nevertheless not regarded as wholly incapable of other business. Their votes were allowed [1].

Conviction of felony:

8. Conviction of treason or felony is a disqualification, unless either the term of punishment has been served or a free pardon has been obtained. Corrupt practices at a Parliamentary election are only a misdemeanour (except in the case of personation which is felony), but a conviction for corrupt practices disqualifies the offender for seven years for voting at any election. A candidate or agent guilty of certain illegal payments, or hirings not amounting to corrupt practices, is disqualified for that place for five years.

33 & 34 Vict. c. 23, s. 2.

of corrupt practices.

Alms.

9. No one is entitled to be registered as a voter who has been within the twelve months next preceding the last day of July in each year in receipt of parochial relief or other alms such as 'by the law of Parliament now disqualify from voting.'

2 Will. IV, c. 45, s. 3 ; 30 & 31 Vict. c. 102, s. 40.

But this disqualification does not now extend to parochial relief given in the form of medical or surgical assistance.

48 & 49 Vict. c. 46.

Alms.

It is not easy to determine what alms, other than parochial relief, disqualify; but it seems safe to say, on the authority of *Harrison* v. *Carter*, that it is not the character of the alms or the position of the person distributing them, but the condition of the voter who receives them, which determines the right to vote. Where alms are given to persons who would, but for the receipt of such alms, come upon the parish, it is obvious 'that

[1] See cases collected in Rogers on Elections, ed. 14, vol. i. pp. 118, 119.

persons in that position are just the persons who are most likely to be susceptible of manipulation for a purpose which the legislature has always been anxious to discourage, and peculiarly open to a temptation from which this enactment was meant to shield them[1].'

Fagot votes.

It will be obvious from the description which has been given of the Property qualification in counties that it would be possible to multiply votes by the creation of a great number of small freeholds, each worth forty shillings a year. The practice was met by Acts passed early in the eighteenth century, by which the splitting of interests in houses and land with a view to the multiplication of votes for election purposes was forbidden, and conveyances made with such intent were declared void. But the fraudulent intention was made the ground of avoidance, and the Act was held to extend only to conveyances not intended to give any real interest, made for the purpose of a particular election, and with an understanding that the property should be reconveyed when the transaction had served its turn. The legislation of 1832 dealt with such fictitious qualifications in two ways. First, by requiring in the case of all qualifications that the voter should have possessed them for twelve months before the date of registration, and next by limiting, in the mode described above, the conditions under which the forty shilling freehold should constitute a qualification.

7 & 8 Will. III, c. 25; 10 Anne, c. 23, s. 1.

Reform Act.

Supra, p. 101.

Still, so long as a rent charge or a joint tenancy gave the franchise, it was easy for a landowner to multiply estates of inheritance, such as would confer votes, without materially inconveniencing himself in the enjoyment of his property.

Rent charges.

The Representation of the People Act, 1884, has put an end to this practice. The fourth section provides that no man shall be entitled to vote in respect of a *rent charge* except the owner of the whole of the tithe rent charge of a rectory, vicarage, or chapelry; and it provides that where two or more

[1] *Harrison* v. *Carter*, 2 C. P. D. 26.

Joint occupiers.

are owners as joint tenants, not more than one, if his interest is sufficient, shall vote, unless the joint tenancy has been acquired by 'descent, succession, marriage, marriage settlement, or will,' or where the joint tenancy is in the actual occupation of the owner for the purpose of carrying on trade or business. Joint *Occupation*, as opposed to joint *Ownership*, was dealt with, so far as concerns counties, by the Acts of 1867 and 1868, which provided that joint occupiers, if the aggregate value of the tenement sufficed, might vote to the number of two, but not more, unless the tenement had been acquired in one of the modes above described.

30 & 31 Vict. c. 102, s. 27.

31 & 32 Vict. c. 48, s. 14.

In cities and boroughs joint *occupation* is regulated by 2 & 3 Will. IV, c. 45, s. 29, and any number of joint occupiers of land or tenement, if the value of the land or tenement be sufficient to give a qualification to each, may vote in respect of the same premises.

Section III.

How they may choose.

§ 1. *Distribution of Seats.*

First it is necessary to ascertain what are the constituencies which choose members for the House of Commons. The present distribution of seats depends upon very recent legislation, but it is necessary to indicate, however slightly, the shares of representation which different parts of the country respectively enjoyed at different periods before the Act of 1885.

48 & 49 Vict. c. 23.

To the Model Parliament of 1295 were summoned two knights from each shire, two citizens from each city, two burgesses from each borough; and it seems clear that the sheriff directed his precept to such towns as he considered qualified within the terms of the writ.

Number of County members.

The county representation underwent little alteration down to 1832; it was varied only by the addition of counties previously unrepresented. In 1536 Monmouth acquired the

right to send two members, and each Welsh county one. The counties palatine of Cheshire and Durham were placed on a footing with the others in respect of representation in 1543 and 1673 respectively. The Union with Scotland added thirty members for counties, out of a total addition of forty-five, and the Union with Ireland sixty-four out of a hundred.

Number of borough members.

But the number of represented boroughs fluctuated considerably during the middle ages. In the reign of Edward I 166 were summoned to return members, but the normal or average number which actually sent members appears to have been 99, of which London assumed, and by custom acquired, the right to return four.

Causes of fluctuation.

The towns were not very anxious to return members, for the members had to be sent to Westminster or wherever the Parliament assembled, and maintained at the expense of their constituents[1]. Again, the borough which returned members was rated higher than the county in the proportion of a tenth to a fifteenth[2], while the town which returned no members shared the rating of the county. And in addition to the unwillingness of the towns we must take into account the action of the sheriff, who might withhold the writ, sometimes arbitrarily, sometimes because a town had become depopulated or decayed.

[1] The payment of their members appears to have been a common law liability of the constituencies. The knights, citizens, and burgesses took home with them their writs *de expensis levandis* as a matter of course at the conclusion of a session. The customary charge was 4*s.* a day for a knight of the shire and 2*s.* a day for a citizen or burgess, and these charges were secured by 35 Hen. VIII, c. 11, in the case of the newly enfranchised counties and towns in Wales and Monmouth, repealed only in the present reign. As a seat in Parliament became more of an object of ambition, members promised, at elections, to serve freely (4 Parl. History, p. 843). The right remained in existence, and in 1681 Lord Nottingham decided in favour of a member for Harwich who sued his constituents for his wages. Lord Campbell, writing in 1846, expresses an opinion that the common law right survives, and that a member might still insist upon the wages fixed by ancient custom; but it may be doubted how far the old liability would attach to the new constituencies created by successive Reform Acts.

Campbell, Lives of Chancellors, iii. 420.

[2] Stubbs, Const. Hist. iii. 449.

Large additions to the borough representation were made during the reign of Henry VIII and onwards until the reign of Charles II. Some towns were added by royal charter; some by statute; some petitioned for the revival of rights which had lain dormant for centuries. In the reign of James I there was a strong tendency to revive such ancient and forgotten rights of representation, and the House of Commons resolved on the 4th of May, 1624, 'that a borough cannot forfeit this liberty of sending burgesses by non-user.'

It is impossible to doubt that, of the boroughs added by royal charter, many were added not because of their importance, or for the value of their voices in the deliberations of Parliament, but because from their smallness and lack of political interest they could be relied upon to return nominees of the Court. And in addition to the boroughs which were never intended to express a free opinion in politics, there were those which had once been thriving ports or seats of manufacturing industry, which had dwindled and decayed as wealth and commerce moved northwards, and had fallen under the influence of a great landowner or proprietor of boroughs; or again it happened sometimes that the nature of the franchise might be such as to deprive the representation even of a large and thriving town of any value in so far as it meant the expression of local opinion.

It would be easy to multiply illustrations of the smallness, the corruption, the non-representative character of the constituencies which existed before 1832. It is enough to say that it was alleged, and with apparent truth, at the end of the last century, that 306 members were virtually returned by the influence of 160 persons; it is certain that the Reform Bill of 1832 had to deal with nine boroughs in which the constituencies did not exceed fifteen voters.

Effect of reforms of 1832, 1867.

The Reform Act of 1832, and the Representation of the People Act of 1867, both tended to diminish or take away the representation of those places which had ceased to express any local or mercantile or political interest, and to give

members to those places which from their population or importance had acquired a fair claim to be represented in Parliament.

There is no great object to be gained by following in detail the transference of political power from landowners and boroughmongers to communities which possessed numbers, interests, and wants. The following table will show the distribution of seats which existed before the Reform Bill of 1832, and the mode in which Scotland and Ireland have acquired representation at the expense of England.

1832.

England and Wales	513
Scotland	45
Ireland	100
	658

1832. By 2 & 3 Will. IV, cc. 45, 65, 88.

England and Wales	500
Scotland	53
Ireland	105
	658

1867. By 30 & 31 Vict. c. 102.
1868. 31 & 32 Vict. cc. 48, 49.

England and Wales	495
Scotland	60
Ireland[1]	103
	658

1885. By 48 & 49 Vict. c. 23.

England and Wales	495
Scotland	72
Ireland	103
	670

The Reform Act of 1832 may, in its process of disfranchisement, be compared with the Redistribution Act of 1885, 48 & 49 Vict. c. 23.

[1] Two Irish seats which had suffered temporary disfranchisement were now permanently left out.

though the reasons and the results of the disfranchising process are widely different.

The Act of 1832 a disfranchising measure.

The Reform Act had to deal with a great number of constituencies which had ceased to represent anything but the caprice or ambition of a few individuals. It disfranchised in England alone 56 boroughs absolutely, and 31 to the extent of depriving each of one member. The seats thus taken from the rotten boroughs were given to counties and large towns,

Effect of uniform franchise on redistribution.

on the principle that the representation of the country in Parliament should not be the representation of numbers only, but of communities in which the population was numerous: indeed it was impossible that representation should be other than local, so long as the franchise in counties differed from the franchise in towns. And for this same reason, until the franchise was made uniform, a measure of redistribution was necessarily a measure of disfranchisement. Where a borough ceased to return members its electors did not merely cease to have a member to themselves; with the exception of those who might possess the county qualification, they ceased to be electors at all.

The Act of 1885 disfranchises towns,

The Redistribution Act of 1885 has deprived in England 79 boroughs of their separate representation, in Scotland 2, in Ireland 22. It has deprived 36 boroughs in England and 2 in Ireland of one member each, and has taken one member from the county of Rutland.

but not electors.

But the Redistribution Act does this without depriving a single elector of his right to vote; for since the occupation, household, and lodger qualifications are now made uniform in county and borough, the borough which ceases to return a member drops into the county constituency in which it is geographically situate; its electors become electors for that division of the county. They do not lose their votes, though their votes may lose something of their former importance.

Is based on numbers.

The Redistribution Act of 1885 differs from its predecessors in that it departs to a great extent from the principle of local representation, and is professedly based on an attempt

to divide the members equally, or with a rough attempt at equality, among the population.

Before the Act became law the average throughout the country of population to members was, in counties, 78,000, in boroughs, 41,200, to a member. But this proportion was not preserved: for instance, 79 boroughs in England, with populations under 15,000, each returned a member, and 36 boroughs, with populations under 50,000, each returned two members.

The Redistribution Act starts on the principle, sacrificed to some extent in favour of local representation, that the proportion of 54,000 to a member should be the basis of calculation. All towns with a population of less than 15,000 are thrown into their respective counties, whether or no they have previously returned members. Towns which have more than 15,000 inhabitants and less than 50,000 are to return one member; those which have more than 50,000 and less than 165,000 are to return two members; and beyond this an additional member is given for every additional 50,000 of population; and the county representation is based in like manner upon numbers.

Exceptions.

The Universities are exceptions from the general principle of the Act. Oxford has more than 6,000 voters, Cambridge about 6,700, Dublin about 4,500; each returns two members. Glasgow and Aberdeen combined have about 8,700 voters; Edinburgh and St. Andrews about 9,100. Of these last, each returns one member, and so does the University of London with about 3,800 voters [1].

Single-member constituencies.

But the Redistribution Act makes a further change and departure from the traditions of our representative system; a change which follows not unnaturally from the attempt to proportion members to population throughout the country. Except in the cases of the Universities of Oxford, Cambridge, and Dublin, of the City of London, which is reduced

[1] As regards the number of voters the Universities compare favourably with several of the Irish Constituencies—with Galway (1759), Kilkenny (1769), Newry (1872).

from four members to two, and of those towns which have hitherto combined the possession of two members with a population between the limits of 50,000 and 165,000, the constituencies return one member apiece. For instance, Wolverhampton, which returned two members, receives an additional member, and is cut into three wards or constituencies. Liverpool, which returned three members, now returns nine, and is divided into as many constituencies. Lancashire, which returned eight members in four divisions, now returns twenty-three members in twenty-three divisions. Except in the cases which I have named as exceptions, in which the principle of the 'community has still been preserved,' the Act adopts, said Mr. Gladstone [1] :—

'not absolutely as a uniform, but as a general and prevailing rule the system of what is known as one-member districts. The one-member district is, as far as England is concerned, almost a novelty, because in a system of representation which counts and reckons more than six centuries of life, what began at the Reform Bill [2] may be considered almost a novelty. The recommendations of this system are, I think, these—that it is very economical, it is very simple, and it goes a very long way towards what is roughly termed the representation of minorities [3].'

§ 2. *Registration.*

Registration.

It is a condition precedent to the exercise of the right to vote that the voter should be upon the Register. This preliminary to the enjoyment of the franchise was first introduced when the franchise was remodelled in 1832, and the rules respecting it have been dealt with by various statutes.

[1] CCXCIV. Hansard, 380. Debate of Dec. 1, 1884.

[2] This is not strictly accurate. Edward IV gave by charter the right of returning one member to Wenlock. The Welsh counties and county towns each returned a member by a statute of Henry VIII; so did Bewdley, Higham Ferrers, and Banbury, enfranchised, the first two by Mary, the last by James I.

[3] It can hardly be said that in the elections which have taken place under the new law the representation of minorities was much advanced by the single-member system.

As this book is not a manual of election law I do not propose to go into the rules of Registration in detail. It is enough to describe the practice in outline for England, as settled by the Registration Act, 1885. 48 Vict. c. 15.

Duties of Clerk of the peace;

It is the duty of the clerk of the peace in a county, of the town-clerk in a borough, to send to the overseers of every parish or township, on or within seven days of the 15th of April in each year, a precept. The precept contains a description of the qualifications which entitle persons to be registered as voters, and the order and dates of the things which the overseer is required to do. By following the chief instructions conveyed in this precept we may obtain some knowledge of the process of registration.

of the overseer,

The overseer must in April or May ascertain who is entitled to be registered as an inhabitant occupier of a rated dwelling-house, and must enter the names of such persons in a column of the rate-book. And if rateable property is not rated, the overseer must act in respect of the inhabitant occupiers of it as if it was rated. (41 & 42 Vict. c. 26, s. 14.)

in respect of owners,

Before the 20th of June he must publish, if in a county constituency, the existing register of ownership voters, and must give notice to any £10 occupier who has not paid his rates.

of occupiers,

Before the 22nd of July he must make out a list of such occupiers as, not having paid their rates by the 20th of July, are disqualified. And before the 31st of July he must ascertain from the relieving officer of the parish the names of all persons disqualified by receipt of parochial relief.

Before the 31st of July he must also make out a list of occupiers, that is, of all persons whom he has ascertained to be qualified as £10 rated occupiers, as inhabitant occupiers, and, if in a county, as £50 rental occupiers [1]. He must make out a list of lodgers already on the register *who have sent in* of lodgers.

[1] The provision of the Act of 1832, which created this qualification, was expressly repealed by the Act of 1884, but the rights of persons entitled to be registered under this qualification were saved by s. 10 of the Act of 1884.

their claims to appear in respect of the same lodgings; and, if in a county, a list of ownership claimants.

Claims and objections.

By the 20th of August all new claims have to be sent in, and the lists, together with notices of objections, have to be published on the door of every church or public chapel in the parish.

By the 25th of August the lists of occupiers and old lodgers, and of claims and objections, must be sent by the overseer to the town-clerk in a borough, to the clerk of the peace in a county, with the addition of a copy of the ownership register, and of lists of claims and objections in respect of ownership.

The Revising Barrister,

In September the Revising Barrister comes round and adjudicates upon disputed claims and objections to names existing on the Register: from his decision an appeal lies on a case stated by him, to the Queen's Bench Division of the High Court, and on the result of the revision the Register is made out, containing three lists if it is for a county, two if it is for a borough. These are lists of ownership, occupation, and lodger voters; the ownership list is omitted in boroughs. The Register, thus made up, comes into force on the ensuing 1st of January, unless accelerated by special legislation.

the Register,

It will be seen that much care is taken in these provisions on behalf of the occupier. The ownership voter must claim in order to get on to the Register, but once there he need not make a fresh claim. The lodger voter has to claim afresh every year. The occupier is privileged to be entered by the overseer on the occupier's list without needing to make a claim.

A man therefore who desires to vote for a county or borough must first obtain some one of the qualifications which have been set forth above, and next he must ensure that his name is placed upon the Register. But he may be subject to disqualifications which, if known and urged before a Revising Barrister, would have disentitled him to be placed upon the Register; and it has been questioned how far the evidence furnished by the Register is conclusive not only upon the

how far conclusive.

returning officer who receives the votes, but upon the Court which may have to inquire into the validity of elections.

The question turns on the construction of s. 7 of the Ballot Act, which enacts that no one shall be entitled to vote whose name is not on the Register; that every one shall be entitled whose name is on the Register, but that 'nothing in this section shall entitle any person to vote who is prohibited from voting by any Statute or by the common law of Parliament.' 35 & 36 Vict. c. 33, s. 7.

And this exception to the conclusiveness of the Register has been interpreted not to include 'receipt of parochial relief, non-residence within proper distance of the borough, non-occupation, insufficient qualification.' 'It does not mean persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the Register: it means persons who from some inherent or for the time irremoveable quality in themselves have not, either by prohibition of statute or of common law, the status of parliamentary electors[1].'

The votes of such persons might be rejected by the returning officer, or if accepted by him might be struck off at a scrutiny upon an election petition.

Thus an undergraduate of full age who, in default of objection, was placed on the Register of parliamentary voters for the City of Oxford in virtue of the occupation of college rooms, would be entitled to vote. Not so an infant undergraduate in a like position.

§ 3. *Mode of Election.*

The process by which an election is made has been described, in its preliminary stages, in an earlier chapter. It has been described up to the point at which the returning officer[2]

[1] *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734.

[2] The returning officer for a county, or town which is a county, is the sheriff, or a deputy appointed by him where there are divisions of the county and the sheriff does not act in all. In boroughs which are incorporated the mayor is the returning officer; in others a returning officer is provided by statute, or appointed by the sheriff. In the Universities of Oxford, Cambridge, and London, the Vice-Chancellor

Effect of the Ballot Act.

receives the writ directing him to procure an election. As the process of election is now governed by the Ballot Act of 1872, it is worth noting that the changes effected by that Act, apart from details of procedure, relate to the publicity (1) of the nomination, (2) of the poll. Until that date the nomination took place at a hustings. The candidates were proposed and seconded in commendatory speeches, addressed for the most part to a casual crowd, chiefly composed of persons who were not entitled to vote. The candidates explained their political views, and, if the election was contested, a show of hands was demanded by the returning officer. Whatever the result of the show of hands it had no effect on the election. A poll was demanded on behalf of that candidate for whom fewest hands were held up, and on the days and at the place fixed for the poll the voters announced publicly the name of the candidate for whom they desired to vote. The disorders of the nomination and the possible intimidation of voters who voted openly were the evils which the Ballot Act was designed to remedy.

Rules of Election.

35 & 36 Vict. c. 33.

The present provisions of the law with respect to the conduct of an election depend upon the Parliamentary and Municipal Elections Act, better known as the Ballot Act, of 1872. The returning officer, upon the receipt of the writ (of which a form was set out on page 55), must give notice of the day and place of election, and of the poll if the election is contested; and he must do so, in the case of counties, within two days of receiving the writ, in the case of boroughs, on the day of its receipt or the following day. The election must take place, in the case of counties within nine days, in the case of boroughs within four days, from the receipt of the writ, and within those limits the returning officer may fix the day. The candidates have to be nominated on the day

The nomination.

16 & 17 Vict. c. 15.

is the returning officer; in the University of Dublin the Provost; for Edinburgh and St. Andrews the Vice-Chancellor of the University of Edinburgh; for Glasgow and Aberdeen the Vice-Chancellor of the University of Glasgow.

fixed for the election by the returning officer. The nomination is made in writing, each candidate being proposed and seconded by a registered elector for the constituency; the names of eight other registered electors must be affixed to the nomination paper as assenting to the nomination.

The poll.

If within an hour of the time fixed for the election no more candidates are nominated than there are vacancies, the election is then made and the names returned to the Crown office in Chancery. If there is a contest the election is adjourned to a polling day, to be fixed by the returning officer: in a county, not less than two nor more than six clear days—in a borough, not more than three clear days—from the day fixed for the election.

41 & 42 Vict. c. 4.

48 Vict. c. 10.

Polling places are to be fixed conveniently as to number and situation by the local authorities, and the poll is to commence at eight in the morning, and conclude at eight in the afternoon. During these hours the voter, qualified and registered as above described, can deliver his vote at the polling place of his district by ballot. A paper is delivered to him containing the names of the candidates, and he places a mark, which he is able to do in secret, against the name or names of those for whom he desires to vote. The paper is placed in a box; at the conclusion of the poll the polling boxes are sent to the returning officer at the place of election, the votes are counted, and the poll declared. The writ is then endorsed by the returning officer with a certificate in the following form:—

I hereby certify, that the members (*or* member) elected for —— in pursuance of the within-written writ, are (*or* is) A. B. of —— in the county of —— and C. D. of —— in the county of ——

(Signed)

X. Y.

High Sheriff (*or* Sheriff *or* Mayor *as the case may be*).

The writ thus endorsed is returned to the clerk of the Crown in Chancery.

In the Universities, English, Scotch, and Irish, the Ballot

24 & 25 Vict. c. 53. Act does not apply, and a voter can deliver his votes orally, or by means of a voting paper sent under certain formalities from the place of his residence.

10 & 11 Vict. c. 21. During the day appointed for the nomination or election, or for taking the poll for an election, no soldier within two miles of any place where such nomination or election is made, or poll taken, is allowed to go out of barracks, unless to relieve guard, or to record his vote.

§ 4. *Representation of Minorities.*

Schemes for representing minorities: There is a matter which cannot easily be passed over in dealing with the mode in which electors should choose their representatives. I refer to the attempts which have been made in various ways to secure what is called the representation of minorities. As the electorate becomes larger and the constitution more democratic a fear has arisen in the minds of some political thinkers lest party organisation should drive into two hostile camps what might otherwise be an unmanageable multitude of too independent voters; a fear lest all freedom and variety of political thought should be lost from the necessity, in order to produce any result at all, of drawing up a definite programme of adherence to certain doctrines or of fidelity to a certain individual. What is called the representation of minorities figures under various forms, and really means different things to different minds.

(1) fancy franchises; First, there is a plan which found favour with the promoters of the abortive reform bills of 1854, 1859, and 1866; a plan which was introduced, only to be rejected, into the bill of 1867. It had for its object to confer additional voting power on persons possessed of qualities supposed not to be too common, on the educated or the thrifty man. We may take the propositions of Lord John Russell's bill of 1854 as a fair illustration. It was intended by that measure to confer the franchise on persons enjoying salaries of £100 a year, or incomes of £10 a year from Government Stock; who paid

40*s.* income tax or assessed taxes, possessed a deposit of £50 in the savings bank, or were graduates of any university [1].

Qualifications of this nature are open to many objections. Some would be very easily created for the purpose of an election. Some might be of a fluctuating character. The universities are for the most part represented already. At any rate, these 'fancy franchises,' as they have been called, were never favourably received by the legislature.

(2) self-made constituencies;

Another idea, which has clothed itself in the phrase of minority representation, is based on the desire to secure expression for opinions, perhaps of political importance, which may not be the opinions of the majority in any assignable locality. It is desirable that such opinions should find utterance: as a matter of fact there are but few opinions held by any number of men which have not a Parliamentary supporter; but the absolute security of a representation of views can only be attained, if indeed it is attainable, by the adoption of Mr. Hare's scheme, and by the abolition of local constituencies altogether.

By this process the number of voters would be divided by the number of seats, and any person would be elected who obtained a number of votes equal to the result of the division. The voter would arrange several candidates in the order of his choice, and his vote would be assigned to the candidate who stood highest on his list, whose number was not yet full. One advantage of the scheme would be that a voter would be less liable to the risk of his vote being thrown away. For it may well happen, under our present system, that a man may be in a permanent minority in the constituency of which he forms a part. Another advantage would be found in the better chance of recognition of exceptional individual merit or of special interests or opinions. But, as Mr. Bagehot has very forcibly pointed out, the scheme, in so far as its machinery did not fall, as it probably would fall, into the hands of party organisers, would give expression only to extreme opinions

[1] Molesworth, History of England, iii. 20.

whose adherents could muster perhaps one or two constituencies. For the bulk of the voters would be driven by party managers into one of the two party camps because their gradations of opinion would not be so strongly marked, nor their desire to enforce them so keen as to make it possible to construct a variety of constituencies, each just off the strict party lines. Where such lines were departed from, the departure would be brought about by the enthusiastic votaries of an impracticable ideal, or by the admirers of the fashionable hero of the hour.

(3) three-cornered constituencies;

There is another form of minority representation, which has for its object not to give greater political power to deserving persons, nor to secure Parliamentary utterance for a variety of views, but simply to diminish the power of the majority by making the minority rather larger. Such is the ground for the institution which prevailed from 1867 to 1885, of 'three-cornered constituencies.' More strictly described, it consists in giving to each voter in some large constituencies, returning three or four members, one vote less than there are seats to fill. The result of this is the return of one member who represents the minority, unless the majority is so large and so well drilled as to be able to spare votes enough to win all the seats.

There was a patent objection to a system which reduced the Parliamentary representation of the majority of a large city to a level with that of the smallest town entitled to return a member. Liverpool, for instance, returned three members; each voter had but two votes: the majority of Liverpool was Conservative; the Liberal minority usually secured one seat; on a party division, therefore, the voting strength of Liverpool was no more than that of Eye, since one of its three members neutralised the vote of one of the other two.

This objection would have been removed if the United Kingdom had been divided into constituencies of equal size, if each had returned three members, and if no voter had been allowed to vote for more than two candidates. All would then have fared alike, and in each constituency the minority, unless it was inappreciable in numbers, would have been represented.

But there are arguments, based on wider grounds, for and against attempts to break the power of a majority by making the minority rather larger. So long as, on all important questions, a member's mind has to be absolutely settled, if he is to obtain or keep his seat; so long, in fact, as a member of the House of Commons is expected to obey with the unquestioning obedience of a soldier the orders of his party leaders, the size of a minority might seem to matter little. A minority, however small, can make itself heard; it can embitter the conduct of public business by irritating opposition, or can impede it by obstruction; but a minority, however large, is still a minority on a party division. Against this it may be urged that if a majority is too large it is apt to become unpractical, each member assuming that he may safely vote against his party, if he pleases, without fear of bringing about a catastrophe. And again, if a minority is too small it is apt to become factious, and from the remoteness of the chances of succeeding to power it loses the sense of responsibility.

(4) proportional representation.

The last form which the question has assumed, and the last with which I propose to deal, is proportional representation; and I do not intend to enter that region of arithmetical jungle further than may be necessary to describe the object at which the system professes to aim. Its supporters desire primarily to give a wider choice to the voter, and by so doing to introduce variety into the representation, not in the sense of securing a hearing for exceptional views, or seats for men of exceptional abilities, but in the sense of obtaining a fuller representation of gradations and varieties of opinion based upon the same principles. In order to effect this they desire to see large constituencies returning considerable numbers of members, but returning them on a system which approximates to Mr. Hare's scheme, applied to a more limited area. The system must be admitted to be at present imperfectly worked out, and is not free from some elements of chance. But it will not be unfair to take the description of its pro-

cedure, which was given by Mr. Courtney, its most eminent political supporter, to the House of Commons. He would allow a great town to retain, as one constituency, all the members assigned to it; would give to each voter one vote, but would allow him to say how he will give his vote in an order of preference, supposing that it is not required by the first or second candidate of his choice.

Mr. Courtney's exposition.

'Take the strongest example,' he says, 'that of Liverpool, with nine members. Each voter would put a figure 1 against the name of the candidate whom he most desired to see elected, a figure 2 against a second to whom he desired to give his vote if the first did not require it, and so on. What follows at the end of an election? All the papers are collected together, and their numbers are known by the existing machinery. Suppose 40,000 votes were given, and there are nine persons to be elected, the first thing to be done, according to the plan of which I am speaking, would be to divide the 40,000 by 10, that is, one more than the persons to be elected, giving a result of 4,000. Any person who has 4,001 is sure to be elected, because the remaining votes could not be divided among nine people, each getting more; the candidate, therefore, who gets 4,001 is certain to be elected. That, I think, is plain to the majority of the House. The papers, having been shuffled together, are arranged in heaps, according to the names marked 1, and there would be a great number of heaps. Some of the heaps would exceed 4,001, and those candidates who were found to have that number would be elected. The heaps remaining after the 4,001 had been taken away would be distributed afresh according to the names marked 2. That would bring up some more papers. The candidate who got 4,001 votes in these heaps would be declared elected, and then there would be another distribution. The process would thus go on, until in the end the nine persons would be elected, each receiving 4,000 votes. I claim that the plan is simple and workable, and that it would secure the representation of the masses of your big towns.

It has been asked, "Are you going to represent numbers or interests?" There is no such distinction. The scheme which I am propounding gives representation to all numbers and to all interests [1].'

Various objects of the schemes.

The schemes which have been propounded under the general description of the representation of minorities in Parliament have, as it would seem, set forth with different objects. There is the attempt to secure additional power in the representation for the educated, the thrifty, and the well-to-do. This is the object of the so-called 'fancy franchises.' There is the attempt to secure representation for every opinion which can find supporters in the country equalling in number the result of the division of voters by seats; this is Mr. Hare's scheme. There is the attempt to break the power of the majority by increasing the size of the minority through the instrumentality of such a machine as the so-called 'three-cornered constituency;' and lastly, there is the attempt of the advocates of proportional representation to offer a wider choice to the voter, and to secure the return of independent members.

The practical form which the difficulty assumes under our existing system, may be tentatively stated thus:—The single-member constituencies may produce a variety of representation, but must needs do so by accident; they can only do so when the ward or division of town or county happens to contain a majority of voters of a special class or character. In the great majority of such constituencies candidates are chosen on strictly party lines; and since large bodies of men have some difficulty in coming to conclusions, the candidates of each side are selected by the really eager or extreme representatives of each party in the division.

The electors of such a constituency can only vote for one candidate. They must choose between two, and each one of the two may be the nominee of the most zealous and uncompromising members of the two political parties. It is very possible

[1] Hansard, vol. 294, p. 675. Debate of Dec. 4, 1884.

Possible effect of single-member constituencies.

that to a great many electors the two candidates are alike distasteful. Men of independent judgment may not care to vote for a candidate whose chief recommendation is, that under no circumstances will he withdraw his support from a given statesman, the leader of his party; or that he accepts with implicit faith a set of dogmas or a scheme of proposed legislation drawn up by active party managers. Yet if they do not vote for such a candidate, if they will not submit to what Mr. Courtney calls 'the pain and ignominy of being compelled to vote as some one tells you,' they must vote for his opponent, whose opinions may be yet more distasteful to them, or they must cease to exercise the privileges of an elector.

Summary.

Without pronouncing upon the merits of the last of the schemes which I have endeavoured to describe, it is not difficult to condemn all the others. It is impossible with a very extended suffrage to pick and choose among electors, and by means of fancy franchises to give greater political power to certain qualities. It is unnecessary to contrive elaborate devices for ensuring a hearing to eccentric or unpopular opinions: the press and the platform give us ample security against the misfortune of failing to be informed of every crotchet which has ever vexed the soul of man. We may endeavour to avert the 'tyranny of the majority' by making the minority a little larger; but a minority must needs be a minority in a world where two and three make five; and the tyranny attributed to a majority generally expresses the natural dislike to being beaten. But it is not desirable that politics should fall entirely into the hands of party organisers, as may not impossibly happen under the system of single-member constituencies with an extended franchise; and it is not desirable that the voter's choice should be limited to an alternative of extremes, and that politics should become the business or the recreation of fanatics, adventurers, or intriguers. The question resolves itself into a choice of risks—the risk lest party discipline, which in a large delibera-

tive assembly is practically necessary for the transaction of business, should be too far relaxed by the representation of opinions on a graduated scale; and the risk lest party organisation, drawn too close, should exclude from political life practical men who do not care to see opinions pushed to their logical results, and independent men who like sometimes to make up their own minds on the questions of the hour.

Section IV.

Privileges of the House of Commons.

Difficulties of the subject.

The privileges of the House of Commons have been the topic of much legal discussion, and difficulties have arisen, not unnaturally, in ascertaining the rules of which they consist; for they only obtain legal definition when cast in a statutory form, or when they have become the subject of judicial decision in the Courts of Law.

Statute Law on the subject is scanty. Privilege exists chiefly for the maintenance of the dignity of the House of Commons, and it is no wonder that the House thinks itself capable of maintaining its dignity without the aid of the legislature. Such Statute Law as exists has for its object the limitation of the prerogative of the Crown as against the House of Commons, and the limitation of the privileges of the House of Commons as against private rights.

There is also a mass of judicial decision, dealing for the most part with cases in which the Courts and the House have come into conflict, and from this it is necessary to select so much as is interesting and important.

Officers and procedure.

First, in order to simplify what follows, it is necessary to state that the House possesses certain officers for the general conduct of its business; that through these officers its privileges are enforced, and enforced by process of which the course has been under discussion, and the validity admitted by Courts of Law.

Privileges demanded.

Next, we come to the privileges themselves. Of these, some are specifically asserted and demanded of the Crown at the commencement of every Parliament. Three deal more especially with the relations of the House and the Crown—the privileges of free speech, of access to the Crown, and of having the most favourable construction put upon all their proceedings. One deals with the relations between the members of the House and other subjects of the realm—the privilege of freedom from arrest.

Privileges not demanded.

But there are other privileges not specifically mentioned on this occasion, though regularly asserted and enforced by the House. These are, the right to provide for the due constitution of its own body, the right to regulate its own proceedings, and the right to enforce its privileges by fine or imprisonment, or, in the case of its own members, by expulsion.

Disputes between House and Courts.

Lastly, we come to the questions of dispute which have arisen between the House and the Courts, and in these it would seem that the House has in the first instance misconceived the limitations on its undoubted privileges, and has then endeavoured to cure its error by an arbitrary assertion of exclusive right to define its privilege; in other words, to assume to itself what privileges it pleased.

Thus it has disputed the legality of a legal act, as in *Ashby* v. *White*, and treated such an act as a contempt. Again, it has endeavoured to legalise an illegal act, as in *Stockdale* v. *Hansard*. When the right of the House to do these things has been disputed, it has tried to settle the question off-hand by a resolution that its privilege covers the case, and that no court has jurisdiction to discuss the legality of anything which its vote has ordered.

This is the issue on which the conflict has turned between the House and the Courts. It is safe to say that the Courts have won the day.

Rules as to commitment.

The only other question of importance is comparatively technical. It relates to the power possessed by the House to commit for contempt, without assigning any other cause, or

any cause at all, in the warrant of commitment, or in the return to a writ of *habeas corpus*.

§ 1. *Officers of the House, and procedure for Contempt.*

A consideration of the privileges of the House of Commons may be assisted by some preliminary words as to the position and duties of the Speaker, by whom these privileges are claimed and through whom they are enforced; and further as to the machinery which the House possesses for recording its proceedings and for putting its privileges into effect.

The Speaker:

Little needs to be said of the history of the office of Speaker. From the first the Commons required and possessed a spokesman, to be their medium of communication with the Crown. At any rate, after 1377 there is a regular succession of Speakers described as 'pourparlour' or 'parlour et procuratour.' The forms of election by the House and of approval by the Crown were settled early in the fifteenth century, and have varied but little [1] from the proceedings already described.

Supra pp. 64-66.

his precedence;

The office is one of high dignity. The Speaker takes precedence of all Commoners, not merely by courtesy or by custom but by legislative enactment. An Act of 1689 [2] provides that 'the Lords Commissioners of the Great Seal not being peers shall have and take place next after the peers of the realm and the Speaker of the House of Commons.'

his duties—(1) as spokesman,

The duties of the Speaker are twofold. He is, firstly, the spokesman and representative of the House; as such he demands its privileges, communicates its resolutions, its thanks, its censures, its admonitions. He issues warrants by order of the House for the commitment of offenders against its privileges, for the issue of writs to fill vacancies among its members, for the attendance of witnesses, or the bringing of

[1] In the sixteenth century the Speaker was practically selected by the Crown and employed to express the royal wishes to the Commons. Stubbs, Const. Hist. iii. 468; Lectures, Mediaeval and Modern History, 272.

[2] 1 Will. & Mary, c. 21, s. 2.

prisoners to the bar. The symbol of his office is the mace which is laid before him on the table when he is in the Chair, and which, borne by the Serjeant-at-arms, accompanies him wherever he goes in his capacity of Speaker.

(2) as chairman.

Secondly, the Speaker is the chairman of the House, and in that capacity he maintains order in its debates, decides such questions as may arise upon points of order, puts the question, and declares the determination of the House.

The Chairman of Committees.

But the Speaker does not act as chairman when the House goes into Committee. The Chair is then taken by the Chairman of Ways and Means, who is chosen at the commencement of each Parliament for the purposes of the Committees of Supply and Ways and Means. The member thus chosen acts as chairman for other committees of the whole House, but upon occasion his place can be supplied by some other member from a panel of five chosen for that purpose by the Speaker.

Ch. vii. Sect. iii. § 2.

Deputy Speaker.

Difficulties have arisen for want of provision for supplying the place of the Speaker if he should be temporarily disabled by illness or accident from discharging his duties. Standing orders of the House, passed with the approval of the Crown, enabled the Chairman of Ways and Means to act as deputy-speaker on such occasions, and 18 & 19 Vict. c. 84 provides for the validity of acts required by law to be done by the Speaker, but done on such occasions by the deputy-speaker.

The Speaker is appointed afresh at the commencement of every Parliament. It is rare that the appointment should be made the subject of a party division; but, as a matter of fact, whenever the office falls vacant during the existence of a Parliament, the new Speaker is the nominee of the party which possesses for the time a majority in the House. On these occasions the House of Commons, after being summoned to the Bar of the House of Lords, is desired by the Lord Chancellor, on behalf of the Crown, to choose a Speaker. If a vacancy in the Chair should occur while Parliament is sitting a minister of the Crown who is a member of the House of Commons acquaints the House of the Queen's desire that

they should choose a Speaker. Either party is capable of producing men qualified beyond reproach to fulfil the duties of the Chair, and the Speaker of the last Parliament is usually accepted by the next without opposition. The need of impartiality created by the judicial duties of a Chairman makes the House shrink from investing the Speakership with the character of a party appointment.

The Speaker, the great officer of the House, may change as Parliaments change: he may lose his seat in the House at a general election, or be rejected as Speaker by the majority of a new Parliament. But under him there are subordinate offices which are not affected by dissolution of Parliament.

The holders of these permanent offices are the Clerk of the House and his assistants, the Serjeant-at-arms and his deputies.

The Clerk of the House of Commons has for his principal duty the record of the proceedings of the House. The Crown appoints him by letters patent under the Great Seal: he is technically styled 'Under-clerk of the Parliaments,' as distinguished from the Clerk of the House of Lords, whose proper title is 'Clerk of the Parliaments.' He signs all orders of the House, endorses the bills sent or returned to the Lords, and reads whatever is required to be read in the House. But his chief duty is to enter the proceedings of the House, and from these to prepare the journals, of the nature of which I shall have more to say later on. He has two assistants, clerks appointed by the Crown on the nomination of the Speaker, and removable only upon an address of the House.

The Clerk of the House.

Post, p. 174.

The Serjeant-at-arms enforces the orders, as the Clerk records the proceedings of the House. He too is appointed by letters patent under the Great Seal. He is the attendant of the Speaker when Parliament is sitting; when it is not sitting he may be called upon 'to attend her Majesty's person.'

The Serjeant-at-arms.

Inside the House his duties are to attend the Speaker

entering and leaving the House, to keep order in its precincts, to bring to the bar of the House persons who are summoned to attend there, or to introduce to the bar persons who are entitled to make communications to the House.

Outside the House he is charged with the execution of warrants issued by the Speaker in pursuance of an order of the House for bringing persons in his custody to the bar, for retaining them in his charge, or committing them to such place of detention as the House may order [1].

Process for enforcement of privilege.

The process by which the House enforces its privileges is by order to attend at the bar, or by order for the Speaker to issue a warrant for bringing the person summoned in custody of the Serjeant, or by a like order for warrant of commitment for contempt. The powers of the House in this respect were described by Parke B. in *Howard* v. *Gosset* [2].

'The House has power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience we need not inquire), to bring them in custody to the bar for the purpose of 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 it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge: and further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised.'

And, in construing warrants issued in virtue of these powers of the House, the rule was held to apply 'that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.'

The powers here referred to will require further discussion and illustration, but this brief statement of their character and the mode of their exercise may make it easier to understand the intervening matter which I have to discuss.

[1] For the officers of the House, see May, Parl. Practice, ch. vii.

[2] 10 Q. B. 451.

§ 2. *Privileges of the House demanded by the Speaker.*

The privileges of the House of Commons are claimed at the commencement of every Parliament, by the Speaker addressing the Lord Chancellor on behalf of the Commons. They are claimed as 'ancient and undoubted,' and are, through the Chancellor, 'most readily granted and confirmed' by the Crown. The claim of Privilege:

The practice of claiming these privileges was of gradual growth. As early as the reign of Henry IV, the Speaker demanded in general terms that he might be allowed to inform the king of the mind of the Commons, and that if he made any error in his communication he might have leave to correct himself by reference to the House.

In 1536 there is a definite demand of access to the Crown, in 1541 comes the demand for freedom of speech, and in 1554 for freedom from arrest, together with freedom of speech and of access. The journals during the reign of Elizabeth record for the most part a demand for 'ancient liberties,' or a use by the Speaker of 'ordinary' or 'accustomed' petitions. From other sources[1] we ascertain that these included the three claims first made together in 1554, and the practice seems to have become regular by the end of the 16th century. its history.

The privileges claimed of the Crown by the Commons are first expressed generally as 'their ancient and undoubted rights and privileges'; and then 'particularly that their persons and servants might be free from arrests and molestations; that they may enjoy liberty of speech in all their debates; may have access to her Majesty's royal person whenever occasion shall require; and that all their proceedings shall receive from Her Majesty the most favourable construction.'

So the House asks for three things: freedom of the person; freedom of speech; and certain rights of a merely formal character. These last admit of brief treatment, I will take

[1] D'Ewes Journal, pp. 65, 66.

them first; then I will deal with freedom from arrest and freedom of speech; then with certain privileges not expressly demanded by the Speaker; lastly with the limitation of privilege by Courts of Law.

(a) *Formal Privileges.*

'The best construction.'

The House has asked for, and is entitled to, liberty of speech in the matter and manner of debate; it is merely by courtesy that it asks to have the best construction put upon its proceedings.

Right of access.

The right of access is one which the House enjoys collectively, when an address to the Crown is to be presented by the Speaker, and is thus distinguishable from the right of each individual peer, as an hereditary counsellor of the Crown, to have audience of the Sovereign. But the House can communicate with the Crown through such of its members as are Privy Councillors, and can have access to the Sovereign in that capacity; in fact the privilege is only important as a mode of giving emphasis to any communication which the Commons may desire to make to the Sovereign.

The other two privileges specially mentioned are of great practical importance, and confer rights, not only against the Crown, but against the public.

(b) *Freedom from Arrest.*

The first of these is freedom from arrest for the persons of members during the continuance of session, and for forty days before its commencement and after its conclusion.

Object of this privilege.

The object of the privilege was doubtless to secure the safe arrival and regular attendance of members on the scene of their Parliamentary duties: the privilege itself may perhaps relate back to the Saxon rule that such persons as were on their way to the *gemot* were in the king's peace. It never was held to protect members from the consequences of treason, felony, or breach of the peace. In 1763 both Houses resolved,

in the case of Mr. Wilkes, that it did not extend to the writing and publishing of seditious libels, and since that time the rule has been considered settled that 'privilege is not claimable for any indictable offence[1].' Nor does privilege protect a member from being committed to prison for contempt of Court. A committee of privileges was appointed to deal with the case of Mr. Long Wellesley in 1831: he had taken a ward in chancery, his own daughter, out of the jurisdiction, and had been committed for contempt by the Lord Chancellor, Lord Brougham. The committee reported that his claim of privilege ought not to be admitted. A series of cases[2] since that date has confirmed the opinion expressed by the Committee of 1831.

But within the limit of civil cases the privilege was made a cause of hardship to suitors, for not only was the member's person protected from arrest and his property from legal process, but rights of action were held in abeyance, since proceedings could not even be commenced against a member or his servant.

Its legislative history.

The history of legislation on this subject may be briefly noted. In 1603 arose the case of Sir Thomas Shirley, a member of the House, who had been imprisoned in the Fleet. The Commons sent their officer to demand his release, and on a refusal committed the Warden of the Fleet to the Tower for contempt. Sir Thomas was after some time released, and thereon the Warden was reprimanded by the House and was also set free. But a Statute was passed (1 Jac. I, c. 13) which was the first legislative recognition of this privilege, and was also some protection to the suitor and to the keeper of the prison. It provided that the suitor should not lose his right of action because he had once taken his debtor in execution, but that the right should revive after the privilege had expired. It further provided that the officer releasing a prisoner from arrest on claim of privilege should not be charged in any action for allowing his prisoner to escape.

[1] Sess. paper, 1831 (114).

[2] See cases collected in May, Parl. Practice (ed. 10), pp. 116–120.

A practice came into use, not long after Shirley's case, of staying proceedings by a letter from the Speaker, in actions commenced against members. Not merely arrest of the person, but distress of goods and the taking of any proceedings at all in an action against a member was regarded as a breach of privilege, unless the member consented to waive his right; and a member's servants were held to be covered by the privilege of their master.

To remedy this hardship on suitors, it was enacted in 1700 (12 & 13 Will. III, c. 3) that suits might be commenced against members and their servants in the principal courts of law and equity during a dissolution, a prorogation, or an adjournment for more than fourteen days, and that during such times judgment might be given and goods taken in execution.

The Act 2 & 3 Anne, c. 18, provided that penalties and forfeitures against privileged persons employed in the revenue or in any office of public trust, should not be stayed on ground of privilege; and 11 George II, c. 24, extended the effect of the Act of William III to proceedings in any court of record.

But the privilege was not reduced to reasonable limits until 10 George III, c. 50. This Statute allowed any action or suit to be commenced and prosecuted, at any time, against members and their servants: and no process thereupon was to be stayed by reason of privilege; only the persons of members were privileged from arrest and imprisonment.

Its present extent.

Thus the members' servants entirely lost their immunity, and the members themselves only retained the privilege of freedom from arrest for a period which was said to extend to forty days before and after the meeting of Parliament. This period was long unsettled by statute or judicial decision, though it was generally assumed to include, as well the duration of a Parliament, as the forty days before and after a Parliament sat. It was held in Mr. Duncombe's case[1] that long custom, though unexplained, had thus fixed the

[1] 1 Exch. 430.

extent of the immunity. The explanation does not seem very difficult. The privilege was designed to secure the protection of a member 'eundo, morando, et exinde redeundo'; the old notice of summons required in Magna Charta was forty days, and this period would therefore be supposed to cover the utmost time required by a member for coming to a Parliament and returning home.

It should be added, that privilege of Parliament operates to take a member out of custody if he is elected while in custody, always supposing that he is not in custody for an indictable offence or for contempt of Court [1].

The Speaker continued to include *estates* of members in his demand for privileges until the Parliament which met in 1857, and their *servants* until August 1892.

Akin to the privilege of freedom from arrest is the privilege, now always waived, of resisting a subpoena to attend as a witness [2]; and the privilege, now confirmed by statute [3], of exemption from liability to serve on juries.

(c) *Freedom of Speech.*

This privilege, though claimed as resting upon the ancient custom of Parliament, has been confirmed by judicial and legislative sanction on divers occasions.

In 1397 the Commons adopted a bill laid before them by one Haxey to reduce the charges of the royal household. The king rebuked the Commons for discussing such matters, and demanded the name of the introducer of the bill. The House gave up the name of Haxey with many expressions of regret for his conduct. He was condemned in Parliament as a traitor, and was saved from death only by the interposition of Archbishop Arundel [4]. Haxey's case.

In the first year of Henry IV, Haxey petitioned the King

[1] 74 Com. Jour. 44; 75 Com. Jour. 230.

[2] May, Parl. Practice (ed. 10), 111. [3] 33 & 34 Vict. c. 77, s. 9.

[4] Haxey would seem to have been a clerical proctor attending under the *praemunientes* clause. See Stubbs, Const. Hist. ii. 492, footnote 2.

for the reversal of this judgment, as being 'encontre droit et la curse quel avoit este devant en Parlement,' and it was reversed by the King with the advice and assent of the Lords spiritual and temporal [1].

This amounted to a judicial recognition of the privilege by the Crown and House of Lords; and the Commons further petitioned the King on their own behalf to reverse the judgment 'si bien en accomplissement de droit come pur salvation des libertes de les ditz Communes [2].' The King assented to their petition, and the judgment was held to be 'wholly reversed, repealed, annulled, and held of none effect.'

Strode's case.

In Strode's case, a prosecution was commenced in the Stannary Court against a member who had introduced certain bills for the regulation of the tin mines in Cornwall. He was fined and imprisoned; and thereupon an Act was passed declaring that not only as regarded Richard Strode, but as regarded all members of that or any future Parliament, legal proceedings 'for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of, should be utterly void and of none effect.'

4 Hen. VIII, c. 8.

The Tudors and free speech.

Yet the Tudors and the first two Stuarts were strongly disposed to limit the freedom of speech and matter of deliberation in Parliament. Members whose speech in matter or manner was obnoxious to the Court were summoned before the Council, committed to prison, or forbidden to attend Parliament till further notice [3]. And the royal view of the extent of the privilege is thus defined by the Lord Keeper in reply to the Speaker's petition. 'Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth or what cometh in his brain to utter that; but your privilege is, *aye* or *no*. Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads that will not stick to hazard their own estates:

1593.

[1] 3 Rot. Par. 430. [2] 3 Rot. Par. 434.

[3] 4 Parl. Hist. 149, and Cobbett, Parl. Hist. i. 870; and see Prothero, Statutes and Constitutional Documents, pp. 117–126.

which will meddle with reforming the Church, and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them [1].'

The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one. A standing protest against this contention on the part of the Crown survives in the practice, at the beginning of every Session, of reading a bill for the first time before the Queen's Speech is taken into consideration.

Ante, pp. 67, 74.

The proceedings in the King's Bench against Eliot, Hollis, and Valentine for seditious speeches in Parliament, and for an assault upon the Speaker, are the last instance of legal proceedings being taken against members of the House in contravention of their privilege of free speech. A conviction was obtained against these men upon the charges made against them, but in the following reign the judgment was reversed in the House of Lords upon writ of error. One cause of error stated was that words spoken in Parliament could only be judged in Parliament and not in the King's Bench; another was that two offences were dealt with by the judgment of the King's Bench, the assault on the Speaker, and the utterance of seditious words in Parliament; and it was alleged that even if the assault was proper to be dealt with by the Court of King's Bench, the words spoken in Parliament could not be dealt with out of Parliament [2].

1629. Eliot's case.

The Commons upon this occasion thought it well to resolve

[1] Cobbett, Parl. Hist. i. 862.

[2] 3 State Trials, 294.

that the Act of Henry VIII was not a special Act passed for the benefit of Strode, but a general Act declaring and confirming the existing privileges of the House.

Bill of Rights.

Finally, 1 Will. & Mary, s. 2, c. 2, enacts 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.'

But though we find no instances after the Revolution of proceedings taken in any Court at the instance of the executive for words spoken in Parliament, yet the free speech and action of members was not unfrequently interfered with, in the case of such as had any office or commission to lose, by a minister like Walpole, or a king like George III, who desired to use all means in his power for keeping in his service a compact and obedient majority.

Freedom of speech in the 18th century.

It is a necessary result of party government that a subordinate member of a ministry should cease to hold a political office if he votes against his leaders in matters which they do not regard as open questions. No injustice is done, nor any privilege infringed by the dismissal from office of one who has taken office on the terms, not perhaps precisely stated, but none the less clearly understood, that in Parliament he will act in accord with those other servants of the Crown who are responsible for the policy of the country. But an officer in the army or the navy does not hold his commission on the terms that if he should sit in Parliament he will support the king's ministers. Nor does the Lord Lieutenant of a county hold office on these conditions. To take away such offices for things said or done in Parliament is an invasion of privilege. But Walpole and George III dealt with such non-political offices, and dismissed the holders of them for words spoken or votes given in Parliament. The last case of this kind was that of General Conway in 1764, who, for opposing the ministry of George Grenville on the question of general warrants, was dismissed from the King's service, not only as a Groom of the Bedchamber, but also as Colonel of a regiment. 'My overt acts,' he says, 'have been only voting as any man

Case of General Conway.

might from judgment only in a very extraordinary and serious question of personal liberty[1].'

The practice was very shortly afterwards discontinued; in fact Burke claims credit to the Rockingham ministry of the following year for having 'abolished the dangerous and unconstitutional practice of removing military officers for their votes in Parliament[2].'

Freedom of speech controlled by the House.

Speech and action in Parliament may thus be said to be unquestioned and free. But this freedom must be understood to apply only to external influence or interference, and does not involve an unrestrained license of speech within the walls of the House. The House controls the action of its own members, and enforces this control by censure; by suspension from the service of the House[3]; by commitment; by expulsion. Abuse of the forms of debate; irregular or disrespectful use of the Queen's name; the use of language which is offensive or insulting to either House, or to individual members of either House, or to Parliament collectively, are the offences which may be thus dealt with[4].

But from the assertion of the privilege of freedom of speech have grown two matters of practice with regard to the presence of strangers in the House, and the publication of its proceedings and debates.

(d) *Freedom of Speech in relation to the Exclusion of Strangers.*

Grounds for excluding strangers.

The House has always claimed and enjoyed the right to exclude strangers and to debate with closed doors, and this for two reasons. The first was the inconvenience to which in former times members were put when, owing to the arrangements of the House, it was possible for strangers to

[1] Walpole's Letters, iv. 229.

[2] Short Account of a late Short Administration.

[3] See Standing Orders for 1896, No. 21 [orders of 28th February, 1880, and 22nd November, 1882].

[4] For a full account of the rules for enforcing order in debate I must refer the reader to May, Parliamentary Practice (ed. 10), ch. xii.

come so far within the body of the House, that, on one occasion at least, a stranger was counted in a division [1].

1771.

The other reason was the possible intimidation which might be exercised by the Crown if reports were made of the speech and action of members, in days when freedom of debate was not fully recognised as a privilege of the House.

Resolution of 1875.

The custom was that, if a member took notice of the presence of strangers, the Speaker was obliged to order them to withdraw. The custom was found in the year 1875 to work inconveniently: certain members who were connected with the Press thought it wrong that reporters should be present only on sufferance, and endeavoured to reduce the rule to an absurdity by frequent notice of the presence of strangers. The House therefore resolved, after some discussion, 'that if, at any sitting of the House or in Committee, any member shall take notice that strangers are present, Mr. Speaker, or the Chairman (as the case may be), shall forthwith put the question that strangers be ordered to withdraw, without permitting any debate or amendment: provided that Mr. Speaker and the Chairman may, whenever he think fit, order the withdrawal of strangers from any part of the House [2].'

The rule does not seem to effect the purpose of those whose conduct procured its passing, for it rather curtails the right

[1] Com. Jour. 33. 212. After a division on motion made and question put, 'That Mr. Speaker do now leave the chair,' 'it having happened that among the members who were coming in on the division a stranger who had continued in the lobby after it was cleared had come in, and was told as one of the Noes, several members objected to the validity of the division, and insisted that the question ought to be put again and the sense of the House taken. Mr. Speaker immediately on declaring the numbers had ordered the doors of the House to be locked, in order that no member might go forth. The Stranger was then brought to the Bar and examined, and it appearing that what he had done was from ignorance and inadvertency, and without any intention of passing for a member on a division, and being known to several members as a man of good character, he was for the present ordered to be taken from the Bar.' He was afterwards dismissed with a caution.

[2] Hansard, 224, p. 55.

of individual members to clear the gallery than alters the position of the representatives of the Press.

(e) *Freedom of Speech in relation to the Publication of Debates.*

Grounds for controlling publication.

Following upon the power to exclude strangers, and a part of the general right of privacy in order to secure freedom of debate, comes the right of the Commons to prohibit the publication of proceedings in their House.

The House of Commons in the Long Parliament was the first to forbid a member 'to give a copy or publish in print anything that he shall speak here without leave of the House [1]': and subsequently printers were warned to give account of the communication to them of matters which took place in the House [2].

Reporting in the 18th century.

Accounts of the votes and proceedings were ordered in 1680 to be printed under the direction of the Speaker, but the desire to maintain the secrecy of debate found stronger expression after the Revolution, and was made the matter of frequent resolutions forbidding the publication of proceedings on pain of incurring the penalties of breach of privilege. There was an interesting debate on this subject in 1738, during the ministry of Sir Robert Walpole, when the leaders of the three great parties in the House took part in the discussion.

Walpole held that it was impossible to be secure against misrepresentation if the report of debates was allowed. Wyndham, the leader of the Tories, thought that 'the public ought to be able to judge of the merits of their representatives.' Pulteney, who led the malcontent Whigs and professed to represent the popular party, took the least popular ground, and said plainly that he would not be 'made accountable without doors for what he said within [3].'

The fear of misrepresentation was not unfounded: newspaper reporting was in its infancy: nor was there any great desire to represent fairly what was said by politicians whose

[1] Com. Jour. 2. 209. [2] Com. Jour. 2. 220.
[3] Parl. Hist. x. 811.

opinions were opposed to those of the reporter: the best reports of the time are evidently far from faithful reproductions of what passed in the House. The resolution of the House in 1738, the result of the debate just described, condemned the publication of any account of its proceedings as 'a high indignity and a notorious breach of privilege'; but in spite of this, the practice of reporting continued.

Down to the year 1771 such accounts of debates as were made public appeared in magazines which came out monthly or quarterly, and after the resolution of 1738 the House and the speakers figured under feigned names. But in 1771 notes of debates, by no means careful as to accuracy, began to appear in daily journals; to these reports of speeches the names of the speakers were attached, sometimes with comments and nicknames of an offensive sort. Thereupon the House entered upon a serious and complicated conflict with the Press.

Conflict between House and City, 1771.

In the course of a series of attacks upon printers and publishers, the Commons sent a messenger into the city to arrest a printer of debates; the printer sent for a constable and gave the messenger into custody for assaulting him in his own house. All parties went to the Mansion House, where the Mayor and two aldermen, Wilkes and Oliver, discharged the printer, holding that, by virtue of the city charter, a warrant of the House was of no force within the City unless backed by a city magistrate: but they committed the messenger for an assault, allowing him to go free on bail. The House of Commons sent for the Lord Mayor and the two aldermen, for the Lord Mayor's clerk and the book of recognizances. They erased from the book the entry as to the messenger's recognizances, and committed the Mayor and aldermen to the Tower. A House which could unwarrantably interfere with the procedure of a court of justice, was not unlikely to disregard the opinion or the interests of the public. Nevertheless, it was frightened by the display of feeling exhibited by the people of London on behalf of the City officers, and this was the last occasion on

which its privilege in this respect was asserted. With the impunity accorded to reporters, the practice of reporting has improved, and the House, sensible of the advantages which it derives from a full and clear account of its debates, has given increased facilities to those who report them.

We are accustomed, therefore, to be daily informed, throughout the Parliamentary Session, of every detail of events in the House of Commons: and so we are apt to forget two things.

Reporting is on sufferance.

The first is, that these reports are *made* on sufferance, for the House can at any moment exclude strangers and clear the reporters' gallery; they are also *published* on sufferance, for the House may at any time resolve that such publication is a breach of privilege and deal with it accordingly.

Limit to right to publish debates.

The second is, that though the privileges of the House confer a right to privacy of debate, they do not confer a corresponding right to the publication of debate. Apart from powers conferred by Statute, the right of the House of Commons to publish its proceedings, otherwise than for the use of its members, would be limited by the common law rules as to defamation of character; and it would be no answer to an action for libel brought against the publisher that the libellous matter was a part of a debate in the House of Commons, or was a part of a report made for the use of the House, and printed and published by its order. Still less is a private member entitled to claim privilege for the publication of a speech delivered within the walls of the House. Within those walls he may say what he pleases, and is protected by the general privilege of the House; but if he chooses to circulate outside the House statements made within it, he does so at his peril, and if they contain defamatory matter he will be liable to proceedings for libel.

Privilege cannot legalise defamation.

The extent to which the publication of Parliamentary proceedings has, in this respect, been protected by judicial decision or statutory enactment, may thus be traced.

It was held in *Lake* v. *King*[1] that an action would not lie

[1] 1 Saund. 131.

Publication by private member,

for defamatory matter contained in a petition printed and delivered to members, this being agreeable to the course and proceedings of Parliament. And if it is permissible to a private individual to circulate in the form of a petition among members that which would be libellous if published otherwise, it follows, as of course, that no words spoken by a member in the course of Parliamentary proceedings, or papers printed and circulated by order of the House among its members, would be actionable.

But directly publication ceases to be limited to the use of members of the House the operation of the law of libel begins. In *Rex* v. *Creevy*[1] a member whose speech had been misreported sent a corrected report to the editor of a local paper. He was held liable to a criminal information for libel.

by order of the House.

Nor is it any defence, at common law, that defamatory statements should have been published by order of the House. In the case of *Stockdale* v. *Hansard*[2] it appeared that the House of Commons had ordered the printing and publishing of copies of certain reports, not for the use of members only, but in numbers sufficient to make some copies available for sale to the public. One of these reports contained matter defamatory of the plaintiff. He sued the publisher, and Lord Denman ruled, and the Court of Queen's Bench upheld his ruling, that the House could not by its order legalise 'the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.'

The controversy between the House and the Court of Queen's Bench, of which this decision forms a part, raised a wider question, to be dealt with hereafter, as to the relation of Courts of Law to questions of Privilege. But the case does fix the limits of the right of the House to publish its proceedings on matters connected therewith, and settles that, apart from statutory protection, such publication, if defamatory, is actionable unless it is confined to members of the House. Such publications were relieved from this liability by 3 & 4

[1] 1 M. & S. 278. [2] 9 A. & E. 1.

Vict. c. 9, which enacts that a certificate from any one of certain officers of either House, verified by affidavit, and stating that the publication was made by authority of the House of Lords or House of Commons, should be an immediate stay of any civil or criminal proceedings taken in respect of defamatory matter contained in the publication.

But a fair report is privileged.

Thus far it was settled that statements published by authority of either House, though injurious to the character of an individual, would not give a cause of action for libel. In 1868 a further question arose. The editor of a newspaper, in a fair report of proceedings in Parliament, made with no hostile or malicious intention but solely with a view to his own profit, published matter defamatory of an individual. The publication could not be said to be authorised by Parliament except in so far as the exclusion of reporters at the will of the House might have made such a report impossible. It was held by the Court of Queen's Bench, that such publications were lawful, and that while 'honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.'

But such publication is carefully distinguished from the publishing of his speech by an individual. 'There is obviously,' says Cockburn C. J., 'a very material difference between the publication of a speech made in Parliament for the express purpose of attacking the conduct of an individual, *and afterwards published with a like purpose or effect*, and the faithful publication of Parliamentary reports in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one[1].'

§ 3. *Privileges of the House not demanded by the Speaker.*

So far I have dealt with those privileges of the House which are demanded by the Speaker and granted by the

[1] *Wason* v. *Walter*, L. R. 4 Q. B. p. 85.

Crown at the commencement of each Parliament. But there are other privileges which would seem to be considered inherent in the House, which are at any rate undoubtedly exercised by it, though they are not specifically claimed from the Crown.

(a) *Right to provide for its proper Constitution.*

One of these privileges is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament; by enforcing disqualifications for sitting in Parliament; and, until recently, by determining disputed elections.

Filling of vacancies.

(1) When a vacancy occurs in the House from any cause which legally vacates a seat, or when a member is returned for two places and makes election which he will serve for, a warrant is issued by the Speaker, in pursuance of an order of the House, to the clerk of the Crown in Chancery, or, in the case of a seat in Ireland, to the clerk of the Crown in Ireland, for a writ to be issued for the return of a member to supply the vacancy. The Speaker's warrant is issued by order of the House; it consequently could not be issued out of Session; but this defect is supplied, to a great extent, by a series of Statutes which provide that the Speaker should issue his warrant, subject to certain formalities and restrictions, if a member should vacate his seat during the recess, by death, by elevation to the peerage, by bankruptcy, or by the acceptance of office, excepting always those formal offices which members take in order to effect a resignation of their seats in Parliament[1].

(2) The right to determine questions of disputed elections,

[1] The Statutes are—as to death or peerage, 24 Geo. III, c. 26; as to office, 21 & 22 Vict. c. 110; as to bankruptcy, 46 & 47 Vict. c. 52, s. 33; as to certain formalities, 26 Vict. c. 20. The formal offices excepted are the Stewardships of the Chiltern Hundreds, of East Hendred, Hempholme, Northstead or the escheatorship of Munster. Other small stewardships were formerly used to vacate a seat (*supra*, p. 91), but it is presumed that these would not now be granted.

claimed and exercised by the Commons from 1604 to 1868, was assigned by 31 & 32 Vict. c. 125 to the Court of Common Pleas, and is now exercised by the Queen's Bench Division of the High Court. The claim of the House to jurisdiction in this matter was somewhat doubtful, though it was exercised without question, if not in a very satisfactory manner, for more than 250 years. Originally the writ addressed to the sheriff was returnable to Parliament: an Act of the 7th Henry IV provided that it should be returned to Chancery, but disputed returns were decided during the fourteenth and fifteenth centuries on the rare occasions when they arose, by the King, assisted by the Lords, though an Act of 1410 authorised the Judges of Assize to hear them[1]. Trial of disputed returns.

In the reign of Elizabeth the Commons claimed the right; in 1604 they insisted upon it. The case arose upon a disputed return for the county of Bucks, and the proceedings in that case are worth noting[2]. James I, in the proclamation for calling his first Parliament, took upon himself to admonish all persons concerned with the election of knights of shires, that, among other things, they should take express care that no bankrupt or outlaw was elected; he further announced that all returns should be made to the Chancery, and that if such returns were contrary to the tenor of his proclamation, they 'should be rejected as unlawful and insufficient.' Fortescue and Goodwin.

Sir Francis Goodwin, an outlaw, was returned for the county of Bucks. On the return of his election being made, it was refused by the clerk of the Crown on the ground of the outlawry. The clerk issued a new writ on his own authority, and Sir John Fortescue was returned.

The House inquired into the matter, and having examined the clerk of the Crown, resolved that Goodwin was duly elected, and ordered the indenture of his return to be filed in the Crown office.

The Lords first took the matter up, and asked an expla-

[1] Stubbs, Const. Hist. iii. 423.

[2] Parliamentary History, vol. i. p. 998 et sq.

nation of the Commons; the Commons refused to discuss the question. A message then came from the Lords that the King desired the two Houses to confer upon the election. The Commons thereupon demanded access to the King, and stated the grounds of their action. The King asserted that returns 'being all made into the Chancery are to be corrected and reformed by that Court only into which they are returned,' and he desired the House to hold a conference with the Judges. This, after a long debate, the House determined not to do, but submitted an argumentative memorial to the King, meeting his objections and alleging precedents for the right they claimed. It is noticeable, that of the five precedents set forth, two only are cases of disputed returns, two are cases of disqualified persons being returned, and one a case of a member being returned for two places.

The King was not satisfied with the answer of the House; he still desired a conference between the Commons and the Judges. To this the Commons reluctantly assented; a conference took place before the King and council, and the King in the end admitted the right of the House to be a court of record and judge of returns, though he claimed a corresponding jurisdiction for the Chancery; and he suggested as a compromise, that the elections of Fortescue and of Goodwin should both be held void and a new writ issued. This was done, and the right of the Commons was not afterwards questioned nor that of the Chancery asserted [1].

Modes of trial.

For some time disputed returns were decided by a Committee of Privileges and Elections nominated by the House. This became an open committee of the whole House after 1672, and finally, in the time of Speaker Onslow, the confidence felt in him caused the parties to these suits to ask a trial at the bar of the House.

1727-1761.

[1] It is proper to note here a distinction between the claim of the Chancery, in the case of Fortescue and Goodwin, to adjudicate upon a disputed return, and the claim of the Chancellor, Lord Shaftesbury, in 1672, to issue writs to supply vacancies during a recess without a warrant from the Speaker.

It would have been difficult to find a worse tribunal. As the trial was before the whole House, no single member felt any individual responsibility. The judges were a large and fluctuating body, wanting alike in the training and the inclination to act judicially. In fact, a disputed return was settled by a party division. The closing struggles of Walpole's ministry turned, not on his foreign or domestic policy, but on votes of the House taken on election petitions. 'Last Friday,' says Horace Walpole, 'we carried a Cornish election . . . You can't imagine the zeal of the young men on both sides.' 'Tuesday, we went on the merits of the Westminster election, and at ten at night divided and lost it. They had 220, we 216; so the election was declared void. We had forty-one more members in town who would not, or could not, come down. *The time is a touchstone for wavering consciences.* All the arts, money, promises and threats, all the arts of the former year are applied, and self-interest operates to the aid of their party and the defeat of ours.' Horace Walpole does not for a moment mean to suggest that men's consciences wavered as to the merits of the disputed election; it was the claim of the minister to support that tried the consciences of his former following. Finally, the loss of the Chippenham election petition determined Walpole to resign.

Trial at bar.

Dec. 17th, 1741.

Some improvement was effected when Mr. Grenville, in 1770, introduced and carried the Act known as the Grenville Act[1], at first a temporary measure, but afterwards made permanent. This Act transferred the decision of disputed returns from the House to a committee, selected from a list chosen by ballot, of forty-nine members, from which list the petitioner and sitting member struck out names alternately until the number was reduced to thirteen. Each party nominated an additional member, and the case was tried by this tribunal, to which was given the power of administering an oath. No appeal lay to the House, whose privileges in this respect were henceforth limited by the operation of the

Under the Grenville Act.

[1] 10 Geo. III, c. 16.

Statute. The committee was a more responsible tribunal than the House at large; it had a better chance of arriving at an impartial decision, and the power of administering an oath enabled it to obtain evidence on which it might rely: but its members could not fail to be interested on party grounds in the result of their decision, and being selected by lot, they had not necessarily any trained judicial capacity. The committee which determined these questions was diminished in number, and the mode of its appointment altered in 1841[1], and again in 1848[2].

Under the Parliamentary Election Acts.

But in 1868 the House adopted the only course by which a really satisfactory decision of controverted elections could be attained, and handed them over to the Courts of Law. The rules for their trial are now to be found in the Parliamentary Elections Act, 31 & 32 Vict. c. 125, and the amending Act, 42 & 43 Vict. c. 75. The petition is presented, not to the House but to the High Court of Justice; the trial is conducted, not by a committee of the House at Westminster, but by two Judges of the High Court in the borough or county of which the representation is in issue. The Judge certifies his decision to the Speaker, and the House, on being informed of the certificate by the Speaker, is required (sect. 13) to enter the same upon the Journals, and to give such directions for confirming or altering the return, or for the issue of a new writ, as the form of certificate may necessitate.

Notice of disqualification.

(3) As I have just explained, the House has given over to the Law Courts the right to determine controverted elections; that is to say, elections which are called in question on the ground that a candidate, otherwise properly qualified for a seat, has been returned in an informal manner, or by persons who were not entitled to vote, or by votes procured through improper inducements. But it retains the right to pronounce at once on the existence of legal disqualifications in those returned to Parliament, and will declare a seat to be vacant,

[1] 4 & 5 Vict. c. 58. [2] 11 & 12 Vict. c. 98.

if the member returned is subject to such disqualification, without waiting for the return to be questioned by persons interested in the matter. The case of O'Donovan Rossa, February 10, 1870, of John Mitchel, February 18, 1875, of Michael Davitt, February 28, 1882, are instances of the exercise of this right by the House of Commons.

The case of John Mitchel, who was twice elected, illustrates best the action of the House in such matters. In the first instance, no petition was lodged, and the House declared the seat vacant. On the occasion of his second election, a petition was lodged, and the seat claimed by the other candidate: the House allowed the disqualification to be determined by the Courts; but it does not follow that the House was bound to await the decision of a Court of Law.

Supra, p. 84.

Unfitness to serve, a cause of expulsion.

(4) Cases may arise in which a member of the House, without having incurred any disqualification recognised by law, has so conducted himself as to be an unfit member of a legislative assembly. For instance, conviction for misdemeanour is not a disqualification by law though it may be a disqualification in fact, and the House of Commons is then compelled to rid itself of such a member by the process of expulsion. But expulsion, although it vacates the seat of the expelled member, does no more than express the opinion entertained by the House of the unfitness of the member expelled. It does not create a disqualification, and if his constituency do not choose to regard his conduct in the same light as the House regards it, they can re-elect him. If the House and the constituency differ irreconcilably as to the fitness of the person expelled, expulsion and re-election might alternate throughout the continuance of a Parliament.

Effect of expulsion.

In 1769 the House, irritated by the re-election of Wilkes whom it had expelled, proceeded not merely to expel him but to declare his election void. The House thus endeavoured to create a new disability depending on its own opinion of the unfitness of Wilkes to be a member of its body. As

a judge of returns the House was able to give effect to its decision, and in February 1770 to declare a subsequent re-election of Wilkes to be void, the votes recorded in his favour to be thrown away, and the candidate next on the poll to be duly returned[1].

But the arbitrary conduct of this House of Commons was not sustained by its successors. Wilkes was elected to serve in the new Parliament of 1774 and took his seat without question.

In 1782 a resolution which he had moved in five previous years was carried, and the vote which declared his election void, and all the declarations, orders and resolutions respecting the Middlesex election[2], were expunged from the Journals of the House.

It may be useful to set out the manner of proceeding where a member has been convicted of misdemeanour and has thereby incurred the penalty of expulsion.

Process of expulsion.

The judge who presides at the trial and gives sentence, communicates the facts to the Speaker, and the Speaker informs the House of what has occurred.

A motion is then made that a humble address be presented to the Queen to give directions that a copy of the Record of the proceedings at the trial be laid before the House. This being done, on a subsequent day the House is moved:—

That the letter addressed to Mr. Speaker, by Mr. Justice —— respecting the conviction before the Central Criminal Court of *A.B.* member for —— might be read, and the same was read as follows:

Mr. Speaker,

I beg to inform you that *A. B.* M.P. was this day convicted of a misdemeanour for which I have sentenced him to twelve calendar months' imprisonment.

And I have the honour to remain &c. &c.

[1] A similar line of action was adopted by the House in 1712, when Walpole was expelled the House, and re-elected by his constituents. The election was declared to be void, and no further question was raised. Cobbett, Parl. Hist. vi. 1071.

[2] May, Const. History of England, i. 414, where a full account of the Wilkes controversy is to be found.

A motion is then made and the question put, that the said letter and record of the proceedings upon the trial of *A. B.* be now taken into consideration.

If it is resolved in the affirmative the House accordingly proceeds to take the letter into consideration, and if the result is unfavourable to *A. B.* it is resolved that *A. B.* be expelled the House [1].

(b) *Right to the exclusive cognizance of matters arising within the House.*

Blackstone lays it down as a maxim upon which the whole law and custom of Parliament is based, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'

Limits of the right.

This statement cannot be accepted without certain reservations. It is not true to say that because a matter has arisen *concerning* the House, and has been adjudged within the House, such a matter cannot be considered elsewhere, if it affects rights exercisable outside and independently of the House. It is strictly true to say that the House has the exclusive right 'to regulate its own internal concerns,' and that, short of a criminal offence committed within the House or by its order, no Court would take cognizance of that which passes within its walls.

Extent of the right.

The best illustration of this statement is the recent case of *Bradlaugh* v. *Gosset* [2]. In that case, the plaintiff complained that having been elected and returned member for the borough of Northampton, he had not been allowed to take the oath required by the Parliamentary Oaths Act, 29 & 30 Vict. c. 19, and that, by a resolution of the House, the Serjeant-at-arms had been ordered 'to exclude Mr. Bradlaugh from the House

[1] The cases which have furnished ground for expulsion are summarised in May, Parl. Practice (ed. 10), 55. The Commons' Journals for 1891 and 1892 will furnish more recent instances.

[2] 12 Q. B. D. 271.

until he shall engage no further to disturb the proceedings of the House.' The disturbance in question arose from the attempt of Mr. Bradlaugh to take the oath which the law required him to take, and which a resolution of the House prevented him from taking. The plaintiff asked the Court to declare the order of the House to be void, and to restrain the Serjeant-at-arms from carrying it into effect.

The House can interpret rules for its own procedure.

The Court held that it was not concerned with the interpretation which the House of Commons, for the regulation of its internal procedure, chose to place upon a statute; and that the House, having power of exclusion, had power to effect such exclusion by the necessary force. The law on the subject is very clearly set forth in the judgment of Stephen J.[1]

'In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a Resolution inconsistent with the Act; for, if the Resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must of course face this supposition, and give our decision upon the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the Statute-law. The more decent, and I may add the more natural and probable supposition is, that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the Resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own.

The Courts accept that interpretation.

It seems to follow that the House of Commons has the exclusive power of interpreting the statute, *so far as the regulation of its own*

[1] *Bradlaugh* v. *Gosset*, 12 Q. B. D. 280.

proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.'

They take no cognizance of things done within the House,

The point at which Courts of Law will enter upon a discussion as to the limits of privilege and the effect of resolutions of the House outside its walls is a matter for separate consideration. But the Judges, in the case referred to, state as clearly as it is possible to state a legal proposition, that they would take cognizance of nothing 'which was done within the walls of the House' short of a criminal offence.

except in case of crime.

It should be noted that the Courts have more than once intimated that a crime committed in the House or by its order would not thereby be considered outside their jurisdiction.

In the case of Sir John Eliot and others above referred to, who were convicted of seditious speeches in Parliament *and of an assault upon the Speaker*, the House of Lords, reversing the judgment upon error, does so on the ground that two distinct offences were included in one judgment, and that one of these offences, the alleged seditious speeches, was not cognizable by the Court of King's Bench. But it was not thereby decided that an assault upon a member of the House, committed within its walls, might not be dealt with in a Court of Law; and Lord Ellenborough, in *Burdett* v. *Abbott*, guards himself by saying that it will be time to consider such a case when it arises [1].

Supra, p. 153.

And lastly, Mr. Justice Stephen says 'that he knows of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice [2].'

(c) *Power of inflicting punishment for breach of Privilege.*

The House is invested, as we have seen, with the exclusive power of regulating its own procedure and adjudging matters which arise within its walls. It follows that the House must

[1] 14 East, at p. 128.

[2] 12 Q. B. D. 283.

possess some power of enforcing its privileges in this respect, and of punishing those who infringe them.

The offences for which punishment is inflicted may be generally described as disrespect to any member of the House, as such, by a person not being a member; disrespect to the House collectively, whether committed by a member [1] or any other; disobedience to orders of the House, or interference with its procedure, with its officers in the execution of their duty, or with witnesses in respect of evidence given before the House or a Committee of the House.

Admonition.

The mildest form of punishment is by summons to the bar of the House, followed by an *admonition* addressed to the offender by the Speaker. The person so summoned may purge himself of his contempt by an apology accepted by the House in full satisfaction of his offence, and so may escape being admonished.

Reprimand.

A more serious mark of the displeasure of the House is a *reprimand*, addressed to the offender by the Speaker. This however is almost invariably preceded by commitment [2].

Commitment.

Commitment is in the first instance to the custody of the Sergeant-at-Arms, an officer whose appointment and duties I have described already.

Before dealing with the right to commit to custody, or to prison, I will note two other forms of punishment used by the House.

Fine.

In former times the House of Commons has imposed fines for breaches of privilege, but the practice has long been discontinued, except in so far as the payment of fees as a condition precedent to release from imprisonment partakes of the nature of a fine [3].

[1] The suspension of members from the service of the House after being named by the Speaker would seem to fall more properly under the rules for conducting debate (*v. infra*, ch. vii. Sect. ii. § 1).

[2] For the exceptions see May, Parl. Practice (ed. 10), 91.

[3] May, Parl. Practice (ed. 10), 92. No fine has been imposed since 1666: but on April 7, 1892, there was some discussion as to inflicting a fine upon directors of a railway company for dismissing a servant of the company on account of evidence given before a Committee of the House. A considerable minority of the House seemed anxious to vote for forms of punishment which the House had no machinery for enforcing.

In the case of its own members, the House has a stronger mode of expressing its displeasure. It can by resolution expel a member, and order the Speaker to issue his warrant for a new writ for the seat from which the member has been expelled. But it cannot prevent the re-election of such a member by declaring him incapable of sitting in that Parliament. In attempting to do this, in the case of Wilkes, the House had ultimately to admit that it could not create a disqualification unrecognised by law[1]. Expulsion.

But expulsion is a private matter, affecting the composition of the House itself, and amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House of Commons. The imposition of a fine would be an idle process unless backed by the power of commitment. It is, then, the right of commitment which becomes, in the words of Sir E. May, 'the keystone of Parliamentary privilege.' It remains to consider how it is exercised and by what right.

When a person is committed to the custody of the Sergeant-at-Arms, he may purge himself of his contempt by an apology, or he may be let off with a reprimand, or he may be committed to prison; or, in the case of a flagrant contempt, the person guilty may be committed to prison without being previously brought into the presence of the House or given an opportunity of apologising.

But the power of the House to punish in this manner is limited by the duration of the Session; prorogation releases prisoners committed by its order, whether or no they have paid their fees. The House cannot therefore imprison for any fixed term; if it did so, and a prorogation occurred before the conclusion of the term, the prisoner would be entitled to a discharge upon a writ of *habeas corpus*. The limit of imprisonment.

The origin of this power of commitment for contempt has been variously stated.

It has been claimed for the House as a right inherent in

[1] Parl. Hist. xxii. 1407, and *vide supra*, 168.

Grounds of right to commit.

every Court of Record; but there is much discussion as to whether the House is or is not a Court of Record.

That the House is a Court of Record.

In the case of Fortescue and Goodwin the House vehemently contended that it was a Court of Record[1]: so too in the debate on Floyde's case, where Coke's words are summarized: 'No question but this is a House of Record, and hath power of judicature in some cases. Have power to judge of Returns and Members of our House.'

But if the House rests its claim on this ground, the claim has been abandoned with the abandonment of the right to determine controverted elections. It might be said that the Journals of the House are records, and this also was maintained by Lord Coke. He rested his argument on the words of the Act of Henry VIII, which requires license or leave of absence given to a member 'to be entered of Record in the book of the Clerk of the House.' But it is doubtful whether the word 'record' is there used in a technical sense.

6 Hen. VIII, c. 16.

The Journals of the House[2], which are prepared by the clerk of the House from entries of the proceedings made by him daily, perused by the Speaker, and then printed for the use of members, are expressly declared by Lord Mansfield *not* to be matter of record[3]. The *dictum* is *obiter*, but may fairly be set off against the statements of Coke, of which one is made in debate, the other in the posthumous volume of the Institutes.

14 East, 152. That the right is needed to maintain its dignity.

It is noticeable that in the case of *Burdett* v. *Abbott*, while Bayley J. rests the claim of the House to commit on its parity of position with Courts of Judicature, Lord Ellenborough C. J. rests his decision on the broader ground of expediency, and the necessity of such a power for the maintenance of the dignity of the House.

'If there were no precedents upon the subject, no legislative recognition, no practice or opinions in the Courts of Law recog-

[1] 1 Com. Jour. 604.

[2] The Rotuli Parliamentorum record the proceedings of Parliament from 1278 to 1503. The Lords' Journals commence in 1509: the Commons' Journals in 1547.

[3] *Jones* v. *Randall*, 1 Cowp. 17.

nising such an authority, it would still be essentially necessary to the Houses of Parliament to have it; indeed, they would sink into utter contempt and inefficiency without it. Could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to await the comparatively slow proceedings of the ordinary Courts of Law for their redress? that the Speaker, with his mace, should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the House? They certainly must have the power of self-vindication in their hands: and if there be any authority in the recorded precedents of Parliament, any force in the recognition of the Legislature, and in the decisions of the Courts of Law, they have such a power.'

On the whole, it would seem that the right of committal finds a surer basis on the necessity of such a power for the maintenance of the dignity of the House, than on any technicality as to the House being a Court of Record[1]. 14 East, 152.

§ 4. *Limitation of Privilege by Courts of Law.*

Causes of conflict between House and Courts.

The Privileges of Parliament, like the Prerogative of the Crown, are rights conferred by Law, and as such their limits are ascertainable and determinable, like the limits of other rights, by the Courts of Law. They consist, in fact, of rights acquired by custom or conferred by Statute, belonging to the House collectively, or to its members as individuals, and having for their object the freedom, the security, or the dignity of the House of Commons. Cases have arisen in which the House has set up claims which the Courts have been compelled to consider.

[1] The limited sense in which the term 'Court of Record' would probably be construed may be illustrated from the case of a Colonial Legislature (the House of Assembly of Nova Scotia), which enacted that it was a Court of Record, and on the strength of this enactment punished a contempt of its privilege by imprisonment. The right of the Assembly to do this was upheld by the Judicial Committee. The powers taken to itself by this House were construed to be 'the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal,' but not to 'try or punish criminal offences otherwise than as incident to the protection of members in their proceedings.' *Fielding* v. *Thomas* (1896), App. Ca. 612.

Claim of House to determine its privilege.

1. The House has asserted that it is the sole judge of the extent of its privileges. The practical result of this assertion is that the House has declared certain acts, legal in themselves, to be breaches of privileges, or certain acts, unlawful in themselves, to be legalised by its declaration of privilege.

To this the Courts have made reply, that when privilege conflicts with rights which they have it in charge to maintain, they will consider whether the alleged privilege is authentic, and whether it governs the case before them.

From the mass of learning and argument lavished upon this topic, it will be enough to select three cases and to state shortly their results as illustrating the law.

Ashby v. *White.*

In *Ashby* v. *White* an action was brought by an elector for the borough of Aylesbury against a returning officer who had refused to allow him to give a vote to which he was legally entitled.

The right to vote was not in question, only the right to sue for the refusal to allow the voter the exercise of his legal right.

The Commons resolved that 'neither the qualification of any elector, nor the right of any person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled'; and they further resolved that Ashby was guilty of a breach of privilege in bringing his action in a Common Law Court.

The confusion of ideas which brought about this resolution was curious. The House of Commons had, beyond doubt, the right to determine the validity of an election; and, incidentally, the qualification of the voters by whom the election was made. The Court of Queen's Bench had, equally beyond doubt, the right to try an action for withholding a Common Law right, such as the franchise, from a man entitled to it.

The Court could not determine, and did not profess to determine, any matter which would affect the validity of an election. It had to inquire into the right of the plaintiff to

give a vote, but it would only enter into this inquiry in order to ascertain if the plaintiff had a cause of action.

The House of Commons could have given the plaintiff no remedy; he could only have obtained its decision on his right to vote, by calling in question the validity of the election. As the candidate for whom he would have voted was elected, he had no inducement to do this; and, if he had done so, the only redress which he might have thereby obtained would have been the committal of the returning officer for contempt. 'Was ever such a petition heard of in Parliament,' said Holt C. J., 'as that a man was hindered of his vote, and praying them to give him a remedy? The Parliament would undoubtedly say, Take your remedy at law. It is not like a case of determining an election between the candidates[1].'

The Queen's Bench decided against the right of action; on writ of error this judgment was reversed in the House of Lords; there ensued a long altercation between the Houses, into the details of which it is unnecessary to enter, and the matter was ended by a prorogation.

Stockdale v. Hansard.

In *Stockdale* v. *Hansard* the House ordered the publication of matter defamatory of the plaintiff; the defendant set up two defences, that the statements complained of were true, and that, if they were not, the order of the House privileged the publication.

Lord Denman's ruling.

Lord Denman, in trying the case, told the jury that he was 'not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual.' The jury found for the defendants that the statements alleged to be defamatory were true. But the Commons took offence at the manner in which Lord Denman had dealt with the question of privilege, and passed resolutions, the effect of which has thus been summarised by an eminent authority[2].

[1] 1 Sm. L. C. (ed. 10) 254.

[2] Mr. Pemberton, afterwards Lord Kingsdown, in his 'Letter to Lord Langdale on the recent proceedings in the House of Commons on the subject of Privilege,' p. 17.

Resolutions of House.

'(1) That the order of the House of Commons affords a justification for the sale of any papers whatever which they may think fit to circulate.

'(2) That no Court of Justice has jurisdiction to discuss or decide any question of Parliamentary privilege which arises before it, directly or incidentally.

'(3) That the vote of the House of Commons declaring its privilege is binding upon all Courts of Justice in which the question may arise.'

Judgment on demurrer.

Other actions were brought by Stockdale against the Messrs. Hansard, and the House resolved that its printers should plead to the action, but in such a way as to rest their defence on the ground of privilege only. On demurrer to this plea, the Court of Queen's Bench supported Lord Denman's statement of the law.

The points for determination were clearly set forth in the judgment of Patteson J.

Judgment of Patteson J.

'First: Whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

'Secondly: Whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from inquiring into the legality of that act.

'Thirdly: If such resolution does not preclude the Court from inquiring, then whether the act complained of be legal or not.'

Order of House no defence to illegal act.

On the first point the learned judge had no difficulty in holding that, though no action could lie against a member of the House for things done in the House, yet that if the thing done was to make an illegal order, the privileges of the House would not shelter those who carried that illegal order into effect outside the House. Nor had he any hesitation in holding that, if the second question were answered in the negative, the act complained of was illegal.

The bulk of his argument was addressed to the question whether the resolution of the House was a bar to inquiry by

a Court of Law into the legality of the acts which it had ordered: in other words, Could the House prohibit the Courts of Law, by resolution, from discussing the legality of any act which it might choose to command?

Resolution of House no bar to inquiry by Court.

'Upon the whole, the true doctrine appears to me to be this: that every Court in which an action is brought upon a subject matter generally and primâ facie within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction: that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities; and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May, 1837, from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution, unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found, which bear upon the question[1].'

And, after dwelling on the importance of maintaining all such privileges as are necessary for the protection of the House of Commons, he thus concludes his judgment. 'But *power*, and especially the power of invading the rights of others, is a very different thing; it is to be regarded not with tenderness, but with jealousy; and unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of showing the existence and legality of the power now claimed lies upon the defendants: it appears to me, after a full and anxious consideration of the authorities adduced by the Attorney-General in his learned argument,

[1] *Stockdale* v. *Hansard*, 9 A. & E. 203.

and after much reflection on the subject, that they have entirely failed to do so.'

True nature of privilege.

Without accepting as finally satisfactory the distinction between 'power' and 'privilege' drawn by the learned judge, it is not difficult to see and to accept his view of the nature of privilege. He regards it as a defensive and not an aggressive weapon lodged with the House, and holds that, in order to justify its use for the purpose of legalising a libel, more ample authority was required than the Attorney-General was able to produce.

Grounds of contention.

The character of the difficulties which arose between the House and the Courts is identical in each of these cases. In *Ashby* v. *White*, the Commons thought that if the Court of Queen's Bench tried an action brought by an elector against a returning officer for refusing to allow him to vote, their right to determine disputed returns was being infringed.

In *Stockdale* v. *Hansard*, they thought that if the same Court tried an action for libellous matter contained in a report made to them pursuant to a Statute, and published by their order, their right to the regulation of their own proceedings was being infringed.

In each case, when the House became aware that the application of its privilege to the matter in hand conflicted with rules of law, it seems in an impulse of annoyance to have asserted a right to define its own privileges in such terms as to override rules of law.

In *Ashby* v. *White*, the House found itself in conflict with the jurisdiction in error of the House of Lords, and a prorogation alone could avert the collision of the two Houses. In *Stockdale* v. *Hansard*, the House found it prudent to concur in the passing of an Act, by which publications ordered by Parliament were protected from the law relating to defamation.

It remains to consider a case in which there was no such conflict of jurisdictions as in the two to which I have just referred.

In the recent case of *Bradlaugh* v. *Gosset*[1], the validity of a resolution of the House of Commons, relating to matters confined within the walls of the House, was called in question by the plaintiff, and the issue raised was, on this occasion, free from all circumstances of irritation. It was stated with the utmost clearness by Stephen J.: 'Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force, if necessary—is such an order one which we can declare to be void, and restrain the executive officer of the House from carrying out?'

The distinction between the cases in which Courts of Law consider that the House is alone interested in the matter in hand and those in which rights external to the House are involved is very clearly furnished by the circumstances of the case; and in the judgment of Stephen J.

Supra, p. 170.

Relation of Courts to Privilege.

'A resolution of the House, permitting Mr. Bradlaugh to take his seat on making a statutory declaration, would certainly never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, *and had attempted by resolution or otherwise to protect him against an action for penalties*, it would have been our duty to disregard such a resolution, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the Statute . . . We should have said that, for the purpose of determining a right to be exercised within the House itself, and in particular the right of sitting and voting, the House, and the House only, could interpret the Statute; *but that as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the Statute must be interpreted by this Court, independently of the House.*'

[1] 12 Q. B. D. 281.

On the whole, it seems now to be clearly settled that the Courts will not be deterred from upholding private rights by the fact that questions of Parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the House, Courts of Law will not hesitate to inquire into alleged privilege, as they would into local custom, and determine its extent and application.

Need grounds of commitment appear on a return to *habeas corpus?*

2. But there is another point on which Courts of Law have come into contact with the House of Commons. It relates to the right of committal for contempt. The question is shortly this: whether, if a person, so committed, obtains a writ of *habeas corpus,* it is a sufficient return to the writ that the committal was by a warrant, issued in pursuance of an order of the House of Commons, when the warrant for committal did not specify any other grounds than contempt. In *Paty's*[1] case, in 1705, the Court of Queen's Bench held that it was sufficient return to a writ of *habeas corpus* that the prisoner was committed for contempt, although the contempt alleged was that Paty, one of those aggrieved by the conduct of the returning officers for Aylesbury, had brought an action against them, as in Ashby's case the Court had already held that he was entitled to do. Holt C. J. dissented from this judgment and, though he was in a minority, I shall state hereafter some reasons for thinking that his view was the correct one.

In *Murray's*[2] case (1751), the return to the writ alleged contempt simply, and the King's Bench held that 'it need not appear what the contempt was, for if it did appear we could not judge thereof.' Like law is laid down by Lord Ellenborough in the case of *Burdett* v. *Abbott*[3], and in the case of the *Sheriff of Middlesex*[4]; and the matter is put most clearly in the question laid before the judges by Lord Eldon,

[1] 2 Lord Raymond, 1105.
[2] 2 Wils. 299.
[3] 14 East, 1.
[4] 11 Ad. & E. 809.

when *Burdett* v. *Abbott*[1] came before the House of Lords for decision. He asked them whether, if the Court of Common Pleas had committed for contempt, stating no other cause on the warrant, or the circumstances of the contempt, and the matter came before the Court of King's Bench on the return to a writ of *habeas corpus*, the latter Court 'would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose were not set forth in the warrant.' The judges unanimously answered that it would not do so, and the House of Lords thereupon decided for the defendant.

The case of *Burdett* v. *Abbott* did not arise, like the previous cases, upon a return to a writ of *habeas corpus*, but in an action of trespass brought against the Speaker for causing the plaintiff's house to be broken and entered, and himself to be carried to the Tower and kept there. But it is clear that, whether or no the House of Commons is a court of record, not only has it the same power of protecting itself from insult by commitment for contempt, but the Superior Courts of Law have dealt with it in this matter as they would with one another, and have accepted as conclusive its statement that a contempt has been committed, without asking what that contempt may have been.

Cause of commitment need not appear,

If the alleged contempt be expressed in the warrant, it is possible that a Court of Law might consider the commitment on its merits. Thus, Lord Ellenborough, in *Burdett* v. *Abbott*[2], states the law:—

but if it does the Courts will consider its adequacy.

'If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, nor of any other of the Superior Courts, inquire 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 commit-

[1] 5 Dow. 199.

[2] 14 East, 1.

ment . . . we must look at it and act upon it as justice may require, *from whatever Court it may profess to have proceeded*[1].'

And thus it is possible that the opinion of Holt C. J. in Paty's case may have been the better one, and that if a contempt were alleged to consist in the exercise of a legal right, a Court of Law might 'act upon it as justice may require.'

Beyond this however the Courts are not likely to go in the examination of the Speaker's warrant. It is regarded in the light of a mandate which issues 'from a superior court acting according to the course of the Common Law,' and differs in this respect from 'the warrants of magistrates or others acting by special statutory authority and out of the course of the Common Law.' Thus the warrant would be valid unless some obvious irregularity should appear upon the face of it[2].

[1] *Burdett* v. *Abbott*, 14 East, 150.

[2] *Howard* v. *Gosset*, 10 Q. B. 359.

CHAPTER VI.

THE HOUSE OF LORDS.

We have, so far, dealt with that part of the legislature which is brought into existence by popular election taking place in pursuance of writs of summons issued by the Crown. We now come to deal with that part which depends for its existence on royal writs addressed to its individual members.

Peerage not identical with Lords of Parliament.

But we are apt to speak of the Lords of Parliament or of the House of Lords as though these were convertible terms with the Peerage, forgetting that the political functions and privileges of a peer who is also a Lord of Parliament are not summed up in his right to a place in an hereditary legislative body, and that the Peerage is not conterminous with the House of Lords.

Lords of Parliament who are not Peers.

That the Peerage and the House of Lords do not mean the same thing is easily shown. For it would seem to be of the essence of the Peerage that it should carry with it hereditary right; such hereditary right is wanting not only to the Bishops but also to the Lords of Appeal, yet Bishops and Lords of Appeal are entitled to be summoned to the House of Lords,

Peers who are not Lords of Parliament.

Again, the peerage before the Union with Scotland was the peerage of the realm of England: after the Union it became the peerage of the kingdom of Great Britain [1], but as many of the peers of Great Britain as were such in virtue of being peers of Scotland did not become Lords of Parliament unless they were in the number of the sixteen repre-

[1] 6 Anne, c. 11, Art. 23.

sentative peers. After the Union with Ireland the peerage became that of the United Kingdom of Great Britain and Ireland, but again such as belonged to this body as peers of Ireland did not become Lords of Parliament unless they were in the number of the twenty-eight representative peers [1].

Functions of Peerage.

It follows therefore that there are Lords of Parliament who are not Peers, and Peers who are not Lords of Parliament. There are certain functions and attributes common to Peers who are Lords of Parliament and to Peers who are not. These may be distinguished in the Lords' Report on the dignity of a Peer, where peers are described:—'First as possessing individually titles of honour giving them respectively rank and precedence; secondly, as being individually hereditary counsellors of the crown; thirdly, as being collectively (together with the Spiritual Lords), when not assembled in Parliament, the permanent council of the crown; fourthly, as being also collectively (together with the Spiritual Lords), *when assembled in Parliament*, a Court of Judicature; and fifthly, as having for a long time formed with the Commons, *when convened in Parliament*, the Legislative Assembly of the kingdom by whose advice, consent and authority, with the sanction of the Crown, all laws have been made [2].'

Reason for dealing with non-Parliamentary functions.

It might be proper to limit our consideration of the peerage to its functions as a branch of the legislature, reserving an account of its other functions for other parts of the subject to which they might seem more appropriate. It is a prerogative of the Crown to confer rank and precedence, as the supreme executive, acting on the advice of responsible ministers: the rights of the peerage as councillors of the Crown should find a place under the head of the Royal Councils, and their judicial powers must unquestionably be considered in detail when hereafter it is necessary to describe the constitution of the Courts of Justice.

[1] 39 & 40 Geo. III, c. 67, Article iv.
[2] Lords' First Report on Dignity of a Peer, p. 14.

It is, however, as members of a legislature, either actual, as in the case of the Lords spiritual and the Lords temporal of the United kingdom, or potential, as in the case of the Scotch and Irish peers, who may be chosen as representatives of their respective branches of the peerage, that a peer enjoys these privileges other than rank or precedence. The Crown may confer a mere dignity by making a man a peer for life, but such an honour has been held to be wanting in those attributes which give most value to a peerage, inasmuch as it does not carry with it the right to sit and vote as a Lord of Parliament, except in the case of the Lords of Appeal, who are by Statute exempt from the disabilities of a life peerage. So it may be convenient in treating of the House of Lords to consider the privileges and duties of peers generally as well as the constitution and privileges of the House of Lords.

Qualifications for House of Lords.

First then let us ask, of what persons does the House of Lords consist? can we classify the Lords of Parliament?

There are five kinds of qualification for membership of the House of Lords, and the 'Lords Spiritual and Temporal' consist of—

(1) Hereditary peers of the United Kingdom:

(2) Hereditary peers who are not hereditary Lords of Parliament—

(*a*) The 16 representative peers of Scotland elected for each Parliament,

(*b*) The 28 representative peers of Ireland elected for life:

(3) Peers who are Lords of Parliament during their lives but transmit no rights, whether as peers or as Lords of Parliament, to their heirs—

(*a*) The 26 spiritual peers,

(*b*) The lords of appeal.

Of these, the spiritual peers hold their place as Lords of Parliament, conditionally on the discharge of episcopal duties. A bishop who resigns his bishopric

ceases to be a Lord of Parliament, though he retains rank and precedence [1]. The same rule applied to the Lords of Appeal and their discharge of judicial functions before 1887; but they now hold their place in Parliament for life [2].

§ 1. *The Baronage as an estate of the realm.*

Origin of baronage.

Such is the present constitution of the House of Lords. But it is necessary to ask not only how these different kinds of qualification arose, but how the entire body of the House comes to exist as an independent branch of the legislature representing an estate of the realm.

Feudalising of great Council.

The Witan of the Saxon kings comprised, at any rate, the earls and bishops. The temporal office of the one, the spiritual office of the other, conferred a right to be present at the great council of the realm. After the Norman Conquest the earl lost, to a great extent, his official position. Nor did the bishop any longer hold his lands free of all but spiritual service. In the words of Dr. Stubbs, 'the earldoms became fiefs instead of magistracies, and even the bishops had to accept the status of barons [3].' Attendance at the king's court became a liability rather than a right, a liability arising out of tenure. We can consider later whether the bishop is summoned in right of his spiritual office or on the liability of his temporal barony.

The Norman baronage.

The earls created after the Conquest were few: nor was it the policy of the Norman and Angevin kings to retain the great territorial offices of the Anglo-Saxon kingdom. But when the baronage appears in the reign of Edward I, as an estate of the realm summoned in a special form to a deliberative assembly distinct from the Commons, it consisted of many persons besides earls and bishops, and we are met by the difficulty of ascertaining how this body was constituted and what were its distinctive characteristics.

[1] 32 & 33 Vict. c. 111, s. 5.

[2] 50 & 51 Vict. c. 70, s. 2.

[3] Const. Hist. i. 270.

When John promised that he would never exact any aid other than the three feudal aids unless with the assent of the common council of the realm, that council was described as consisting of persons whose right to be present was wholly dependent upon their position as tenants-in-chief of the Crown. The assembly was divided into two groups, and of one group each member received a special summons. Some members of this group are easily distinguishable from all the members of the other: the archbishops, bishops, abbots and earls. Besides these come the 'majores barones,' and where all alike depended for their right to be present on holding lands of the Crown, it is not easy to say what constituted the difference between the *majores barones* specially summoned and the *minores barones* and other tenants in chief summoned 'in generali.' It may have been greater extent of possessions, or greater political influence, or a longer line of descent.

The *majores barones* of the Charter.

So far as the assembly of John is concerned its only importance to us lies in the conclusion to which it leads us, that, since the right to be present depended in all cases upon tenure, the distinction between the *majores barones* and the *minores barones* could not have rested on the fact that the former held of the Crown.

This conclusion is important when I come to ask what gave a right of summons to the assembly of the baronage in the constitution of Edward I. The right of representation in the House of Commons of 1295 most certainly did not depend upon the holding lands of the Crown. Did then the right of summons to the House of Lords depend upon such holding? Or I may put the question in this way: Apart from the earls and bishops, was the estate of the baronage limited to such persons as held of the crown on baronial tenure, and did such tenure confer a right to be summoned? There are in fact three possibilities as to the relation of the estate of the baronage to tenure. The king might have been bound to summon all who held of him '*per baroniam*,' and none other: he might have been free to select for summons whom he chose

The baronage of Edward I.

Tenure *per baroniam* gave no right of summons.

within the limits of those who held lands of him either *per baroniam* or on some other tenure; or his discretion as to the summons might have been unrestricted by the requirement of tenure.

We may dismiss the first of these three possibilities. There seems to be no doubt that the particular holding which carried with it the feudal obligations of a barony, the holding of thirteen knights' fees and a third, did not place the holder among the *majores barones*, nor did it confer the right to be summoned to Parliament. The Committee of the House of Lords appointed in 1819 to inquire into 'all matters touching the Dignity of a Peer of the Realm' came to a decided conclusion that many who were in possession of baronies in the technical sense of holding *per baroniam* were not summoned by Edward I[1].

Was it a condition of summons?

The second question, whether the discretion of the king as to summons was or was not limited to those who held, *per baroniam* or otherwise, of himself admits of some doubt.

In the reign of Edward II the case of Thomas Furnival is decisive as to the character of the tenure. It was clearly not necessary that the person summoned should hold as by barony. Thomas Furnival was amerced for lands held of the king, as by barony. He alleged that he did not hold his lands on such tenure. On inquisition made by order of the Exchequer it was found that he held the lands on account of which he was amerced, and that he held of the king 'but not by barony[2].' He was undoubtedly summoned, by writ, to Parliament before and after this contention[3].

But it is not so easy to ascertain whether in the thirteenth

[1] 'Henry the Third is reported to have reckoned that above two hundred properties, denominated Baronies, existed in his time; the remaining records afford proof of the existence of a very large number of such Baronies, and except in the instances already mentioned, there appears to have been no claim of a seat in Parliament in respect of such Baronies.' Third Report on the Dignity of a Peer, p. 242.

[2] Madox, History of the Exchequer, ch. 14, s. ii. *ad fin.*

[3] See the lists of persons summoned to the Parliaments of Edward II and Edward III in the Appendix to the Report on the Dignity of a Peer.

and fourteenth centuries persons were summoned who did not hold of the king at all.

Conflicting opinions.

Mr. Hallam tells us that it is assumed and stated, without denial, but also without proof, that persons were summoned who did not hold of the Crown [1].

Dr. Stubbs says that 'for the period before us'—the reign of Edward I—'membership of the Parliamentary baronage implies both tenure and summons [2].'.

The Report on the Dignity of a Peer suggests, rather than asserts, that tenure was not a condition precedent to summons [3].

In the course of the reign of Edward III an alteration took place in the wording of the writ of summons which may indicate a change in the conditions of summons. The peer was bidden to attend—not *in fide et homagio,* but—*in fide et ligeantia.* This change did not take place at once. The words *homagium* and *ligeantia* were used, sometimes one, sometimes another, sometimes both, indiscriminately from 1348 to 1373, after which latter date the peer was regularly summoned *on his faith and allegiance.*

Summons created the baronage,

Perhaps one may be safe in saying this much: Tenure of the Crown by barony never gave a right to a writ of summons, and if it ever was a condition precedent to summons it very early ceased to be so. As regards the further doubt whether it was ever necessary that the person summoned should be a tenant of the Crown on any terms, authorities leave us in uncertainty. But whether or no the king uniformly or habitually confined his summons to such as held of himself, the estate of the baronage was ultimately constituted and defined, not by conditions of birth or of tenure, but by the exercise of the royal prerogative in issuing the writ of summons.

[1] Hallam, Middle Ages, iii. 123. [2] Stubbs, Const. Hist. ii. 184.

[3] Report, p. 243. The case of Warine de L'Isle, who held a barony of a mesne Lord and not of the king yet was summoned to Parliament, seems the only authority for the suggestion.

and conferred hereditary right.

In one respect the discretion of the Crown was subject to an important limitation. A writ of summons conferred a right to be summoned upon the heirs of the first recipient of the writ, if only he had obeyed it and taken his seat. The date from which a writ of summons operates in this way so as to create an hereditary peerage has been variously stated. Lord Redesdale in the L'Isle case would fix it at the fifth year of the reign of Richard II; he regards the rule as settled by the statute 5 Ric. II, st. 2, c. 4, which Lord Coke interprets, and seemingly with good ground for so doing, to be merely declaratory of existing practice[1]. Mr. Hallam would place it later[2]. Bishop Stubbs tells us that it is convenient to adopt the year 1295 as the era from which the baron whose ancestor has once been summoned and has once sat in Parliament can claim an hereditary right to be so summoned[3]. Professor Freeman thinks that Dr. Stubbs fixes the date a little too rigidly, and says:—

'One may certainly doubt whether Edward I, when he summoned a baron to parliament meant positively to pledge himself to summon that baron's heirs for ever and ever, or even necessarily to summon the baron himself to every future parliament. The facts are the other way: the summons for a while still remains irregular. But the perpetual summons, the hereditary summons, gradually became the rule, and that rule may in a certain sense be said to date from 1295. That is, from that time the tendency is to the perpetual summons, to the hereditary summons; from that time anything else gradually becomes exceptional; things had reached a point when the lawyers were sure before long to lay down the rule that a single summons implied a perpetual and an hereditary summons[4].'

§ 2. *Legal difficulties in defining the estate of the Baronage.*

Difficulties from mode of creation;

We may say that from 1295 onwards the general rule obtained that the Parliamentary baron acquired his rank and

[1] Report of proceedings on claim to the barony of L'Isle, ed. Nicolas, p. 200. Mr. Pike, Const. Hist. of the House of Lords, pp. 94–100, seems to agree, as to dates, with Lord Redesdale rather than with Dr. Stubbs.

[2] Hallam, Middle Ages, iii. 125.

[3] Const. Hist. ii. 184.

[4] Encyclopaedia Britannica, Tit. *Peerage*.

his right to vote by writ of summons followed by the taking of his seat. The earl was created by formal investiture with the sword, frequently in Parliament, and he received a charter, or later letters patent, declaring the dignity conferred upon him and limiting its devolution. As the other ranks of the peerage were called into existence the grant was in like manner evidenced by charter or patent. Richard II conferred a barony in this manner. The practice was not repeated in the case of baronies until the reign of Henry VI, but thenceforth it became the usual mode of creating Parliamentary baronies as well as other ranks in the peerage, and tended greatly to simplify questions which from time to time arose as to the rights to disputed peerages.

For the patent was evidence of title and indicated the line in which the peerage was to descend, usually to the heirs male of the grantee of the patent; while the titles of baronies which depended upon the writ of summons were complicated, not merely by the greater difficulty of proof, and by the fact that they passed to heirs lineal, and were not limited to the male line, but undoubtedly by the fact that for a long time an impression prevailed that they were connected with the holding of land, and hence that they might be dealt with like so much landed property [1].

From connection with tenure.

From this connection, right or wrong, of barony with tenure some curious results arose.

Prynne tells us [2], but without giving authority for the statement, that baronies by tenure were alienated by sales and gifts 'whereby the former barons, only by tenure, were no more summoned after such alienations, but the new tenants who purchased or possessed them.' It may not be easy to find proof of Prynne's general assertion, but at any rate there seems no doubt that holders of baronies exercised a power of

Alienation of baronies.

[1] We may note the effect, in confirming the idea that baronies were by tenure, of the position of the mitred abbots who asked to be excused attendance on the ground that they did not hold baronies in the sense of land baronies. Stubbs, Const. Hist. iii. 443.

[2] Brief Register, p. 239.

limitation so as to exclude heirs general in favour of a particular line of descent. Thus William Baron Berkeley in the reign of Henry VII, having barred the entail of the castle, lands and other hereditaments, including, as was considered at the time, the Parliamentary barony, settled the same on King Henry VII, in tail male with remainder to his own right heirs; the Parliamentary barony thereupon remained in abeyance until the death of Edward VI, when the heirs male of Henry VII failed and the remainder took effect in favour of the great-grandson of William's brother, who was then summoned to Parliament in right of the barony.

Tenancy by the curtesy.

Again, until the end of the sixteenth century a commoner marrying a baroness in her own right became entitled to a writ of summons during her life. Henry VIII thought it objectionable that 'a dignity should shift from the husband on the death of the wife[1],' and, in a case where a man claimed a dignity in right of his wife, laid down the rule that unless there was issue of the marriage, so as to make the husband a tenant by curtesy of England, he should not enjoy his wife's dignity. The right was thus narrowed, but until the *Willoughby*[2] case (1580) it was held that a tenancy by the curtesy in a peerage existed during the lifetime of the father to the exclusion of the eldest son, though of age[3].

Surrender of baronies.

The surrender of a barony to the Crown by the process of levying a fine suggests the connection of the right or liability to be summoned to Parliament with the tenure of an estate. The surrenders of peerages which took place before the seventeenth century appear to have been surrenders either of earldoms which had the character of offices, or of peerages created by letters patent which might be returned to the Chancery whence they came. In the year 1640 a fine had been levied of a barony which was created not by letters patent but by writ, and the fine was held good.

[1] Collins, p. 11, and see Pike, Constit. Hist. of House of Lords, p. 107.
[2] Ibid. p. 23.
[3] See Cruise on Dignities, and the cases there collected, pp. 106, 108.

The earlier practices above mentioned have ceased to be any longer lawful, not in consequence of any statute, or of any formulation of rules relating to the peerage by the House of Lords, but as a result of the gradual establishment of custom by a series of resolutions or decisions of the House on disputed peerages. In the words of Lord Campbell, 'It is now fully settled that the law of the peerage of England depends entirely upon usage, both as to the power of the Crown and as to any claim that may be made by a subject[1].'

Effect of seventeenth century decisions.

The seventeenth century—and especially the latter part of the seventeenth century—may be looked upon as the period when the customs of the Peerage were defined and reduced to the form in which they appear in modern text-books. And this was done by resolutions of the House passed upon cases referred to it for consideration by the Crown, or passed independently of such reference.

Thus in 1640 the House resolved in general terms that a peerage could not be alienated or transferred to another nor surrendered to the Crown. In the *Purbeck* case[2] in 1678 the House definitely held that a particular peerage could not be surrendered, nor the peer divest himself of his barony by the process of suffering a fine[3].

In 1670 it was held in the *Ruthyn* case[4] that title to a peerage must originate in matter of record; that is, by writ or by a succession of writs or by patent. Such a decision would mean that the House would not accept the fact of the seat having been taken, or a ceremonial having been passed through, unless supported by documentary evidence of a certain sort.

[1] 8 H. L. C. 79.

[2] Collins, 306, and Lords' Rep. iii. 26.

[3] Lords' Rep. iii. 25, and see Collins, 301. It has recently been contended that a peer may evade the disabilities, without surrendering the rights, of a peerage and may continue to sit in the House of Commons if he refrains from asking for a writ of summons. This must be considered to be settled in the negative by the action of the Commons in the case of Lord Selborne. *Supra*, p. 78, note.

[4] Collins, 256.

In 1673 it was held in the *Clifton*[1] case that a man to whom a writ of summons is issued, and who in pursuance thereof takes his seat in Parliament, acquires thereby an hereditary peerage.

In 1677 comes the important decision in the case of the barony of *Freschville*[2], that a Parliamentary barony is not constituted by the mere receipt of a writ of summons nor is the blood of the holder ennobled thereby. Proof must be given that the summons was obeyed and the seat taken in order to perfect the title to the barony.

Nineteenth-century decisions.

Life Peerages.

Two questions remained to be settled on the subject of the law of the peerage, and these were settled in very recent times. The power of the Crown to create peers for life with a right not merely to possess rank, precedence, and the other attributes of peerage, but to sit and vote as Lords of Parliament, was called in question in the year 1858 in the *Wensleydale* Peerage case. It was then held that the Crown had no such power.

Baronies by tenure.

The right of a subject to claim a writ of summons in virtue of the holding of certain lands was raised and adjudicated upon in 1861 in the *Berkeley* Peerage case, when the question of the existence of baronies by tenure was finally set at rest.

So far I have tried to show how the baronage came to be an estate of the realm and a separate House of Parliament, and to point out the legal difficulties which have sprung from the customary and indeterminate character of its origin.

We now come to consider:—What are the limits on the right of the Crown to create peers;—what are the limits on the right of the Crown to summon peers;—what disqualifications may prevent a peer, duly created and properly summoned, from sitting and voting;—what there is individual or characteristic about the mode of creation or of summons in the case of each of the classes of peers enumerated on a preceding page;—what are the privileges of the House collectively or of its members individually.

[1] Collins, 292. [2] Lords' Rep. iii. 29.

§ 3. *Real or supposed restrictions on Creation.*

With regard to restrictions on the Crown's right to create peers, one may say that the right to confer the dignity of the peerage is, as to the United Kingdom, unlimited; as to the Scotch and Irish peerage it is limited by the Acts of Union with Scotland and Ireland. There is, however, some uncertainty as to the sort of estate in a dignity which the Crown may legally confer. And until the question of the legal existence of baronies by tenure was set at rest it was not absolutely certain that the holder of such a supposed dignity might not transfer it at his pleasure and so, to that extent, encroach on the royal prerogative of creating peers.

Let us take first the recognised limitations imposed by the Acts of Union.

Limitations in Acts of Union.

Scotch peers.

The Act of Union with Scotland provides that the peerage of Scotland shall after that Act be the peerage of Great Britain, and makes no provision for any increase of the Scotch peerage, or for the maintenance of its numbers at their then existing figure. It would follow that if the Queen made a new peer of Scotland he would not be admitted to vote at the election of Scotch representative peers. Indeed an Act of the present reign [1] takes away the right to vote in respect of any peerage in virtue of which the vote has not been exercised since 1800.

Irish peers.

The Act of Union with Ireland provides that the Crown may make one peer of Ireland for every three that become extinct after the Union until the number fall to 100, and that the number of Irish peers not entitled by the possession of other peerages to an hereditary seat in the House of Lords of the United Kingdom shall never fall below 100.

The Crown therefore cannot create a peer of Scotland; and can only create a peer of Ireland under the circumstances defined in the Act of Union with Ireland. We now come to the doubtful question of the right of the Crown to create

Permissible limitations of peerages,

[1] 10 & 11 Vict. c. 52.

peerages with limitations which would not be admissible in the case of grants other than those of dignities.

In the *Devon* peerage case[1] it was held that a grant of an earldom made to a man and *his heirs male* was good, a grant differing from an estate tail in the absence of words of procreation and from an estate in fee by reason of the restriction as to sex. In the *Wiltes* claim of peerage[2] it was held that a similar grant was bad. There were other reasons for holding that the claimant in the Wiltes case could not sustain his claim, for William le Scrope the first Earl of Wiltes was alleged to have forfeited his earldom, upon his execution, in the troubles which ended in the dethronement of Richard II. But Lord Chelmsford seems to express a strong opinion that the grant was bad. He asks 'whether it is competent to the Crown to give to a dignity a descendible quality unknown to the law, and thereby to introduce a new species of inheritance and succession?' and adds, 'the question put in this way seems to answer itself. The Crown can have no such power unless there is something so peculiar in a dignity, so entirely within the province of the Crown to mould at its pleasure, that a limitation void as to every other subject of grant is good and valid in the creation of a peerage. No one has pushed the argument to this extravagant length, and yet, if any one limitation which the law prohibits in a grant of property may be applied by the Crown to the grant of a dignity, it is difficult to see how you can stop short of holding that there is no restriction upon the Crown's establishing any order of succession to a dignity, however novel and extraordinary.'

said to be the same as of realty.

It must be admitted that the rule as to the possible limitations and the descent of dignities is by no means clear. Lord Chelmsford denies the right of the Crown to create by patent any limitation of a dignity which would not be permissible in the case of real estate. And this must be taken with the further restriction mentioned by Coke (1 Inst. 16, b.), that a

[1] 2 Dow & Cl. 200. [2] L. R. iv. H. L. 126.

man or woman might be ennobled for life but not for years, because then such a dignity might pass to executors or administrators; it would in fact be personalty.

But it is difficult to see why the Crown should be restricted in creations by patent if the creation by writ confers an estate such as, in the case of realty, is unknown to the law. And that such an estate is conferred by writ seems clear from the words of Coke, who says that a writ of summons confers on the person summoned 'a fee simple in the barony without words of inheritance.' Such an estate would be to the grantee and his heirs general subject to the condition of taking his seat: but he qualifies this statement almost immediately by saying that 'thereby his blood is ennobled *to him and his heirs lineal.*' Cruise commenting on these *dicta* of Coke says, 'a person having a dignity by writ is not tenant in fee simple of it, for in that case *it would descend to heirs general,* whether lineal or collateral, of the person last seised; whereas a dignity of this description is only inheritable by such heirs as are lineally descended from the person first summoned to Parliament and not to any other heirs. It is in fact a species of estate not known to the law in any other instance except that of an office of honour[1].'

But in creations by writ,

the limitation seems anomalous.

It would seem then that a dignity conferred by writ of summons and not expressly limited by an accompanying patent is like a *donatio conditionalis* such as the Statute of Westminster II was intended to perpetuate, or that it is an estate tail created without words of limitation and incapable of being barred. If, as seems tolerably clear, the Crown could at the present day create a barony by writ[2], it can create such an estate in a dignity as the law would not recognise in the

Nature of estate in dignity by writ.

[1] Cruise, on Dignities, p. 100, and see Pike, Const. Hist. of the House of Lords, 124.

[2] Hansard, vol. 140, p. 331. Lord Campbell says 'the writ without the patent is conclusive evidence of an intention to create a barony in fee which is clearly within the prerogative of the crown.' It is presumed that the 'fee' must be understood with the limitations cited from Coke on the previous page.

case of land and can thereby 'give to a dignity a descendible quality unknown to the law.' With submission it may be questioned whether Lord Chelmsford's reasoning in this part of his judgment in the Wiltes peerage case is well founded.

Baronies by tenure;

It remains to consider the vexed question of baronies by tenure, which, if they could be held to exist, would encroach upon the exclusive prerogative of the Crown to summon whom it will to its Councils and to the Lords' House of Parliament. But the question has been decided adversely to the validity of such baronies in the *Berkeley* peerage case.

The Berkeley peerage case came to be decided in 1861, upon a reference by the Crown to the House of Lords of a petition of Sir Maurice Berkeley to the Queen to be declared Baron of Berkeley and to receive a writ of summons to Parliament.

grounds of claim.

The ground of the petition was that Sir Maurice was for the time being entitled to the castle and lands constituting what had been the territorial barony of Berkeley; and it may be said shortly, that in order to prove his case the petitioner had to show, first, that the right to a writ of summons had shifted with the right to the castle and lands of Berkeley, and secondly, that it had shifted in such a way as to make a precedent for the disposition by will of a barony by tenure.

As to the first point the petitioner was able to make out a case. There were two settlements of the castle and territorial barony of Berkeley by which it might be alleged that the Parliamentary barony had been allowed to pass to the person for the time entitled under the settlement.

First settlement of barony.

Of these settlements the first took place in the reign of Edward III, when Thomas, Lord Berkeley, with license from the Crown, settled the castle and lands constituting the territorial barony upon himself for life with remainder to his son Maurice in tail male. The result of this settlement was that when, in the third generation, male heirs failed in the direct line of descent, not only the lands but the writ of summons to Parliament went out of the direct line to the nearest male

heir [1]. There seemed no doubt that this was a genuine exercise of a right to direct the devolution of a barony by tenure, and that the baron summoned as just described was recognised by the House of Lords as entitled to the same precedence as though he had been in the direct line of descent.

Second settlement.

The second settlement was more doubtful in its application to the matter in dispute. William Lord Berkeley, in the reign of Henry VII, having barred the entail above described by suffering a fine, settled the territorial barony upon the heirs of his body, with remainder to Henry VII, and the heirs of his body, with a reversion to his own right heirs. William died childless, and his lands passed under the settlement to Henry VII, and his brother Maurice was never summoned to Parliament. When Edward VI died childless the reversion fell in, and Maurice's great-grandson acquired the property and was summoned to Parliament, taking the precedence due to the ancient barony. But in the meantime, though Maurice Berkeley was never summoned to Parliament, his son Maurice was summoned, yet only as junior baron, and he never obtained the high precedence due to the old Berkeley barony. When Maurice died childless his brother Thomas was summoned, and on the death of Thomas, his son, also named Thomas, was summoned, and this last enjoyed the precedence of the old barony. Shortly before his death the reversion had fallen in by the death of Edward VI, and Thomas's son Henry obtained the Berkeley lands as well as the Berkeley peerage.

Upon these facts it seems open to question whether the Parliamentary barony was not recognised, with or without the precedence due to it, as vested in the heirs of William the settlor, during some part of the time that the territorial barony was vested in the Crown.

These two settlements made the strength of the claimant's

[1] Maurice left sons of whom the eldest, Thomas, took the barony, but on his death left an only daughter, who was excluded from the succession by the entail. The barony passed to James, the nephew of Thomas and eldest grandson of Maurice, and this James was regularly summoned until his death in 1463.

Why insufficient proof.

case, because they afforded proof that a dealing with the castle of Berkeley affected the right of summons to Parliament. In consequence of the first, the right of summons had followed the castle out of the direct line of descent. In consequence of the second, the writ of summons had, at any rate for a time, ceased to be issued while the castle was vested in the Crown.

They were by deed and with licence;

But the inadequacy of these settlements to establish the claimant's case arose from the fact that in each case the settlement was made by deed and with licence from the Crown, whereas the claim set up rested on a devise of the castle by will. The claimant had therefore to contend that modes of dealing with land unknown to the law at the date of the last settlement on which his case rested were applicable to baronies by tenure.

but the claim rested on a devise.

For since his claim rested on a devise, and since wills of land were not valid at the date of the last settlement which was used to prove a right to deal with the barony by the holder, the claimant, in order to establish his case, was obliged to assume that a barony by tenure, if it existed at all, was susceptible of the widest exercise of rights of alienation and disposition, rights which had come into existence at a later date than any precedent which he could allege.

12 Car. II, c. 24, s. 11.

He could make no use of the saving clause in the Act 'for taking away tenures *in capite* and by knights service,' wherein it was provided that nothing in that Act should 'hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament:' for it was impossible for him to prove that any one had ever acquired such a right by devise.

The results of a decision in favour of the claimant would certainly have been startling; for he asserted, in the case of baronies by tenure, the existence of a right—

> 'By which a peer, of his own authority and of his own caprice, might disinherit his own sons, might transfer the peerage to a stranger, might confer a privilege on this stranger to demand a summons from the Sovereign to sit in the great council of the

realm, and might compel the unwilling sovereign to receive the homage of a peer so created[1].'

The decision of the House of Lords coincided with the opinion given by the judges consulted in the *Fitzwalter* case—

'That whatever pretence there may have been for presuming that there were originally baronies by tenure, yet that baronies by tenure had been discontinued many years and were not then in being, and so not fit to be revived or to admit any pretence or right of succession thereupon, and that the pretence of a barony by tenure was therefore not to be insisted on[2].'

Summary.

The Crown, then, has the exclusive prerogative of creating peers, and can do so at will, subject only to the restrictions (1) that it cannot create a peer of Scotland; (2) that it can only create a peer of Ireland under circumstances defined in the Act of Union with Ireland; and (3) that the point seems doubtful whether in directing the devolution of a dignity it is confined to limitations recognised by law in the case of other grants.

The Peerage Bill, 1719.

Beyond these restrictions its powers are unlimited: but it would not be right to leave this part of the subject without noting a proposal made in the year 1719 to confine within very narrow limits the creation of new peers.

The Peerage Bill of Lord Sunderland would have closed the House of Lords to any increase in its numbers beyond six. The king was to be allowed to make six new peers; after which, new creations were only to take place on the extinction of existing peerages. The Scotch peerage was to be represented by twenty-five hereditary peers, which number was to be maintained by reinforcement from the remaining peers of Scotland as occasion required. The bill was rejected, and its provisions are matter of history. The successful attempt of Anne and her ministers in 1711 to pack the House of Lords by the creation of twelve new peers, and so to secure a majority for the Parliamentary approval of the Peace of Utrecht, was

[1] Per Lord Campbell, 8 H. L. C. 81.

[2] Collins, 287.

probably the ground of this venturesome proposal. It may not be much more venturesome to surmise that, if the ranks of the House of Lords had been closed in 1719, the House itself would hardly have been in existence with its present powers and privileges at the present day.

§ 4. *Restrictions on Summons.*

For our purposes, which are mainly to consider the House of Lords, and not the Peerage generally, the limits upon the Crown's right of summons are more important than the limits upon its right to confer the Dignity of the Peerage. I will deal with all that exist or have been suggested with such comment or explanation as may appear to be necessary.

Tenure.

1. *Tenure.* Enough has been said on this point to show the character of the suggested limitations and the grounds on which, in the Berkeley peerage case, it was held not to exist. If baronies by tenure existed now they must be held with all the modern freedom of alienation and disposition, and the subject might therefore by sale or gift constrain the Crown to summon to its Councils and Parliament the man whom he might procure as his purchaser or select as his donee.

The historical uncertainty as to the existence of such baronies, and the practical absurdities which would follow from their existence, combine to lead to the conclusion that, at any rate, in the language of the judges in the Fitzwalter case, they are 'not fit to be revived.'

Scotch and Irish Peers.

2. *Scotch and Irish Peers.* I have already referred to the restrictions which are set upon the power of the Crown to create peerages of Scotland and Ireland. There are further restrictions upon its power to summon peers of Scotland and of Ireland to sit and vote in the House of Lords.

Restrictions imposed by Acts of Union:

The Act of Union with Scotland conferred upon all Scotch peers the same privileges as were enjoyed by the peers of Great Britain. The Act of Union with Ireland conferred upon all Irish peers the same privileges as were enjoyed by

the peers of the United Kingdom of Great Britain and Ireland. But in each case the right to sit in the House of Lords otherwise than as representative peers under the conditions of their respective Acts of Union was excepted from these privileges.

formerly by resolution of House of Lords,

So jealously was this exception guarded by the House of Lords that throughout the greater part of the eighteenth century it was maintained that the Crown could not confer upon a peer of Scotland a peerage of Great Britain which would entitle him to a writ of summons. The House came to this resolution in 1711, without reference from the Crown, in the case of the Duke of Hamilton (of the Peerage of Scotland), who claimed a seat as having been created Duke of Brandon in England [1]. This resolution was affirmed in 1719 in the case of the Earl of Soloway, created Duke of Dover.

The House of Lords endeavoured thus to impose a strange restriction upon the Crown's right of summons, maintaining that a Scotch peerage, though not a disqualification for receiving a peerage of the United Kingdom, was a disqualification for the enjoyment of the privileges of such a peerage in respect of sitting and voting in the House.

now rescinded.

But in the year 1782 a claim was again made for a writ of summons in respect of the dukedom of Brandon, and the judges were asked by the House of Lords to say whether the Duke of Brandon was incapable of receiving a writ because he was also Duke of Hamilton, or, in the terms of the reference, 'whether the Peers of Scotland be disabled from receiving, subsequently to the Union, a Patent of Peerage of Great Britain with all the Privileges usually incident thereto.' The judges delivered a unanimous opinion in favour of the claim, and there is now no doubt that the Crown, though it cannot summon a Scotch or Irish peer (apart from the representative peers), yet may enable itself to summon such a peer by conferring upon him a peerage of the United Kingdom.

[1] See debate and protest of dissentient peers. Cobbett, Parl. Hist. vi. 1047.

Spiritual peers.

3. *The Spiritual Peers.* The number of the Lords Spiritual sitting and voting in Parliament is now twenty-six—twenty-four bishops and two archbishops. An increase in the number of English bishops has not entitled the Crown to increase the number of Lords Spiritual summoned to Parliament, and the issue of the writ of summons is regulated by Acts of Parliament which provide for the creation and endowment of new Bishoprics.

The right of Crown limited by Statute.

In the Acts which establish the bishoprics of Manchester, St. Albans, and Truro, as well as in the Bishoprics Act of 1878[1], it is provided that the number of Lords Spiritual shall in no case be increased by the foundation of these bishoprics, but that whenever there is a vacancy among the Lords Spiritual by the avoidance of any see in England or Wales other than the sees of Canterbury, York, London, Durham, or Winchester, the vacancy is supplied by the summons of the senior bishop who has not previously become entitled to a writ. The five sees above named confer a title to a writ of summons at once.

Between the years 1800 and 1869 one archbishop and three bishops of the Irish Church were summoned, in rotation of sessions, to the House of Lords, but the Irish Church Act, 32 & 33 Vict. c. 42, s. 13, provides that no archbishop or bishop shall henceforth be summoned to, or be qualified to sit in, the House of Lords by reason of his episcopal dignity.

Descendibility.

4. *Descendibility.* A very important limitation upon the right of the Crown to issue the writ of summons is found in the hereditary character of the Lords of Parliament. The limitation may be stated and has been disputed in two ways: the Crown cannot withhold the writ from a man whose ancestor has been summoned by writ and has taken his seat; nor can it summon a man in pursuance of a patent limiting his peerage, and therewith the right to the summons, to the term of his life.

How it affects the right of summons.

[1] 41 & 42 Vict. c. 68, s. 5. This Act provided for the foundation of the bishoprics of Liverpool, Newcastle, Southwell, and Wakefield.

The writ of summons issued without letters patent and followed by the taking of the seat, constitutes a descendible peerage, and this has been so held since the latter part of the seventeenth century, when the Clifton peerage was supported on the following grounds, thus expressed by the judges who were consulted:—

That Sir Jervas Clifton was summoned to Parliament by the name of Jervas Clifton of Leighton Bromswold, by writ, dated July 9. 9 Jac. I.

That he accordingly did come and sit in Parliament as one of the peers of England.

That he died 16 Jac. I, leaving issue behind him Catherine, his sole daughter and heir, who married to the Lord Aubigny, afterwards Duke of Lenox.

That the said Duke, 17 Jac. I, was by letters patent created baron Leighton of Leighton Bromswold, in the county of Huntingdon, to him and the heirs male of his body, whereof none are now living.

That the petitioner is lineally descended from him and is his heir (by the said report) and as such now claims the barony of Clifton.

All which being admitted to be true we are of opinion,

First, that the said Sir Jervas, *by virtue of the said writ of summons, and his sitting in Parliament accordingly*, was a peer and baron of this kingdom, and his blood thereby ennobled.

Secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively after several descents to the petitioner as lineal heir to the said Lord Clifton.

Thirdly, that therefore the petitioner is well entitled to the said dignity[1].

Life peers.

Again, if the Crown creates a peerage by letters patent with an accompanying writ, a limitation in the patent to the life of the grantee will be held to invalidate the grant, so far as it is intended to convey the right to a writ of summons.

The question arose and was argued at length and finally determined by a Committee of Privileges in the case of the Wensleydale peerage.

[1] Collins, 192.

I must not, in this place, discuss the possible advantages of this contemplated action of the Crown; or how far the House might have been the stronger for a reinforcement, from time to time, of eminent men whose fortunes might be inadequate to support an hereditary peerage, though their abilities might increase the usefulness of a second chamber. We are concerned only with the legal aspect of the matter, and it may be stated as follows.

What the Crown might have done.

If the Queen had addressed a writ of summons to Baron Parke as Lord Wensleydale, and there had been no patent limiting the grant, the House could not have questioned the right of Lord Wensleydale to take his seat, nor could the Crown have refused a summons to Lord Wensleydale's heir after his death[1]. The first of these propositions was laid down by Lord Campbell in debate, and admitted; the second follows from the decision of the Clifton peerage case cited above. The words of Lord Campbell on the first point are significant.

'The writ without the patent is conclusive evidence of an intention to create a barony in fee, which is clearly within the prerogative of the Crown; but the writ *with the patent as clearly shows the intention merely to give operation to the patent*, and that the nominee shall have nothing beyond the dignity and privileges which the patent may lawfully confer[2].'

It followed then that the House of Lords was entitled to consider, on the creation of a new peerage by patent, whether the patent conferred such a peerage with such rights as the Crown might lawfully confer, and was further entitled to resist any claim by the new peer to rights which were not conferred by the patent, or, being conferred, were beyond the powers of the Crown to create.

What it did.

Lord Wensleydale's patent contained what were ultimately regarded as two repugnant clauses — a limitation of the peerage to the term of his life, and a special provision that

[1] Hansard, cxl. 362. [2] Ibid. 331.

he should be entitled to a writ of summons as a Lord of Parliament.

The right of the Crown to create a life peerage by patent was practically undisputed, but it was admitted that for four hundred years there had been no instance of a 'commoner being sent under a peerage for life to sit and vote in the House of Lords,' and it was contended that even before that time no such instance had been satisfactorily established [1].

Historical argument.

I will not follow the historical arguments of the learned lords who took part in the debate, but will be content with the summary of Dr. Stubbs as to the historical probabilities of the existence of Lords of Parliament who were life peers. There are, no doubt, cases which would seem to be cases of intermittent summons, or cases in which a man has been summoned during his life while his descendants have received no summons. Prynne has made out a list of these [2], and founds upon it an argument that a writ of summons no more necessarily makes a man an hereditary peer of Parliament than the return of a man as knight of a shire makes him an hereditary member of the House of Commons. But Dr. Stubbs tells us that—

'On careful examination Prynne's list shrinks to very small proportions; some of the names are those of judges whose writs have been confusedly mixed with those of the barons; some occur only in lists of summons to councils which were not proper Parliaments. In most of the other cases the cessation of the summons is explained by the particular family history; for example, the son is a minor at the time of his father's death, and dies or is forgotten before he comes of age. In others, nothing is known of the later family history, and it must be supposed to have become extinct [3].'

Dr. Stubbs goes so far as to say that 'no baron was ever created for life only without a provision as to the remainder or right of succession after his death.'

[1] Hansard, 3rd series, vol. 140, p. 335. [2] Prynne, Reg. i. 332, 333.
[3] Const. Hist. iii. 439.

Authentic cases of life peerages.

The well-authenticated cases of grants of life peerages appear to fall under three heads:—(1) grants for life of higher rank in the peerage to persons already entitled to a writ of summons in virtue of an existing barony; (2) grants of baronies for life, with an express provision that the bearers of the title should not sit in Parliament[1]; (3) grants of life peerages to women, mostly the mistresses of the last two Stuart and the first two Hanoverian kings.

None of these support the contention in favour of the legality of a creation of a Lord of Parliament for life, and if such creations had been proved to be the practice of the thirteenth and fourteenth centuries, the disuse of them for four hundred years would have been a formidable argument against the revival of such a prerogative by the Crown. If precedents were to be drawn from times when the rules of the constitution were in many respects indefinite, and from the exercise of prerogatives which for hundreds of years the Crown had been content to forego, some strange results might have been followed in the present century. As was pointed out in the debate, much of the Reform Act of 1832 was needless legislation if the Crown could have resorted to the power, which it undoubtedly exercised at one time, of issuing writs to new constituencies and withholding writs from others. Just as it was proposed that Queen Victoria should remodel the House of Lords, so William IV might have redistributed seats and remodelled the House of Commons, on the same principle, though necessarily on a larger scale.

Result of argument.

On the whole the balance of legal argument was strongly against the claim of the Crown. With the merits of the plan as a source of strength to the House of Lords I am not here concerned. The rule of law seems clear. The Crown can confer such dignities and with such limitations as it may please, but a Lord of Parliament must be an hereditary peer, except in the special cases of the bishops and the lords of appeal in ordinary; when once an hereditary peer is summoned

[1] Const. Hist. iii. 440, note 1.

the right to a summons descends to his heirs, except in the special case of the representative peers of Ireland[1].

5. *Alienage.* The framers of the Act of Settlement[2] went so far as to provide that no person born out of the kingdom, unless born of English parents, even though naturalised, might be a member of either House of Parliament. The Naturalisation Act of 1870[3] enabled an alien to become naturalised, and so to acquire political rights; but the alien until naturalised is not qualified for any parliamentary or municipal franchise, or entitled to any right or privilege as a British subject except such rights and privileges in respect of property as are thereby expressly given to him. Alienage.

It must be taken therefore that the Crown's right of summons is limited by the rule that none but a British subject may receive a writ of summons to the House of Lords.

6. *Bankruptcy.* A further limitation on the powers of the Crown must be noted in the case of bankrupt peers. The Bankruptcy Act[4] of 1883 disqualifies them from sitting and voting, but an unrepealed clause of the Bankruptcy Disqualification Act[5], 1871, provides that 'a writ of summons shall not be issued to any peer for the time disqualified from sitting or voting in the House of Lords.' Bankruptcy.

§ 5. *Disqualifications for Sitting and Voting.*

There are some disqualifications which do not affect the royal right to issue the writ of summons, but which rest upon the individual peer. There would appear to be nothing to prevent the Crown from summoning such peers to attend, but a rule of law, or resolution, or standing order of the House would forbid them to sit and vote therein.

1. *Infancy* is such a disqualification, if not by the common law of Parliament, at any rate by a standing order of the Infancy.

[1] The representative Peers of Scotland are not individually summoned.
[2] 12 & 13 Will. III, c. 2.
[3] 33 & 34 Vict. c. 14.
[4] 46 & 47 Vict. c. 52.
[5] 34 & 35 Vict. c. 50, s. 8.

22nd of May, 1685, to the effect that 'no lord under the age of one and twenty years shall be permitted to sit in this House.'

Felony.

2. *Felony* is now a disqualification similar in its character and effects to the like disqualification in the case of members of the House of Commons. For by 33 & 34 Vict. c. 23, the old rule as to corruption of blood is abolished, and, except in the case of outlawry, the forfeiture which ensued upon corruption of blood. A conviction of treason or felony therefore, is no longer held to affect the nobility of blood of the convicted person; but it incapacitates him, if the conviction is followed by a sentence of a certain severity [1], from sitting or voting as a member of either House of Parliament until he has either suffered his term of punishment or received a pardon under the great seal or sign manual.

Sentence of House.

3. *Sentence of the House.* It is presumed that the House of Lords could not, any more than the House of Commons, by mere resolution exclude a member of its own body permanently from taking a part in its proceedings. But it can disqualify by sentence, sitting as a Court of justice, either upon an impeachment by the House of Commons or, presumably, upon trial of one of its own members, in the full House if Parliament is sitting, if not, in the Court of the Lord High Steward. And this sentence passed by resolution of the House is an actual disqualification, and not, as in the case of the expulsion of a member by the House of Commons, a punishment which may or may not be temporary, as the person expelled does or does not obtain re-election.

Thus the sentence upon the Earl of Middlesex, Lord High Treasurer of England, impeached by the House of Commons for bribery, extortion, and other high crimes and misdemeanours, was settled by resolution of the House, before the Commons had demanded that sentence should be passed.

[1] The punishments which must follow conviction in order to produce this effect are penal servitude, or imprisonment with hard labour for any term, or without hard labour for a term of twelve months.

Lord Middlesex was to be incapable of holding office, to pay a fine to the king, and then came:—

'The sixth question, "Whether the Lord Treasurer shall ever sit in Parliament hereafter, or no?"

'Agreed "that he shall never sit hereafter[1]."'

Sentence to this effect was passed on sentence being demanded by the Commons. But the Crown can exercise the prerogative of pardon and so remove the disqualification and restore the right to sit and vote.

4. *The Oath.* The obligation of the Parliamentary oath was not imposed upon the Lords till more than a hundred years after it had been required of the Commons. But since 30 Car. II, c. 1, the law respecting the oath has been the same for the Lords as for the Commons, and it now depends on the Parliamentary Oaths Act 1866, modified, so as to admit of affirmation in place of an oath, by 51 & 52 Vict. c. 46.

§ 6. *Modes of acquiring right to sit and vote.*

The right to sit and vote:

I have now dealt with the limitations which are set upon the right of the Crown in respect of the creation of peers; with the further limitations which restrict the right of the Crown to summon those on whom it has conferred the dignity of the peerage; and with the disqualifications which, apart from any restrictions on the Crown's right of creation or summons, may be a bar to a peer's right to sit and vote. It remains to consider the process by which the right to sit and vote is acquired, before discussing the privileges of the Lords and their mode of transacting legislative and judicial business.

i. *Peers of the United Kingdom.*

how acquired by peer of the United Kingdom;

A peer of the United Kingdom is now invariably created by letters patent, and these are accompanied with a writ of summons to the House. On his introduction to the House he presents his patent of peerage to the Chancellor, and this

[1] Lords' Journals, iii. 382.

having been read is, together with his writ of summons, entered upon the Journals of the House. At each successive Parliament he receives a separate writ of summons in the form set forth in an earlier chapter.

A peer who succeeds to his peerage during infancy is entitled to his summons when of full age; a peer who succeeds when of full age is entitled at once and makes application to the Chancellor for a writ. The mode of application rests upon custom. Usually, a near relation of the peer who desires to claim his writ of summons makes a communication to the Lord Chancellor. The peer then produces certificates of his father's marriage, of his own baptism and of his father's burial, an extract from the Journals of the House showing that the late peer took his seat, and the patent which directs the devolution of the peerage. A near relative makes a declaration that the person described in these documents is the peer who claims his seat. Unless the case is one of doubt the writ is issued at once, and he takes his seat without the formalities required in the case of a newly created peer. If the case should be doubtful, the Chancellor may decline to order the issue of the writ. The claimant must then petition the Queen, through the Home Office, and the decision is referred to the Lords, not as a matter of right, but by custom; for the Queen might, if she chose, determine the question upon any advice that she was pleased to ask. The Lords direct the Committee for privileges to deal with the claim, after hearing evidence the Committee reports to the House, and the Crown grants or withholds the summons accordingly.

It would seem that if a peer on succeeding to his peerage did not apply for his writ of summons he would nevertheless be liable to be summoned, and a high authority has maintained that, whether he did or did not make application, it would be the duty of the Lord Chancellor to issue a writ to a Peer whose title was beyond question [1].

[1] Evidence of the Clerk of the Crown in Chancery. Report on Vacating of Seats, p. 21. [Commons' Papers, 278, 1894.] There have been cases, in

ii. *Representative peers of Scotland.*

The Act of Union with Scotland makes no provision for any addition to the Scotch peerage, so it is not necessary to go behind the process by which the Representative peers obtain their right to sit and vote. by Scotch representative peers.

It is provided by 6 Anne, c. 23 (78, in revised Statutes), that whenever a new Parliament is summoned, a proclamation should be made under the Great Seal, commanding the peers of Scotland to meet in Edinburgh, or at such other place and at such time as is named in the proclamation. This proclamation has to be published at the Market Cross at Edinburgh, and in all the county towns of Scotland ten days at least before the day of election [1]. By custom the election takes place at Holyrood, and is marked by some curious features. Proclamation.

The Peers sit at a long table, and the roll of peerages is called over by the Lord Clerk Register: each answers to the peerage in right of which he is present. The roll is a roll not of peers but of peerages, so that the same peer may be called two or three times if he happens to represent more peerages than one: nor is there any mode of disputing, at the time, the right of any one to be present who answers to a peerage called. The roll is then called a second time, and each peer rises and reads out his list of those for whom he Election.

recent times, of peers holding permanent offices in the Civil Service which, by the rules of the Service, may not be held together with a seat in either House. The peer, under these circumstances, upon succeeding to his peerage, has not applied for his writ of summons and has thus avoided the disqualification for office which a seat in Parliament would involve.

But the liability to a summons remains. The office, which is under any circumstances held at the pleasure of the Crown, is thus held not only subject to dismissal but to disqualification by summons.

The suggestion that a seat in the House of Commons is tenable under such conditions has been repudiated by the House. *Supra*, p. 78.

[1] It seems strange that in 1874 the officials concerned in the conduct of the election of Scotch peers did not appear to be aware that the time had been shortened from the period of twenty-five days required by the Act of Anne; 14 & 15 Vict. c. 87. See Report on the Representative Peerage of Scotland and Ireland, p. 21. [Lords' Papers, 140, 1874].

desires to vote. No peer may vote more than once, though he may represent more than one peerage. At the conclusion of this part of the proceedings proxies are handed in, the Lord Clerk Register then reads out the list of sixteen elected peers, and makes a return, which he signs and seals in the presence of the assembled peers. The Return is then sent to the Clerk of the Crown in Chancery, and by him transmitted to the Clerk of the House of Lords. The elected Scotch peer does not therefore receive a special summons, but presents himself to take the oath, which is preliminary to taking his seat, in right of his election as evidenced by the list supplied to the Clerk of the House: he then enjoys his right to sit and vote during the continuance of that Parliament. The rules of election seem to offer opportunities for the giving of votes by persons not entitled to vote; for those who are assembled as representing the peerages on the roll are not required to offer any evidence of their right to be present. So when a peerage is called the Lord Clerk Register is compelled to receive any votes tendered in respect of it except in so far as he may be debarred by a clause in the Act about to be referred to.

An Act of the present reign[1] has, though inadequately, attempted to supply a remedy for this inconvenience. It provides—

Recent legislation as to election.

1. That peerages in respect of which no vote has been given since 1800 shall be struck off the roll, and no vote accepted from persons claiming to represent them unless the House of Lords should specially give direction to that effect. § 1.

2. That if a right to vote is disputed, any two peers present may enter a protest, and the Lord Clerk Register is thereon bound to send the proceedings to the Clerk of Parliaments, and the claim is considered by the House of Lords in Committee of Privileges if application is made for such inquiry. § 3.

Scotch representative peers.

3. That if a claim has been established in the case of an

[1] 10 & 11 Vict. c. 52.

individual to a particular peerage, no vote is to be received in respect of that peerage from any other than that individual during his lifetime. § 4.

Nevertheless it may happen that a man without any right to vote may nevertheless vote, and vote unquestioned, unless two peers present should think it worth their while to protest, and further to move the House of Lords to inquire into the validity of the vote.

A Scotch representative peer on whom a peerage of the United Kingdom is conferred, at once vacates his seat as a representative peer, and a new election is held.

iii. *Representative Peers of Ireland.*

Irish representative peers.

It is provided by the Act of Union with Ireland that the number of Irish peers shall never be reduced below one hundred, and that until that limit is reached the Crown may create one new peerage for every three which become extinct.

Of the Irish peerage twenty-eight are elected as representatives of the whole body in the House of Lords, and each representative peer enjoys his right as a Lord of Parliament for the term of his life.

Mode of Election.

All the peers of Ireland are entitled to vote at the election of the representative peers, and their right to vote is certified by the Chancellor of England through the Clerk of the Parliaments to the Clerk of the Crown in Ireland, in each case of a new peer becoming entitled to be placed on the voting roll.

When an election has to be made, owing to the death of a representative peer, a certificate of the death is sent by two other such peers to the Lord Chancellor of England, who thereupon issues a writ to the Chancellor of Ireland directing him to provide for the holding an election.

The person responsible for the conduct of the election is the Clerk of the Crown and Hanaper in Ireland, who on receipt of a warrant from the Chancellor sends voting papers to all the peers who have proved to the House their right to be on the Roll and who apply for papers. The voting papers are sent in

duplicate, each form having a writ attached to it; the peer fills up the duplicate papers, seals them and sends them to the Clerk of the Crown. But before filling up the paper he is required to take the oath of allegiance before a judge in England or Ireland, a privy councillor, an ambassador or secretary of an embassy abroad, or a justice of the peace for any Irish borough or county. It may well happen that an Irish peer not resident in Ireland has some difficulty in satisfying this requirement. And as a matter of fact, Irish peers do lose their votes because they cannot, without great inconvenience, present themselves before any of the persons qualified to administer the oath.

Mode of voting.

After a lapse of fifty-two days from the day of the issue of the writ the poll is closed, and the Clerk of the Crown hands in one copy of the writs and voting papers at the Bar of the House of Lords, together with a certificate stating the number of votes given for each peer who has been voted for, and who it is that is elected. The elected peer is entitled to a writ of summons on his election and at each successive Parliament.

No vacancy is created among the Irish representative Peers by the promotion of any one of them to a peerage of the United Kingdom.

iv. *The Spiritual Peers.*

The form of writ addressed to the Bishop or Archbishop entitled to a summons to the House of Lords has been given earlier, and it has been noticed that the royal right of summons in respect of bishopries is limited by the Acts which provided for the creation and maintenance of new bishoprics. It remains to consider the process by which a person in holy orders becomes a bishop, and the steps by which his title to summons is perfected, subject to the limitations which I have mentioned as to the number of spiritual peers who may be lords of Parliament.

Ante, p. 52.

Process of creation.

Congé d'élire.

On a vacancy in a bishopric or archbishopric, the first stage in the proceedings is the notification of the vacancy by the

dean and chapter to the Crown in Chancery. The Crown thereupon sends them a *congé d'élire*, together with letters missive containing the name of the person whom they are desired to elect. The *congé d'élire* is a form: if the election is not made in accordance with the letters missive within twelve days of their receipt the Crown appoints by letters patent [1].

Letters missive.

The next stage in the process, following upon the election by the dean and chapter, is the consent of the person elected: he must signify this before a notary public, and make oath and fealty to the Crown. He does this immediately before, and as part of, the business of his confirmation. He thereupon becomes Lord Bishop elect. It remains that he should be confirmed in his election, consecrated, and enthroned.

Consent.

Oath of fealty.

The confirmation is brought about by the issue of letters patent under the great seal,—in the case of a bishopric, to the archbishop of the province; in the case of an archbishopric, to four bishops, or to one archbishop and two bishops. The ceremony takes place before the vicar general of the province. The forms of confirmation are solemn, elaborate, and idle. A proctor represents the dean and chapter by whom the bishop has been elected. He presents to the vicar general the letters patent requiring the election to be confirmed, and requests that opposers of the confirmation may be publicly called upon to show cause against the proceedings about to be taken. They are called: but, if they should appear, they will not be heard.

Confirmation.

On the occasion of the confirmation of Dr. Hampden who had been appointed and elected to the bishopric of Hereford, opposers were present and were prepared to state reasons against the confirmation. The Vicar General refused to hear them, and when they applied to the Court of Queen's Bench

The opposers.

[1] 25 Hen. VIII, c. 20. Where, as in the case of a new bishopric, there is no dean and chapter, the Crown appoints at once by letters patent. The modes of giving authority for consecration in the cases of suffragan, Indian, colonial, and [illegible]nary bishops are described in vol. ii. *The Crown*, ed. 2, p. 427.

for a *mandamus* to compel a hearing of their objections[1], the Court was evenly divided on the question whether the *mandamus* should issue or not: consequently the matter went no further.

The Act 25 Henry VIII, c. 20, §§ 4, 6, requires the confirmation of the bishop, and neither suggests nor prohibits remonstrance. It would seem that the Archbishops might provide such a procedure[2] as would enable reasonable objections to be heard, or else might divest the process of confirmation of a meaningless ceremonial and reduce it to a formal act. When it is concluded the vicar general commits to the bishop elect the care, governance and administration of the spiritualities of his see and decrees that he should be enthroned. The bishop then acquires the rights as to spiritual discipline and jurisdiction which belong to his office, but he is not entitled to its temporalities until after consecration. When this has taken place he does homage to the Queen for the temporalities of his see, and takes an oath of fealty to her. He thereupon becomes entitled in his turn, or at once if he holds a bishopric which confers a seat in Parliament immediately, to his writ of summons to the House of Lords.

Consecration. Homage.

Whether a bishop sits in the House of Lords in virtue of a temporal barony, or of his ecclesiastical status, is a matter of purely historical interest. Doubtless the bishop was summoned to the Witan in his spiritual capacity, as to an assembly of the wise. It is also beyond question that the bishops and many of the abbots, after the conquest, held their lands of the Crown as temporal baronies. But the conditions under which bishops were summoned to Parliament when Parliament came into existence are not so clear. They were summoned to sit, and they sat, with the estate of the baronage. They were bidden by the *Praemunientes* clause to summon the clerical estate. If we regard the early Parliaments as called

Do bishops sit as temporal barons,

[1] *Reg.* v. *The Archbishop of Canterbury*, 11 Q. B. 483 (1848).

[2] See report of proceedings in the Convocation of Canterbury, in the Times of Jan. 28, 1897, p. 8.

together mainly to vote supplies to the Crown, we may suppose that the estate of the clergy was summoned to ensure a due contribution from that estate, and that the bishops and abbots, holding temporal baronies, were summoned in virtue of these, and with the same object. If we regard these Parliaments as Councils of the Crown, and assume that the bishops were summoned as counsellors, it is still difficult to dissociate them from the baronage, because the Norman and Plantagenet councils were assemblages of the great feudal vassals.

or in right of spiritualities?

In support of the view that the bishop sits in virtue of his spiritual functions may be urged, firstly, the difference in the form of his writ. He was summoned 'fide et dilectione,' and now 'on his faith and love,' not like the temporal peer, on his 'faith and allegiance.' Again, during a vacancy in the bishopric, or during the absence of the bishop in foreign parts, the guardian of the spiritualities was summoned in his place.

Thus in the eleventh year of the reign of Henry VII writs of summons were issued;

'Custodi spiritualitatis episcopatus Lincolnensis, sede vacante.'

'Custodi spiritualitatis episcopatus Bangorensis, ipso episcopo in remotis agente.'

At the present time the homage done to the Queen for the temporalities of the see, and the oath of allegiance taken, suggest that the bishop sits as a baron. On the other hand neither the bishops created in the reign of Henry VIII nor those who occupy the sees created in the present reign have ever held baronies, and now that the lands of bishoprics are transferred to the Ecclesiastical Commissioners, any conclusions which may be founded on the connection of barony and tenure must be regarded as obsolete. Whatever he may once have been, the Bishop is now a Lord of Parliament in virtue of his office[1].

In respect to the right to be tried by peers in the Court of the Lord High Steward, or of taking part in such trials, or in impeachments, the bishops have lost the position, which they

[1] See Pike, Constitutional History of the House of Lords, ch. ix.

once undoubtedly occupied, as peers of the realm [1]. On the one hand they claimed exemption, not only from the Court of the Lord High Steward but, from all secular jurisdiction. On the other hand they could not, as ecclesiastics, pass sentence of death [2], and so if they were summoned to serve in the Court of the Lord High Steward they were at one time held entitled to appear by a Proctor [3].

The result of this was that they were excluded from trial in the Court of the Lord High Steward without obtaining immunity from other jurisdictions, and that, as the Court consisted, for a long time, of persons specially summoned, the bishops, who could not take part in passing sentence, were left out.

Finally, the Lords in 1692, resolved that 'Bishops who are only Lords of Parliament are not Peers, for they are not of trial by nobility [4],' and as a corollary to this it was laid down by Blackstone that as the bishops have no right to be tried in the Court of the Lord High Steward, they 'therefore surely ought not to be judges there [5].'

The Bishop sits in the House of Lords in virtue of a writ of summons in the form given in an earlier chapter, and subject to the rule that there are no more than twenty-six spiritual peers who are also Lords of Parliament in virtue of their spiritual office; that of these, five are to consist of the Archbishops of Canterbury and York, and the Bishops of London, Durham, and Winchester, and that the other bishops obtain, in order of seniority, their right to a writ of summons.

Ante, p. 54.

A bishop may resign his see and therewith lose his seat in the House of Lords [6], though he retains 'his rank, dignity and privilege.'

[1] Pike, Const. History of the House of Lords, p. 157, et sq.

[2] Constitutions of Clarendon, § xi.

[3] Year Book, 10 Ed. IV, no. 17, p. 6.

[4] Standing Orders of the House of Lords, LXXIII.

[5] Blackstone, Comm. iv. 265. This matter is fully discussed by Mr. Pike, Const. History of the House of Lords, pp. 212–223.

[6] 32 & 33 Vict. c. 111, s. 5.

v. *The Lords of Appeal in Ordinary.*

Lords of Appeal

I do not propose to enter here upon the judicial functions of the House of Lords: it is enough to say that for most purposes it is a final Court of Appeal from the Queen's Courts in England, Scotland and Ireland: that there is nothing but the conventions of the House to prevent any peer of Parliament from taking part in such Appeals, but that an Act of 1876, the Appellate Jurisdiction Act[1], has provided that no appeal shall be heard or determined unless there are present at such hearing and determination at least three Lords of Appeal. The Lords of Appeal are of three kinds, (1) the Lord Chancellor for the time being, (2) such Lords of Parliament as have held high judicial office, (3) the Lords of Appeal in ordinary. It is with these last that I am concerned. They form an exception to the general rules which govern the tenure of a right to sit and vote in the House of Lords, and like the bishops they transmit no rank or dignity to their descendants.

The Appellate Jurisdiction Act of 1876 gave power to the Crown to appoint two Lords of Appeal in ordinary. Their number might be increased to four as the paid members of the Judicial Committee died or retired. They must possess certain qualifications—that is, they must have held, for two years, high judicial office, or have practised at the English, Scotch or Irish bar for fifteen years; they are entitled to salaries of £6000 a year; and, as judges, they hold office on a like tenure to other judges, during good behaviour, unaffected by the demise of the Crown, but removable on an address of both Houses of Parliament.

See vol. ii. p. 469.

are life peers.

Besides this, each Lord of Appeal is entitled to the dignity of Baron for his life, and to a writ of summons to attend, and to sit and vote in the House of Lords. Until 1887 his right to a summons was dependent on the continuance of his

[1] 39 & 40 Vict. c. 59, amended by 50 & 51 Vict. c. 70.

discharge of judicial functions. It is now a right which lasts for the term of his life.

The Peers of the United Kingdom are the only members of the House of Lords whose right to sit and vote is descendible. Of the rest, the representative peers of Ireland and the Lords of Appeal enjoy a right necessarily coextensive with the term of their lives. A Scotch representative peer may lose his seat by non-election, or vacate it by the acceptance of a peerage of the United Kingdom; a bishop may resign his see, and with it his right to be summoned to Parliament.

Introduction of peers.

The formalities of the introduction of peers rest on the standing orders of the House of Lords.

A peer by descent needs no introduction, but may take his seat at any time after attaining the age of twenty-one. Peers who are summoned in virtue of newly created peerages, or in virtue of special limitations in remainder in patents of old peerages, are introduced by two peers, their patents presented to the Chancellor and read by him, and their writs of summons also presented. The patent and writ are both entered on the Journals of the House. This rule does not of course apply to the Scotch representative peers. The taking and subscription of the oath or affirmation of allegiance completes the title to the seat.

Rank and precedence of peers.

We may note here the ranks and precedence of the members of the Peerage. The title of Duke was first conferred on a subject by Edward III, who created his son, the Black Prince, Duke of Cornwall. That of Marquis dates from the reign of Richard II. Earldoms date from Saxon times. The first Viscount was created by Henry VI; and when we come to the origin of the lowest rank of the peerage, that of Baron, we must recur to the antiquarian discussion of a few pages back.

The station of the peers and their precedence within the House are regulated by 31 Henry VIII, c. 10, 'for placing of

the Lords.' This Act recites that 'in all great councils and congregations of men having sundry degrees and offices in the Commonwealth, it is very requisite and convenient that order should be had and taken for the placing, and sitting of such persons as are bound to resort to the same,' and then proceeds to order the placing of the Lords. The royal children alone have place beside the king. First on the right-hand side was to sit the king's vice-gerent, then the two archbishops, the bishops of London, Durham, and Winchester, and the others 'after their ancienties.' On the left-hand side were to sit first the Lord Chancellor, the Lord President, the Lord Privy Seal, above all dukes save such as were of the blood royal. Other great officers were to sit above all peers of a like rank to themselves. Such were the great chamberlain, the constable, marshal, lord admiral, lord steward, and king's chamberlain. The king's secretary if a baron was to sit above all other barons, if a bishop above all other bishops. Then it was provided that 'all Dukes, Marquesses, Earls, Viscounts and Barons not having any of the offices aforesaid shall sit and be placed after their ancienties as it hath been accustomed.' Such great officers as were not peers were to sit in the middle of the chamber.

§ 7. *Privileges of the House of Lords.*

The privileges of the House of Lords are sometimes taken to include its various judicial functions and some rules of procedure which are not strictly a part of its privileges as a House of Parliament.

Privileges of the Lords.

I will take the privileges of the House in the order in which I dealt with the privileges of the House of Commons, and will note such correspondence or difference as may exist.

Speaker of the Lords

Firstly, the Lords do not go through the form of asking for their privileges. The Speaker of the House is, by prescription, the Lord Chancellor or Lord Keeper of the Great Seal; in his

absence his place is taken by deputy Speakers, of whom there are always several, appointed by commission under the Great Seal, and if they should all be absent the Lords elect a Speaker for the time being. The woolsack on which the Speaker sits is outside the limits of the House, so that the office may be discharged by a commoner, and has been so discharged when a commoner has been Lord Keeper of the Great Seal, or when the Great Seal has been in commission[1]. Nor has the Speaker of the House of Lords the authority on points of order, nor the dignity in relation to the other members of the House, which is possessed by the Speaker of the House of Commons.

The permanent officers of the House are the Clerk of the Parliament, whose duties are to keep the records of the proceedings and judgments of the House; the Gentleman Usher of the Black Rod, whose duties answer to those of the Serjeant-at-Arms in the Commons; and the Serjeant-at-Arms, who is more especially the attendant of the Chancellor.

The Speaker then, even on such occasions as he is chosen by the Act of the House, does not receive any formal approval from the Crown, nor are the privileges of the House demanded by him or by any of its members. These privileges may now be compared with those of the House of Commons.

does not demand privileges.

Freedom of the person;

Freedom from arrest is claimed by the Lords as well as by the Commons. It is claimed by the Lords when Parliament is sitting or *within the usual times of privilege of Parliament*, except in cases of treason, felony, or refusing to give security for the peace; and this privilege is held to extend to their servants and followers during session and twenty days before and after.

The privilege of declining to serve as a witness is now waived by the Lords as by the Commons, and that of freedom from jury service is confirmed by Statute.

of speech;

Freedom of speech in the House of Lords has not come into question as often or as definitely as the like privilege in the

[1] May, Parl. Practice, ed. 10, p. 185.

Commons; but the attempts of Charles I to prevent the attendance of peers whom he considered to be hostile to himself[1], and the dismissal from non-political offices during the eighteenth century of peers who acted in opposition to the king's ministers, show that freedom of speech in the Lords has not been wholly unquestioned.

of access; The privilege of freedom of access to the person of the Sovereign exists for each individual peer, and not, as with the House of Commons, for the House collectively. This right would seem rather to belong to the magnates as hereditary counsellors of the Crown than to the Lords as a House of Parliament[2].

of excluding disqualified persons; The right of the House of Lords to see to the due constitution of its own body is analogous to the right which the House of Commons possesses to prevent disqualified persons from taking part in its business and to declare the seats vacant in virtue of which such persons claim to sit.

In the exercise of this privilege the House of Lords appears to have an undoubted right to decide on the validity of a new creation[3], as entitling the newly created peer to sit and vote.

[1] Gardiner, History of England, vol. vi. 91, 94.

[2] See vol. ii. The Crown (ed. 2), pp. 89, 140.

[3] Lord Campbell, in the debate on the Wensleydale peerage, says: 'By our free constitution there is a tribunal appointed for trying the legality of every exercise of the Royal prerogative which may be questioned. With regard to the creation of a Peer, that tribunal is the House of Lords. We have no right to consider the merits or demerits of the party who claims to take his seat here, if he be a British subject free from legal disability; but we have a right to see that he shows a title to sit here *ex facie* good: and if he claims by patent, the validity of that patent is necessarily submitted to our jurisdiction. We may call in the judges as advisers, but the House decides *proprio vigore*. Like all other deliberative assemblies, we are necessarily vested with the power of preventing intruders from interfering with our deliberations.' Lord Campbell goes on to insist upon the need of distinguishing two things which he says 'are entirely dissimilar—deciding upon claims to an old peerage, and considering the validity of a new creation. It is quite true that with respect to the former we have no jurisdiction except upon a reference from the Crown, and Lord Holt was quite right in refusing to pay any attention to any adjudication of this House upon a claim to the Banbury peerage without any such reference. The power of deciding on these claims the Crown, from the remotest times, has reserved to itself, with

The House exercised this right when, in 1711, it came to the decision, reversed in 1782, that the acquisition of an English peerage did not entitle a Scotch peer to a seat, and when, in 1856, it decided against Lord Wensleydale's claim to take his seat as a life peer. But the House has no right to decide on claims to an old peerage, unless the decision should be referred to it, as is usually the case, by the Crown.

of demanding presence of its members;

It was in the use of this same right to see that the House is duly constituted that the Lords petitioned the Crown in 1626 to send to the Earl of Bristol the writ to which he was entitled, a committee having reported that there was no precedent for the action of the Crown in withholding the writ [1]. In the same year the King was compelled to release the Earl of Arundel, whom he had kept in custody on no such charge as took his case out of the limits of privilege. The House met the many evasions and postponements of Charles by adjourning all other business to the consideration of their privileges, and thereupon the King set the Earl free from restraint [2].

of determining claims.

The House is also empowered by the Act of Union with Ireland to determine all disputed claims to Irish peerages; and in respect of disputed claims to vote at the election of representative peers of Scotland, a decision may be obtained from the Committee of Privileges under the provisions of 10 & 11 Vict. c. 52.

of commitment.

No question has been raised, so far as I am aware, concerning the right of the House to regulate and control its

such advice as it may ask. Formerly they were referred to the Earl Marshal and the Hereditary Constable, and, according to modern practice in cases of doubt and difficulty, they have been referred to this House. The Attorney-General has been the chief adviser of the Crown in peerage cases, and upon his sole advice the Crown may still act respecting titles that have been dormant for centuries. . . . But the claim to sit on a new creation by patent is a very different proceeding. Here the patent must be produced and read to verify the right of the claimant to take his place. If it confers such a dignity as by law gives a right to sit here he must be admitted.' Hansard, cxl. p. 329.

[1] Gardiner, Hist. of England, vol. vi. 94.

[2] Elsynge on Parliaments, 224 et sq.

own proceedings; and in comparing the privileges of the two Houses it only remains to consider the right of the House to commit for contempt. The House of Lords possesses wider powers in this respect than does the House of Commons[1]; it can commit for a definite term, and the prisoner is not released by prorogation. If however the commitment is not for a specific term, prorogation does, as it would seem, end the commitment[2], although Lord Denman in *Stockdale* v. *Hansard*[3] seems to have considered this to be doubtful.

Proxies.

A privilege which the House has thought it right to forego since 1868 is that of voting on divisions by proxy. The origin of the practice was doubtless due to the desire of the king in the early days of Parliaments to secure that the members of the baronage were individually bound by the grants made or the laws agreed to in their House. 'Those lords,' says Elsynge[4], 'that could not appear according to their summons made their *proxies*. But if they neither came nor made proxies, then for their disobedience to the king's writ they were amerced.' There were occasions when the king was not satisfied with an appearance by proxy, and on such occasions the writ contained a clause to the effect that a proxy would not be admitted[5].

The practice shows that a peerage involved liabilities as well as rights, and that the attendance of the peer in Parliament might at any time be insisted upon by the king.

The rules which the House adopted for the regulation of voting by proxy are now immaterial, for a standing order was made on March 31, 1868, that 'the practice of calling for proxies on a division shall be discontinued.'

Protests.

The right of a dissentient peer to record a protest on the Journals of the House is not a privilege except in so far as the control of its own procedure by the House is a privilege.

[1] 8 Durnf. & East, 314. [2] May's Parliamentary Practice (ed. 10), p. 89.
[3] 9 A. & E. 127.
[4] Manner of holding Parliaments in England, p. 119.
[5] Report on Dignity of a Peer, Appendix I, Part ii. p. 408, and see Pike, Const. Hist. of House of Lords, pp. 243–245.

The House of Commons might by standing order confer the same right upon its members. But a minority in the House of Commons is content with the power of speaking in a debate and voting in a division. In the House of Lords a minority, or any part of one, enjoys a further opportunity for the expression of its views, and can enter the grounds of its dissent in the form of a protest upon the Journals of the House.

Judicial duties.

The judicial functions of the House of Lords are fourfold. 1. As a Court of Appeal it reviews the judgments of the High Court of Justice and Court of Appeal. 2. As a Court of first instance it tries great offenders against the State upon impeachment by the Commons. 3. It has a criminal jurisdiction over members of its own body, in cases where a peer is charged with treason or felony. 4. and it is a court for the determination of disputed claims of peerage on reference from the Crown, and of the validity of new peerages intended by the Crown to confer a right to sit and vote in the House. Of these the first is a function which it inherited from the *magnum concilium*, and cannot be called a privilege of Parliament; the second is a duty which it discharges in conjunction with the Commons as the High Court of Parliament; the third is merely an application of the rule in Magna Charta that a man should be tried by his peers; the last is a privilege analogous to that enjoyed by the Commons of declaring a seat vacant where disqualifications exist, and, until recently, of determining disputed returns.

The part played by the House of Lords in the practical working of the Constitution is hardly a matter for this book. Yet one may note the curious historical transformation whereby the estate of the baronage has, by the continuous exercise of the royal prerogative in the creation of peers, developed into a second chamber containing a fair representation of the general interests of the community, and in many respects admirably fitted to maintain a high level of political discussion. The functions of the House of Lords, whether social or

political, have been exhaustively dealt with by Mr. Bagehot, and I have little or nothing to add to his chapter[1] on the subject.

On one matter of this nature it may be proper for me to dwell, though not here. When I come to deal with the process of legislation in the two Houses, it will be necessary to consider for how long and under what conditions the House of Lords may resist the expressed wishes of the House of Commons and reject measures which the House of Commons has passed.

[1] English Constitution, ch. iv.

CHAPTER VII.

THE PROCESS OF LEGISLATION.

We have now brought our Parliament together, have analysed its constituent parts, and have ascertained how they come into existence, and of what they consist. The next step must be to consider how they act.

Legislative functions of Parliament most striking because here Parliament is sovereign.

The most prominent if not the most important function of Parliament is legislation. Parliament, it is true, discharges other and serious duties as the representative of public opinion in the country. In this capacity it indicates the Ministers whom the Crown should employ, and the policy which those Ministers should follow. But it is in legislation that the sovereignty of Parliament is displayed. Its control over those who carry on the executive government, though effective, is indirect: its control over every rule of conduct which it may choose to take in hand is direct and absolute.

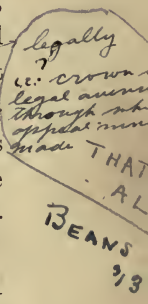
I would speak of the absoluteness of legislative sovereignty with the reservations which Mr. Dicey[1] has shown to exist in respect of all sovereignty, however absolute; I would make it clear that the omnipotence of Parliament is dependent on a certain correspondence between legislation and public opinion, a correspondence which must be more or less close in proportion to the tractability, the political capacity, the power of organisation of the governed. The law-maker in a despotism must consider first whether his law will cause a revolt; and next whether he has force at his back to crush it. The

Limitations on its sovereignty.

[1] Law of the Constitution, p. 71 sq.

law-maker, in a state where the bulk of the population elects those who make the laws, has to consider whether the majority will approve, or at any rate will accept his law. In the first case, sovereignty, based on force, is limited by the possibility of a stronger force being brought to bear upon it. In the second case legislative and political sovereignty are divided, and the action of the legislative sovereign is affected, before an ultimate appeal can be made to force, by an indication of the wishes of the political sovereign, the electorate.

But given a certain correspondence with public opinion, and Parliament is omnipotent. From it there is no appeal save to the electorate, and the Crown only can make that appeal. Parliament could recast the framework of the executive, which it is generally content to criticise. The courts of law will not venture to consider whether its enactments are advisable, they will only endeavour, when required, to ascertain what those enactments mean.



This supreme legislative power, which is the outward and visible sign of sovereignty, the nearest approach to that monster of absolutism which Austin created for himself, is the form of Parliamentary action upon which our inquiry should first turn. If Parliament is sovereign, it would seem natural to look first at the mode in which its sovereign attributes are shown, and later at the duties of Parliament as a grand Court for national grievances, and at its critical attitude towards the executive.

Division of subject.

I propose, therefore, now to consider the process of legislation in Parliament, and to divide the subject into five heads, as follows:—

1. Antiquities of legislative procedure.
2. Ordinary procedure of the Houses. Public Bills.
3. Money Bills.
4. Private Bill Legislation.
5. Provisional and other Statutory Rules and Orders.

Section I.

ANTIQUITIES OF LEGISLATIVE PROCEDURE.

§ 1. *The Rights of the Commons.*

Legislation before Parliament existed.

In considering how at different times laws have been framed and passed, we need not regard the forms in which the charters and assizes of the Norman and Angevin kings were issued. Magna Charta is, in form, a charter of liberties, in substance, a treaty between king and people, though it is issued *per consilium venerabilium patrum, et nobilium virorum.* Other enactments of kings, though made before the representation of the counties and boroughs in the Commons, are made by the advice and with the assent of the national council. Whatever may have been the respective shares of the king and his counsellors, legislation proceeded from the king with the counsel and consent of a body of advisers variously constituted from time to time.

But we are concerned only with legislation by the Crown in Parliament; and the steps were gradual by which the Commons became partakers in this counsel and consent, and established thereby the legislative sovereignty of Par-

1297. liament. The Confirmatio Cartarum is a solemn affirmation of the right of the Commons to be parties to taxation: an act of the fifteenth year of the reign of Edward II is a like affirmation of their right to be parties to legislation.

The Confirmatio Cartarum runs thus:—

Rights of the Commons in respect of taxation:

'v. And for so much as divers people of our realm are in fear that the aids and tasks which they have given to us before time towards our wars and other business, of their own grant and goodwill, howsoever they were made, might turn to a bondage to them and their heirs, because they might be at another time found in the rolls, and so likewise the prises taken throughout the realm by our ministers: we have granted for us and our heirs, that we shall not draw such aids, tasks nor prises into a custom, for anything that hath been done heretofore, or that may be found by roll in any other manner.

'vi. Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy Church, as also to earls, barons and to all the commonalty of the land, *that for no business henceforth will we take such manner of aids, tasks nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient tasks and prises due and accustomed.*'

of legislation.

And the Act of 1322 is even more explicit on the legislative rights of the Commons:—

'The matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded and established in parliaments by our lord the king, *and by the assent of the prelates, earls and barons and the commonalty of the realm*, according as hath been heretofore accustomed.' 15 Edw. II. *st. c.*

Difficulties in the exercise of these rights.

But though the participation of the commonalty of the realm was thus early declared to be essential to the validity of taxation and of legislation, yet as a matter of practice it was a long time before the process of legislation assumed its present form. There were two causes at work to produce this delay. The Crown in Council possessed and exercised a concurrent legislative power, inconsistent with the requirements of the Statute of Edward II for the participation of Crown, Lords and Commons in all legislative acts. And again, the mode in which the Commons at first exercised their right to partake in legislative functions was ill-adapted to secure that they obtained their due share in the framing of the required laws.

§ 2. *The claims of the Crown to legislate.*

The first of these obstacles to the full recognition of the legislative rights of the Commons is found in the concurrent legislative power of the Crown in Council. This survival of the pre-Parliamentary Constitution is manifested in the distinction, so difficult to be drawn by the student of constitutional history, between Statute and Ordinance.

Statute and ordinance:

The recognised differences between these two modes of

how distinguishable.

legislation are described by Dr. Stubbs as being differences partly of form, partly of character[1]. The *Ordinance* is put forth in letters patent or charter and is not engrossed on the Statute Roll; it is an act of the king or of the king in council; it is temporary, and is revocable by the king or the king in council. The *Statute* is the act of the Crown, Lords and Commons; it is engrossed on the Statute Roll; it is meant to be a permanent addition to the law of the land; it can only be revoked by the same body that made it and in the same form.

The ordinance in fact seems to follow the form of legislation which was in use when the Crown in Council discharged both legislative and executive functions. Its existence indicates the difficulty, which is noticeable for some time after Parliaments were at work, in distinguishing the functions of the Crown in Parliament from those of the Crown in Council, of the 'Magnates' as Councillors of the Crown from the same persons as Lords of Parliament.

Illustration.

A good illustration of the view which the mediaeval Parliaments entertained of the difference between Statute and Ordinance is to be found in the proceedings of the year 1340. The petitions of that year were considered in two groups. One of these was ordered to be dealt with by a joint committee[2] of the two Houses and related to such articles as were intended to be perpetual. These were 'by the common assent and accord of all' to be put into a Statute, 'Lequel Estatut notre Seigneur le Roi, par assent de touz en dit Parlement esteantz, commanda d'engrosser et ensealer, et fermement garder pour tut le Royalme d'Engleterre: et lequel estatut commence "A l'honeur de Dieu &cet.[3]"'

[1] Const. Hist. ii. 584.

[2] The Committee consisted of prelates, temporal peers and judges, twelve knights of the shire, and six burgesses. Rot. Parl. ii. 113.

[3] Rot. Parl. ii. 113. The Statute, 14 Edw. iii. st. 1, runs thus:—

'To the Honour of God and of Holy Church, by the assent of the Prelates, Earls, Barons, and others assembled at the Parliament holden at Westminster, the Wednesday next after Mid-lent in the 14th year of the reign of our Lord King Edward the Third of England and the first

The other group related to 'such points and articles as were not perpetual but for a time,' and with these 'notre Seigneur le Roi, par assentz des Grantz et Communes, fait faire et ensealer ses Lettres Patentes qui commencent en ceste manere, "Edward &cet. Sachetz que come Prelatz Countes &cet.[1]"'

Ordaining power of Crown questioned by Commons.

As the relative positions and duties of Crown and Parliament grew more definite, Crown and Commons alike realised the importance of this independent exercise of legislative power by the Crown in Council. One may note how the confusion is gradually cleared away in the course of the reign of Edward III. During that reign various experiments were tried for raising money at councils to which a limited number of knights and burgesses were summoned. Thus in 1353 an assembly of this sort sanctioned the Ordinance of the Staple[2], whereby trade was regulated, a new capital offence created, and a source of supply secured to the Crown. But the Commons present at this council protested against the enactment of matter so grave, unless in Parliament and in statutory form, and petitioned that the ordinances so made 'should not be of record as though they had been made by a general Parliament.' The king thereupon promised that steps should be taken to publish the Ordinances of the Staple and that in the next Parliament they should be rehearsed and put on the Roll of Parliament. Next year a Parliament, duly constituted, confirmed the Ordinances 'to be held for a Statute to endure always' and provided against further dealing with the matter save by consent of Parliament.

Illustration.

Rot. Parl. ii. 253, 257.

year of his reign of France: the king for the peace and quietness of his people, as well great as small, doth grant and establish the things underwritten, which he will to be holden and kept in all points *perpetually to endure.*'

[1] Rot. Parl. ii. 113.

[2] The staple was a system for the regulation of markets in certain towns, where goods were brought for sale and sold after trial of their quality to merchants who had a monopoly in dealing with such goods. The market and the monopoly were alike matters of royal grant, and were granted in return for contribution to royal revenue. Stubbs, Const. Hist. ii. 411.

A source of conflict in 17th century.

The confusion between Statute and Ordinance gradually passed away, but as it passed away the Crown came to assert as a part of its prerogative the right to legislate independently and so to make the work of Parliament needless, or to interfere by saving clauses and dispensations with the operation of Statutes, and so to make the work of Parliament nugatory. The Royal Proclamations of the sixteenth and seventeenth centuries form the battleground of the old controversy which is fought under changed names, and the right of the Crown to tax or to legislate without Parliamentary sanction is asserted and disputed in one form or another from the Ordinance of the Staple to the Bill of Rights.

§ 3. *The share of the Crown in framing Laws.*

Statutes drafted by Crown on petition of Estates.

The difficulties which arose from the mode of procedure in framing and passing laws were of a different kind. At the outset of our Parliamentary history statutes were drafted and enacted by the Crown in Council on the petition of the estates of the realm, and the first questions arose upon the necessity for the assent of all to the petitions of each.

Was it requisite that all estates should concur?

The procedure of early Parliaments is obscure, and for our purposes not very important. The date at which Lords and Commons first held separate sessions is uncertain, if indeed it is certain that they ever sat together. The fact that the baronage, the clergy, the knights, and the burgesses voted money in different proportions suggests, not two sessions, but four. At any rate, by the year 1341 the clergy had ceased to attend, and the Lords and Commons sat apart. But the necessity for a concurrence in legislation of the two estates which constituted Parliament does not seem to have been recognised for some time after the Statute of Edward II had ostensibly secured the legislative rights of the Commons.

Apart from the Statute Quia Emptores passed *instantia magnatum*, which belongs to an earlier date, we may accept in proof the statement of Dr. Stubbs that 'although in 1340,

1344, and 1352 the statutes passed at the petition of the clergy received the assent of the Commons, it seems almost certain that from time to time statutes or ordinances were passed by the king at their request without such assent[1].'

The abstention of the clergy, as an estate, from Parliament settled any question that might have arisen as to the need of their assent to petitions of the Lords or Commons, and throughout the fourteenth century the Commons adopted and merged the separate petitions of the 'magnates' in their own, even in matters such as the trial of peers, which exclusively concerned the Upper House.

Double capacity of peers.

The twofold duties of the peers as an estate of the realm and as councillors of the Crown make it difficult throughout the fourteenth century to discover how far their concurrence in the petitions of the Commons was needful to secure the assent of the Crown. For the king might be moved to reject a petition either because the Lords did not concur in it, sitting as a House of Parliament, or because they advised him to refuse it in their capacity of councillors of the Crown.

Ordinary process of mediaeval legislation.

Setting aside these questions of initiation and concurrence as relating to exceptional cases, we may pass to the ordinary mode of legislation by statute made on petition of the Commons. The king summoned a Parliament, partly for advice, mainly for supply. Having stated his need of a grant of money, the Commons stated their need of legislation, usually for the maintenance of customs or the correction of their abuse. Grievances came before supply, and the grant of money might perhaps depend upon the answers received by the Commons to their petitions. Hence the ordinary form of words intended to imply rejection was constructed so as to seem to mean merely a postponement. A favourable answer was couched in the words, 'le roy le veut,' an unfavourable answer in the words, 'le roy s'avisera.'

Petition.

Answer.

But an affirmative answer to their petition did not necessarily give to the Commons all that they desired in the way of

[1] Stubbs, Const. Hist. ii. 595.

legislation. Under the most favourable circumstances the king, with the assistance of his council, framed a law in accordance with the terms of the petition, and this law was engrossed in the Statute Book; or if the matter was of temporary importance it was regulated by ordinance in letters patent.

Imperfect security for effective legislation.

But the wishes of the Commons were apt to be defeated in various ways even though their petitions had received the royal assent. For sometimes the matter was either forgotten or intentionally laid aside after Parliament had broken up, and then no law was made. Sometimes a law was made, but not in accordance with the terms of the petition. Sometimes the law was made in a satisfactory form, but accompanied with saving clauses which enabled the king to suspend it for a time, or dispense with its operation in certain cases.

Attempts to obtain it.

The Commons attempted in many ways to secure that their petitions, when answered in the affirmative, should be made into statutes in the form and to the intent required, and free from the possibility of suspension or revocation.

They asked to have the answers of the king set forth in writing and sealed, so that they might be assured of a correspondence between answer and petition. They annexed con-

1327. ditions to the grant of supply to the effect that the petitions exhibited by Lords and Commons should be affirmed in the

1341. form in which they had received the king's assent. Their efforts seem to have been chiefly directed to procuring the due enactment in Statute or Ordinance of such provisions as were intended to be respectively permanent or temporary, and one may suspect from the tenour of the frequent petitions of the Commons that the king was apt to employ the revocable form of Ordinance where the Commons desired the permanent form of Statute, and to issue charters or letters patent instead of entering the required provisions on the Statute Roll.

The Commons seem to make a nearer approach to a control over the details of legislation when they petition, as they did in the reign of Henry V, that no statute should be enacted without their consent, and receive for answer

'the king of his grace especial granteth that from henceforth no thing be enacted to the petitions of his Comune that be contrarie of their asking whereby they should be bound without their assent. Saving alway to our liege lord his royal prerogative to grant and deny what him lust of their petitions and asking aforesaid[1].'

The growing influence of the Commons in legislation is marked by the changes in the form of the enacting clause of statutes.

Forms of enactment.

The Statute of Westminster i. is thus described as 'Etablissement le Roi Edward fait par son conseil et par l'assentement des Erceveques, Eveques, Abbes, Priors, Countes, Barons, et la comminalte de la terre illoeque somous.' From the year 1318 until the accession of Edward III statutes are expressed to be made by the assent of the prelates, earls, barons, and the commonalty of the realm. From the commencement of the reign of Edward III the mode of legislation upon petition finds expression in the words 'at the request of the Commons,' though sometimes both Houses are described as petitioners, as in the form 'Le roy supplie feust par les Prelats, Countes, Barons, et les communaltez.'

It is not till the 11th of Henry VI that the words 'by authority of Parliament' come in, thereby placing the Houses upon a level in legislative power; and a little before that date the 'request' of the Commons begins to drop out. The enacting clauses are not uniform, but gradually throughout the reign of Henry VI statutes ceased to be enacted by the *request* of the Commons and are enacted by the *authority* of Parliament, and from the 1st of Henry VII the *request* is never revived.

§ 4. *Commencement of modern procedure.*

But the substantial remedy for the difficulty which I have described was found when, as took place in the reign of Henry VI, the Commons adopted the practice of framing their petitions in statutory form, and requested that the form

[1] Rot. Parl. iv. 22.

The Commons draft the bills they want.

should not be altered. Dr. Stubbs tells us that this custom was introduced 'first in the legislative acts which were originated by the king [1]'; an early instance of its adoption by the Commons is to be found in the Parliament Rolls of 1429, when they ask that 'the Bill which is passed by the Communes of yis present Parliament; hit lyke unto ye king by yadvys of the Lordys Spirituell and Temporell in yis present Parlement, yat graciously hit may be answered after the tenure and fourme yerof [2].'

There is a further indication of the change in the not unfrequent use of the expression, 'billa formam actus in se continens [3]': meaning that the 'bill,' which in Parliament, as in the Chancery, was the usual vehicle for a petition, did not contain a petition only, but the scheme or draft of a statute.

Three readings.

It is not easy to ascertain the commencement of the practice of reading a petition or bill three times, and to say when the Lords read and considered and rejected such a petition acting as a House of Parliament, and no longer as Councillors of the king and as parties to his decision.

For our purposes it is enough to note that by the reign of Henry VII, Parliamentary procedure, so far as legislation is concerned, had assumed its present form after passing through the phases which I have described. In the reign of Henry VIII we can trace in the Lords' Journals the entire course of a bill through that House [4], and when we begin the Commons'

[1] Const. Hist. iii. 463. [2] Rot. Parl. iv. 359.

[3] The phrase perhaps survives in the modern heading of a bill sent from one or other House 'A bill intituled an Act.'

[4] It may be interesting to trace the progress of a bill through the House of Lords, 1 Hen. VIII:—

'8° die Parliamenti.

'Item Billa de Forests, et de feris extra suas clausuras parcas sive indagines licite venandis, et interficiendis lecta est jam primo.

'12° die Parliamenti.

'Item Billa de Forests et feris extra parcas et forestas interficiendis, lecta est jam secunda vice.

'14° die Parliamenti sexto Februarii.

'Item Billa de Forests et feris extra parcas sive forestas venandis et

Journals with the reign of Edward VI, we find the three readings to be the practice of the lower House also.

Different as was the practice of a mediaeval Parliament to that of the Parliaments of our own time, we can trace even in the conduct of legislation during the fourteenth century the rudiments of modern procedure. The king opened Parliament with a statement of his wants and a promise to redress grievances; petitions were based upon grievances and presented before the grant of supply: the petitions and the subsequent grants passed from Commons to Lords, and received the royal assent in words still in use. When the intended statute was drawn up in a bill, and no longer left in the inchoate form of petition, it offered fuller opportunities for discussion and probably rendered necessary a closer attention to procedure and the rules of debate.

Effect of new procedure;

But the form of legislation by bill presented for the acceptance or rejection of the Crown did much more than help to formulate Parliamentary procedure, or to secure the due effect of the royal assent to a petition. It established the distinction between Executive and Legislature, the Crown in Council and the Crown in Parliament; and though in seeming it was merely a change from the suggestion of a topic of legislation to the suggestion of a topic clothed in the form of legislation, it really laid the foundation of the omnipotence of Parliament.

in increasing power of Parliament.

Until this mode of legislation came into practice, the Houses had petitioned the Crown for the redress of public grievances, just as the suitor petitioned the Crown in Chancery for the redress of a private and individual grievance. The legislative act came from the Crown, and though Lords and Commons might complain of legislation which was not

interficiendis lecta est jam tertio cui omnes Domini assensum prebuerunt.

'15° die Parliamenti.

'Item Billa de feris extra parcas et forestas venandis missa est in domum inferiorem, nuntio clerico Parliamenti.

'23° die Parliamenti.

'A domo inferiori adducte sunt sex Bille

1 De Forestis quam approbat Domus inferior. *Expedita.*

initiated or embodied in their petitions, yet such legislation did take place from time to time, and all laws were left to the Crown to make, and depended for form and time of making upon the pleasure of the Crown.

But when the Houses of Parliament took into their own hands the drafting of Statutes, their demands for legislation became definite and urgent; the laws which they desired to see made could not be varied, postponed or nullified. They no longer asked the King to assent to the making of a law on a given subject, and then to make one, but they asked him to say 'yes' or 'no' to the passing of a law drawn in the form in which they wished it to pass, and no longer admitting of amendment.

When the Crown could no longer control legislation, except by refusing assent to laws framed and presented for its acceptance or rejection, there had plainly arisen a new legislative power outside the executive. The Houses and the Crown had changed places: the assent of the former had hitherto been required to measures generally initiated by them, but always framed by the Crown: henceforth assent or rejection was all that was left to the Crown in dealing with measures initiated, framed and passed by the House.

A full account of the antiquities of Parliamentary procedure might fill a volume with interesting matter, but the brief sketch which I have just given may suffice as an introduction to what is important for my present purpose, the mode in which laws are framed and passed at the present time.

Section II.

ORDINARY PROCEDURE OF THE HOUSES. PUBLIC BILLS.

§ 1. *Business of each day.*

In order to follow the process of legislation it is necessary to consider, however briefly and in outline, the forms of business of the Houses, because it is somewhat difficult to trace the

steps by which a bill becomes law, if those steps traverse a region with which the reader is wholly unfamiliar. Perhaps the simplest way of getting at the procedure of the House of Commons will be to take a statement of the ordinary business of the day, to consider what the various items of business mean, and to select for further inquiry so much as is relevant to my present purpose.

The order of business is as follows.

The House generally proceeds each day with: 1. Private Business; 2. Public Petitions; 3. Giving Notices of Motions; 4. Unopposed Motions for Returns; 5. Motions for leave of Absence; 6. Questions; 7. Orders of the Day and Notices of Motions as set down in the Order Book.

I will examine these in order.

1. *Private business* means private bill legislation, and I propose to defer the treatment of this until I have concluded the more important topic of public bill legislation. Private business.

2. *Public Petitions* are petitions from localities or bodies of persons or individuals, relating to matters of public policy and general concern which are under the consideration of Parliament, or which it is desired to bring under the consideration of Parliament. They must be distinguished from the private petitions which form the first stage in private bill legislation. These public petitions are a feature in the aspect of Parliament as the Grand Inquest of the nation, and I shall have to deal with them in the concluding chapter of this book. Public petitions. *Post*, ch. x. § 4.

Here it is enough to say that members who have intimated to the Speaker their intention to present a petition are called upon to do so at the completion of private business. When the list is exhausted others may present petitions, without notice, before public business commences. But such presentation must not interfere with the giving of notices, or asking of questions; nor is it permitted after 5 o'clock, unless the petition relate to motions on the notice paper, or orders of the day.

Notices of motion.

3. *Giving notices of motion.* Every member who desires to propose a question to the House, or, in other words, to make a motion, is entitled to do so; but he must give the House due notice of his intention, and in order to secure an opportunity of being heard he must enter the terms of his motion in the Order book or Notice paper, with his name and the day on which he proposes to bring on such motion.

The precedence of these questions is established as follows. A member who desires to propose a question to the House must, in the first instance, place his name on the notice paper. Each name on the notice paper is numbered, and when the time for this part of the business of the House arrives, the numbers are all put into a ballot box, shuffled, and drawn out one by one by a clerk at the table. As each number is drawn, the name of the member to whom it belongs is called by the Speaker. The member thereupon gives notice of his motion and gets priority of choice of day and hour according to the order in which his number comes out of the ballot box [1].

Motions for returns,

4. *Motions for Returns* are motions for accounts or papers to be supplied to the House. If no opposition is raised to such motions they are allowed to come on in the place assigned to them in the list of business in the Standing Orders.

for leave of absence.

5. *Motions for Leave of Absence.* A member is supposed to be always in attendance upon the House; if, therefore, he desires to be absent for any time, he must apply for the leave of the House, and this may be granted or refused [2].

In the sixteenth and seventeenth centuries, when members did not live with the fear of the constituencies before their eyes, absence without leave was regarded as a serious impediment to business. Nowadays the evil remedies itself: a constituency will not return a member who neglects his

[1] The distance of time for which notice may be given is limited by Standing Order 19. The period between the day of giving notice and the day for which notice is given may not include more than four days (i. e. Tuesdays) on which notices have precedence.

[2] 82 Com. Jour. 376.

duties; but when the constituencies did not know or did not care how far their members attended to the business of the House, it was necessary to deal with the matter otherwise. Thus an Act of Henry VIII exonerates a shire or borough from payment of wages to members who left Parliament before the end of the Session without a license from the Speaker, which license was to be 'entered of record in the book of the clerk of the Parliament appointed for the Commons House.' And the House seems to have been inclined to treat as vacant the seat of a member who, from his engagements elsewhere, was unable to take part in the business of the House.

6 Hen. VIII, c. 16.

Thus on the 18th of February, 1625, 'Mr. Gay informeth the House that he is returned a burgess for the City of Bath, and is mayor of the same city; and besides, one of the principal men of their city hath murthered himself, and his wife; and that the mayor is the only coroner, and therefore desireth leave to go home.

'Referred to the Committee of Privileges whether a new writ shall issue.

'Resolved, upon the causes alleged by Mr. Gay, he shall have liberty to depart home to the City of Bath, about those affairs[1].'

Enforcement of attendance.

The House, as has been already noticed, in dealing with the disqualification of unsoundness of mind, has shown itself reluctant to declare a seat vacant on the ground of incapacity to attend Parliament. But a member who contumaciously refuses to fulfil the duties of membership may be placed in the custody of the Serjeant-at-arms, and though the only recent case of this nature relates to attendance at a Committee[2], there seems no reason why non-attendance after leave of absence refused should not be treated as a contempt.

A call of the House.

Enforcement of attendance for some special purpose by means of an order for a *call of the House* may be said to have fallen into disuse. There has been no such call since 1836. In the event of a call of the House a member who neither

[1] 1 Com. Jour. 821.

[2] Case of Mr. Smith O'Brien, Hansard, 3rd series, vol. 85, p. 1291. And see case of Mr. J. P. Hennessey, Hansard, 3rd series, vol. 156, pp. 1931, 2213.

attended nor offered a sufficient excuse would be brought in the custody of the Serjeant-at-arms to receive such sentence as the House might think it right to inflict[1].

Questions.

6. *Questions.* These are inquiries addressed to Ministers of the Crown, or to members concerned in the business of the House, on matters connected with the business of Parliament or with the administration of government. Such inquiries ought not to be of an argumentative character, but should be so framed as merely to elicit the information wanted. Nor should the answer do more than convey such information, though a Minister of the Crown may sometimes go further in the way of explanation: and he may also, in the interest of the public service, decline to answer the question.

Orders of the day.

7. *Notices of Motion and Orders of the Day.* These mark the commencement of the public business of the House. On nights appropriated by the Government, which are primarily Mondays and Thursdays, (though the Government usually acquires a larger command of the time of the House,) motions concerning the arrangement of business, or for leave to bring in bills or for the appointment of select committees, are introduced in such order as the Government pleases. On Tuesdays and Fridays the notices given by private members come on first for brief discussion. Then follow the Orders of the day, matters which the House has ordered to be discussed on a given day; notices of motion, except as aforesaid, do not come on for discussion until the Orders of any given day have been dealt with.

There are certain days in the week appropriated to the discussion of matters which the House collectively has ordered to be discussed. These are Mondays, Wednesdays, Thursdays, and Fridays[2]. On all these days except Wednesday the Ministry has the right of placing first on the Orders of the

Government nights.

[1] The last occasion of a call of the House was on the 19th April, 1836. The last occasion of a motion for a call was on the 23rd March, 1882.

[2] The House only sits on Saturday by special resolution, and rarely for the transaction of any but Government business.

day such matters introduced by the Government as the House has ordered to be discussed, and on Friday the first order must be the Committee of Supply or Ways and Means.

Notices of Motion, therefore, come first only on Tuesdays: on Fridays, when Supply is the order of the day, there is, or was, a certain latitude of preliminary discussion to be described hereafter. Thus Tuesday is essentially a private member's night, and on Friday private members can raise questions in which they are interested, before going into Committee of Supply[1].

Post, p. 271.

Hours of Sitting. On Monday, Tuesday, Thursday and Friday, the House meets at 3 o'clock, on Wednesday at mid-day. On the four first-named days the House sits until 1 o'clock in the morning unless previously adjourned; on Wednesday until 6 o'clock.

Hours of Sitting.

But between midnight and 1 A.M. on the first four days, and between 5.30 and 6 P.M. on Wednesday, only unopposed business can be taken; for by a standing order made on 24th February, 1888, the pending business is interrupted at the hours of midnight or 5.30 P.M. and is appointed, unless the House shall otherwise determine, to be resumed on the next day at which the House shall sit. If the House is in Committee the Chairman leaves the chair, and reports to the House. The departure of Speaker or Chairman from the chair may be deferred if, on the interruption of business, the closure is moved. This, which may lead to consequential motions in order to bring the question under discussion to an issue, does not admit of amendment or debate, and so does not greatly prolong the business after the hour of midnight.

A *Morning Sitting* is one which begins at 2 P.M., and at such a sitting the ordinary course of business is followed, and immediately after questions to ministers have been dealt with

Morning Sittings.

[1] By a sessional Order of 27th February, 1896, renewed in 1897, the opportunity of raising questions on the motion that the Speaker leave the chair is taken away.

such orders of the day come on as the House has appointed for the morning sitting. At 7 o'clock the House suspends the sitting to resume it at nine. But the business under discussion at seven is not resumed at nine. Orders of the day have been set down for the 9 o'clock sitting, and until these are disposed of the business of the morning sitting cannot be taken. The evening sitting ends as I have described, at midnight for opposed business, at 1 o'clock for business which is unopposed. But the House retains the control of its business, and the rules laid down may be modified, either in such manner as is provided by the Standing Orders, or by the general consent of the House.

Modifications of the ordinary course of proceeding become more and more frequent as the mass of business for which the Government has to provide continues to increase. The majority which a Government has at its command enables it to appropriate to itself the time of the House and arrange for the transaction of its business irrespective of the Standing Orders.

Adjournment of the House at a fixed hour.

The business on which the House is engaged at any sitting may be stopped by an adjournment to a later hour or day. An adjournment may come about mechanically, when an hour has been reached which the Standing Orders have fixed for the conclusion of a sitting: or it may be brought about by a member moving that 'the House do now adjourn.' Such a motion, coming before the orders of the day have been reached, may be used to introduce a topic which a member thinks that the House should at once consider. The motion for adjournment is then merely formal, and designed to give an occasion for the previous discussion.

On motion for adjournment.

A motion of this sort might be made *bona fide*, or it might be made in order to obstruct the business of the House, or again, though made *bona fide* it might be frivolous. Stringent rules have therefore been laid down to prevent the adjournment being moved obstructively or frivolously. The matter for discussion must be definite, and of urgent public importance:

the motion can only be made when the questions on the notice paper are disposed of and before the commencement of public business: the Speaker may refuse to put the question if he considers that the matter is not important: the leave of the House must be given, or forty members must rise in their places to support the motion: and if less than forty and more than ten shall rise, a division may be taken at the instance of the member who moves the adjournment, on the question whether or no the motion shall be made.

A 'count out.'

There is yet a third way in which the business of the House may be brought to an end: this is a 'count out.' If at any time after 4 o'clock the attention of the Speaker is called to the fact that there are not forty members present, and on counting the House it is proved that there are less than forty, the House is thereupon adjourned[1].

Conclusion of Debate.

A debate may be brought to an end by adjournment of the discussion to a future day, or by the question being put at the end of a discussion, or by the question being put under the rules relating to the closure of debate.

The closure.

The Closure is brought about when a member moves that 'the question be now put,' although other members may be desirous of continuing the discussion. Such a motion may only be made when the Speaker or Chairman of Ways and Means is in the Chair, and he may refuse to put the motion on the ground that the rights of the minority are thereby infringed or the rules of the House abused.

Urgency resolutions.

The Closure dates from 1881. In that year the development of obstruction in the House of Commons was met by Urgency Resolutions. In pursuance of these a Minister of the Crown might move that the state of public business was urgent. The question was put without debate, and if urgency was declared by a majority of three to one in a House of not less than 300 the regulation of the business of the House, while business continued to be urgent, devolved upon the Speaker. Under urgency resolutions of this sort the

[1] For the rules as to a 'count out,' see May, Parl. Pract. (ed. 10) 223.

Speaker made rules by which the discussions on the Bill for protection of Person and Property in Ireland (1881) and on the Bill for the Prevention of Crime (1882) were reduced within measurable compass.

The closure, 1882.

In the autumn of 1882 the Closure was established by Standing Order, but the initiative was left with the Speaker who, if he saw that 'the evident sense of the House' was in favour of the conclusion of a debate, might put the question to the House that the pending debate should close. If this were decided in the affirmative by a majority of more than 200 or opposed by a minority of less than 40, the question at issue was to be put at once[1].

The closure, 1887.

In 1887 the present Standing Order was made under which any member may move that 'the question be now put.'

'After a Question has been proposed, a member rising in his place may claim to move "that the Question be now put"; and unless it shall appear to the Chair that such motion is an abuse of the Rules of the House or an infringement of the rights of the minority, the Question "that the Question be now put" shall be put forthwith and decided without amendment or debate[2].'

This brings to an issue a debate then pending, but there were two other methods for accelerating discussion.

One is provided by this same Standing Order which enables a member, with the assent of the Chair, to move that a clause, or any part of a clause, 'stand part of or be added to the Bill.' Such a motion, if carried, overrides any amendments which may have been set down to the words in question[3].

The 'guillotine.'

The other is effected by resolutions or orders of the House by which the discussion on a measure is limited in time, and certain stages are ordered to be reached by a specified day and hour. Such an order, which may altogether preclude discussion on important clauses of a Bill, is known as 'closure by compartments,' or more familiarly as 'the guillotine.'

[1] Annual Register, 1882, p. 27.

[2] Standing Order 25. [18th March, 1887; 7th March, 1888.]

[3] See May, Parl. Practice (ed. 10), 213, 214, for a fuller account of the machinery of the closure.

Illustrations are to be found in the debates on the Criminal Law (Ireland) Bill of 1887[1], the Home Rule Bill of 1893[2], and the Evicted Tenants Bill of 1894[3].

Obstruction.

It only remains to note the control which the House exercises over the speech of individual members. There are two Standing Orders which serve the purpose of maintaining order and stopping prolixity in debate. By Order 23[4], a member disregarding the authority of the Chair or wilfully obstructing the business of the House, may be *named* by the Speaker, and thereupon a motion may be made and question put without amendment, adjournment or debate that the member so named be suspended from the service of the House for a week on the first occasion, a fortnight on the second, a month on the third or any subsequent occasion.

Irrelevance.

By Order 24[5], the Speaker or Chairman may stop irrelevance or tedious repetition by first calling the attention of the House to the conduct of a member guilty of these offences, and then directing him to discontinue his speech.

§ 2. *A Public Bill in the Commons.*

When a bill first comes before the House it must come on in the form of a notice of motion. A bill may take its origin from the Lords or the Commons, but it will be convenient to trace it through its progress to the maturity of a Statute, beginning, as most important bills begin, in the House of Commons. I will then point out such difference of procedure as may be noticeable when a bill takes its origin in the House of Lords.

Motion for leave to introduce a bill.

First, the member who desires to introduce a measure gives notice, as above described, of his intention to do so. When the motion comes on in its order, he moves for leave to introduce a bill. Usually this is no more than a form, but

[1] Hansard, 3rd series, vol. 315, p. 1594.
[2] Ibid, 4th series, vol. 14, p. 373.
[3] Ibid. vol. 27, p. 1410.
[4] 28th Feb. 1880, and 22nd Nov. 1882.
[5] 27th Nov. 1882, and 28th Feb. 1888.

there may be occasions when the purport of the bill is explained on its introduction[1]. Thereupon an order of the House is made that the bill be prepared and brought in by the mover and other members named by him. The bill may then immediately be presented, which is done by the member appearing at the bar, whereupon the Speaker calls upon him by name, he calls out, 'A bill, Sir,' and is desired by the Speaker to bring it up. He brings it to the table, and delivers it to the clerk of the House, by whom its title is read aloud.

First reading.

The questions that a bill 'be now read a first time,' and that it be printed, are put without amendment or debate: an order is then made that it be read a second time on a day named.

Second reading.

The bill then takes its place among the orders of the day, and when the second reading comes on in due course a motion is made and question put 'that the bill be now read a second time.' This is the point at which the general principle of the bill is most fully discussed and its fate decided.

An opponent may move that the bill be read a second time that day six months, which shelves it for the Session, or may meet the motion that the bill be now read a second time with a direct negative which shelves it for the day, or may move, by way of amendment to the question, resolutions which affect or alter the character of the bill.

These are all civil ways of rejecting a bill: but there are precedents for a bill being rejected, and torn in the House: and in 1772 a bill was rejected, thrown over the table by the Speaker, and kicked out of the House by members. The offence of this particular bill was that it had been returned from the Lords with an amendment to a money clause[2].

The bill in Committee.

If the bill passes its second reading it is committed to a Committee of the whole House. If it should be thought desirable that the bill should contain provisions on matters

[1] Lengthy debates took place on the two Bills for the Government of Ireland in 1886 and 1893; on the Bill for the Protection of Life and Property in Ireland, 1881; and on Criminal Procedure (Ireland), 1887.

[2] Parl. Hist. vol. 17, p. 515.

not strictly relevant to its main subject, the Committee is empowered, by *instructions*, to introduce such provisions. Such instructions are not imperative, they merely confer a power which the Committee would not otherwise possess of discussing and introducing amendments so as to widen the scope of the bill beyond its original design[1]. The Committee is then appointed by a resolution 'that this House will resolve itself into a Committee of the whole House.' The Speaker thereupon puts the question, 'that I do leave the Chair[2].' This being agreed to, he leaves the chair, and the Chairman of Committees presides. The bill is then discussed in detail, clause by clause, and each member may speak to every question as often as he please. At the conclusion of each sitting of the House in Committee on the Bill, the Speaker resumes the chair; the Chairman of Committees reports that progress had been made with the bill, and asks for leave to sit again; and the House orders that the Committee shall resume its work on a given day. While the bill is in Committee amendments may be made in any part of it. The clauses are taken one by one, and each may be altered or omitted: amendments must be relevant to the scope of the bill, or to the instructions which enlarge that scope: new clauses cannot as a rule be added until the discussion on the existing clauses is ended.

Instructions.

Amendments.

When the bill has gone through Committee, the Chairman reports to the House to that effect, and an order is made for the consideration of the bill as amended, on a day named. This is called the 'Report stage' in the progress of a bill[3]. The Speaker is then in the chair. Further amendments may now be made and new clauses added. If these amendments

Report.

Re-commitment.

[1] Instructions must also be supplementary and ancillary to the main purpose of the bill, and must not introduce matter which would properly be the subject of a distinct measure. Otherwise the Speaker will rule them to be out of order. Hansard, 4th series, xii. 205.

[2] This is merely formal (Standing Order, 28 Feb., 1888), unless notice of an instruction has been given.

[3] If no amendments are carried there is no Report stage, and the bill goes on to its third reading.

are of a complicated character the bill may be re-committed, wholly, or as to particular clauses and amendments. It is then again discussed in Committee, and again reported for the consideration of the House. But no amendment may be proposed on the Report stage which could not have been proposed in Committee without an instruction.

Third reading.

After the bill as amended has been taken into consideration, a motion is made that the bill be read a third time. On this being carried, an order is made that the clerk 'carry the bill to the Lords, and desire their concurrence,' and the bill is endorsed with the words *soit baillé aux seigneurs*.

§ 3. *Exceptional procedure.*

Before proceeding to follow the fate of a bill in the House of Lords, I will mention two points of some importance in which the procedure above described is not applicable.

Bills relating to Religion, Trade.

The first relates to the mode in which bills on certain subjects are required to be introduced. From the 30th April, 1772, until the 29th February, 1888, it had been a rule of the House that no bill relating to Religion or the alteration of the laws relating to Religion, and no bill relating to Trade or the alteration of the laws relating to Trade, might be brought in until the proposition had been considered in a Committee of the whole House.

Illustration: Irish Church Bill, 1869.

Thus, in the case of the Disestablishment of the Irish Church in 1869, the proceedings began with a resolution in a Committee of the whole House moved by Mr. Gladstone, 'That the Chairman be directed to move the House that leave be given to bring in a Bill to put an end to the Establishment of the Irish Church, and to make provision in respect of the temporalities thereof, and in respect of the Royal College of Maynooth.' This resolution being carried was reported to the whole House which was at once moved for leave to bring in the Bill, the Bill was ordered to be brought in, was presented, and read a first time on the same evening.

The rule was found to be inconvenient and was repealed in 1888.

But the House will not proceed upon any Petition, Motion, or Bill, for granting any money or for releasing or compounding any sum of money owing to the Crown, except in a Committee of the whole House.

Money grants must originate in Committee.

This means that bills upon such subjects require to be founded upon Resolutions passed in Committee; but this subject of *money bills* must be dealt with later.

The second matter is the creation in the year 1882 of two standing Committees, one to deal with bills relating to law, the Courts of Justice, and legal procedure; the other with bills relating to trade, shipping, and manufactures, if such bills should be committed to them by order of the House.

Standing Committees for law, and trade.

This plan is a compromise between the occasional practice of committing bills to a select Committee of 15 members, and the general practice of considering them in Committee of the whole House. The Committee consists of not less than 60 or more than 80 members, and its consideration and report of bills is to be equivalent to a consideration and report by a Committee of the whole House. It was hoped that this arrangement would diminish the length and irrelevance of discussions upon public bills, especially public bills which might contain provisions of a technical character. The Standing Order by which these Committees were appointed was revived in 1888, and the subjects of Fishing and Agriculture were added to those assigned to the Committee on Trade.

§ 4. *A Bill in the Lords.*

After noting these possible variations in procedure, I will now resume the history of a bill at the point at which it is sent up to the House of Lords with a message that the Commons desire their concurrence. The bill is read a first time as soon as brought up: it then remains on the table of the House of Lords, and if twelve days pass while the House

Procedure in the Lords.

is sitting, and no notice is given of the second reading of the bill, it ceases to appear on the minutes and is dropped for the Session. But if the bill is taken up by a member of the House, the procedure is in no way different from the procedure in the House of Commons. The bill may be accepted by the Lords without amendment, and then after the third reading it is not returned to the Commons, but a message is sent that the Lords have agreed to the said bill without any amendment. If, however, the Lords amend the bill they return it after the third reading with a message that they agree to the bill with amendments to which they desire the concurrence of the Commons, and endorsed with the words, *A ceste bille avesque des amendemens les seigneurs sont assentus.*

Disagreement between the Houses.

The Commons may agree or disagree with the Lords' amendments to their bill; whether they agree or disagree the bill is returned with a message to that effect; but if they agree the bill is endorsed with the words *A ces amendemens les Communes sont assentus.* Should there be disagreement and neither House be willing to accept the bill in the form which is satisfactory to the other, there are two modes by which the reasons of difference may be stated so as to bring about an agreement. One of these is a Conference, the other is a statement of reasons drawn up by a Committee of the dissentient House and sent to the other with the amended bill.

A Conference.

A Conference is a formal meeting of members appointed by their respective Houses; these members are called Managers. The Managers on behalf of the dissentient House are entrusted with the drafting of reasons for their disagreement, and with the task of reading and delivering them to the Managers of the other House. No argument is used or comment made unless the conference be a free conference, in which case each set of Managers endeavours by persuasion to convince the others or in some way to effect an agreement between the Houses.

A free conference.

Reasons assigned

The ceremony of a conference is extremely formal: the Lords sit; the Commons stand: the Commons are bare-

headed; the Lords, except when speaking, are only required to take off their hats as they approach and leave their seats. in lieu of conference.

Practically conferences are not resorted to at the present time. No free conference has been held since 1836, and in 1851 the Houses by resolutions agreed to receive reasons for disagreement or for insistance on amendments in the form of messages[1], unless a conference should be specially demanded by one or other House.

The way in which the Houses come to terms may be illustrated by some entries from the Journals of 1881 respecting the Irish Land Act. Illustration: The Irish Land Act, 1881.

The Lords sent back the bill to the Commons with amendments to which the Commons could not agree. It was thereupon 'Ordered That a Committee be appointed to draw up reasons to be assigned to the Lords for disagreeing to the amendments made by their Lordships to the Bill':—and a committee was appointed consisting of Mr. Gladstone and others: 'and they are to withdraw immediately.'

The Committee reported very shortly after, and it was 'Ordered That a message be sent to the Lords to communicate the said reasons (with the Bill and amendments): and that the Clerk do carry the same.'

The Lords disagreed to the amendments of the Commons, and in like manner communicated their reasons for disagreement by message; and after further communications of this nature, 'A message was sent to the House of Commons by Sir William Rose, Clerk of the Parliaments':

'To acquaint them, "That the Lords agree to the amendments made by the Commons to the further amendments made by the Lords, and to the consequential amendments

[1] Until 1855 it was customary that messages from the Lords should be conveyed to the Commons by Masters in Chancery, or, on special occasions, by Judges. Messages from the Commons were conveyed to the Lords by the Chairman of the Committees of Ways and Means, or the member in charge of the Bill with which the message was concerned. In 1855 it was agreed that one of the clerks of either House might be the bearer of such messages. May, Parl. Pract. (ed. 10), p. 412.

made by the Commons to the said Bill, and do not insist upon their amendments to the said Bill to which the Commons have disagreed."'

Differences which cannot be settled by conference.

The length to which the House of Lords may carry its opposition to measures sent up from the House of Commons is a matter to be settled by practical sagacity rather than by convention. Rules of law clearly do not apply. The House of Lords is, for legislative purposes, co-ordinate with the House of Commons.

A bill passed by the Commons and rejected by the Lords may relate to a subject in which the country, that is the electorate, takes no special interest; the House of Lords may then be considered free to exercise its critical faculties without regard to the wishes of any one outside its own body.

On the other hand the Commons may assert that the bill which they send to the Lords is one on which the electorate has set its heart, and the Lords may maintain either that the country does not desire such legislation at all, or at any rate does not desire it in that particular form.

Settlement by compromise;

The difficulty can only be settled in one of three ways, by a compromise if possible, or, if each House adheres to its opinion, by a dissolution of Parliament or a creation of peers.

Dissolution;

A dissolution of Parliament would ascertain, if there was room for doubt, what was the opinion of the electorate. But if there should be no room for doubt, or if the opinion of the country should be expressed with clearness, a further resistance of the House of Lords can only be met by a creation of peers sufficiently numerous to affect the balance of power in the House.

Creation of peers.

The last creation of peers for such a purpose is almost contemporaneous with the last occasion of the refusal of the royal assent to a bill[1]. The last occasion when such a

[1] The creation of peers to secure the approval of the House for the Treaty of Utrecht was in 1712: the last refusal of the royal assent to a bill was in 1707.

creation was seriously contemplated was in 1832, when the resistance of the Lords to the Reform Bill seemed to threaten the peace of the country. The knowledge that such a measure was under serious consideration sufficed to induce the peers to take the king's advice and allow the bill to pass.

Post, p. 345.

But though we are told sometimes that the royal prerogative in the creation of the peers is a safeguard of the constitution and a means of harmonising the action of the two Houses, it seems plain enough that to introduce a number of persons into the House of Lords for the sole object of determining a vote on a particular occasion is a use of legal powers which nothing could justify but imminent risk, in the alternative, of public danger.

We do not think well of the Tudor practice of harmonising the action of the Commons and the ministers of the Crown by the creation of boroughs intended to return nominees of the Court. It is not easy to distinguish the cases, or to approve of influencing either House, by additions made to its numbers, in order to secure submission to the wishes of the Crown or the ministers of the Crown.

Convention as to limits of resistance.

But the Reform Bill of 1832 was passed without the creation of a precedent for 'swamping' the House of Lords. And we may note that, since that date, a convention has grown up, more salutary in its operation than the exercise of the royal prerogative.

Not recognised in 1832.

In 1831 and 1832 the Peers did not only set themselves in opposition to the Commons but to the wishes of the electorate expressed clearly and emphatically at a general election held in 1831. To appreciate the significance of their action, we must remember:—that the first Parliament of William IV was dissolved in April 1831, because after the House of Commons had passed the Reform Bill introduced by the Ministry, on its second reading, by a majority of one vote, there were evident signs that the progress of the bill would be embarrassed and its character altered in Committee: that

the country had returned to Parliament a House of Commons which had passed the Reform Bill on its second reading not by a majority of 1, but of 136; and that the bill coming up to the Lords with this evidence, within and without the House of Commons, that it was a measure on which the country had set its heart was rejected on the second reading in the Upper House by a majority of 41: that the Reform Bill once more introduced *de novo* in the House of Commons, had been carried on a second reading by a majority of 162, and having come up to the Lords and passed a second reading by the narrow majority of 9, was in imminent danger of being frustrated in Committee.

There was no doubt as to the wishes of the country. There was no doubt that the House of Lords did not regard the wishes of the country. It was fortunate for them that they ultimately bowed to the wishes of the king.

The precedents, of 1869 and 1884.

In 1869 we find a very different principle laid down by an eminent member of the House of Lords and accepted by the majority of the House. At the general election of 1868 the question of the Disestablishment of the Irish Church had been brought most distinctly before the constituencies, and a great majority of the members returned to the House of Commons were pledged to support such a measure. When in 1869 the Irish Church bill came before the House of Lords, Lord Cairns, in urging the House not to reject a measure of which he personally disapproved, said:—

The Irish Church Bill.

'There are questions which arise now and again—rarely but sometimes—as to which the country is so much on the alert, is so nervously anxious and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature in this country what it requires; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do otherwise than the country desires[1].'

[1] Hansard, 3rd series, vol. 197, p. 293.

So too Lord Salisbury:—

'Reject this bill now, and you will tell the English people that you have determined upon offering an uncompromising resistance to the decision which they have unhesitatingly pronounced[1].'

Thus it would seem that since 1832 a convention has come into existence that where the country has emphatically pronounced in favour of a measure and that measure is submitted by the House of Commons to the House of Lords, the Upper House will acquiesce in legislation of which a majority of its number may not approve, and will confine its opposition to amendments of detail.

The action of the House of Lords in 1884, when the Peers refused to read the Franchise bill a second time until they had before them a consequential measure for the Redistribution of Seats, illustrates this convention.

At the general election of 1880, a majority of members had been returned to the House of Commons pledged to vote for an extension of the franchise in counties. In 1884 the Prime Minister introduced a bill which proposed to add very largely to the electorate. Such a measure involved a considerable redistribution of seats, but the Government did not propose to bring forward a Redistribution bill until the Franchise bill had become law. The Franchise Bill.

The Commons acquiesced in this arrangement but the Lords said, and not without some show of reason, that before conferring large powers upon the persons whom it was proposed to enfranchise, they desired to know how those powers would be distributed throughout the country.

They did not reject the Franchise bill, but they declined to proceed with it until the measure which should accompany it was placed before them. The dispute was not really between the Lords and the Commons so much as between the Lords and the Ministers of the Crown, nor did it concern the merits of a measure so much as the time and order in which certain

[1] Hansard, 3rd series, vol. 197, p. 94.

measures should be introduced. This was the real issue, obscured, as happens in such cases, by misunderstandings and imputations of motive. The result was a compromise, the Government scheme for the redistribution of seats was published, and the bill was settled in consultation by the leaders of both parties; the Lords thereupon passed the Franchise bill and the conflict was at an end.

And so the relations of the two Houses may thus be stated. In matters which do not greatly interest the electorate the Lords can use a free hand in rejection, amendment, or postponement. In matters of widespread interest the House of Lords by rejecting a measure sent to them by the House of Commons might force the Queen's Ministers to advise a dissolution in order to ascertain the sense of the country; if the country gives a decided answer, the Lords must, substantially, abide by it, and, as the history of the last twenty-five years has shown, they will abide by it. The alternative to such a compromise might be the disturbance of the public peace, or a large creation of peers, which means that the resistance of the House of Lords would be overcome by a violent transformation of its character.

The right to force a dissolution.

I should add that the power, which the House of Lords appears to possess, of compelling an appeal to the country on an issue upon which the two Houses are at variance, is one which has not been exercised, at least in modern times. It could only be exercised by reasonable men, under one of two conditions; in a case where the country had not expressed any definite opinion on the measure passed by the Commons [1], or in

[1] This matter was much discussed in 1893 and 1894, when the House of Lords, in the belief that the Governments of Mr. Gladstone and Lord Rosebery did not possess the general confidence of the country, dealt freely, by way of amendment and rejection, with measures sent up from the House of Commons. In particular, the Lords threw out, upon the second reading, the bill for the better government of Ireland, an important constitutional change in favour of which it was supposed that the country had not definitely pronounced. No appeal to the country was made either by Mr. Gladstone or by Lord Rosebery who succeeded him in 1894, and the result of the general election of 1895 may be said to have justified the action of the House of Lords.

a case where the country has demanded a measure of a certain sort, and the Lords contend that the measure submitted to them does not carry out the wishes of the country, or embodies principles which have not been considered by the electors and which ought to be brought to their knowledge.

The progress of a bill, which takes its origin in the House of Lords, differs from that of one which is begun in the House of Commons only in some matters of form too slight and technical to be noticed here.

But when a bill has passed both Houses it is ripe for the royal assent, which transmutes it from a proposed law to an actual law. The form in which the royal assent is given may properly be deferred till we come to consider the functions of the Crown in Parliament.

SECTION III.

MONEY BILLS.

§ 1. *History and General Rules.*

General rules as to money bills.

Legislation which has for its object the grant of public money, or the imposition of burdens upon the taxpayer, possesses some special features which require to be specially noted.

In the first place such legislation is under the entire control of the House of Commons.

A bill relating to Supply must begin in the House of Commons. It is formulated there, and though it needs the concurrence of the Lords it cannot be amended by them on its way to receive the royal assent.

In the second place such legislation only takes place on recommendation from the Crown:

In the third place such legislation must commence in a Committee of the whole House.

History.

We need not trace this right further back than the reign of Richard II, when, as Dr. Stubbs tells us, it became the

practice 'that all grants should be made by the Commons with the advice and assent of the Lords, in a documentary form which may be termed an act of the Parliament[1].'

The right seems on one occasion to have been disregarded by Henry IV, though not from any design to override the privileges of the Commons, with the result that the Commons obtained after a remonstrance a formal recognition that the grant was theirs. Henry IV, in the year 1407, commenced the financial business of the Session by a discussion with the Lords as to the probable requirements of the service of the year, and the Commons were summoned to be told the result of the discussion. The Commons complained of the prejudice to their liberties which this action involved, and the king at once gave way, and while maintaining the right of the Lords to deliberate with the king on the needs of the kingdom, decided that neither House should make any report to the king on a grant made by the Commons and agreed to by the Lords, or on any negotiations concerning the same until both Houses were agreed, and that the report should then be made by the Speaker of the House of Commons, 'par bouche de Purparlour de la dite Commune.'

Commons claim to be necessary parties to grant,

Until the reign of Charles I the grant was not recited in the preamble of the act which legalised the subsidies as the grant of the Commons alone, but in the year 1625, in the act 'for the graunt of two entire subsidies graunted by the Temporalitie,' it is 'your Commons assembled in your High Court of Parliament' who grant the subsidies.

then that the grant is theirs,

So far the Commons claimed that the grant of supplies should be regarded as theirs; later in the seventeenth century they went further and denied the right of the House of Lords to interfere by amendment or alteration. They resolved in 1671, 'That in all aids given to the king by the Commons, the rate or tax ought not to be altered[2],' and again in 1678, 'That all aids and supplies, and aids to his Majesty in Parliament, *are the sole gift of the Commons:* and all bills for the

that Lords must not amend,

[1] Const. Hist. iii. 459.

[2] 9 Com. J. 235.

granting of any such aids and supplies *ought to begin with the Commons:* and 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 by the House of Lords*[1].'

Thus far the Lords would appear to have retained a power of rejection, and this, though rarely exercised, was not denied until the year 1860. In that year the Commons, among other provisions for the supplies to be granted, made a readjustment of taxation, increasing the property-tax and stamp-duties and repealing the duty on paper. The Lords assented to the bills providing for the proposed increase of taxation, but when the bill for the repeal of the paper duties came before them they rejected it. May not reject.

The Commons met this action on the part of the Lords by resolutions which set forth the privileges of the House in the matter of taxation, and which, while they did not deny that the Lords might have a power of rejecting money bills, intimated that the Commons had it always in their power so to frame money bills as to make the right of rejection nugatory. Resolutions of 1860.

The Resolutions were three in number.

1) The first recites that the right of granting aids and supplies to the Crown is in the Commons alone.

2) The second, that although the Lords have exercised the power of rejecting bills of several descriptions relative to taxation, by negativing the whole, yet the exercise of that power by them has not been frequent, and is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant the supplies, and to provide the ways and means for the service of the year.

3) The third, that to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over Taxation and Supply, this House has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of

[1] 9 Com. J. 509.

the Commons as to the matter, manner, measure, or time, may be maintained inviolate [1].

But though in the consideration of the constitutional rules which relate to money bills the exclusive right of the Commons to deal with such bills is the topic most frequently dwelt upon, the second rule which I propose to note can hardly be said to be less important.

No petition for any sum relating to the public service, nor any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund, or out of moneys to be provided by Parliament, will be received or proceeded with unless recommended from the Crown [2].

Money only granted on recommendation from the Crown.

The House, therefore, while it can determine the amount of money which shall be granted and the sources from which that money shall be drawn, has absolutely precluded itself from determining that any money shall be granted at all, unless the proposal for a grant emanates from the Crown.

The responsible advisers of the Crown, the ministers of state, are alone capable of proposing that public money should be raised, or if already raised should be spent; and the House would not entertain a motion by a private member for a specific outlay on any object which he might consider deserving of public support. The relations of Crown, Lords, and Commons in respect of money grants cannot be better stated than in the words of Sir Erskine May.

'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 they be necessary for the public service *as declared by the Crown through its constitutional advisers* [3].

[1] This power was exercised in 1861, by including the financial measures of the year in one bill which the Lords could not amend and were constrained to accept or reject in its entirety. May, Const. Hist. vol. i. ch. vii. 489. See the debate on the Finance Bill of 1894. Hansard 4th series, vol. 27, p. 253.

[2] Standing Order, 57.

[3] May, Parliamentary Practice (ed. 10), 515.

No private member may propose specific grant.

It is possible for any member of the House of Commons to move a resolution to the effect that public money might profitably be expended upon purposes specified in the resolution; and if the House agree to the motion it thereby commits itself to a general approval of such an outlay. But it would not be in accordance with the rules of the House for a private member to move that a specific sum be granted for a specific purpose; such a motion could only proceed from a minister of the Crown. For it cannot be too strongly impressed upon the student of constitutional law, that all the money spent upon public service is spent by the Crown; that all the money granted for the public service is granted by the Commons, and that the Commons have imposed upon themselves a rule that they will not grant a penny unless it is asked for by a minister representing the Crown for a purpose specified in the terms of his request.

Such a rule is the great safeguard of the tax-payer against the casual benevolence of a House wrought upon by the eloquence of a private member; against a scramble for public money among unscrupulous politicians bidding against one another for the favour of a democracy. But the rule is not law. Like all other resolutions or standing orders of either House it is a self-imposed rule made by a public body for the guidance of its procedure. It could be altered almost as easily as a College by-law, quite as easily as a rule of the Marylebone Cricket Club. Yet some of the most valuable parts of our constitution are to be found either in practices which depend upon simple usage, or upon rules as insecure as the standing order which I have just described [1].

The third rule to note respecting money bills is, that by a Standing Order of the House agreed to on the 29th March, 1707, 'the House will not proceed upon any petition, motion,

[1] The possible infringements of this rule by addresses and resolutions of the House pledging the Government to a proposal for outlay, or by suggestions, printed in italics, in Bills coming from the House of Lords, are described by Mr. Gladstone, Gleanings of Past Years, vol. i. ch. iii. § 20.

or bill, for granting any money, or for releasing or compounding any sum of money owing to the Crown, but in a Committee of the whole House.' Here we come to the actual process by which the House grants supplies to the Crown.

§ 2. *Committee of Supply.*

The sources of royal revenue and the checks on departmental expenditure must form matter for a separate chapter of another volume of this work[1]. We have here to consider how the House of Commons grants supplies to the Crown, how it indicates the sources whence those supplies are to be drawn, how it appropriates the supplies granted to the services for which the grant is made.

Committee of Supply.

The Speech from the throne always contains a demand from the Crown for supply, and as soon as the House of Commons has agreed upon an address in reply to the Speech, it passes two resolutions—one that on a certain day it will resolve itself into Committee of Supply; another that on a certain day it will resolve itself into Committee of Ways and Means.

Estimates of the items of expense of different departments are presented to the House by the ministers responsible for those departments, and, on the day fixed, the House, goes into Committee of Supply or postpones the sitting of that Committee until a later day.

Grievances precede Supply.

Until the year 1882 the rule prevailed that, before going into Committee of Supply, and on the motion being made and question put that 'Mr. Speaker do now leave the Chair,' it was open to any member to move an amendment, however irrelevant. The practice illustrated the maxim that redress of grievances precedes the grant of supplies. Thus, on a night intended to be devoted to supply, the motion that 'Mr. Speaker do now leave the Chair' might be met by an amendment in the form of a motion for the establishment of a harbour on the coast of Donegal, or a lighthouse on an island in the Red Sea.

[1] Vol. ii. ch. vii.

Among the rules of procedure settled in 1882 was one which provided that when the first order of the day on Mondays and Thursdays is that the House go into Committee of Supply, the Speaker should leave the chair without any question being put[1], and thus no amendment can on such occasions be moved, unless on first going into Committee of Supply an amendment be moved or question raised as to the estimates proposed to be dealt with[2].

Proceedings in Committee.

When the House has gone into Committee, the estimates put down for discussion are considered. The minister respon-

[1] Standing Order, 56 (27 Nov. 1882). This rule is usually applied to Morning Sittings in which Supply is to be taken.

[2] A change was introduced into the practice relating to Committee and Report of Supply in 1896, by a Sessional Order renewed in 1897. The success of the new practice is such that the Sessional Order may very probably be made a Standing Order in 1898, but it is well at present merely to note the change and call attention to its two chief features: (1) that Friday is no longer a night on which grievances precede supply, since the Speaker then leaves the chair without question put; and (2) that a limited time is allotted to Supply, and that the votes which have not been discussed within that time are put, at its conclusion, without amendment or debate.

The text of the Orders is as follows:–

Resolved, that so soon as the Committee of Supply has been appointed and Estimates have been presented, the business of Supply shall (until it be disposed of) be the first Order of the Day on Friday, unless the House otherwise order, on the motion of a Minister of the Crown moved at the commencement of Public Business, to be decided without amendment or debate; *and the provisions of Standing Order No.* 56 *shall be extended to Friday.*

Not more than twenty days, being days before the 5th of August on which the Speaker leaves the chair for the Committee of Supply without question put, counting from the first day on which the Speaker so left the chair under Standing Order No. 56, shall be allotted for the consideration of the Annual Estimates for the Army, Navy, and Civil Services, including Votes on Account, the Business of Supply standing first Order on every such day.

Provided always, that on motion made after notice by a Minister of the Crown, to be decided without amendment or debate, additional time, not exceeding three days, may be allotted for the business of Supply, either before or after the 5th of August.

On the last but one of the allotted days, at 10 o'clock p.m., the Chairman shall proceed to put forthwith every question necessary to dispose of the outstanding votes in Committee of Supply; and on the last, not being earlier than the twentieth of the allotted days, the Speaker shall, at 10 o'clock p.m., proceed to put forthwith every question necessary to complete the outstanding Reports of Supply.

sible for them may make, in the case of the army and the navy estimates, a statement on the estimates as a whole, before the items are separately discussed and voted upon.

At the conclusion of each sitting the Committee resolve 'to report progress and ask leave to sit again.' For if the Committee should be closed it could only be re-opened by a fresh demand of Supply from the Crown, either in a speech from the throne or in a royal message.

and on report.

The Speaker then resumes the chair, and the Chairman of Committees reports:—(1) That the Committee has come to several resolutions. The House then orders the reports to be received on a day named. (2) That the Committee ask leave to sit again. The House then resolves that it will on a day named resolve itself again into Committee of Supply.

When the time comes for receiving the report the various items of supply agreed to be furnished are reported to the House, and it resolves that each item shall be granted to Her Majesty for the purpose specified.

At the end of the session all the resolutions of this nature passed during the session are embodied in the Appropriation Act, to which we shall come presently.

§ 3. *Committee of Ways and Means.*

The Committee of Supply determines what money shall be granted to the Crown and for what purposes; the Committee of Ways and Means determines how the money required shall be raised, or whence it shall be drawn. In order to understand the working of this Committee there are some facts about the revenue which it is necessary to bear in mind.

Some taxation is annual, some permanent.

The greater part of the revenue of the country is not granted annually by the Commons, but is settled and legalised by statutes which do not require an annual renewal. The great bulk of taxation goes on from year to year, unless Parliament should otherwise determine, and its proceeds are paid over to a fund called the Consolidated Fund.

This fund is therefore replenished from the proceeds of taxation which is permanent, or which is annually granted, or which is freshly imposed. It is for the Committee of Ways and Means to frame resolutions as to the employment or replenishing of this fund and report them to the House. The Committee receives from the Chancellor of the Exchequer a financial statement for the coming year. He balances the expenditure of the year against the proceeds of the permanent taxes paid into the Consolidated Fund *plus* such additional taxation as he may think it necessary to recommend. The duties of the Committee of Ways and Means are therefore twofold—to meet the needs of Supply by grants from the Consolidated Fund; and to adjust income to expenditure by dealing with the taxation of the year. The Committee reports its resolutions at the conclusion of each sitting, as in the case of the Committee of Supply; the resolutions of the Committee are considered upon a subsequent day and adopted or rejected by the House; and unless the work of the Committee is finished, an order is made that on a day named the House will again resolve itself into Committee of Ways and Means.

Committee determines the source from which the supplies granted shall be drawn.

So much of the work of the Committee of Ways and Means as proposes new taxation passes, when adopted by the House, into bills for the imposition of such taxation. So much of the work of the Committee as proposes grants from the Consolidated Fund passes, when adopted by the House, into a 'Ways and Means,' or 'Consolidated Fund Bill,' authorising the payment out of the Consolidated Fund of the Supplies already voted.

§ 4. *Appropriation Bill.*

In speaking of the Appropriation Bill I do not wish to anticipate what I may have to say hereafter as to the Treasury, Exchequer, and Audit Departments, and the various machinery by which it is secured that the intentions of Parliament as to the disposition of public money will be carried

No public money paid without authority of Parliament;

out. It is enough to say that none of the public money, that is, of the money constituting the revenue of the Crown, is paid except by Parliamentary authority, and that about two-thirds of the revenue of each year is appropriated to specific purposes in an Appropriation Act passed in that year.

some payments need annual authority;

For just as some taxation is annually renewed while some does not require to be so renewed, so some payments are annual grants, while some do not require to be annually sanctioned [1]. Thus the payments of interest on the National Debt, and of various salaries and pensions, are required to be made, as they fall due, by the Statutes which create the charge; they do not need to reappear annually in the estimates and run the gauntlet of the Committee of Supply.

some do not.

But the sums voted to meet the army, navy, and civil service estimates cannot be legally paid until they are embodied in the Appropriation Act; and the House of Commons, in order to get the supplies of the whole year into one bill, reserves the Appropriation Bill until the close of the session.

Preliminary appropriations,

Nevertheless, since money is often wanted for the public service some time before the Appropriation Act is passed, and inconvenience may be caused by delay in paying money to meet supplies which have been already granted by the Commons, it is customary to give statutory authority for such payments out of the Consolidated Fund, and to do this after supply has been agreed to in the Commons to the amount for which the issue is allowed, but some months before the general Appropriation Act is passed. This is done more than once during the session; and, at the end of it, these preliminary Consolidated Fund or Ways and Means Acts are embodied in the general Act passed at the close of the session, in which the items for which the earlier payments were legalised are set out in detail.

embodied in the Appropriation Act.

When the Appropriation Bill has received the assent of the Lords it is returned to the Commons, and when the House is

[1] For a fuller account of the distinction between Consolidated Fund Services and Supply Services, see vol. ii. pp. 340-343.

summoned for prorogation it is brought by the Speaker to the bar of the House of Lords, and handed by him to the Clerk of the Parliaments to receive the assent of the Crown.

A bill for granting money to the Crown, whether the grant take the form of the imposition of new taxes, or of an appropriation of money out of the consolidated fund, is expressed differently to other bills in its enacting clause. It may be well to compare the forms.

Act for granting duties of Customs and Inland Revenue.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, 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 Queen'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.

Appropriation Act.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled, towards making good the supply which we have cheerfully granted to Your Majesty in this session of Parliament, have resolved to grant unto Your Majesty the sum hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the Queen'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.

Section IV.

PRIVATE BILL LEGISLATION.

§ 1. *Historical outline.*

A private bill is partly a judicial proceeding.

The passing of a private bill is, at the present time, a proceeding partly legislative, partly judicial. Such a bill commences by petition; it is furthered by persons outside the House, the promoters, who have some practical interest in the passing of the bill: it relates to matters of individual, local, or corporate interest. Although it passes through the forms of a public bill, and although these forms are a vital part of its progress, yet the most interesting and important stage of that progress is its passage through Committee, which is for the purpose of private bill legislation a select Committee of one or other House. This Committee acts as a judicial tribunal before whom counsel appear on behalf of the promoters or the opponents of the bill in question.

Originally the petition of an individual.

The history of private bill legislation might lead us to a great deal of very interesting inquiry concerning Parliamentary antiquities [1], but with these it is only possible to deal in the most general way. The petition with which the bill commences was the only method in the Middle Ages for obtaining rights or the enforcement of rights which the Common Law Courts could not confer or assure. If a man had to complain of inequitable dealings in the matter of property or contract, he petitioned the Crown or the Crown in Chancery. If he had to complain of violence or oppression, such as the ordinary courts could not or dared not redress, he petitioned the Crown in Council. If he was not in search of equity or of law, but wanted to get the law altered in his favour, he petitioned Parliament, sometimes addressing himself to King, Lords, and Commons, sometimes to Lords and Commons, sometimes to

[1] The learning of this subject is made extremely interesting in Mr. Clifford's work on Private Bill Legislation, where the historical side of the question is amply treated.

the Commons alone, sometimes to the king or to the king in Council.

Addressed to Parliament.

The petitions from which private bill legislation takes its origin are those which it became the practice in the reign of Henry IV to address to Parliament, or to the Lords or the Commons[1]. Such petitions were not handed, as in earlier procedure, to the Receivers and Triers of Petitions nominated (as they were nominated until 1886) at the commencement of each Parliament. They went to the House to which they were addressed, generally the Commons, and after consideration there, were passed on with the endorsement, '*soit baillé aux seigneurs.*' Such petitions were at first of a purely personal character, attainders or the reversal of attainders, rewards given or punishments inflicted in individual cases. Later comes local legislation, the regulation of fisheries, of the navigation of rivers, of harbours, the prevention of floods and the inclosure of commons. Last comes legislation on behalf of bodies incorporated for commercial purposes, requiring, in furtherance of those purposes, some interference with private rights. Such are the acts passed to confer powers on railway, gas and tramway companies, of which every session affords numerous examples.

See ch. x. § 4.

Cease in time to be wholly personal.

'Private' and 'Local' Acts.

The first of these three groups is at the present time distinguished from the rest by the title of 'Private Act,' and relates to naturalisation, to dealings with trust estates, in rare cases to divorce. The last two are included under the general term 'Local Acts,' and cover almost the whole ground of private bill legislation.

§ 2. *Procedure in respect of Private bills.*

Technicality of procedure.

It would be impossible without entering into technicalities and details unsuited to the compass and character of this book, to attempt to do more than give a very general outline of the process of private bill legislation. Enough may be

[1] Stubbs, Const Hist. iii. 460, and n. 4.

said, however, to show the nature of these half legislative, half judicial proceedings, and the care with which the Houses guard themselves against legislating in the interest of private persons or of corporations to the detriment of individual interests, unless they are satisfied that public purposes are to be attained for which individual interests may fairly be set aside with compensation for loss sustained.

Petition.

By the 21st of December, in the year before the bill is to be brought forward, a petition for the bill must be deposited in the Private Bill Office of the House of Commons, together with a copy of the bill and certain explanatory documents required by the Standing Orders of the House.

Memorial from opponents.

Here too are sent memorials from parties interested in preventing the passing of the bill, to the effect that the Standing Orders of the House have not been complied with in the presentation of petition, bill, and documents.

Inquiry as to compliance with Standing Orders.

On the 18th of January the petitions and memorials are dealt with by two Examiners, one appointed by the House of Lords, the other by the Speaker. If no one appears in support of a petition, it is struck out, but in the ordinary course the agent concerned in promoting the bill offers proof that the Standing Orders have been satisfied; those who have presented memorials against the bill are heard, not on the merits of the bill, but on the preliminary question of compliance with the Standing Orders; witnesses are called; and at the conclusion of the hearing the petition is endorsed by the examiner and returned to the Private Bill Office. If the endorsement is to the effect that the Standing Orders have been complied with, no more is said; but if the examiner decides adversely to the petition on this point, he makes a report to the House of Commons, and sends a certificate to the House of Lords to indicate the non-compliance.

Want of compliance may be condoned by House.

But the preliminaries are not yet over, nor is the bill lost because the examiner has found that the Standing Orders have not been complied with. The petition is in any case presented to the House of Commons by a member three days

after endorsement; if reported against by the examiner it is referred to the Standing Orders Committee, consisting of eleven members of the House, who consider whether the Standing Orders may be dispensed with, and even if the Committee report adversely to the bill, their report may be overruled by the House.

So far the rules of the House are careful to provide that all persons interested in the proposed bill may have full notice by advertisement, and full information by access to documents of the intention and nature of the proposed bill.

First reading.

The bill is read a first time, and is then, upon notice given of the second reading, referred back to the Private Bill Office for examination, lest the form in which it is drawn should violate the Standing Orders, or depart from the terms in which leave was given for its introduction.

Second reading.

It is then read a second time, and here if at all the general principle of the bill is discussed in the House: but the effect of a second reading is not, as in the case of a public bill, to affirm the principle of the bill, it merely indicates that the bill contains no obviously objectionable features.

Reference to Committee.

When read a second time, the bill is committed. If it is a railway or canal bill, it goes to a standing committee for those matters: if it is not such a bill, it goes to the committee of selection [1] which arranges the bills and assigns them to committees consisting of four members and a referee.

Renewed inquiries as to form.

But further precautions are taken, before the Committee deals with the bill. The Chairman of Ways and Means for the Commons and the Chairman of Committees for the House of Lords examine all bills before they are passed into Committee. They may report any special circumstances in connection with the bill either to the House or to the Chairman of the Committee, or may recommend that a bill to which no opposition has been offered should be treated as opposed. They may introduce amendments, within the scope

[1] This consists of the Chairman of Committee on Standing Orders and seven other members.

of the bill, and amendments may be introduced by public departments interested in the matter of the bill, as by the Board of Trade in a Railway Bill.

The bill in Committee.

The Committee stage is the really interesting and exciting part of the career of a private bill, for there the judicial aspect of the House in its dealings with these measures is brought into strong light: and it appears in a judicial character not as in the preliminary stages of the bill to ensure compliance with forms of procedure, but to hear a keen and animated contest upon the merits of the bill conducted by counsel for the promoters and opponents, and supported by witnesses examined upon oath.

Requirement of *locus standi* in opponents.

But the opponents of a bill have to go through various formalities before they are permitted to appear in that capacity. The opponent of a bill must first deposit a petition at the Private Bill Office within ten days after the first reading. He must then be prepared to meet objections raised by the promoters of the bill to his right to be heard, and such objections are raised and argued before a court of referees, consisting of the Chairman of Committees and three persons appointed by the Speaker, to determine the *locus standi* of petitioners against a bill. Questions of *locus standi* are argued by counsel before this court, and the right of an opponent to be heard in Committee against the whole or against any clauses of the Bill is there settled.

Judicial character of proceedings in Committee.

This is the process by which the right of opposing a bill or any part of a bill is ascertained and limited; when this is settled the Committee sits to hear the parties; counsel then appear for the promoters of the bill and for the petitioners against it, witnesses are examined, and the whole proceeding is of a judicial character, though conducted before a tribunal not perhaps very familiar with judicial functions.

If the preamble of the bill is proved to the satisfaction of the Committee, the clauses are taken in order; if the preamble is rejected, the bill falls to the ground. When the Committee has been through the bill it is reported to the

House, and its subsequent stages are similar to those of a public bill except in the form, to be described presently, in which it receives the Royal assent.

Much might be added as to the process of classification of private bills, and the details of procedure in respect of them. But since these are not matters of constitutional importance, and can easily be found in books of Parliamentary practice or in the published Standing Orders, I do not propose to carry the subject further.

As the ordinary course of Legislation depends almost entirely upon the rules which each House adopts for the regulation of its procedure, it is well to note that these fall into three classes.

Rules governing process of Legislation.

There are *standing orders*, resolutions as to procedure, which each House intends to be permanent, and these, though they may at any time be repealed or suspended by resolution, endure from one Parliament to another in default of such repeal or suspension.

There are *sessional orders*, rules which last only for the session, and are renewed at the commencement of each session.

There are *indeterminate orders* and resolutions. Such are resolutions declaratory of practice and usage which expire with the session in which the resolutions were passed. These are not, technically, standing orders, though they are observed from session to session, and are regarded as regulations operating in the same way as a standing order.

Section V.

Provisional and other Statutory Orders and Rules.

I must not conclude the subject of the Process of Legislation without noticing the delegation of legislative powers to government departments; an important, and an increasing practice. Such legislative powers are sometimes exerciseable without further reference to Parliament, sometimes their exercise is more or less subject to Parliamentary supervision.

Provisional Orders.

Provisional Orders are, of these forms of departmental legislation, the nearest akin to private bills. They are made by a government department acting under statutory powers, and their object is to give effect to schemes or proposals of local bodies and companies, subject in the first instance to the approval of the department, and finally of Parliament.

These orders are arranged in groups by the department from which they proceed, and thus grouped are placed in schedules to Bills which come before the Houses of Parliament for confirmation. On the first reading of such bills they are referred to the examiners, mentioned in the previous section, to ensure that the Standing Orders are complied with. If opposition is offered to any Order, 'the confirming Bill is referred to a select committee and thereupon the opposed Order is treated as a private Bill: the preamble must be proved by evidence, and the promoters, though relieved from the payment of House fees, are liable to all other costs of procedure in Parliament besides the expense incurred in carrying the Order through the department[1].'

Illustrations of the subject of such procedure are Orders conferring powers to make piers, harbours, tramways, to employ electric lighting, to create local government or sanitary districts.

The Provisional Order, being to all intents a form of private bill legislation, has no force whatever until the confirming bill wherein it is scheduled passes both Houses of Parliament and receives the royal assent.

Provisional Order Bill.

Briefly it may be said of Provisional Orders that they are made by a government department in pursuance of a statute; that they are scheduled in a Bill which goes through all the stages necessary to turn a Bill into an Act; but that unless objection is specifically raised they are not discussed, but are accepted by the House on the authority of the department from which they emanate.

[1] Clifford, Private Bill Legislation, ii. 677.

The following form exhibits the character of a Provisional Order and the Bill which confirms it:—

A Bill

to confirm certain Provisional Orders of the Local Government Board relating to the city of Manchester, and the boroughs of Middleton and Stafford.

Whereas the Local Government Board have made the Provisional Orders set forth in the schedule hereto, under the provisions of the Public Health Act, 1875. And whereas it is requisite that the said Orders should be confirmed by Parliament:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. The orders set out in the schedule hereto shall be and the same are hereby confirmed, and all the provisions thereof shall have full validity and force.

2. This Act may be cited as the Local Government Board's Provisional Orders Confirmation (No. 16) Act, 1889.

Orders made under statutory powers.

Other Orders are made every year which do not go through the form of provisional orders. They are very numerous, and often relate to important matters.

They vary in character.

Their character,

Some are made by bodies constituted for a time and invested with statutory powers, such as the Public Schools or University Commissioners; others are made by government departments. Some are purely local in character, such as schemes made by the Ecclesiastical Commissioners, or the orders which fix boundaries of parishes or confirm the by-laws of a municipal corporation: some are of a public and general character, such as the rules made by the judges under the provisions of the Judicature Acts; some stand midway between local or private and public or general enactments, such as the statutes made by University Commissioners for the University and Colleges under the Universities Act, 1877.

They vary in duration.

their duration,

Some are temporary, such as Orders made by a Committee of the Privy Council or by the Board of Agriculture touching the importation of cattle or the muzzling of dogs. Others are intended to be permanent, such as the charters which the Queen grants on the advice of the Privy Council creating corporations for objects prescribed and defined by Statute; such too are Orders for the discontinuance of burial grounds or fixing boundaries of parishes. Others are varied from time to time, such as the orders made by the Education department of the Privy Council.

They vary, lastly, in the procedure necessary to give them force.

their mode of enactment.

Some must be submitted to the Privy Council, and, unless they are there questioned, must then be laid upon the tables of the two Houses for a fixed period of time. Such has been the procedure in the case of bodies created for a time but invested with powers of making ordinances of a permanent character. The Commissions which inquired into the condition of the Universities of Oxford and Cambridge, and the Colleges therein, possessed the power to make statutes regulating those societies, but these statutes were required to be submitted to the Queen in Council, and, unless there petitioned against and disallowed, were after twelve weeks to be laid before both Houses of Parliament: then, unless during the ensuing twelve weeks either House addressed the Queen against the statutes, they were to be approved by Her Majesty in Council. The Commissioners appointed under the Public Schools Act of 1868 were not required to lay before Parliament the Statutes made for the regulation of the Schools in question unless made without the concurrence of the governing bodies of those schools.

Other Orders, again, are laid before Parliament without the intervention of the Privy Council: such are Rules of the Supreme Court made by the Judges, or certain regulations made by the Secretary of State and Council of India.

Other Orders, again, may be brought before Parliament, if the Queen in Council is addressed with that object. Such are schemes made by the Charity Commission acting under powers originally conferred upon the Endowed Schools Commissioners.

Lastly, the great mass of these Statutory Orders take effect at once, and are not required to be laid before the Queen in Council or before Parliament[1].

[1] The most important of the Statutory Rules and Orders for each year are now published annually, and the hitherto pathless wilderness of existing rules and orders has been made plain by the *Index to the Statutory Rules and Orders* in force on January 1st, 1891.

CHAPTER VIII.

THE CROWN IN PARLIAMENT.

I HAVE now traced the progress of a bill up to the point at which it has received the assent of both the Houses, of the Lords Spiritual and Temporal and the Commons in Parliament assembled. In order that it may become law it still requires the Royal assent: it requires to be 'enacted by the Queen's most excellent Majesty.'

Topics to be dealt with.

We come, therefore, to the functions of the Crown in Parliament, and in dealing with them I do not propose to confine myself to the action of the Crown in legislation, but to consider in other matters the relations of the Crown to Parliament; and these fall under three heads.

First, we may regard the Crown as constituting Parliament and bringing it to an end.

Secondly, we may regard the Crown as communicating with Parliament while Parliament is sitting.

Lastly, we may regard the Crown as a party to legislation, as giving validity to laws proposed by Parliament, as turning a bill into an act.

§ 1. *The Crown as constituting Parliament.*

It is the Crown which constitutes Parliament; the Houses meet by Royal invitation; they assemble in the Royal Palace at Westminster[1]; they are opened by the Royal permission;

[1] The Houses of Parliament are described in a Statute (see 30 & 31 Vict. c. 40) as Her Majesty's new Palace at Westminster, commonly called the

they continue in existence and working during the Royal pleasure.

I have sufficiently described in an earlier chapter the process of summoning, opening, proroguing, and dissolving Parliament. I will, therefore, confine myself here to noting the obligations which rest upon the Crown to call a Parliament into existence, and to enable a Parliament, while it is in existence, to sit.

Securities for summons and session of Parliament.

The Statutes which have been passed on this subject are four; and of these only one remains in force; so scanty is the direct legal security for the frequent summons and session of Parliament.

The first is 4 Ed. III, c. 14, which enacts that 'a Parliament shall be holden every year once, and more if need be'; this was re-enacted in the thirty-sixth year of the same reign, but the words 'if need be' seem to have been treated as applying to the whole clause, and Parliaments were often intermitted for years together. This Statute was repealed by the Statute Law Revision Act, 1863.

Annual Parliaments.

The second was an Act of the Long Parliament, 16 Car. I, c. 1. This Act provided that if the king neglected to call a Parliament for three years, the peers might issue out writs, and that if the peers neglected to do so, the constituencies might elect a House of Commons for themselves. The loyalty of the succeeding reign caused the repeal of this Statute in 1664 as being 'in derogation of His Majesty's just rights and prerogative inherent to the imperial crown of this realm.' And indeed it proceeded on the assumption, reasonable in itself, though unhistorical, that the Lords and Commons assembled, not because the king wanted their advice, but because they desired, and because the constituents of the members of the Commons desired, that the action of ministers should be discussed by persons who, though not responsible for the conduct of public business, had an interest in seeing that it was conducted well.

Triennial Parliaments.

But the Act 16 Car. II, c. 1, did not only repeal the Act of

Houses of Parliament. As to the character of the building as a Royal Palace, see *Combe* v. *Delabere*, 22 Ch. D. 333.

Triennial Session.

the Long Parliament; it further provided that '*the sitting and holding* of Parliament shall not be intermitted or discontinued above three years at the most.' This was repealed by the Statute Law Revision Act, 1887.

The fourth is 6 Will. & Mary, c. 2, which provides:—

Triennial summons.

'That within three years at the farthest from and after the dissolution of the present Parliament, and so from time to time ever hereafter, within three years at the farthest from and after the determination of every other Parliament, legal writs under the great seal shall be issued by directions of your Majesties, your heirs and successors, for calling assembling and holding another Parliament.'

Statute does not secure annual sessions,

It would seem then that, apart from the general expression of the Act of Edward III, the only statutory securities which we have ever possessed for the frequent summons and sitting of Parliament are the Act of Charles II, providing that Parliament shall sit at least once in every three years, and the Act of William and Mary to the effect that we shall not be more than three years without a Parliament.

Nor do the Statutes say what is to happen if the Crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the Crown might not fulfil the Law.

nor does the need of supply;

It is sometimes said that the necessities of supply compel the Crown to an annual summons of Parliament. But, as I had occasion to say in speaking of the Committee of Ways and Means, so much of our taxation is now permanent that government might fairly be carried on for a while without those annual taxes which every session increases or diminishes.

but of appropriation of supply;

It is not the need of supply, but of the appropriation of supply and of the Army Act, which makes it legally necessary for Parliament to sit every year. If Parliament did not appropriate the supplies of the year to specific purposes, the money which comes in on account of the various items of taxation could not legally be paid out to meet the services of the year, except in the case of such charges upon the revenue as are permanently authorised by statute. The interest upon

the national debt would be paid, but not the wages of sailors serving on board of Her Majesty's ships, nor the regimental pay of Her Majesty's land forces. The salaries of the judges would be paid, but not the salaries of the law officers of the Crown, or of the civil service generally, or the bills for furniture and repairs in the offices of the public departments. Enough money would come in to meet some, though not all, of these charges, but the authority to pay two-thirds of the nation's liabilities would be wanting, and there would be no one in the kingdom who could make the payments without committing a breach of duty[1].

and of the Army Act.

And the absence of any authority to pay the officers and men in Her Majesty's army would not be the only difficulty which the army would occasion if the sitting of Parliament should be intermitted for a year. The existence of a standing army in time of peace is contrary to law. It is legalised each year, for a year, by the Army Act. Again, the punishments and procedure for the maintenance of discipline in a large body of troops are contrary to the common law of the land, as declared by several statutes. They too are legalised by the Army Act which brings into force each year, for a year, a code of military law[2]. These are the only practical securities for the summons of Parliament with tolerable frequency, but they neither impose any penalty nor supply any alternative machinery in case the Crown should make default in fulfilling the Statutory requirements as to the issue of writs of summons.

No more need be said as to the prerogative of the Crown in summoning Parliament and setting its business in motion. The prerogative of dissolution gives rise to difficult and intricate questions.

The prerogative of dissolution.

The right of the Queen to dissolve Parliament at her pleasure is unquestionable: the exercise of the right, at any given time, may or may not be constitutional: and the word '*constitutional*' in this connection means much what is meant by the word '*reasonable*' in the law of contract. Where two

[1] See vol. ii. ch. vii. sect. ii. § 4.

[2] Ibid. pp. 367, 368.

Circumstances requiring a dissolution.

parties are in dispute as to the meaning of terms in a contract which they understand in two different senses, the dispute can only be settled by ascertaining what construction a reasonable man would put upon the terms in issue. And where two parties differ as to the propriety of a dissolution of Parliament on any given occasion, the question can only be settled by ascertaining whether a reasonable man would have concluded, at the time, that the House of Commons then in existence did not represent the opinion of the majority of the electorate. The φρόνιμος of Aristotle must in the end determine what is constitutional and what is not.

Not the introduction of new measures:

Looking to precedents we find that it has not been considered essential to make an appeal to the electorate before measures of novelty and importance are submitted to Parliament. The Acts of Union with Scotland and with Ireland, the Septennial Act, the Reform Act, the Repeal of the Corn Laws, the measure of Home Rule for Ireland introduced in 1886, were no parts of a ministerial programme of legislation submitted to the electorate when the members by whom these measures were passed or discussed were chosen to serve in the House of Commons.

not always a change of electorate.

A great change in the composition of the electorate has been held to necessitate an appeal to the new voters and constituencies at the earliest date possible after the legislation which has effected the change. Such was the case in 1832, 1868, 1885.

Acts of Union. Scotland.

And yet there was no dissolution of Parliament after the passing of the Acts of Union. Queen Anne was given powers by Statute to declare by proclamation under the Great Seal that the members for the House of Commons in the Parliament of England should also be members for the same constituencies in the Parliament of Great Britain. The new Scotch constituencies elected their members, and when it was thus complete the Parliament met. It was not even regarded as a new Parliament so as to necessitate the re-election of members holding office under the Crown.

Ireland.

The Act of Union with Ireland gave to George III similar powers to those conferred upon Anne, as regarded the members of the House of Commons for Great Britain. Those Irish members whose constituencies were entitled to return them to the Parliament of the United Kingdom, retained their seats without re-election. Where two members sat for a constituency which was henceforth to return one, their rights to sit were determined by drawing lots in public and solemn form.

Precedents no assistance.

Thus far we are not greatly helped by precedents, for we can supply from them cases in which great constitutional or economical reforms have been brought before Parliament without a previous appeal to the electorate: and cases also in which great changes affecting the composition of the electorate have not been followed by a general election.

Suggested rules.

I will therefore pass by precedents which do not greatly help us, and try to lay down some rules bearing upon the subject.

The Crown can act alone:

Firstly: the prerogative of dissolution is one which the Crown may exercise with or without the advice of its ministers. As in the selection of ministers, so here, the Crown has a wider latitude of discretion than in other departments of executive government.

when the Crown should act.

Secondly: the constitutional time for its exercise is when the king has reason to think that his Parliament does not represent the opinion of the country.

We may go so far as to classify the circumstances which may justify the belief that Parliament does not represent the opinion of the country.

(*a*) The policy of the ministers of the Crown may be acceptable to the House of Commons, but the king may think that it is unacceptable to the country.

(*b*) The policy of the ministers of the Crown may be unacceptable to the House of Commons, but the king may think that it is acceptable to the country.

(*c*) The House of Commons, for lack of political interest or

from the circumstances of parties may speak with a broken and uncertain voice, may fail to adhere to any consecutive policy or to give a continuous support to any ministry.

In the first case, the Crown appeals to the country against ministers and Parliament; in the second, it appeals to the country on behalf of its ministers and against Parliament; in the third, it appeals to the country to return a majority of some kind so as to enable the business of government to be carried on.

The Crown appealing against Ministers and Parliament:

Such a case as I have placed first on the list could hardly have arisen since party government acquired a settled form. An illustration is supplied in Macaulay's description[1] of William III in 1701, hesitating as to the prospects of a dissolution, deciding finally, on his own responsibility, to dissolve, in the expectation that a Whig majority would be returned and that he would be enabled to employ again the ministers whom he trusted. We see here the prerogative exercised in complete independence of ministerial advice.

But it is a convention of the modern constitution that the Crown should act on the advice of ministers. Hence on the few occasions during the last 180 years when the king has had reason to suppose that his ministers and his Parliament are alike opposed to the political opinions of a majority in the country, the king has changed his ministry, and having taken into his service ministers who do not command a majority in Parliament has appealed, by their advice and on their behalf, to the country.

on behalf of Ministers against Parliament.

Such was the conduct of George III in 1784, of William IV in 1834. In each case the king summoned to his councils a body of ministers who did not command the support of the House of Commons. Mr. Pitt, who accepted office in December 1783, struggled for three months against a majority, large at the outset but gradually decreasing, and when Parliament was dissolved in March 1784, the choice of the king was amply justified by the victory of his ministers at the polls.

The case of Mr. Pitt.

In 1834 Sir Robert Peel, called to office on the retirement

[1] History of England, v. 293.

of Lord Melbourne and his colleagues [1], found himself unable even to attempt the conduct of public business in the face of the majority which confronted him in the House of Commons. He was compelled to advise a dissolution as soon as he had accepted office. The Whig majority was very sensibly diminished, but it remained a majority. Sir Robert Peel retired after two months' struggle with his opponents in the new Parliament. The case of Sir Robert Peel.

Thus in the case of Mr. Pitt the king was right as to the feeling of the country; in the case of Sir Robert Peel the king was not wholly wrong, for the popularity of the Whigs was on the wane, but he was not sufficiently right to justify his experiment. In both cases the change of ministry preceded the dissolution, and in both cases the dissolution took place on the advice of responsible ministers.

From these instances we see that where the king has had reason to suppose that the policy of his ministers, though acceptable to Parliament is unacceptable to the country, he does not appeal directly to the country, but by changing his ministry for one which he believes to be in accord with the electorate he makes a preliminary appeal to the House of Commons, to be followed, if the House will not support his ministers, by an appeal to the country.

The third class of cases may be illustrated from the dissolutions of 1807, of 1857, of 1859, and of 1886, when, either from the composition of parties, as in the earlier cases, or the novelty of measures introduced, as in 1886, a minister has been unable to secure the support which he requires in the House, and the electorate is invited by the Crown to pronounce definitely upon men or measures. Cases where the Commons are unsettled.

[1] It is plain from the Melbourne Papers, pp. 218-228, that the Melbourne Ministry was not dismissed, as has been often alleged, by the independent action of the king. Lord Melbourne was the first to suggest the retirement of the ministry when Lord Althorp ceased to lead the House of Commons, and the matter was settled amicably between the minister and the king. Peel, however, believed that William had dismissed the Melbourne Ministry, and that in taking office he was assuming responsibility for the dismissal. Sir R. Peel's Memoirs, ii. 31.

§ 2. *The Crown in communication with Parliament.*

The Crown, if it desires to communicate with either House of Parliament, can only do so by speech from the throne at the opening and close of session or by message in one form or another. For though the Queen is entitled to be present on her throne during the debates in the House of Lords, she might not take part in them. The speech from the throne which opens and concludes the business of Parliament was formerly an address to both Houses delivered in person and capable of being charged with exhortation or rebuke adapted to the prospects or the history of the session. These speeches now contain formal statements as to the foreign relations of the country, communications of topics of legislation to be proposed by ministers, remarks on the condition of trade, on the weather in connection with the harvest, and, at the close of the session, expressions of thanks for the supplies granted and congratulations on the additions to the statute-book which the labours of the session have produced.

Speech from the Throne.

The presence of the king at the sittings of the House of Lords in the mediaeval Parliaments appears to have been very common[1]. The decision of Henry IV, relating to the right of the Commons to the exclusive dealing with supply, is called the 'Indemnity of the Lords and Commons[2],' and in so far as it contains a permission to the Lords to transact business in the absence of the Crown, it suggests that the House of Lords in the reign of Henry IV still retained so much of the character of the King's Council as to make the presence of the king necessary to the due transaction of its business.

Royal presence in the House of Lords.

Ante, p. 266.

But, however this may be, the practice had become so unusual by the reign of Charles II, that the Lords were uncertain what business of the House could be transacted in his presence. On one occasion Charles came unexpectedly into the House when it was sitting in Committee, and thereupon the sitting of the House was resumed. But the king said

[1] Stubbs, Const. Hist. iii. 480. [2] Rot. Parl. iii. 611.

'that he is come to renew a custom of his predecessors long discontinued, to be present at debates but not to interrupt the freedom thereof: and therefore desired the Lords to sit down, and put on their hats, and proceed with their business.' Whereupon 'the Lords again taking their places and putting on their hats the House was again adjourned into a Committee during pleasure.'

Charles II was a frequent attendant at debates, being present at as many as forty-three out of eighty-nine in the session of 1672–3, and upon one occasion in the session of 1671 he rebuked the Lords for their disorderly conduct, desiring them 'not to prophane such a presence as this with the like disorder, but keep their places and proceed with their businesses according to their orders prescribed in the House[1].'

Since the death of Queen Anne the presence of king or queen during debates in Parliament has been discontinued. The ceremonies of opening, prorogation or dissolution of Parliament, and of giving the royal assent to bills are the only occasions on which the Queen is present in the House of Lords.

In the Commons.

Her presence during a debate in the House of Commons would be something very different from a revival of a practice long disused. Charles I is the only sovereign[2] who has thus ventured to violate the rights of the Commons to freedom and secrecy of debate. The Journals of the House for the 4th of January, 1642, contain the only precedent for a situation incompatible alike with the dignity of the Crown and the privileges of the Commons.

The entry of the preceding business is interrupted, and the report runs :—

[1] 12 Lords' J. 413.

[2] Gardiner, History of England, x. 139. But Dr. Stubbs (Lectures on Mediæval and Modern History, p. 281) describes how in 1532 Henry VIII drove the Annates Bill through Parliament by two visits to the Lords and one to the Commons. In the lower House the voices went against him and he insisted on a division, an exceptional practice at that time. [Dr. Stubbs has kindly referred me to the *Domestic State Papers*, Henry VIII, vol. v. no. 898. It seems doubtful whether the king came to the House or summoned the Commons to his presence.]

His Majesty came into the House and took Mr. Speaker's chair.

'Gentlemen,

'I am sorry to have this occasion to come unto you.' . . . .

The journal breaks off abruptly, and its silence is significant.

Royal messages,

The Crown therefore, except on the occasions which I have mentioned, must communicate with the Houses by messages,

under sign-manual,

and these may be either formal, under the sign-manual delivered to the Lord Chancellor in the one House, and to the Speaker in the other, and received by members uncovered: or of a less formal character,

reported *verbatim*,

but reported verbatim by a minister or officer of the household to the House of which

informal.

he is a member: or lastly, it is permissible for a minister to communicate to the House in the course of debate a statement from the Crown, but this only 'if it relates to matters of fact, and is not made to influence the judgment of the House, and then only with the indulgence of the House[1].'

Apart from these modes of address, the Crown has no means of communicating with Parliament. Nor are these used except upon formal occasions. The Queen can direct the attention of the Houses to certain matters in her opening speech. She can while they are sitting communicate a request for supply, or place at the disposal of the country some matters of royal interest or prerogative; she can, at the close of the session, if she choose, comment upon the conduct

Use of Queen's name in debate.

of business and the progress of legislation. All measures introduced or advocated by the Queen's ministers are assumed to have the royal approval, but to introduce into debate in either House any allusion to the personal wishes of the Queen, or to use Her Majesty's name in such a manner as to influence the judgment of members, is contrary to the rules of the House.

Thus during the session of 1876, a member of the House of Commons made at a public meeting a statement to the effect that a measure then before the House had been brought forward in deference to the personal wishes of the Queen. Mr. Disraeli,

[1] Hansard, 3rd series, vol. 228, p. 2037.

who was then Prime Minister, desired to contradict this statement on behalf of the Queen and with her authority. He said, 'I can only speak with the indulgence of the House. I have the authority of Her Majesty to make a statement on her part, but at the same time, as I have felt it my duty to place before Her Majesty the fact that it is not in accordance with the rules of the House that the name of the Sovereign can be introduced into debate without the permission of the House—it therefore rests with the House whether I shall go on. If the House desires it I shall do so.'

Mr. Speaker thereupon said, 'As the House is aware, one of the rules of the House is this—that the introduction of the Queen's name into debate, with a view to influence the decision of the House, would certainly be out of order. At the same time, if the statement of the right honourable gentleman relates to matters of fact, and is not made to influence the judgment of the House, I am not prepared to say that, with the indulgence of the House, he may not introduce Her Majesty's name into the statement[1].'

The House is the ultimate authority in the matter, and may set aside its own conventions, if it so please, and if occasion require.

§ 3. *The Crown as a party to legislation.*

Legislation without the Crown.

We have still to consider the action of the Crown as a party to legislation, and looking back at the history of this matter, and noting, as we have had to do, the large share of legislative power which the Crown once possessed, we are apt to forget that laws have been passed to which no royal assent was given; we are apt to forget the episode of the Commonwealth; the restoration of Charles II; the resolution of the Lords and Commons that the crown should be offered, on the abdication of James II, to William and Mary; the strange conclusion at which Lord Chancellor Thurlow arrived during the insanity of George III, in 1788, that he could put the

[1] Hansard, 3rd series, vol. 228, p. 2037.

great seal to a Royal Commission empowering him to give the royal assent to Acts of Parliament.

We may leave out of consideration the makeshifts to which constitutional lawyers may be reduced when the throne is vacant or its occupant insane. All that can be done under such circumstances is to supply, as soon as may be, the deficiency in the constitution. Apart from catastrophes which need to be dealt with as may best suit the circumstances of each case, we may safely join with the second Parliament of Charles II in holding that there is no truth in the 'opinion that both Houses of Parliament, or either of them, have a legislative power without the king,' an opinion the expression of which rendered its holder liable, by the same statute, to the penalties of a *præmunire*.

The royal assent:

When a bill has passed through all the necessary stages which I have described above, it is ripe to receive the royal assent; and this assent is given by the Queen in person or by commission.

in person,

If the Queen should come to Parliament in person, every bill which is ready for the royal assent would necessarily be

by commission;

presented to her for assent or rejection and could not be withheld. In the same manner, when a commission is issued to give the royal assent, every bill which is ready should be included in a schedule annexed to the commission. No bills are allowed to reach their final stage, after a commission has been issued, until it has been acted upon, for otherwise the commission would need to be altered so as to include them.

It seems to have been regarded as doubtful at one time whether the Crown by assenting to a single bill did not thereby terminate the session of Parliament[1], and as late as 1670 a clause was inserted into an act providing that 'His Majesty's royal assent to this bill shall not determine this session of Parliament[2].' But the doubt has been cleared up without express enactment or decision upon the point, and the royal assent is now given to bills as soon as they are ready

[1] Gardiner, History of England, iv. 127. [2] 22 & 23 Car. II, c. 1.

to receive it. The validity of the royal assent by commission is certified by 33 Henry VIII, c. 21, the Act for the attainder of Queen Catherine Howard. It is declared in that Act— formal requisites.

> That the king's royal assent by his letters patent under his great seal *and signed with his hand*, and declared and notified in his absence to the Lords spiritual and temporal and to the Commons assembled together in this high house, is and ever was of as good strength and force as though the king's person had been there personally present and had assented openly and publicly to the same.

And also—

> That this royal assent and *all other royal assent hereafter to be so given* by the kings of this realm and notified as aforesaid, shall be taken and reputed good and effectual to all intents and purposes without doubt or ambiguity; any custom or use to the contrary notwithstanding.

The provisions of this Act are followed, and the commission is under the sign manual as well as the great seal. The only departure from the law on this subject was in the case of the Regency Bill of 1811, when George III was incapable of expressing any rational intention, and a commission was nevertheless sealed for the purpose of giving his assent to the bill.

There are three forms of expressing the royal assent to a bill. A public bill is made law by the expression of the royal assent in the same form as that in which the kings of the fourteenth century were wont to reply to petitions for legislation. A favourable answer was couched in the words 'le roy le veult'; but if the king was unwilling to legislate he was also anxious not to offend by a curt refusal, and he 'smiling put the question by' with the words 'le roy s'avisera.' Modes of expression: (a) to a public bill. The royal veto:

These words, which amount to a veto upon legislation, have been seldom used since legislative procedure assumed its modern shape, save in the reign of William III.

The frequent use of this veto by William III was probably due to the recent limitations imposed by the Bill of Rights on

the suspending and dispensing power. His position differed in some respects from that of his predecessors and successors.

why not used by Tudors or Stuarts,

The Tudor monarchs, with their packed Parliaments, ran no great risk of being asked to assent to legislation of which they disapproved, although Elizabeth exercised the right of rejecting bills on at least one occasion very freely[1]. The Stuarts, with their exalted ideas of the prerogative, might readily assent to legislation from which they held themselves entitled to be set free by the use of the dispensing and suspending powers.

or at the present time;

If, on the other hand, the Crown in modern times disapproves of proposed legislation, it must begin its opposition earlier. The Queen can inform her ministers that a bill which they intend to propose is distasteful to her, and that she cannot entertain it. If the ministers insist upon their measure she can dismiss them and employ others, in the hope that those others may be supported by Parliament. She thus appeals from her ministers to Parliament. If Parliament, in its desire for this particular measure, refuses its confidence to the new ministers, and puts them in a minority on divisions upon important questions, the Queen has one more resource. She can dissolve Parliament and appeal to the country. If the constituencies return a new Parliament pledged to the measure of which the Crown disapproves, this last resource has failed. It remains for the Crown, in the words of Lord Macaulay, 'to yield, to abdicate, or to fight.'

its use by Will. III.

William III had neither a packed and submissive Parliament, nor a dispensing power, nor yet a responsible Ministry. He could not through ministers make his wishes felt in the inception of a bill, and being bound to observe the laws to which he assented, he chose to be circumspect in giving his assent. To a nation used to the arbitrary dealings of the Stuarts, the use of his veto by William was not regarded as a violation of constitutional usage. This may account for the fact that his refusal to assent to measures so important as

[1] Parl. Hist. i. 905.

the Place Bill and the Bill for Triennial Parliaments, when they first were presented to him, did no more than cause disappointment. But in this respect his reign must be regarded as a transition period. Anne exercised the veto once, when in 1707 she refused her assent to the Scotch Militia Bill. Since then the words 'le roy s'avisera' have never been used.

(b) To a private bill, or claim of right.

A private bill receives the royal assent in a different form, suggesting its character as a private petition, by the words '*soit fait comme il est desiré.*'

A claim of right is granted in a form very nearly similar to this. The Petition of Right received the assent of Charles I in the words *soit Droit fait comme il est desiré.* The Petition was a claim of Public Right, and the answer given in these terms constituted the Petition a declaratory Statute.

(c) To a money bill.

A money bill is a grant of supply or an appropriation of supply granted by the Commons to the Crown, and it needs for its efficacy the assent of the Lords and the Crown. The form of assent to such a bill is '*La Reyne remercie ses bons sujets, accepte leur benevolence et ainsi le veult.*'

The process of giving the Royal assent by Commission may be illustrated by an extract from the Journal of the House of Lords for the year 1880.

The Lord Chancellor, on the 2nd of September in that year, acquainted the Lords that 'Her Majesty had been pleased to issue a Commission to several Lords therein named for declaring Her Royal assent to several Acts agreed upon by both Houses of Parliament.'

The Lords Commissioners sent to desire the attendance of the Commons, and the Commons attended with the forms described in a preceding chapter, the Speaker bringing with him the Appropriation Bill. Then the Lord Chancellor said:

My Lords and Gentlemen of the House of Commons,

Her Majesty, not thinking fit to be personally present here at this time, has been pleased to order a Commission to be issued under the

Great Seal, and thereby given Her Royal assent to divers Acts agreed upon by both Houses of Parliament, the titles whereof are particularly mentioned; and by the said Commission hath commanded us to declare and notify Her Royal assent to the said several Acts in the presence of you the Lords and Commons assembled for that purpose: which Commission you will now hear read.

The Commission was thereupon read, and the schedule containing the titles of the Acts to which assent was to be given, and the Lord Chancellor then spoke again:

In obedience to Her Majesty's commands and by virtue of the Commission which has now been read, we do declare and notify to you the Lords Spiritual and Temporal, and Commons in Parliament assembled, that Her Majesty hath given Her Royal assent to the several Acts in the schedule to the Commission mentioned: and the Clerks are required to pass the same in the usual form of words.

Then the Clerk of the Parliament, having received the Money Bill from the hands of the Speaker, brought it to the table, where the Clerk of the Crown read the titles of that and other Bills to be passed, severally as follows, viz.:

Appropriation Act 1880. (Sess. 2.)

To this Bill the Royal assent was pronounced by the Clerk of the Parliament in these words, viz.:

La Reyne remercie ses bons sujets accepte leur benevolence et ainsi le veult.

Then the Clerk of the Crown at the table read the titles of the Bills to be passed severally, as follows, viz.:

Post Office (Money Orders) Act 1880.
Doctors' (Scotland) Act 1880.
(and a number of others.)

To these Bills the Royal assent was pronounced by the Clerk of the Parliament in these words, viz.:

La Reyne le Veult.

Lord Plunket's Indemnity Act 1880.

To this Bill the Royal assent was pronounced by the Clerk of the Parliament in these words, viz.:

'Soit fait comme il est desiré.'

In 1876 a question was raised as to the validity of a royal assent given by commission while the Queen was on the continent. A statute of the 2nd William and Mary had given efficacy to 'acts of royal power' done by the King during his absence from the realm; and it was not considered necessary to create Lords Justices with delegated powers or to legislate afresh upon the subject[1].

Until 1793 an Act of Parliament commenced its operation from the first day of the Session in which it was passed. The Statute 33 Geo. iii. c. 13 provided that the date on which a Bill received the royal assent should be endorsed upon it by the Clerk of the Parliament, and that 'such endorsement should be taken to be part of such Act and to be the date of its commencement where no other commencement shall be therein provided.'

[1] May, Parl. Practice (ed. 10), 485.

CHAPTER IX.

THE EXECUTIVE AND LEGISLATURE IN CONFLICT.

I HAVE described the constitution of our Parliament, and its action in Legislation. I wish now to consider the various ways in which one of the three parts of this legislative body has tried to act independently of the other two in respect of legislation, or to control or influence the others so as to get legislation practically into its own hands. I do not reckon among influences of this sort the greater power which the House of Commons of the present day exercises in proportion to the other two branches of the legislature. This power is due to natural causes, to the fact that the House of Commons represents large numbers, and keen political interests or vivid wants. I propose to deal with infringements by one part of the legislature of the rights of another either by direct invasion or assumption of those rights, or by indirect influence obtained over those who ought to have maintained them. The period over which the conflict extends must be taken to commence after the settlement of the respective rights of Crown, Lords, and Commons in Legislation, as described in Chapter VII of this book. The direct assault by the Crown upon the concurrent law-making and taxing powers of Parliament lasted through the sixteenth and seventeenth centuries; the indirect influences brought to bear by the executive on the legislature, and specially on the House of Commons, are mostly matters of eighteenth-century history.

The Crown, as being at once the executive and a branch of

the legislature, is also that branch of the legislature which has most often and in the greatest variety of ways endeavoured to assume to itself legislative power or to subordinate to itself the other branches of the legislature. And it is possible to distinguish and classify the forms which have been assumed by these endeavours of the Crown.

The Crown has tried to legislate independently of Parliament: it has tried to nullify legislation effected in the entire Parliament by dispensing with the operation of statutes in individual cases, or by suspending their operation altogether; it has tried to raise money without parliamentary grant; it has tried, personally or through its ministers, to influence the legislature by the corruption of members or the corruption of constituencies. Or one may summarise the forms assumed by these attempts of the Crown thus:—

1. Claim to be independent of Parliament in legislation.
2. Interference with the action of Parliamentary legislation.
3. Claim to be independent of Parliament in taxation.
4. Influence brought to bear on elections or members.

§ 1. *Royal Proclamations.*

The efforts of the Crown to assume to itself independent legislative powers found some colour in the identity, in early times, of the executive and the legislature, of the King in Council and the King in Parliament. The King in Council had once legislated, and, as we have seen, continued to legislate by way of Ordinance for some time after Parliament had acquired legislative power, and this often took place with the sanction and approval of Parliament. Of the legislative character of the ordinance as distinguished from statute I have already spoken, and also of the jealousy which this practice of independent legislation by the Crown in Council created. This jealousy was awakened as the confusion between the Executive and the Legislature cleared away, and as Parliament, and especially the Commons, realised the importance of insisting upon the fulfilment of the terms of the Statute of

Ante, p. 237. Legislation by ordinance,

Edward II, whereby the consent of prelates, earls, barons, and the commonalty of the realm was required to matters which were to be established 'for the estate of the king, the realm, and the people.'

revived in Proclamation.

Legislation by ordinance, which had been denounced at the end of the fourteenth century and which had disappeared during the fifteenth, revived in the sixteenth in the form of legislation by Royal Proclamation.

The modern form of Proclamation has already been set forth in an earlier part of this book, but the Proclamations of the Tudor sovereigns were a great deal more than ministerial acts summoning or proroguing Parliaments, or exercising powers conferred upon the Crown by Statute. They made new laws, new offences, new punishments, and the offences were tried and the punishments inflicted by the Court of Star Chamber.

Statute of Proclamations.

Henry VIII, who was skilful in extending the discretionary prerogative by legal means, and in obtaining from Parliament an increase of powers which it was the duty of Parliaments to control, procured in 1539 the passing of the Statute of Proclamations[1]. The ostensible object of this statute was to enable the executive, when Parliament was not sitting, to act promptly as occasion might require. It professed to guard the laws and customs of the realm and the person and property of the individual. Nevertheless it enacted that Proclamations made by the king, with the advice of his honourable council, or of a majority of his council, 'should be observed and kept as though they were made by an Act of Parliament,' and permitted the enforcement of such proclamations by such pains and penalties as the King and Council should see requisite. Such an Act was, as Dr. Stubbs describes it, 'a virtual resignation of the essential character of Parliament as a legislative body; the legislative power won for the Parliament from the king was used to authorise the king to legislate without a Parliament[2].'

[1] 31 Hen. VIII, c. 8.

[2] Stubbs, Const. Hist. ii. 588.

The Statute of Proclamations endured but for a short time; it was repealed by 1 Edward VI, c. 12, s. 4, but the practice continued, and though royal proclamations had no longer by statute the force of law, they were used to introduce ecclesiastical changes and social and economic regulations; they were enforced by penalties of fine, imprisonment, and even slave labour on the galleys[1]. In the reign of Mary the validity of such proclamations was called in question, and the judges did not hesitate to assign to them their proper legal character as statements of existing law, and not sources of new law.

Proclamations under Edward VI.

Mary.

'The king, it is said, may make a proclamation *quo ad terrorem populi* to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one[2].'

Nevertheless the Tudor queens continued to legislate by way of proclamation more freely than the kings of the fourteenth century had ever ventured to do by ordinance. Impositions were laid upon imported goods, sumptuary rules were made as to the building of houses, and the quality of apparel; trade regulations were enforced by punishments in excess of those which the common law would have inflicted.

Elizabeth.

James I used this method of legislation quite as freely. In the proclamation by which he summoned his first Parliament he tried to limit the choice of the electors by describing the quality of the candidates to be elected, and the discretion and duties of the sheriff by a charge that writs were not to be sent to ancient or depopulated towns. By proclamations also he levied impositions on merchandise; a matter which is better considered when I come to deal with the king's claim to levy money without the consent of Parliament. He interfered in various ways with personal liberty and freedom of trade[3], bidding country gentlemen to leave London and go and

James I.

[1] Hallam, Hist. of England, i. 37.

[2] Ibid. i. 337.

[3] For specimens of such proclamations, see Rymer; Old edition, xvii. 417, 607; Hague edition, vol. vii. part 4, pp. 16, 143.

maintain hospitality in their own houses, forbidding the increase of buildings about London, and the making of starch out of wheat. But the proclamations on these last matters elicited a judicial opinion which must be taken as a final and conclusive statement of the law upon the subject. Coke was consulted as to their legality; he asked leave of the Council to confer with some of his brethren on the Bench, and three judges were appointed to assist him. The result of their consideration may be thus set forth:—

Judicial opinion on their validity.

'1. The king by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.

'2. The king hath no prerogative but what the law of the land allows him.

'3. But the king, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by law: the neglect of such proclamation aggravates the offence.

'4. If an offence be not punishable in the Star Chamber the prohibition of it by proclamation cannot make it so[1].'

Constitutional value of the opinion.

We find here set forth in a few words several salient features of our Constitution: and this is the more interesting as having been delivered at a time when a clear statement of the points at issue between Crown and Parliament was greatly needed, and when the first step to be taken towards a settlement of constitutional difficulties was that the nature of those difficulties should be understood.

The king's prerogative is ascertainable by rules of law, and is limited by those rules; he cannot make new nor alter existing laws, nor create new offences, nor constitute new courts for the trial of offences otherwise provided for. He is the executive, his business is the enforcement of existing law. If he thinks he can best enforce it by proclaiming it, he is welcome to do so. The judges in awarding sentence upon

[1] 12 Co. Rep. 74, 75.

offenders against the law so proclaimed may fairly consider that the warning aggravates the offence.

In stating thus pointedly that the business of the king was to administer the law, and not to make the law, Coke brings us to the distinction between the functions of the Crown in Council, and those of the Crown in Parliament.

If one asks where is the law to be found by which the king's prerogative is determinable, the answer is 'in statutes, in judicial decisions, in the customs of the realm.' If one asks what power in the State can do that which Coke says the king can not do, the answer is that the Crown in Parliament can make, unmake, and alter the law which it is the duty of the Crown in Council to administer.

The indefinite jurisdiction of the Star Chamber was at this moment one of the open questions of the Constitution, and in this matter Coke goes no further than to say that, whatever that jurisdiction may be, it cannot be increased by the method of proclamation.

Proclamations continued to be made, not only by James I but by Charles[1], and so long as the Star Chamber continued to exist it was difficult to prevent their enforcement by some form of penalty. But when this jurisdiction had been abolished by the Long Parliament and there remained only the regular tribunals before which it was possible to try offenders against the proclamations of the Crown, the *dicta* of Coke and his brethren came to correspond not merely with the law as it was, but with the law as it was observed, and we hear little more of this encroachment of the prerogative on the rights of Parliament.

16 Car. I, c. 10.

Perhaps we may find in an episode of eighteenth-century history as good an illustration as possible of the difference between legal and illegal proclamations.

Illustrations of legal and illegal proclamations.

When Lord Chatham and his colleagues took office in the summer of 1766 the ministers of the Crown thought themselves bound to take measures in view of the great scarcity

[1] Hallam, Hist. of England, ii. 25.

occasioned by a bad harvest. By their advice two Royal Proclamations were issued.

Proclamation by way of admonition.

There were on the statute-book certain laws against forestallers and regraters, persons who bought up corn and kept it back to get a high price, or who carried corn from one part of the country to another in order to take advantage of better prices where the corn was scarcer. Whatever may have been the economical merit of these laws, the Crown was within its rights in proclaiming them and the penalties for the breach of them. A proclamation of these statutes was just such an admonition 'for the prevention of offences' as came within Coke's description of a legal exercise of the prerogative.

But the ministry went further. Without waiting for the summons of Parliament they advised the king to lay an embargo, by proclamation, upon all ships laden with wheat or wheat-flour. Such a restraint was contrary to the provisions of statutes, which made the export of corn free. When Parliament met, the ministers were severely attacked for having counselled the Crown to break the law, and it is to be noted that they did not for a moment attempt to defend the legality of the proclamation. They claimed to have acted for the best on an emergency, and Lord Camden said that 'it was but a forty days' tyranny.' After acrimonious debates an Act of Indemnity was passed in favour of the ministers who had advised and the officials who had carried out the embargo.

The Forty Days' Tyranny.

Practical difficulty of subject.

The whole proceeding illustrates the difficulty which must recur from time to time, and which the Statute of Henry VIII proposed to meet. Ordinarily the law is sufficient for all circumstances that may arise, but there may be occasions when the executive must act in breach of the law. The Act of Henry VIII solved the difficulty by giving to the Crown in Council a discretionary legislative power. It is safer to allow the executive to act at its peril on the chance of an indemnity; and, though timid ministers may shrink from

risk and responsibility when action is required, we must choose between such possibly unreasonable inaction and the greater danger of placing the Crown and its ministers above the law of the land.

§ 2 (a). *The Dispensing Power.*

Uses of the dispensing power.

The power claimed by the Crown to legislate by way of Proclamation differs from the dispensing power in this, that the former would enable the Crown to make new law, the latter would enable it to remedy inconveniences arising from existing law. But the claim of the Crown to independent legislative power was never admitted, and, when called in question, was uniformly declared illegal, while the power to dispense with the operation of statutes seems, within certain limits, to have been unquestioned. It may have been of practical utility, for, as Hallam says[1], 'the language of ancient statutes was usually brief and careless, with few of those attempts to regulate prospective contingencies, which, even with our pretended modern caution, are often so imperfect; and as the sessions were never regular, sometimes interrupted for several years, there was a kind of necessity, or great convenience, in deviating occasionally from the rigour of a general prohibition.' But he adds that more often some motive of interest or partiality would induce the Crown to infringe upon the legal rule. And there seems no doubt that, in the mediaeval constitution, pardons or dispensations from the observance of statutes seem to have developed into something very different from a remedy for individual cases of inconvenience or hardship.

Modes of exercise.

In 1347 the Commons petitioned against the grant of charters of pardon in great numbers of cases of murder, robbery, rape, and other felonies,[2] and the king promised to use this prerogative henceforth for the honour and profit of the people, and to consider in Council the cases in which pardons

[1] Hallam, Hist. of England, iii. 60.

[2] Rot. Par. ii. 172.

had already been granted. But again in 1351 a like remonstrance was required, and the nature of the dispensations is shown by the statement that the number of these charters was so great that the county authorities dared not indict malfeasors. The pardon was given not after conviction but before indictment, and the prayer is that such charters should not henceforth be given to common malefactors and murderers, nor to any one, so far as is consistent with the king's oath and conscience; but that such common malefactors and murderers should be brought within the law for the quiet of the commonalty and the maintenance of the peace[1].

In order to prevent such hasty grants of pardon for offences the nature of which was hardly known to the king who pardoned them, a statute was passed in the 13th of Richard II providing that no such grants should be made unless the name of the offender and the precise character of the offence were specified in the terms of the charter. And while the Commons remonstrated against the exercise of the dispensing power in the form described, the Courts of law endeavoured to frame some rules for its limitation. It was held that the king could not dispense with *mala in se*, which were said to be violations of common law; nor with statutes passed to prohibit *mala in se*, or in other words, to put common law into the form of a statute; nor with the rights of individuals or corporations. But it was very hard to define the power of the king to dispense with penal statutes, and the difficulty may perhaps be best illustrated by two cases both decided near the end of the seventeenth century.

Illustrations.

The case of *Thomas* v. *Sorrell*[2] was an action brought for penalties for selling wines by retail contrary to the Statute 12 Car. II, c. 25.

An Act of the reign of Edward VI had forbidden the sale of wine by retail save with licenses granted in certain forms by certain authorities. James I incorporated the Vintners' Company and gave them the right to sell wine by retail or in

[1] Rot. Par. ii. 229.

[2] Vaughan, 330.

gross in and within three miles of the City of London, and in other places, *non obstante* the Statute of Edward VI.

The Statute of Charles II, which imposed fresh penalties on the sale of wine by retail, saved the rights of the Vintners' Company, of whom the defendant Sorrell was one.

The questions for the Court were, whether the patent of James I was void in its creation: if not, whether it expired when that king died; if not, whether the saving clause of 12 Charles II, c. 25, saved it from the operation of that statute: and the Court had no difficulty in deciding that the patent had not expired and that the saving clause operated in its favour. *Thomas v. Sorrell.*

It remained therefore to decide whether the original dispensation was valid, and to the consideration of this point Vaughan C. J. devoted much learning and ingenuity. He distinguishes a *Dispensation*, or relief from the consequences of an unlawful act done or contemplated, from a *License*, or permission to do an act which may legally be done subject to the grant of such a license, and from a *Pardon* or relief, after conviction, from the penalties of wrongdoing. A dispensation then may be granted either before or after the doing of the illegal act, but in contrast to a pardon it must be given 'so as the offender shall not be impleaded for it.' The distinction between *mala prohibita* and *mala in se* he rejects as confusing, and rightly so, for no act is legally *malum* unless forbidden by law. He denies the power of the Crown to dispense with any general penal law, and he endeavours to define the dispensing power by limiting it to cases of individual breaches of penal statutes where no third party loses a right of action, and where the breach is not continuous. The forfeiture in the case before the court was a part of the king's inheritance. No private right was therefore affected by the dispensation granted, nor was it contrary to the intention of the Act of Edward VI, which was not that no wine should be sold, but 'only that every man should not sell wine that would, as they might when the Act was made.'

So 'the king could not better answer the end of the Act, than to restrain the sellers to freemen of London[1]'.

The judgment of Vaughan C. J. shows the extreme difficulty of limiting the power ascribed to the Crown. His conclusion seems in substance to amount to this, 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 his exclusive benefit. Although the judgment may be taken to represent all the learning of the time on the subject of the dispensing power, it cannot be said to present a satisfactory view of the law where perhaps it was impossible to state the law in a clear and satisfactory form.

In *Godden* v. *Hales*[2] the matter for which the king granted a dispensation was a continuous breach of a general penal statute passed in the interest of the Church of England.

Abuse of dispensing power.

The cause of action was debt for £500, and the action arose as follows. The defendant, holding a military office under the king, had neglected to take the oaths of supremacy and allegiance and to receive the sacrament according to the rites of the Church of England as required by 25 Car. II, c. 2. For this he was indicted at the Rochester assizes in March 1686 and convicted, and the plaintiff became entitled to the forfeit of £500 as by the statute was provided. Sir E. Hales set up in defence letters patent under the Great Seal, received from the king before the date of the indictment, and discharging him from taking the oaths, from receiving the sacrament, and in other respects from satisfying the tests prescribed by 25 Car. II, c. 2.

The case was tried in the Court of King's Bench, but the opinions of all the judges were taken, and eleven out of twelve pronounced in favour of the king's right to dispense with the last Act. They did not trouble themselves with the nice distinctions which had perplexed the question as discussed by Vaughan, but said boldly that the laws were the

[1] Vaughan, 355.

[2] 2 Shower, 475.

king's laws, that he might dispense with them as he saw fit, and need render no account for so doing.

Distinction between *Thomas* v. *Sorrell* and *Godden* v. *Hales*.

Whatever may be the technical difficulty in distinguishing the constitutional limits, as they existed in 1685, of the king's dispensing power, there is none in distinguishing such cases as *Thomas* v. *Sorrell* and *Godden* v. *Hales*. In the one the king in the interest of trade granted a dispensation from penalties provided for his benefit; in the other the king in the interests of a religion which was not that of the nation, set aside penal laws which had been passed for the security of the national religion.

Interpretation of dispensing power by the king.

There was no doubt that the king intended to put himself above the law, and, apart from all legal interpretations of the dispensing power, to set aside statutes as he pleased. For he had announced to Parliament at the beginning of the session of 1685 that he proposed to employ certain persons not qualified by law to hold commissions in the army. The Commons had addressed him in terms of remonstrance, and had offered to introduce Acts of Indemnity in favour of such persons as he might wish to employ, being under the disabilities created by 25 Car. II, c. 2: and they stated that 'the continuance of them in their employments may be taken to be a dispensing of that law without Act of Parliament, the consequence of which is of the greatest concern to the rights of all your Majesty's dutiful and loyal subjects, and to all the laws made for the security of their religion.'

To this remonstrance the king replied with a rebuke to the Commons for their lack of confidence in him; and it would seem that if a dispensing power claimed for such purposes and with such an intention could by any possible interpretation come, as Hallam seems to think it might come[1], within the legal rights of the crown, it were idle to endeavour to draw nice distinctions concerning the limits of a power which was in effect superior to Parliament.

So thought the Parliament which passed the Bill of Rights,

[1] History of England, iii. 62a.

for the dispensing power is therein dealt with in such a way as to preclude its further exercise.

It is declared and enacted:

(1) That the pretended power of dispensing with laws, or the execution of laws by royal authority, as it hath been assumed and exercised of late, is illegal.

(2) In s. 2, that from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such a statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament [1].

Effect of the Bill of Rights.

From these clauses of the Bill of Rights one may deduce the following propositions:—

That the dispensations granted by James II were illegal.

That there were dispensations of older date which the Bill of Rights was not intended to invalidate.

That from the date of the passing of the Bill of Rights no dispensation of any Statute or part of a Statute was to be valid unless Parliament made provision for the same in the terms of the Statute.

The words *non obstante* were merely the technical terms in which the Crown was in the habit of dispensing with statutes, and are equivalent to the words 'any article or clause in such or such a statute to the contrary notwithstanding': and the 'bill or bills to be passed' were never brought forward.

We may therefore say that any exercise of the dispensing power subsequent to the Bill of Rights must take place by authority of Parliament, not by the prerogative of the Crown, and that we must go back to some considerable time before 1688 to find cases of dispensations which would be held to be lawful.

[1] This clause was not in the original Declaration of Right, but was inserted when the Bill of Rights came to be re-enacted by Parliament, December 16, 1689.

The *Case of Eton College*[1] (1815) furnishes an instance of such a dispensation. The Statutes of that College forbade the Fellows to hold any spiritual preferment in conjunction with a Fellowship in the College. Queen Elizabeth gave permission to the Fellows to hold benefices of a certain value without thereby forfeiting their Fellowships, 'any article or clause in the Statutes of our said College to the contrary notwithstanding.' It was argued that such a dispensation was saved by the words 'as it hath been assumed and exercised of late,' and that the Bill of Rights did not affect an assumption or exercise of the dispensing power which had taken place 100 years before. The fellows were allowed to take the benefit of the dispensation by the Visitor of the College acting on the advice of his assessors, Sir W. Grant and Sir W. Scott.

§ 2 (b). *The Suspending Power.*

The suspending power.

In the time of the Stuarts it must be remembered that the dispensing power with which I have just been dealing was made to rest upon something more than precedent or convenience: it was claimed on behalf of the Crown because the king was held out to be the source from which law emanated and to possess a discretionary prerogative which enabled him, whensoever he thought the interests of the kingdom demanded it, to vary or set aside the law of the land. On this ground had been based the decision of the Court in *Godden* v. *Hales*. In the year 1687 James II determined to act up to the estimate formed by the judges of his prerogative, to free himself from the necessity of granting dispensations in individual cases, and to suspend all the penal laws relating to religion.

The Declaration of Indulgence.

'We do declare,' runs the celebrated Declaration of Indulgence, 'that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters

[1] The case is reported by Mr. Williams (1816). The substance of it may be found in Broom, *Constitutional Law*, note to Seven Bishops' case.

ecclesiastical, for not coming to church or for not receiving the sacrament, or for any other nonconformity to the religion established, or for or by the reason of the exercise of religion in any manner whatsoever, *be immediately suspended*, and the further execution of the said penal laws, and every of them *is hereby suspended*.'

The declaration goes on to say that 'the oaths of supremacy and allegiance and also the several tests and declarations mentioned in the Acts of Parliament made in the twenty-fifth and thirtieth years of the reign of our late royal brother King Charles II shall not at any time hereafter be required to be taken declared or subscribed by any person or persons whatsoever who is or shall be employed in any office or place of trust either civil or military under us or in our government.'

The petition of the Seven Bishops.

The validity of the claim thus asserted came in a somewhat circuitous way before the law courts in the Seven Bishops' case. Six Bishops, with the Archbishop of Canterbury, petitioned the king that he would not insist on the reading of this declaration by them and its distribution throughout their dioceses as had been ordered by the King in Council. For this they were tried in the Court of King's Bench as for a seditious libel, and the defence set up came to this—that the declaration of the king's intention to suspend the penal statutes respecting religion, amounted to an expression of intention to break the law, and that loyal subjects might decently, and without seditious purpose, petition against the requirement that they should publish an illegal declaration.

Their petition alleged nothing that was false; it was not proffered with malice: if the king's action was illegal or doubtful in respect of legality the petition was not seditious. The only point therefore on which the judges might instruct the jury was whether the legality of the declaration was so sure that to petition against it was seditious. On this the judges were divided; two addressed themselves to the interpretation of the law, two to the furtherance of the king's wishes. Of the former Powell J. puts the matter in the clearest light:—

'If there be no such dispensing power in the king,' he says, 'then that can be no libel which they presented to the king, which says

that the declaration, being founded upon such a pretended power, is illegal. Now this is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference nor know any, in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament. All the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences[1].'

Whatever might be said for the possibility that the dispensing power could be exercised with salutary effect, it was clear that the suspending power as claimed and used by James II was inconsistent with the very existence of a Parliament, as a legislature. The Lords and Commons might meet to vote supplies, to state grievances, to criticise the ministers of the Crown, but it would be idle for them to make laws which the king could at any moment annul. The Bill of Rights accordingly made short work of the suspending power, enacting:—

'That the pretended power of suspending of laws or the execution of laws, as it hath been assumed and exercised of late by royal authority, without consent of Parliament, is illegal[2].'

§ 3. *Taxation.*

The claim of the Crown to levy taxes without consent of Parliament is very closely associated with the claim to legislate independently of Parliament. For it was only by keeping a firm hold upon the sources of extraordinary revenue that the Commons obtained a hold upon legislation.

Nature of the discussion.

It must be borne in mind that I do not propose here to give an account of the sources of royal revenue, but of the respective claims of Crown and Parliament to demand the money of the people for the needs of government. The story of the controversy is so well told in the two great seventeenth century cases that I will not do more than sketch the

[1] 12 St. Tr. 183.

[2] 1 Will. & Mary, Sess. 2, c. 2.

character of the dispute and then leave Bate's case and the case of Shipmoney to give the history of the matter as they do nearly to its end.

Why the king could not live of his own.

The king in the fourteenth century had certain sources of income, feudal dues, crown lands, fees, fines and the like; and the contention of the Parliaments of those days was that the king should 'live of his own.' This meant that the king had an income sufficient for the business of government, and should ask for no more. But it was not really desirable that the king should live of his own. If he had done so he would have been too great for the liberties of the country or too small for its security: he would have been rich enough to make him independent of Parliaments or so poor as to become contemptible among his rivals abroad and his vassals at home. We might never have known parliamentary government because the king would never have had cause to ask his people for money, or we might never have become a united kingdom because the monarchy would have collapsed among the rival magnates or have fallen a prey to a foreign invader.

The difficulty never arose, because, in the words of Dr. Stubbs, 'no king of the race of Plantagenet ever attempted to make his expenditure tally with his ordinary income.' It would have been unfortunate either for our liberties, or for our independence and cohesion as a nation, if the kings of that race had been able or had tried to do so.

Modes of taxation.

When the king wanted money in excess of the ordinary revenue he could obtain it either by direct taxation levied on the estimated value of land and chattels, or by indirect taxation in the form of impositions upon exports and imports.

Direct aids and prises.

Of these the first had been kept within the control of the national assembly or of Parliament by various enactments, from Magna Charta onwards, dealing with the different forms —scutages, aids, tasks and prises—which taxation of this kind assumed.

Indirect Imposition on merchandise.

It was not so easy to maintain Parliamentary control over impositions on exports and imports. The king

claimed a prerogative to regulate trade, to define the privileges of alien merchants, to make agreements, apart from Parliament, with the merchants as a sub-estate or class.

After a long struggle the Commons in 1340[1] obtained the passing of a statute, not wholly satisfactory in its terms, limiting the king to a fixed charge on wool, and on other things to the ancient customs, unless Parliament granted more. In 1371[2] they carried a statute which closed the controversy as to wool, and from 1373[3] they regularly granted customs on wine and merchandise for a term of years or for the life of the king, under the name of tunnage and poundage.

The claim of the Crown to levy impositions in addition to the customs thus granted was not raised for nearly two hundred years. But in 1557 Mary laid a duty on cloths exported and another on French wines imported. Elizabeth laid a duty on sweet wines, and these continued to be raised throughout her reign. Impositions.

Indirect Taxation. The Case of Impositions.

James determined to derive a substantial revenue from impositions of this nature. He began by the publication of letters patent increasing the duty on tobacco from *2d.* to *6s. 10d.* a pound, and on currants from *2s. 6d.* to *7s. 6d.* Bate, a Turkey merchant, refused to pay the additional impost, and the Attorney General took proceedings against him in the Court of Exchequer. Bate set up the statute granting *2s. 6d.*, and averred that he had paid all that the law required him to pay. Judgment was given against him mainly on the ground that trade was matter of general policy falling within the discretion of the king. The king's power was said by the Court to be double, ordinary and absolute; the ordinary power seems in the view of the Court to have been concerned with administration of known existing law, the larger and The case of Bate. 2 St. Tr. 371.

[1] 14 Ed. III, st. 2, c. 4.

[2] 45 Ed. III, c. 4.

[3] Stubbs, Const. Hist. ii. 528.

more indefinite power determined the policy of government, and could not be limited by statute or common law. The right to control trade was put on a level with the right to protect merchants from foreign oppression and to declare war if such oppression should continue.

The decision does not at the time appear to have struck either the bar or the public as erroneous or corrupt. But the effect of it was to cause the king to raise the duties upon all kinds of merchandise. Bate's case was decided in 1606; a great increase on duties was made by a book of rates published in 1608, but it was not until 1610 that the Commons took up the matter, and we get the learned argument of Mr. Hakewill in support of a remonstrance against impositions to be presented by the House to the king[1]. The argument falls into three divisions; the first is directed to showing that by the analogies of the Common Law the Crown did not possess the right which it claimed; the second shows that the claim has been resisted whenever made; the third enumerates the statutes which preclude the Crown from levying impositions. In conclusion he deals with the reasons assigned by the Court of Exchequer *seriatim*.

The protest of the Commons.

Hakewill's argument.

Argument from Common Law.

The argument drawn from the Common Law is twofold. It is laid down as a general proposition that the customs, so far as they are not settled by statute, exist by allowance of common law; that for all the expenses of government which the king must needs incur, a source of revenue is provided; 'for the maintenance of the courts of justice, fines and other like profits: for the protection of wards lunatics and idiots, the profits of their lands': for the security of trade by keeping up harbours, clearing the sea of pirates, maintaining embassies, the duties on exports and imports recognised by law.

(a) Common law revenues are certain,

First then it is argued that these common law revenues of the Crown are either certain or reducible to certainty. It would be wholly contrary to the spirit of the Common Law that the subject should be liable to pay sums the amount of

[1] For Hakewill's argument, see State Trials, vol. 2, p. 407.

which was arbitrary and uncertain, dependent on the pleasure of the person interested in raising them. This principle is illustrated from fines, reliefs, aids, and other sources of revenue, and the conclusion is drawn that 'custom being, as the above revenues are, due to the king at Common Law, arising out of the property and interest of the subject, is like them *limited to a certainty which the king has not power to increase.*'

(b) and sufficient.

Secondly, it is not merely the certainty in amount, but the sufficiency for all purposes, of the common law revenues of the Crown, that goes to show the invalidity of the king's claim. The charges arising from the performance of royal duties are met by appropriate sources of royal revenue, and it is asked 'to what end has the Common Law thus provided for the maintenance of the king's charge but that after these duties are paid the subject may hold and enjoy the rest of his estate to his own use, free and clear from all other burdens whatsoever.' For the extraordinary needs occasioned by war there is a like provision. War must be defensive or offensive. If defensive, the king can legally call upon every subject at his own charge to serve in person. If offensive, it can hardly be so sudden as to give the king no time to call upon Parliament to grant him aid, or if the war be 'against the Scots, Welch, or other borderers within the land,' the military tenures supply a force bound to serve by the terms of their holding.

The arguments from Common Law come to this, that an arbitrary imposition such as James claimed the right to levy is contrary to the spirit of the law, and that the needs of government were sufficiently provided for: that the king should 'live of his own,' and if he could not do so, should seek aid from Parliament.

Argument from history.

The historical argument which forms the second part of Hakewill's speech is not so satisfactory. He states that from the Conquest to the reign of Mary, not six cases could be found of impositions levied as James proposed to levy them.

He defines impositions of this sort as 'an increase of custom at the king's pleasure, commanded by him to be taken, the passage being free and open to all men,' and he distinguishes such impositions from 'dispensations, or licences for money, to pass with merchandise prohibited by act of Parliament to be exported'; from the rare cases of subsidies exacted from merchants in time of necessity by ordinance of the king and magnates without assent of the Commons; from forced loans collected from merchants; from agreements made with merchants to grant them trading privileges in consideration of payment of money[1]. He is successful in showing that the cases he cites had never passed without remonstrance by the Commons, and that from the death of Edward III to the accession of Mary no such duties had been imposed. His statements as to the impositions levied by Mary and Elizabeth are not perfectly clear, nor does he tell the whole story. It seems certain that both these queens imposed duties, that throughout their reigns duties were paid on exported cloth and imported wine, and that no question was raised in Parliament concerning them[2].

Argument from Statute.

The third chapter of the argument consists in a recital of the statutes which Hakewill held to be conclusive against the claim of the Crown, and here again it is hard to admit that the statutes meet the case. He begins with Magna Charta, § 41: 'All merchants may safely and securely enter England and depart thence and remain and go to and fro therein by

[1] Of these modes of raising money the dispensations were an exercise of the dispensing power mentioned above, but they were none the less regarded with jealousy by the Commons, and efforts were made to prevent such dispensations by statute (27 Ed. III, st. 2, c. 7; 36 Ed. III, c. 11). Of impositions by Ordinance, Hakewill gives but one instance, and then the Ordinance was revoked as soon as made. The forced loans were lawful if '*bona fide* borrowed and truly intended to be repaid.' The negotiations with the merchant class were resisted and finally stopped by the Commons; see Rot. Parl. ii. 229, 25 Ed. III. The Commons petition against a grant made by the merchants, on the ground that the people will ultimately pay the sum granted in the increased prices which the merchants will be compelled to charge.

[2] Hallam, History, i. 317.

land and by water, to buy and to sell, *free of all evil tolls by the old and rightful customs*, save in time of war, and if they be alien enemies.'

Lest this should be taken to apply to foreign merchants, he cites 2 Edward III, c. 9: 'All merchants, strangers, and *privies* may go and come with their merchandise into England after the tenor of the Great Charter.'

He next cites the so-called statute *de Tallagio non concedendo*[1], which, whatever its intention may have been, refers to 'tallages or aids' and not to indirect taxation, and the *Confirmatio Chartarum*, which was closer to the point, for it recites a release by Edward of an imposition complained of by the Commons, and a declaration by him, 'for us and our heirs, *that we shall not take such things without their common assent and good will*,' saving certain customs therein granted by the Commons. Lastly he cites 14 Edward III, st. 1, c. 21, which was an answer to a petition of the Commons against the taking of more than the ancient custom on wool, woolfell, leather, tin and lead. The king in turn asks for a subsidy, and the statute, reciting the requests of king and Commons and the grant of the subsidy, proceeds to enact that the king will take no more in future than 6*s.* 8*d.* on the sack of wool, and on the other things no more than the ancient custom without consent of Parliament.

Difficulties in the way of the argument.

The whole of Hakewill's argument on the subject of impositions is a good illustration of the form which constitutional difficulties took in the time of the Stuarts. Neither precedent nor statute was conclusive; each disputant thought he had the law on his side, and each had in fact an arguable case; for statutes and precedents were applied to circumstances which they were never designed to meet. Difficulties had arisen between the Plantagenet kings and the Commons as to the

[1] The Petition of Right contains, in the preamble, a reference to this document as a Statute; but in fact the Confirmatio Chartarum, 25 Ed. I, c. 7 (1297), is the authentic enactment, of which the *de Tallagio non concedendo* is an abstract, imperfect and unauthoritative. Stubbs' Charters, 497.

right of the king to tax and levy impositions; these had been met from time to time in different ways. Sometimes the king conceded the point immediately at issue; sometimes a compromise was effected; sometimes a statute provided for the circumstances of the case. When similar difficulties arose two hundred and fifty years later, both parties appealed to the ancient precedents and statutes, and the Courts had to determine the rights in question. On a strict and literal application of the law, as settled in the reign of Edward III, to the circumstances of the reign of James I, having regard to the recent precedents of the reigns of Mary and Elizabeth, Bate's case was by no means clear. But we, who look at the question from further off, can see that the statutes and precedents of the fourteenth century, if they meant anything, meant that the king should not raise money without consent of Parliament, that the door had been closed to direct taxation and the imposition of export duties, and that the express Parliamentary grants of tunnage and poundage, for a term of years or for life, showed the intention of the Commons and of the Crown, until Mary's time, to treat import duties as being in no way different from other modes of raising money. The decision in Bate's case violated the spirit of the constitution rather than the letter of the law.

Impositions last till 1640.

Hakewill's argument led to a remonstrance by the Commons, and this to a reduction of impositions for a while, but the Crown continued to use them as a source of revenue. They were not touched by the Petition of Right, which dealt only with 'gift, loan, benevolence, or other suchlike charge,' and it remained for the Long Parliament to prohibit them. In the Act of 1640, which granted the king tunnage and poundage for that year, punishments were provided for any officer who should levy such customs without Parliamentary grant, and it was further 'declared and enacted that it is and hath been the ancient right of the subjects of this realm that no subsidy, custom, impost, or other charge whatsoever ought or may be laid or imposed upon any merchandise exported or

imported by subjects, denizens, or aliens, without common consent in Parliament[1].'

Direct Taxation. The Case of Shipmoney.

The case of Hampden.

The form which this mode of taxation took was a writ under the Great Seal addressed to the sheriff of each county, demanding for the king's service a ship or ships of a specified tonnage to be sent, fitted, manned, and victualled, to Portsmouth on a certain day[2]. The cost was to be assessed for the county and some of its boroughs by the sheriff; for other boroughs by the mayor or bailiff. Hampden's share of the contribution demanded from the county of Bucks was £1. He refused to pay it, and was summoned to show cause in the Court of Exchequer in Trinity term of the 13th Charles I[3].

The counsel for Hampden followed the same line of argument as was adopted in the Parliamentary discussion on the case of Impositions.

Argument from Common Law;

The provision made by the law for the defence of the country by sea was the grant to the king of tunnage and poundage, and the service of the Cinque Ports. To this provision the right assumed by the Crown of levying impositions had added considerably. If more was wanted Parliamentary supply was the only legal source.

from history;

Precedents were producible on both sides; of cases where the king had raised money or troops on an emergency, and of cases where he had borrowed or begged money for a special purpose, or had deferred the raising of money till a Parliament could meet. Statutes were conclusive in this case against the claim of the Crown, from Magna Charta to the Petition of Right. In fact it was unnecessary to go beyond the Petition of Right passed nine years before, wherein, reciting Magna Charta and the Statute de Tallagio non Concedendo, it was

from statute.

[1] 16 Car. I, c. 8, s. 1.

[2] The first writ of Shipmoney (1634) was addressed to maritime towns, the second (1635) and the third (1636) were sent to the whole kingdom.

[3] 3 State Trials, 825.

prayed by the Houses and granted by the king that 'no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge, without common consent by Act of Parliament [1].'

Admission of executive power of the Crown.

St. John, one of Hampden's counsel, made in his argument some bold admissions: he declined to draw any distinction between inland and maritime counties in respect of their liability for coast defence. He further admitted that the king was entrusted with the defence of the country and was judge of the best means for securing that defence. He concedes to the Crown 'that as the care and provision of the law of England extends in the first place to foreign defence; and secondly, lays the burden upon all; and for aught I have to say against it, it maketh the quantity of each man's estate the rule whereby this burden is to be equally proportioned upon each person; so likewise hath it, in the third place, made his Majesty sole judge of dangers from foreigners and when and how the same are to be prevented; and to come nearer, hath given him power by writ under the Great Seal of England, to command the inhabitants of each county to provide shipping for the defence of the kingdom, and may by law compel the doing thereof.'

Its limitation by Parliament.

This was to admit a great deal. But St. John goes on to show that while the king was judge of the policy to be pursued in meeting dangers, Parliament was the proper instrument by which supplies were to be obtained. The only ground for dispensing with a Parliamentary grant and resorting to arbitrary taxation would be the imminence of danger, and Hampden's counsel had no difficulty in showing not only that no danger was imminent, but that no such imminent danger was alleged in the writ.

Holborne carries the matter further, and limits, more closely than St. John had done, the discretionary powers of the Crown. 'If there be a storm or leak in the ship, that the danger be actual, it is justifiable for the master to throw out

[1] 3 Car. I, c. 1, s. 10.

the goods; but if he sees a cloud arise and out of fear of a storm he threw out the goods, I doubt on a jury which way this will go.'

Decision that *Rex* is *Lex*.

The judges, by a majority of seven to five, decided in favour of the Crown, some, as Finch and Weston, on the ground that the king was constrained or might be constrained by the necessities of the defence of the kingdom to raise money without waiting for a Parliament; others, alleging the superiority of the king to the law. The opinion of these last may be taken in the words of Berkeley, 'the law is of itself an old and trusty servant of the king's: it is his instrument and means which he useth to govern his people by. I never heard nor read that *Lex* was *Rex*, but it is common and most true that *Rex* is *Lex*, for he is *Lex loquens*, a living, a speaking, an acting law [1].'

In this matter of taxation, as fifty years afterwards in the case of the dispensing power, judges were found to maintain that for taking the subject's money Acts of Parliament were unnecessary, as later that for imposing general rules of conduct, Acts of Parliament were precarious; for the king, the source of all law, might if he chose do without them or set them aside.

The Long Parliament, by Statute 16 Car. I, c. 14, declared the judgment in the case of shipmoney to be contrary to law, and enacted the observance of the provisions of the Petition of Right, and the Bill of Rights enacts—

'That the levying money for or 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 [2].'

Practical difficulties of the question.

It is noticeable that throughout the controversies between Crown and Parliament in the seventeenth century the same difficulty recurs and presents itself under different aspects, to such of the parties as were not wholly engrossed in the technicalities of the discussion.

[1] State Trials, iii. 1098.

[2] 1 Will. & Mary, st. 2, c. 2.

There must be some person or body in the State capable of acting promptly in cases of emergency. A Parliament if not sitting has to be called, and is at best an unwieldy body for the purpose of dealing with present and pressing difficulties.

In the seventeenth century the choice lay between the submission of such difficulties, as they arose, to Parliament, and the assignment of great and dangerous power to the Crown. And apart from the danger to liberty of entrusting the Crown with the powers claimed for it by its advocates there was a practical inconvenience. If a king, animated with the best intentions, persistently blundered in the exercise of his discretion, there was no remedy short of a revolution.

Our cabinet system is the solution of the puzzle of the seventeenth century: we fix responsibility upon a group of ministers who can be removed if they fail; we do not fear lest they should threaten our liberties, and at the same time we expect that the servants of the Crown and the nation will not shrink from responsibility if occasion should arise when action must be taken without waiting to secure the acquiescence of Parliament.

§ 4. *Influence of the Executive on the Legislature.*

Influence of executive on legislature.

In the previous sections of this chapter I have described attempts made by the Crown to resume those functions in the State which had once belonged to the Crown in Council before Parliament grew up alongside the older institution, before the executive and legislature had become distinct bodies with appropriate duties. But I must not leave this part of my subject without noting other modes by which the executive has endeavoured to control the legislature, not by interfering with its duties but by influencing its action.

Influence of the Crown upon the Commons.

For when the position of Parliament in the constitution had become defined; when the participation of the Commons

in the imposing of taxes and the making of laws had become recognised as necessary, if taxes were to be paid and laws obeyed; when the king's part in legislation had been reduced to an expression of assent or dissent; it became worth the while of the king and his ministers to consider how far their wishes could be effected by the instrumentality of Parliament, and in particular of the Commons.

Dealings with the constitution of the House;

The modes adopted in view of this end may be said to have passed through three stages. First we have the attempts of the Tudors to obtain a subservient House of Commons by the creation of constituencies and the management of elections. The first Stuarts, with the exception of the attempt of James to form a Court party in Parliament, tried methods more in accord with their high notions of prerogative and their contempt for constitutional forms. They influenced debate, so far as they tried to influence it, by interference with freedom of speech; but they preferred to dispense with Parliamentary forms and to fall back on the independent action of the Crown described in the earlier sections of this chapter. The third stage commences with the Restoration: the king could no longer venture to create new constituencies nor to interfere directly with freedom of speech in Parliament; he addressed himself to the corruption of individual members, by places, by pensions, and by bribery. After the Revolution this method became more frequent and systematic as the House of Commons increased in power with no corresponding increase in responsibility. The art of Parliamentary management, as we shall have to note shortly, attained its perfection in the fifty years preceding the concession of independence to the American Colonies.

with freedom of speech.

with integrity of members.

The influence exercised by the Tudor sovereigns upon the House of Commons was of two kinds, the creation or restoration of constituencies designed to be under the influence of the Crown, and instructions general or special addressed to the sheriffs or to electors conveying recommendations or commands about the elections.

Creation of boroughs.

The additions made by Henry VIII to the representation of the country are free from the suspicion of any sinister motive. One cannot say the same of the twenty-two new members added in the reign of Edward VI. Fourteen of these were returned by seven Cornish boroughs, and from the number of persons represented and the qualifications of the electors in the year 1816 it may be concluded that with all due allowance for changes in the fortunes of these boroughs they never were expected to be anything but corrupt. The constituencies were as follows:—

Bossiney, mayor and freemen chosen by the mayor .	9
Newport, burgage tenants paying scot and lot . .	62
Westlooe, corporation, consisting of twelve persons who need not reside	12
Grampound, mayor, recorder, aldermen and freemen	42
Saltash, mayor and free burgesses	38
St. Michael's, portreeve, lord of the manor and inhabitants paying scot and lot	18
Camelford, corporation being inhabitant householders paying scot and lot	9

Mary added or revived fourteen boroughs, Elizabeth, thirty-one [1]. The clear intention of these additions was to form a court party in the House of Commons, and to obtain seats for friends of the Crown or its ministers, placemen who would vote as they were told but who had no local interest, such as would ensure their return, unless constituencies were made or found for them.

Interference with elections.

The creation of new boroughs, or the revival of old ones, would not, however, have been of much use if the Court had not taken active steps to fill them with suitable representatives. This was done either by general directions to the

[1] Of the boroughs added by Mary ten were newly enfranchised, of those added by Elizabeth twenty-five. About this time members habitually ceased to press for their wages, and this among other reasons inclined boroughs which had ceased to return members to ask for a revival of their privileges.

returning officers for the election of members of a certain character, or by express recommendations of individuals.

A circular addressed to the sheriffs in 1553 is an illustration of both forms of interference. It bids the sheriffs give notice to the electors that they should, in the first instance, choose residents of knowledge and experience, but that, if the Privy Council should make special recommendation of men of learning and wisdom, such direction should be regarded.

Such interference with elections by the Privy Council or by individual ministers of the Crown or noblemen did not take place without exciting some resentment in the Commons. The practice of nominating courtiers or placemen could not well be carried out consistently with the statute of Henry V, which required residence as a qualification for election. Accordingly in 1571 a bill was brought in to make valid the election of non-residents. The bill was supported on the ground that it would give to every constituency the choice of the best available candidates, and thus was raised the question whether a member represented the general interests of the whole kingdom or the local interests of those who returned him. The opponents of the bill did not merely maintain that if the requirement of residence was abolished local interests might suffer; they alleged the risk of such interference with the representation as we have been discussing, the probability that candidates would be nominated by noblemen and courtiers and that 'lords' letters would bear sway [1].' The bill progressed so far as to be committed, but was then dropped.

Cessation of their modes of influence, &c.

It would not be difficult to collect other instances and illustrations of interference by the Crown or its ministers with freedom of election: but the wholesale creation of constituencies ceased with the accession of James I. The additions made in his reign to the representation were mostly by way of revival of constituencies which had ceased to return members, and were the result of the action of the House of

[1] D'Ewes, Journal, 168.

Commons ordering a warrant for the issue of a writ. An illustration is afforded by the cases of Pontefract and Ilchester in the year 1620, as to which the following entry appears in the Commons' Journals of the report of the Committee of Privileges[1]:—

> For Pomfrett that 26 Ed. I it sent burgesses which continued a good while after. That by reason of the barons war it grew poor. That 10 Hen. VI, a return was made they could not send burgesses by reason of poverty.
>
> 4th Jac. the king granted all their former liberties and customs.
>
> That the Committee thinketh it to stand both with law and justice that a writ should go for choice of burgesses.
>
> For Ilchester:—till Hen. V time sent burgesses. Upon question, Pomfrett to send burgesses. Upon like question, Ilchester to send burgesses, and writs for both.

This shows that the right of sending members to Parliament began to be prized as the Commons grew more independent and the general interest in politics more keen, and serves to explain how it was that the Stuart kings first had recourse to other measures for influencing Parliament. By the advice of Bacon, James I endeavoured to form a Court party in the House, not merely of placemen or nominated members, but of aspirants for Court favour, who might influence the temper of the Commons in the king's interests. These persons were called 'Undertakers.' Such a group of members, professing to form a channel of communication between Crown and Commons, came into existence again in the time of Charles II, and reappears under somewhat different conditions in the 'king's friends' of George III.

The Undertakers.

But attempts to influence the House of Commons were not very congenial to kings who maintained, as James maintained, that the privileges of the House were 'derived from the grace and permission of his ancestors and himself' and might be 'retrenched' at his pleasure: or who, like Charles I,

[1] Com. Jour. ii. 576.

could, through the mouth of his ministers, threaten the House that if they trenched on his prerogatives they might 'bring him out of love with Parliaments[1].'

Parliamentary management after Restoration.

Interference with freedom of debate, such as has been spoken of under the head of Parliamentary privilege, and invasion of the province of Parliament by independent legislation and taxation, were the rough methods employed by Charles, and it is not until after the Restoration that we find a revival of attempts to influence members.

Charles II ventured only upon one addition to the constituencies, that of Newark, by royal charter, an exercise of the prerogative which did not pass unquestioned by the Commons[2], during his reign. The forfeiture and re-modelling of the borough charters at the end of the reign of Charles II and at the commencement of the reign of James II is the last form of violent external measures used by the king to affect the representation. The ill success of the attempts of James II to dispense with the forms of the constitution made it clear that, if the House of Commons was to be made an instrument for carrying out the policy of the Crown and of the ministers of the Crown, some mode of treatment must be discovered other than tampering with the representation of the country in Parliament, or interference with freedom of debate.

Increased difficulties of executive.

After the Revolution the House of Commons by means of its control over supply, and over the existence of the standing army, had become the chief power in the State. In order to carry on the business of government it was necessary that the ministers of the Crown should have the continuous support of a majority of that House. But such continuous support was not easy to secure. Throughout the reigns of William and of Anne party spirit was, on the whole, sufficiently vehement to supply to some extent the want of party dis-

[1] Gardiner, Hist. of England, vi. 110.

[2] Com. Journals, ix. 403. The city and county of Durham were enfranchised by 25 Car. II, c. 9.

cipline. Yet the corruption of members by places and bribes was common, and the management of elections through the returning officers was an important object of ministerial care [1].

Systematic corruption of Parliament in 18th century.

But it was not till after the accession of the Hanoverian kings that Parliamentary management became a system under the hands of Walpole. He realised to the full the importance of a working majority in the Commons, and the difficulty of keeping it together.

The difficulty was serious. The engrossing political issues of the seventeenth century were in a great measure laid to rest, and there was not excitement enough in politics to create genuine party divisions. The House debated with closed doors, and its members were free from external criticism. The constituencies in many cases were so small or so corrupt as to care little what their members said or did. In the absence of any external control over the conduct of members, and of any real political interests or issues to keep parties together, in the demoralisation of politics, which was partly due to the moral collapse of the Restoration, partly to the risks and uncertainties of political life during the past forty years, it was not easy for Walpole to get a majority to support his ministry out of mere public spirit. Nor did he try to do so. He accepted the condition of public morality. He kept his majority together by the simple process of bargain and sale. But that which had been done intermittently during previous reigns, he did in a businesslike and systematic way. Bribery is not easily proved where it is to the interest of all parties concerned to keep the secret; but Walpole's hints to his successor, Henry Pelham, as to the best mode of keeping together the rank and file of the party, are quite sufficient

How it was possible.

[1] In the Wentworth Correspondence, p. 135, the defeat of the Whigs in 1710 is attributed to an electioneering blunder. They had thought there would be no election till the next year, 'so had directed her Majesty's choice of sheriffs, almost throughout England, of Tories; their friends they kept off till next year, *when they thought they should have use of them in the elections of Parliament men.*'

to indicate the mode in which the House of Commons was 'managed' between the years 1721 and 1742. The process of management continued under Henry Pelham and his brother, the Duke of Newcastle, until George III took into his own hands the business of corruption. To trace the gradual emancipation of the House of Commons from such influences would be to write the political history of England from the death of Henry Pelham to the Reform Bill of 1832.

How it came to cease.

The elder William Pitt was the first to prove to the political managers of the eighteenth century that there was a public outside the constituencies capable of taking a generous interest in political matters. The members of the Whig party who grouped themselves under the leadership of Lord Rockingham did something to show that common opinions on the conduct of affairs of state may bind a party together as well as ties of relationship or the prospect of mutual gain. One antidote for the political corruption of the last century was to be found in the growth of genuine political interests throughout the country. Such interests would diminish the necessity for giving bribes and the inclination to receive them: but the publicity of debate and the reform of the representative system could alone furnish a real security that members of the House of Commons would attend to the interests of their country rather than to their own. When members become responsible to popular constituencies, and when the constituencies have the means of knowing what their members say, and how they vote, a minister can only hope to obtain precarious and occasional support by offering personal advantages to individuals. But I need not carry this matter further. Nevertheless it is necessary to speak shortly of the various inducements offered to members, and the process by which Parliamentary management was effected.

Modes of influencing members.

Offices and pensions.

With official disqualifications I have already dealt in describing the persons who may be elected to serve in the

House of Commons; but historically such disqualifications fall into two groups. Those created during the greater part of the last century were designed to secure the independence of Parliament: the more modern disqualifications are for the most part imposed to secure the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics.

The Acts 5 Will. & Mary, c. 7, and 12 & 13 Will. III, c. 10, excluded Collectors of Excise duties and Customs. 6 Anne c. 7 (41 in revised statutes) imposes the disqualifications de-
Ante, p. 77. scribed in an earlier chapter; and 1 Geo. I, c. 56, disqualified pensioners for terms of years.

15 Geo. II, c. 22, the place bill of 1742, the one reform effected by those who ejected Walpole from office, excluded the holders of some two hundred offices from the House of Commons.

22 Geo. III, c. 82, abolished a number of places about court, which had previously been tenable with seats in the House of Commons, and provided that if revived they should be *new* offices within the meaning of the Act of Anne.

This may be regarded as the last of the statutes which, in creating official disqualifications, had in view the independence of the House of Commons. The amount of influence accruing to the Crown from the places which were thus abolished, or made to disqualify, may be collected from Burke's speech on Economical Reform, made with a view to the passing of the last of the Acts I have mentioned. It is not difficult to see the use to which such places were put when the reform of the king's household was thwarted because 'the turnspit in the king's kitchen was a member of Parliament'; when the Board of Trade could be described as 'a sort of temperate bed of influence: a sort of gently ripening hot-house where eight members of Parliament receive salaries of a thousand a year, for a certain given time, in order to mature, at a proper season, a claim to two thousand granted for doing less, and

on the credit of having toiled so long in that inferior laborious department.'

Government contracts.

Another form of corruption, applied chiefly to commercial members, was the grant of a government contract, such as to supply the navy with beef or the army with cloth.

Such a contract was given, not for the advantage of the branch of the service to be supplied, but with a view to the parliamentary support of the contractor. The service was ill supplied. The constituents did not obtain the unbiassed attention of their member to local or national interests, and everybody was injured by the transaction, except the member who made money out of the contract, and the minister who secured the member's vote [1].

This practice was brought to an end by the disqualification of holders of government contracts by 22 Geo. III, c. 45.

Shares in loans.

A more expensive form of corruption was practised in the latter part of the eighteenth century, during the ministries of Bute, Grafton and North. It consisted in assigning to friends and supporters of the minister shares in government loans and lotteries. By this means the country was made to borrow money on terms considerably above the market price, and, in the case of a loan brought out by Lord North, sustained a loss of nearly a million upon the transaction. The practice was abandoned by Pitt, who, from the time that he became minister in 1784, when he wanted to raise money by loan, invited offers which were sent to him sealed by the persons anxious to take up the loan. These tenders were opened in the presence of those who had made them, and the best offer was taken [2].

Payment for votes.

But all these advantages which might accrue to the supporters of a ministry were occasional and unsystematic as compared with the direct method of bribery which prevailed from the reign of Charles II to the end of the ministry of Lord North in 1782.

[1] Parl. Hist. xx. 123–129. and xxi. 1333 and 1365.

[2] See May, Constitutional History, 325, and the authorities there cited.

Much has been said and many authorities cited as to the corruption of Parliaments between these periods. Its prevalence during the reigns of Charles II and William III is attested by Burnet[1] and affirmed by Macaulay[2]. Individual cases of the receipt of money by members of either House in consideration of support given to ministers are instanced by Sir E. May[3]. But the systematic maintenance of a ministerial majority by the regular payment of bribes seems to have been the invention of Walpole. The evidence is scanty, but there is significance in Walpole's advice to Henry Pelham, advice given by a man who had retired from office to the man whom he desired to succeed him in power. 'I think it needless to suggest to you the necessity of forming within yourselves your own scheme. *You must be understood by those you are to depend upon, and if it is possible they must be induced to keep their own secret*[4].' Such advice explains the requirement of leaders of the House of Commons, when the Prime Minister was a member of the House of Lords, that they should be 'authorised to talk to members of the House of Commons on their several claims and pretensions.' It explains also the fluctuations in the expenditure of the secret service money in correspondence with the Parliamentary needs of government.

The system of Walpole;

George III, who liked to be his own minister, paid great attention to this department of ministerial duty. His correspondence with Lord North affords more than one illustration of the use made of the secret service money and of the King's savings out of the civil list, to corrupt members and constituencies.

of George III.

In particular, when North retired in 1782 the King writes[5]: 'I must express my astonishment at the quarterly accounts of the secret service being only made up to the 5th of April,

[1] Hist. of his Own Time, ii. 144.
[2] Hist. of England, iii. 541.
[3] Constitutional Hist. of England, i. 312.
[4] Coxe's Pelham, 193.
[5] Correspondence of George III with Lord North, vol. ii. 421–425.

1780. No business ought ever to be the excuse for not doing that.'

'I shall make out the list paid by Mr. Robinson to Peers, and shall give it to the First Lord of the Treasury: but I cannot answer whether under the idea of influence there will not be a refusal to continue them. Those to members of the House of Commons cannot be given; they may apply if they please to Lord Rockingham, but by what he has said I have not the smallest doubt he will refuse to bring their applications as well as those of any new solicitors in that House.' Payments to members of Lords and Commons.

Lord North apologises for the delay 'with a heart full of the deepest affliction.'

'The secret service list was always ready after every quarter, so that no delay is imputable to him. Mr. Robinson, *whose list is of a nicer nature,* never omitted entering every sum he paid the moment he paid it, so that every article of his account is kept in perfect order.'

It would seem from this that such members of either House as desired to be retained in the service of the ministry made application to the minister, that he communicated their wishes to the King, received authority to expend the necessary sums of money, made the payments, and accounted for them in a book which should have been sent quarterly to the King.

The allusion to Mr. Robinson's list as being 'of a nicer nature,' suggests that the purchase of a Peer's vote and influence involved more delicacy and secrecy than was needed in dealing with a Commoner.

Other forms of corruption are disclosed in this winding up of business between the King and North. No other minister was so completely in accord with George III as to the methods of politics, and to this we probably owe the frank disclosures of their correspondence.

Secret pensions were paid to members in breach of the law; and in prospect of the advent to office of a minister who would not connive at such proceedings, these pensions were Pensions.

set down in the names of the wives of such as were married. Poor George Selwyn, who was a bachelor, had to forego his pension altogether. 'He must look to better days,' said the King.

Bribery at elections.

But the most serious item of expenditure revealed in this part of the correspondence was the outlay in bribery at elections. 'If Lord North remembers correctly, the last general election cost near £50,000 to the Crown, beyond which expense there was a pension of £1000 a year to Lord Montacute and £500 a year to Mr. Selwyn for their interest at Midhurst and Ludgershall.' On bye-elections alone the King had spent £13,000 in three years. But Lord North says of the members who were assisted to come into Parliament that 'they all behaved with very steady attachment to the end.'

Removal of opponents from Commissions. *Ante*, p. 149.

A cheaper mode of securing the support of members who held commissions in the army and navy was to deprive them of their commissions if they voted against the government. I have already alluded to this infringement of the privilege of freedom of debate, which was, as Burke says, discountenanced and altogether abolished in Lord Rockingham's short administration in 1765.

Honours and dignities.

Besides these grosser forms of corruption, and in substitution for them as direct bribery and intimidation of members ceased, honours and dignities were held out as inducements to rich men or large landowners to support the government. At a time when many boroughs were, so far as representation went, articles of property, the votes which an owner of boroughs could command might be placed at the disposal of a minister in consideration of a peerage, or an advancement of rank in the peerage. By this means Pitt, between the years 1784 and 1801, was able not merely to strengthen his position in the House of Commons, but to change in great measure the political colour of the House of Lords, by the creation or promotion of 140 peers.

Purchase or corruption of constituencies.

All these modes of influencing members of the House of Commons were rendered possible only by the condition of the representation. The counties were independent, but were not likely to look beyond the county families, and the cost of a contest was enormous. In many boroughs there were no electors capable of expressing an opinion; where there was such an electorate its opinion was often determinable at a known price. Thus a seat in Parliament for a borough was in most cases a matter of bargain and sale; only in some cases the seat was purchaseable without any reference to electors, in other cases the electors made their own terms. The two parties in the state competed with one another for the possession of such seats as were to be bought out and out, and a man who wished to get into the House of Commons, and who had no such local interest as would procure his election for a county, could not easily obtain a seat except as nominee of the government or of the opposition, or by the favour of an owner of boroughs, or by purchasing a seat for himself.

Purchase of boroughs.

Bribery of constituents.

The ministers had resources which enabled them to compete successfully with other purchasers of seats, and the domestic economy of George III was, as appears above, not without reference to electioneering interests. But we are not here concerned with the defects of the representative system before 1832, except in so far as they rendered the House of Commons susceptible to the influence of the Crown and its ministers.

The great change in this respect dates from the Reform Bill of 1832. The modern constituency exercises a far more potent control over the actions of its member than any ministerial influence. The independence of members is no longer threatened by the Crown; and if we have any reason to fear lest votes should not be given strictly on the merits of a question before the House, the fear is rather lest the vote should be determined by the influence of local fanatics or

busybodies, than by the anticipation of emolument or favour to be bestowed by the ministers of the Queen.

Influence of the Crown upon the Lords.

So far we have spoken chiefly of the influence of the Crown on the House of Commons. Its influence on the House of Lords has been of two kinds. Firstly, the Lords are from their position and mode of life more easily affected by any expression of the personal wishes of the Crown. On two notable occasions such an expression of the royal wishes has determined the action of the House of Lords on an important question.

(1) Expression of royal wishes.

In case of Fox's India Bill;

When, in December 1783, Fox's India Bill had passed the Commons, and was under discussion in the House of Lords, George III had an interview with Lord Temple, afterwards Marquis of Buckingham, and empowered Temple to say that, 'whoever voted for the India Bill was not only not his friend, but would be considered by him as his enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger and more to the purpose.'

This statement was written out in the king's own hand. It was shown by Temple to peers who were wavering in their opinion of the merits of the bill, and to peers who were apt to be guided in their political conduct by an intimation of the king's wishes. The result was that the bill was thrown out on a motion that it should be committed.

of Lord Grey's Reform Bill.

A like influence was brought to bear upon the House of Lords in order to bring about the passing of the Reform Bill of 1832. The first Reform Bill had failed on an adverse resolution, carried as a preliminary to its being committed, in the House of Commons. The second Reform Bill had been thrown out on the second reading in the House of Lords. The third Reform Bill, after passing the House of Commons and the second reading in the House of Lords, was in course of being so handled in committee as to defeat the objects of

the ministry who had introduced it. Lord Grey and his colleagues resigned. A Tory ministry which Lord Lyndhurst and the Duke of Wellington endeavoured to form was made impossible by the refusal of Peel to be a party to any measure of Reform however moderate. Lord Grey was recalled, but the attitude of the Peers remained hostile. It seemed that the course which Harley and Bolingbroke had adopted would have to be followed, and that a creation of peers, on a greater scale than was required in 1712, would become necessary. The King reluctantly assented to such a creation, but, at the same time, he had recourse to the policy of George III. His secretary was instructed to inform the Duke of Wellington that the matter might be settled by 'a declaration in the House of Lords, from a sufficient number of peers, that they have come to the resolution of dropping their further opposition to the Reform Bill.' This communication caused Wellington, and with him the leaders of the Tory opposition in the House of Lords, to abstain from any further attack upon the bill, and it speedily became law.

(2) Power of creating peers.

The creation of peers by the Crown in order to bring about the passing of a measure is a power which has only once been exercised.

In 1712 it was necessary, in order to avert opposition to the Peace of Utrecht, that the Whigs should cease to be in a majority in the House of Lords. The matter was promptly dealt with by the Queen and her advisers; twelve new peers were created, and a Tory majority secured. The excitement caused by this exercise of the prerogative seems not to have extended much beyond the limits of society, nor to have met with much severer comment than the jest of Wharton, who asked the twelve new peers, as they were about to take part in a division immediately after taking their seats, 'whether they intended to vote singly or by their foreman.'

Possible effects of the use of this power.

Yet the existence of this prerogative is a curious feature in our constitution, an instance of a dormant power, which, if exercised, might produce strange results. The Queen might,

without exceeding her legal rights, double or treble the number of the House of Lords. She might do this, and might do so by the introduction of persons whom she selected for no other reason than personal liking or caprice. We are told sometimes that this prerogative is to be regarded as a constitutional safeguard, a means of bringing the legislative action of the House of Lords into correspondence with the wishes of the people as represented in the House of Commons. In an earlier chapter I have discussed the merits of this mode of producing harmony between these two branches of the legislature. No doubt the knowledge that a large creation of peers was seriously contemplated by William IV and his ministers, contributed to secure the passing of the Reform Act in 1832. But as I have pointed out elsewhere, the use of this prerogative ranks, with impeachment and the royal veto, among things which might happen, but almost certainly will not happen[1].

p. 261.

For if we compare this prerogative with another, as undoubted, and as completely fallen into disuse, the prerogative of refusing assent to the bills passed by the two Houses, it is not difficult to see how much the more formidable of the two is the prerogative of increasing the peerage. For the power of packing one of the Houses of Parliament is more lasting in its operation if exercised, than the power of using the veto. The will of an individual cannot long hold out against the expressed intentions of a nation, but the course of legislation and policy might insensibly be altered in many ways by the alteration in character of one of the two legislative chambers.

[1] It may and does happen in self-governing colonies which possess a second chamber nominated by the Governor on the advice of his responsible ministers. See Part II, The Crown (ed. 2), p. 277.

CHAPTER X.

THE HIGH COURT OF PARLIAMENT.

Functions of Parliament not only legislative,

The legislative power of Parliament is perhaps the most conspicuous feature of our constitution to any one who seeks to compare the disposition of forces in different political societies. What is understood, elsewhere than in England, by a constitutional government, is a government the ordinary working of which is regulated by a written constitution, a constitution which cannot be altered by ordinary legislative procedure, which needs for its alteration some abnormal process for obtaining the expression of national consent.

But our Parliament can make laws protecting wild birds or shell-fish, and with the same procedure could break the connection of Church and State or give political power to two millions of citizens, and redistribute it among new constituencies. It is little wonder then that with this constant process and possibility of change before our eyes, we lose sight of the other functions of Parliament in the contemplation of its legislative power.

but judicial.

But, as I had occasion to note in speaking of the Royal Proclamation for the summons of Parliament, the Queen calls a Parliament with no ostensible purpose of legislation, but that she may 'have the advice of her people.' And Parliament discharges various and important functions answering to the work of the ancient Council of the Crown. In dealing with

the duties which the Houses discharge as constituting the High Court of Parliament, we must be careful to distinguish the direct from the indirect, those which are based on rules of law, and those which rest on use or convention.

§ 1. *The direct and indirect judicial power of the Houses.*

Lord Coke says boldly 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[1].' But we must strictly limit the sense in which judicial attributes are thus assigned to the two Houses severally and jointly.

Each has, as we have seen, a jurisdiction over its own members and over the general public in respect of contempt against itself. Each has certain powers of a judicial character in dealing with the constitution of its own body and the right of persons who claim to be members of that body. The Lords can try their own members if charged with treason or felony. They also constitute a final court of appeal for the United Kingdom. Acting jointly, the Lords can try and sentence a criminal impeached by the Commons, or a Bill of Attainder can be passed by both Houses and presented to the Crown.

Besides these existing and undoubted powers, it must not be forgotten that each House has in past times claimed a further jurisdiction as a court of first instance.

Original jurisdiction claimed by the Lords;

The House of Lords has endeavoured to exercise a jurisdiction in matters of great importance, where the remedy given by the Common Law Courts might be inadequate or difficult to procure. It was in virtue of this claim that upon reference from the Crown they undertook to try the dispute between Skinner and the East India Company in the year 1667. Skinner complained that the company had seized his ship and goods, and had dispossessed him of a house and small island near Sumatra. The judges advised the Lords that Skinner

[1] iv. Inst. c. i. p. 23.

had a remedy in the Courts at Westminster for the seizure of his ship and goods, but not for the loss of his house and island.

The Lords thereupon heard the case, and in April, 1668, gave judgment against the Company and in favour of Skinner for £5,000: in May, 1669, they sentenced the deputy governor of the Company, Sir Samuel Barnardiston, to pay a fine of £300, and to remain in custody till it was paid, for a breach of privilege in petitioning the Commons against their action in the matter. Meantime the Commons had voted that the action of the Lords was contrary to law, and inasmuch as some members of the East India Company were also members of the House [1], that their privileges had been infringed. The quarrel between the two Houses was not brought to an end by a prorogation in December, 1669. It showed signs of reviving when the Houses met again in February, 1670. The king thereupon came forward as mediator, and at his request both Houses consented to erase from their journals all records and entries of the matter. The Lords thereby admitted that they had no jurisdiction as a court of first instance, and that to petition the Commons against such an exercise of jurisdiction was a fair exercise of the general right of the subject to petition [2].

and by the Commons.

The House of Commons too has set up a jurisdiction as a court of first instance to try political offences. Numerous cases are to be found in the Journals of the House during the seventeenth century of the exercise of such a supposed jurisdiction, but perhaps the most conspicuous is also happily the last. It occurred in 1721, when the House by resolution committed to Newgate a prisoner named Mist for the publication of a journal which contained expressions of a hope for the restoration of the Stuarts. There was no suggestion of a breach of privilege by Mist, and the House dealt with his conduct as constituting a purely political offence [3]. Although

[1] Hatsell, vol. iii. p. 189.

[2] For a detailed account of this great controversy, see Hargrave's Preface to Hale, Jurisdiction of the House of Lords, pp. ciii–cxxiv.

[3] Hallam, Const. Hist. iii. 276.

the House never repeated such an assumption of judicial power, yet in the eighteenth century, when privilege was in other respects extended to the detriment of free discussion, both Houses did take upon themselves to determine questions of private right arising between their members' servants and the outside public [1].

The ground of these claims.

The attempted assumption by the Lords of a jurisdiction in cases such as that of *Skinner* was probably a result of the disappearance of the jurisdiction, which, in the court of Star Chamber, had from time to time been exercised in a salutary manner for the bringing to justice of great offenders. The extensions of privilege to matters outside its proper limits were the acts of two irresponsible and not very public-spirited bodies at a time in our history when the privileges and emoluments of power were more regarded than its duties. I do not propose to deal with these disputed or excessive exercises of jurisdiction, nor is it necessary to touch again upon the undoubted rights of the Houses to maintain their dignity by committal for contempt, and to provide that unqualified persons do not take part in their business or deliberations. Nor again will I here anticipate what I shall have to say hereafter in dealing with Courts of Criminal jurisdiction concerning the right of a peer to be tried by his peers.

Forms of jurisdiction.

But the criminal jurisdiction exercised by Parliament through the process of impeachment is a distinct feature of its attributes as a court. The appellate jurisdiction of the House of Lords is doubtless a survival of a portion of the jurisdiction of the Curia Regis, and of the time when a session of Parliament was not easily distinguished from a session of the Magnum Concilium. The practice of petitioning Parliament dates from a time when Parliament might be expected to attend to individual cases of hardship and provide a remedy. And another judicial duty is thrown upon Parliament by the removability of certain officers of the executive upon address from both Houses to the Crown. These are the legal duties

[1] See instances cited in Pemberton on Privilege, p. 87.

of Parliament as a high court. Then we come to those which rest on use and convention, the practice of inquiring into the conduct of individuals or of departments by committee of either House; of determining, by votes of censure or adverse decisions, on important subjects, that the executive has no longer the confidence of the country. The criticism and censure of the executive is not a judicial act, nor except in a figurative sense can it be regarded as a function of the High Court of Parliament. And yet it is impossible not to recognise the fact that members are returned to the House of Commons to give a qualified or unqualified support to a minister or a policy, and that though indirect in its operation the control exercised by Parliament on the choice and action of the ministers of the Crown is a part of its functions as the Grand Inquest of the nation.

§ 2. *Impeachment.*

Origin of the practice.

The practice of impeachment by the Commons at the bar of the Lords dates from the reign of Edward III. There seems no ground for regarding it as a development of the system of Appeals in Parliament by which private accusers endeavoured to get a trial before Parliament of the person whom they charged with an offence[1]. The Lords declared in 1387 that the case of any high crime touching the king's person and the state of his realm, committed by Peers of the realm, with others, should be dealt with in Parliament, and according to the law and course of Parliament[2]. Such a court bound by no settled rules, and disregarding the advice of the judges, might create the offence and the penalty in the course of its judicial proceeding; such appeals were forbidden by 1 Hen. IV, c. 14. They revive in an altered form in the Acts of Attainder, by which in the latter part of the fifteenth and throughout the

[1] Sir Fitz James Stephen, Hist. of Criminal Law, vol. i. p. 154, appears to hold this view. But the two modes of procedure are in fact distinct.

[2] Rot. Parl. iii. 236.

sixteenth century persons who had played for a high stake in politics and lost it, or who, by no fault of their own, chanced to be on the unpopular side, were hurried to death with no form of trial.

Impeachment was one of the various forms in which the Commons tried to obtain control over the conduct of the ministers of the Crown. The control was of value when king and ministers were prepared to disregard the law, and when Parliament could not bring constant, regular pressure to bear upon them. Thus out of fifty-four impeachments which have taken place since the year 1621, nineteen took place in the first three years of the Long Parliament. As soon as the House of Commons became able so to control and review the conduct of ministers as to make it impossible for them to conduct business without a Parliamentary majority, impeachment lost its value and fell into disuse.

As only two cases, those of Warren Hastings[1] and Lord Melville, have occurred in the last hundred and fifty years, and none since 1805, the law upon this subject can hardly be said to have a practical interest. It may be well, however, to summarise the procedure of an impeachment, and to note the constitutional questions that have from time to time arisen in respect of it.

Motion for impeachment.

The first stage in the proceedings is to induce the House of Commons to take action, and this is done by a member charging the accused person with high crimes and misdemeanours and moving that he be impeached.

Articles of impeachment:

If this motion is carried, the member at whose instance it was carried goes to the bar of the House of Lords and impeaches the accused 'in the name of the Commons of the United Kingdom.' A Committee of the House of Commons is then appointed to draw up articles of impeachment, and these, when drawn, are delivered to the House of Lords. They are

[1] Warren Hastings in India, like a minister in the seventeenth century, was in a position to do many questionable things before he could be called to account, but the proceedings in his case from their length and futility served to show that impeachment was out of date.

also delivered to the person accused, who may, if he pleases, answer them.

trial: If the accused is a peer he is taken into custody, for the purposes of the trial, by order of the House of Lords; if a commoner, by the serjeant-at-arms, who delivers him into the charge of the usher of the Black Rod. The Commons appoint managers to conduct their case, and the trial proceeds in Westminster Hall. The forms of a criminal trial are followed, the Lords sitting as judges, the Lord High Steward presiding if a peer is on his trial, the Lord Chancellor or Speaker of the House of Lords in the case of a commoner.

verdict: At the conclusion of the case the question of 'guilty' or 'not guilty' is put to each peer, beginning with the junior baron, on each of the articles of impeachment. Each answers in turn, standing uncovered, with his right hand on his breast, 'guilty,' or 'not guilty,' 'upon my honour.' The numbers are ascertained, and the decision of the House announced by the Lord High Steward to the House and to the accused.

If a verdict of guilty is found by a majority of the Lords, it still rests with the Commons to determine whether this verdict shall be proceeded upon. The Lords are not entitled to pronounce sentence until the Commons demand it.

sentence. When the Lords have determined upon the sentence to be given, they send a message to the Commons that they are ready to proceed upon the impeachment. It is still open to the accused person to offer matters in arrest of judgment, and for this purpose the managers attend the House of Lords, and the accused is brought to the bar. Then the Speaker of the House of Commons demands judgment, and it is pronounced by the Lord who presided at the trial.

Execution of sentence. The execution of the sentence pronounced by the Lords is like the sentence of any other criminal court, dependent upon the pleasure of the Crown. Although an ordinary prosecution is at the suit of the Crown, whereas an impeachment is at the suit of the Commons, the Crown is not thereby ousted of its prerogative of pardon. It can pardon a person condemned

upon an impeachment, or remit a part of the sentence, and has exercised this prerogative in various cases.

Some points have arisen in cases of impeachment which, after some controversy, appear to be settled by custom or statute:—

Case of Fitzharris.

1. It was at one time questioned whether a commoner could be impeached for anything but a misdemeanour; and it was maintained that he cannot be impeached for a capital offence. This view prevailed in 1681 in the case of Fitzharris, whom the Commons impeached for high treason, at a time when he was being proceeded against for the same act at common law. The Lords refused to proceed with the impeachment, and Fitzharris was tried on indictment at common law, but the Commons protested against this action of the Lords, and in subsequent cases the objection was not raised, and the Lords resolved that the impeachment of a commoner for a capital offence should be proceeded with.

Case of Lord Danby.

2. Another question has arisen as to the right of the person impeached to plead a pardon under the Great Seal in bar of the impeachment. In the impeachment of the Earl of Danby in 1679, the Earl set up as a defence the King's express command in writing, and also produced a pardon under the Great Seal, given after the proceedings in the impeachment had commenced, and given with a view to bar the proceedings against the accused. The Commons protested; indeed the course taken by the King and by Lord Danby was open to grave objection on constitutional grounds, for the Crown was made directly and personally responsible for the very same act which the Commons had made matter of impeachment.

The question was set at rest by a clause in the Act of Settlement to the effect that 'no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament[1].'

Effect of prorogation and dissolution.

3. The effect of a prorogation and of a dissolution of Parliament upon proceedings in an impeachment has been differently regarded at different times. Contrary resolutions have

[1] 12 & 13 Will. III, c. 2, s. 3.

been passed by the House of Lords on these points, but the law may be stated as follows:—Proceedings in the House of Lords on an impeachment are unaffected by a prorogation or a dissolution, and this has been held without question since Warren Hastings' case in 1786. But to avoid all difficulty with regard to the proceedings of the House of Commons, an act has been passed in each of the last two cases of impeachment[1] providing that they shall not be discontinued by prorogation or dissolution of Parliament.

The rights of the bishops.

4. As regards the position of the bishops during the course of an impeachment, the same difficulty has arisen as in the case of the trial of a peer. The difficulty turns on the title of the bishop to his seat in the House of Lords, and on the question of 'ennobled blood.'

Ante, p. 220.

The practice is however settled by custom and resolution of the House. The Lords have resolved 'that the Lords spiritual have a right to stay and sit in Court in capital cases, till the Court proceed to the vote of guilty or not guilty[2].' And by custom the bishops sit in the House during the trial and vote on any incidental questions that may arise, but withdraw before judgment is given, entering a protest 'saving to themselves and their successors all such rights in judicature as they have by law, and by right ought to have.'

Acts of attainder.

I pass over those acts, in form legislative, in substance judicial, which we know as acts of attainder or of pains and penalties. An Act of Parliament can, as we know, do anything. It can make that an offence which was not, when committed, an offence against any existing law; it can assign to the offender, so created, a punishment which no court could inflict. The procedure is legislative and, as such, differs in no respect from legislation on any other matter of public importance.

§ 3. *Appellate Jurisdiction of the House of Lords.*

To discuss the history of the appellate jurisdiction of the House of Lords would lead us far into legal and parliamentary

[1] 26 Geo. III, c. 96; 45 Geo. III, c. 125.

[2] 13 Lords' J. 571.

antiquities. If one may venture upon a general statement the process of its attainment may be described as follows.

Residuary judicial power of Crown.

After the three Common Law Courts had been parted from the *Curia Regis* and had acquired distinct jurisdiction in cases concerning the king's interest, or the king's revenue, or concerning suits between subject and subject, there yet remained in the king a residuary judicial power. This power was called into play where the Courts were not strong enough to do justice, or were deficient in rules applicable to the case at issue, or were alleged to have decided wrongly. The exercise of jurisdiction in cases where, from the greatness of the offender or the importance of the issue, it was thought that the Courts could not do adequate justice, seems to have assumed various forms. Such cases were dealt with by the Crown in Parliament, the Crown in Chancery, and the Crown in Council. As Parliament became more distinctly a law-making and tax-granting body, cases of this nature, when brought before it, assumed a political aspect. Appeals in Parliament were forbidden in 1 Hen. IV, and so far as this jurisdiction survived in Parliament at all it survived in the form of acts of attainder and private or personal acts. The Chancellor too, as his jurisdiction took shape, eliminated cases of this character, and they fell wholly into the hands of the Council. And the Council or the Star Chamber, as employed by Henry VII, 'brought down punishments on the heads of the great, when it was difficult to find a jury which would not be hindered by fear or affection from bringing in a verdict against them even if it could be supported by the strongest evidence [1].'

Punishment of great offenders by Council.

Common law rules supplemented in Chancery.

The exercise of jurisdiction in cases where the Courts were unable to provide rules suitable to the matter in hand passed into the Chancery, which developed a supplementary body of law to meet the deficiencies occasioned by the rigidity of the Common law.

The appellate jurisdiction in cases of error passed into the

[1] Gardiner, Hist. of England, i. 6.

House of Lords and is all that Parliament retained of the residuary judicial power vested in the Crown. Records were, as Lord Hale tells us[1], brought from other courts, sometimes to be examined *in pleno parliamento*, sometimes *coram praelatis, proceribus et magnatibus in parliamento.* Error from Common law Courts went to the Lords.

In the reign of Henry IV the Commons requested to be relieved of the judicial business of Parliament[2], and the Lords alone have exercised this jurisdiction. Appeal lay to the House of Lords by writ of error from the Common Law Courts, alleging error of law appearing upon the face of the record. Early in the seventeenth century the House assumed, and (after some conflict with the House of Commons in the reign of Charles II) continued to exercise jurisdiction in cases of appeals from decrees in equity. Such an appeal was made by way of petition and not by writ of error, and was of the nature of a rehearing, though no new evidence was admitted. And appeal from equity Courts.

Proceedings in Error before the House of Lords have been abolished by the Appellate Jurisdiction Act, 1876, and all appeals take place by way of a rehearing on petitions in a form provided by the Act, and by rules made in pursuance of the Act[3]; this procedure need not concern us here.

But it should be noted that the Appellate Jurisdiction Act, 1876, places the jurisdiction of the House of Lords upon a statutory basis, and determines the constitution of the Court in so far as it provides that no appeal shall be heard unless there are at least three members present who have judicial experience of the kind described in the Act. A sitting of this Court is however a sitting of the House of Lords; the forms of giving judgment follow the forms of carrying a motion on any other subject; and the Appellate Jurisdiction Act, with its amending Acts[4] of 1887, may be said to have been directed not so much Its effect.

[1] Hale, Jurisdiction of the House of Lords, c. xxii (p. 127, ed. Hargreave).

[2] Stubbs, Const. Hist. iii. 21 and 477.

[3] 39 & 40 Vict. c. 59. For the forms of appeal, see Wilson Judicature Act. (ed. 7), p. 803.

[4] 39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70.

to changing the character, as to securing the efficiency of that branch of the High Court of Parliament which acts as a final Court of Appeal. Of its functions in that capacity it will be proper to speak in dealing with the Courts.

§ 4. *The Right of Petitioning.*

The right to petition was said by one of the Judges in the Seven Bishops' case to be 'the birthright of the subject': in the Great Charter the King promised that he would not deny or postpone justice to any one, and thus whosoever in the thirteenth or fourteenth centuries wanted by peaceable means to get anything which was not recoverable in the courts of law, addressed a petition to the King in that great council of which Parliament was at first regarded as a session. Legislation itself was, as we have seen, for a long time initiated by petition of the Commons or Clergy to the King in Council; individuals addressed the King in his great Council or in Parliament, and it was held that wherever 'from the poverty of the petitioner, the power of his adversary, the insufficiency of the law, or any other similar cause, he could not obtain redress, then the Supreme Court of Parliament was to give him a speedy and effectual remedy [1].' For the assortment of these petitions different arrangements were made from time to time. Edward I appointed receivers and triers, and as the procedure of Parliament became organised, its first business upon opening was to hear the names of the receivers and triers of petitions appointed by the King from among the Lords of Parliament.

Petitions asking for legal remedies.

The receiver's duty was to be accessible to all persons who had complaints to make, such persons being invited by public proclamation, and to transmit their petitions, when received, to the triers. The triers assorted the petitions, handing over each to its appropriate tribunal, the Judges, the Chancery, the Council, or Parliament.

[1] Select Committee on Public Petitions, 1833.

A survival of this practice existed until 1886 in the procedure of the House of Lords. At the commencement of every Parliament, receivers and triers of petitions were appointed. The receivers were judges or masters in the Courts; the triers were chosen from among the temporal peers [1].

Receivers and triers appointed until 1886.

By the end of the reign of Richard II the Chancery had built up an equitable jurisdiction appropriate to such cases as the Common Law courts failed to remedy for want of elasticity in their rules; and the King's Council, too, had become a body distinct from Parliament; it was (with the Crown) the executive, and it was the resort of suitors who were too poor to meet the charge of litigation in the Common Law courts or were oppressed by persons too powerful to be dealt with by the ordinary process of law [2]. Suitors who

[1] The entry appears upon the Journals of 1880 as follows:—

'Les Recevours des Petitions de la Grande Bretagne et d'Irlande:

'Messire Alexander Edmund Cockburn, Chevalier et Chief Justicer de Banc Commune.

'Messire Robert Lush, Chevalier et Justicer.

'Messire Henry William Frayling, Ecuyer.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours procheinment ensuivant.

'Les Recevours des Petitions de Gascoigne et des autres terres et pays de par la mer et des Isles.

'Messire Fitzroy Kelly, Chevalier et Chief Baron de l'Exchequer de la Reyne.

'Messire Charles Edward Pollock, Chevalier et Justicer.

'Messire John Walter Huddleston, Chevalier.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours procheinment ensuivant.

'Les Triours des Petitions de la Grande Bretagne et d'Irlande;

'Le Duc de Bedford.

'Le Duc de Devonshire.

'Le Marquis de Lansdowne.'

[And twenty-one other peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Tresorier.

'Les Triours des Petitions de Gascoigne et des autres terres et pays de par la mer et des isles:'

[Then follows a list of twenty-one peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Chambellan.'

[2] Vol. ii. The Crown, p. 94.

desired a remedy for individual grievances ceased to apply to the High Court of Parliament, whose legislative, as contrasted with its judicial functions, were now acquiring prominence.

Petitions asking for *privilegia.*

Their place was taken by suitors of another sort, who desired a *privilegium* or change of the law for their benefit, or an exemption from its provisions. From the time of Henry IV such suitors become frequent, addressing themselves chiefly to the Commons, sometimes to both Houses of Parliament, sometimes to the King in Council. But such petitions, to whomsoever they were addressed, appear to have gone through the form of legislation, and to have received the assent of Crown and Parliament.

Private bill legislation was simpler in its objects than it is now, though similar in its character. An estate act, a divorce act, a naturalisation act, are modern instances of the limited kind of *privilegia* which petitioners sought when they first asked Parliament to alter the law on their behalf. A railway or canal bill, though conferring exceptional rights on a corporation, may affect in its operation the proprietary rights of very many and the comfort or prosperity of a large portion of the community. The line between public and private legislation is less easily drawn than it was in the early days of private petitions.

But I have so far spoken only of petitions of two kinds—petitions which asked Parliament for a remedy afterwards given directly by the Courts, and petitions which asked for changes or exemptions from the law on behalf of individuals.

Public petitions,

What are called public petitions, that is, petitions complaining of public grievances, and asking for some change in the general law, or some legislation to meet new circumstances, are not common before the seventeenth century.

A Committee of Grievances, to which petitions were referred, was appointed by the House of Commons in 1571, and throughout the reigns of James I and Charles I entries appear in the Journals of the House regulating or referring to

the proceedings of this Committee. In January, 1640, we find this entry:

'Members added to the Committee for sorting petitions, and are specially to consider of and to sort such petitions as concern the public.'

Such petitions multiplied during the first years of the Long Parliament, and after the Restoration it was thought well to restrict tumultuous petitioning on matters of public policy.

13 Car. II, st. 1, c. 5, prohibits under penalty of £100—

legal restrictions on presentation,

(1) The signing of petitions to the King or either House of Parliament for any change in Church or State by more than twenty persons, unless approved, in the country, by three justices of the peace or a majority of the grand jury sitting at assizes or quarter sessions, in London by the Mayor, Aldermen, and Common council:

(2) The presentation of a petition by a company of more than ten persons.

The Bill of Rights contains a clause which does not seem wholly consistent with the Act of Charles II. It declares that—

'It is the right of all subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.'

The statute law relating to petitions is thus brief, and may almost be said to be immaterial. For the Act of Charles II seems to be construed as directed not against petitioning, but against the presentation of petitions in a certain manner. It is more important to follow the dealings of the Lords and the Commons with regard to petitions submitted to them.

right of commoner to present them,

As to the respective rights of petitioners to petition, and the Commons to deal with such petitions, the House declared the principles on which it would act in two resolutions passed in 1669, which run thus:—

'That it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in

case of grievance, and the House of Commons to receive the same.'

right of Commons to reject them.

'That it is an undoubted right and privilege of the Commons to judge and determine concerning the nature and matter of such petitions, how far they are fit or unfit to be received.'

The right to make petition, and the right to receive and consider such petition was so far clearly set forth, but it has been a matter of increasing difficulty to deal with petitions as they became more frequent.

Every petition must be presented to the House by a member, and the presentation, the reading and often the discussion of petitions made inroads upon the time of the House, which eventually needed limitation. Petitions had to be presented before 10 in the morning: at that hour, fifty years ago, members who had petitions to present came down and balloted for places; if a member came out high on the list he might get his petition presented and read, and if need be discussed that evening. If he got a low place on the ballot, the time allowed for the reception of public petitions might, owing to pressure of the public business of the House, be too short to enable him to present his petition, and he would have to reappear at 10 a.m. the next day to take his chance of another ballot.

The numbers of petitions steadily increased. In the five years ending 1789 it was 880. In the five years ending 1831 it was 24,492. In the five years ending 1877 it was 91,846. The cost of printing petitions amounted between 1826–1831 to £12,000.

rules of the House,

To remedy these troubles the House has framed various rules. A Select Committee is now appointed, in pursuance of a resolution of February 20th, 1833, to which are referred all petitions except such as relate to private bills. The duty of this Committee is to classify, to abstract, and to report. Its reports are issued twice every week during session, and the Committee has power to direct the printing of a petition *in extenso*, and to limit its circulation to members of the House.

As a consequence of this process of classification and abstracting of petitions by the Committee, the House has been able to economise its time in the presentation of petitions, and by standing orders of 1842 and 1853 to limit the dealings with a petition on its presentation by a member to a statement of the parties from which it comes, the number of signatures, the material allegations and the prayer with which it concludes. No debate is allowed, but the petition if required to be read may be read by the clerk of the House. The rule as to debate may be set aside, and the petition discussed if it should disclose a case of urgency for which an immediate remedy is required [1].

rejection of petitions.

It remains to consider how the House will deal with Petitions which are in form insufficient, or in matter such as the House considers 'unfit to be received.'

In form a petition must satisfy certain requirements. It must be written, it must be free from erasures or interlineations, it must not be a simple memorial or remonstrance, but must conclude with a prayer.

In matter it must be respectful of the privileges of the House, and free from disloyalty or expression of intention to resist the law. Beyond this the inclination of modern times is to allow the widest latitude to petitions.

One may profitably compare the Kentish Petition with a somewhat less celebrated, though at the time notorious petition of the year 1875.

The Kentish petition.

The Kentish Petition [2], drawn up on the 29th of April, 1701, and signed by all the Deputy Lieutenants of the county present, more than twenty Justices of the Peace, and a large number of freeholders, was intended to urge the Commons to greater dispatch of business, and to enable the king to fulfil his treaty obligations with the States General. It concluded with a prayer 'That this House will have regard to the voice of the people: that our religion and safety may be effectually

[1] Standing Orders, 78–81.

[2] xiii Common's Journals, 518.

provided for; that the loyal addresses of this House may be turned into bills of supply; and that His Majesty may be enabled powerfully to assist his allies before it is too late.'

On this petition the following resolution was passed—'That the Petition is scandalous, insolent and seditious, tending to destroy the Constitution of Parliament, and to subvert the Constitution of this realm.'

The gentlemen who presented the petition were voted guilty of a breach of Privilege, and were imprisoned by order of the House.

The Prittlewell petition.

The Prittlewell Petition[1] was presented in the year 1875, and related to the conduct of the three judges who presided at the trial at bar of Orton, the claimant of the Tichborne estates. But the petition did not merely impugn the good faith of the judges, it suggested that the Speaker had not been impartial in dealing with complaints of the conduct of this trial.

The Select Committee on public petitions drew the attention of the House to this document, and after an interesting debate the order that the petition should lie upon the table was read and discharged.

It would seem from the tenor of the debate that the ground of objection to the petition was the reflection on the Speaker's impartiality. It would not have been a ground for rejection that the conduct of the judges was commented upon with freedom, for the precedents of the last thirty years go to show that the House wisely allows petitioners to express anything short of an intention to break the law, or a contempt for the body to which they appeal for redress.

A petition may be rejected at once, upon its presentation by the member in charge of it; or, as in the case of the Prittlewell petition, it may be ordered to lie on the table, and when attention is drawn to it by the Select Committee, the order may be discharged and the petition thereupon rejected.

[1] Hansard, vol. 223, p. 976.

§ 5. *Committees of Inquiry.*

Origin of the practice.

The practice of inquiring into the conduct of individuals or of departments of government by means of special or select committees of the House is said by Mr. Hallam [1] to have begun in the year 1689. The mismanagement of the war then being carried on in Ireland was the cause of this inquiry being instituted, and upon its report, which reflected severely upon the conduct of Colonel Lundy, the governor of Londonderry, the House addressed the Crown with a request that he might be sent to England for trial on the charge of treason.

Need of power to administer oaths.

This right of inquiry, since frequently exercised, depended for its efficacy on the exercise of parliamentary privilege to enforce attendance of witnesses and production of documents; but it was for a very long time hampered by the want of power in the House or in any committee of the House to administer an oath. Gradually, and for certain occasions, the power was given to committees to examine witnesses upon oath. The first concession of this right was made by the Grenville Act, 1770, in the case of committees for trying disputed returns; the power was subsequently given to committees upon private bills; and finally, by 34 & 35 Vict. c. 83, the House of Commons may administer an oath to a witness at the Bar of the House, or any committee of the House may administer an oath to the witnesses examined before it [2].

The scope and character of the inquiry may vary greatly and the value of the inquiry may vary in proportion. A committee may be appointed to take evidence as to the working of a department, as to the propriety of bringing new matters under the supervision or control of the executive, as to the causes of a disaster, as to the conduct of an individual.

[1] History of England, iii. 143.

[2] If a witness contumaciously refuses to answer questions addressed to him by the Committee, the matter is brought before the House as one of Privilege, and the witness is brought to the Bar: see the case of Mr. Kirkwood, *Times* newspaper for July 18, 1897.

'A Committee,' said Mr. Gladstone in 1855, 'is extremely well fitted to investigate truth in its more general forms, by bringing every possible form of thought to bear on the points before it; but it is also well fitted for overloading every question with ten or fifteen times the quantity of matter necessary for its consideration; and therefore as ill as possible calculated for those rapid searching and decisive inquiries which have practical remedies rather than the arriving at general propositions for their main business [1].'

These words indicate the limits within which committees of either House may profitably work. They may collect facts with a view to future legislation; they may be used to ascertain a specific fact, as when a committee examined the physicians of George III with a view to the ascertainment of his mental condition. But they may also trench upon judicial or executive functions. Thus on the 29th January, 1855, the House of Commons determined to appoint a committee to inquire 'into the condition of our army before Sebastopol, and into the conduct of those departments of Government whose duty it has been to administer to the wants of that army.' This vote of the House of Commons was treated as a vote of censure by the Government of Lord Aberdeen. He and his colleagues resigned, and Lord Palmerston became Prime Minister. But he proposed to treat the vote of the 29th of January not merely as a vote of censure on Lord Aberdeen's Government, but as an expression of intention on the part of the House to inquire into the past and present conduct of the war in the Crimea. The committee was appointed, but the acquiescence of Lord Palmerston in its appointment cost him the adhesion of three prominent members of his Government, Sir James Graham, Mr. Sidney Herbert, and Mr. Gladstone. They urged that to hold such an inquiry in the midst of war would necessarily paralyse the departments of government which were engaged in superintending and providing for our military operations, that it would be unfair to the officers who were conducting

[1] Hansard, cxxxvi. p. 1837.

them on the spot, and that if the appointment of the committee meant anything, it meant that the House proposed to interfere with the management of the war.

'It is really,' said Mr. Gladstone, 'if it is anything practical, a committee of government, a committee too which takes out of the hands of the executive the highest, the most important, the most solemn of its functions. I am satisfied that an inquiry such as is proposed by a Committee of this House is incompatible with real confidence on the part of Parliament in those who hold executive office, and entirely incompatible with the credit and authority which ought, under all circumstances, to belong to the ministers of the Crown whatever party or political creed they may profess.'

The power of the House of Commons to criticise the action of the executive and to call ministers to account is undoubted, but it is distinguishable from the direct interference with executive action which would ensue from Parliamentary inquiries held on transactions which were in course of being carried through by ministers.

The executive can always through the agency of royal commissions hold inquiries on its own account, and is responsible for the appointment of such commissions and the conduct of their inquiries.

§ 6. *Address for the removal of servants of the Crown.*

The report of a committee of inquiry may form the foundation, though it need not be the only foundation, for an exercise of the judicial functions of Parliament.

Mode of procedure for removal of an officer of state.

Certain officers of state, the most important and conspicuous of whom are the judges [1], are removable upon an address to the Crown made by both Houses of Parliament. The ground of proceedings by address may be the petition of an individual, the motion of a member, or the report of a Select Committee appointed in consequence of such petition or motion.

These proceedings assume a judicial character, and it would appear proper that they should begin in the Commons. For

[1] By 12 & 13 Will. III, c. 2.

the Commons are especially 'the grand inquest of the High Court of Parliament'; and there is this further reason against such proceedings being commenced in the Lords, that if when the matter came before the Commons they thought it a case for an impeachment, the Lords would be in the unsatisfactory position of judges who had pre-judged the case on which they were called to decide.

Committee of inquiry.

The House of Commons, having appointed a committee to inquire into the truth of charges made, whether by petition or on motion, and having received the report of the committee, hears the official complained of in his defence. It may accept without further inquiry the report of the committee[1], but the better opinion seems to be that the evidence against the person charged, although it has already been taken by the committee, should be heard at the bar of the House.

Address to Crown.

If the House of Commons is satisfied of the truth of the charges made, an Address to the Crown is drafted praying the removal of the officer charged, and this, when agreed to, is communicated to the Lords. They, if they please, inquire again into the evidence, and, if satisfied, agree to the Address and send a message to the Commons to that effect. Thereupon members of the two Houses are deputed to present the Address to the Crown.

Agreement of Lords.

In cases of the sort described, Statute has provided for the exercise by the Houses of this judicial power. In the particular instance of the judges the Act of Settlement introduced this Parliamentary control in addition to the powers of removal which the Crown possesses if a judge should misconduct himself in the business of his office. But an address for the removal of an officer of State, proffered to the Crown by either House, may be no more than an expression of disapproval of the conduct of the executive generally, or of an individual member of it in particular.

[1] See the case of Sir Jonah Barrington, set forth at length in Todd's Parliamentary Government in England, ii. 736.

§ 7. *Parliament and the Ministers of the Crown.*

In discussing the limits which should be assigned to inquiry by Select Committees, we came upon the relations of the Houses of Parliament to the Ministers of the Crown, and touched the point at which danger arises from the interference of a popular assembly with the action of the executive. That point is not easy to define. The modern practice of questioning Ministers of the Crown in either House, joined to the facility with which information of some sort on all subjects is procurable through the post, the telegraph, and the press, would seem to keep the executive under a standing committee of inquiry. And yet it is also certain that Parliament recognises to the full the importance of non-intervention in matters of government, and that on the rare occasions when it has encroached upon executive functions, such encroachment, as in the case of the Sebastopol Committee, was the result of error rather than intention. Disapprobation of a minister, of a department, of a policy, may be and is from time to time expressed, but interference with the action of a minister, or of a department, or with the development of a policy is, on the whole, carefully avoided. Address for removal of minister,

Yet an expression of confidence or disapproval is a judgment passed by one or other House upon the Ministers of the Crown. It may relate to a matter for which an individual minister is responsible, a matter unconnected with the general character or policy of the government. In such a case the retention of office by the individual may alone be affected by the vote. Or it may relate to matters for which the Ministry considers itself collectively responsible, and may thus bring about the retirement of the Ministers of the Crown and a change in the policy of the country.

Yet it would seem that the House of Commons is as reluctant to interfere in the composition as it is in the action of the executive. For when the confidence of the nation in a Ministry is withdrawn, this is indicated either by the un-

mistakable verdict of the polling booths, as in 1868, 1874, 1880, 1886, or by an adverse vote in the House of Commons on some matter which Ministers regard as vital. There are only three instances of a definite expression of opinion by the House of Commons that the Queen should change her Ministers—of a definite vote by the House to the effect that it is expedient that her Majesty's Ministers should possess the confidence of the House and of the country, and that such confidence is not reposed in the present Ministers of the Crown. Votes of this nature having been passed in 1841, in 1859 and in 1892, led in each case to the resignation of the Ministry.

or of want of confidence in ministry.

But the effect and legal character of a vote of this nature must be carefully distinguished from an address such as that for the removal of a judge. The latter is a statutory remedy given to the estates of the realm for the security of the due administration of justice; the former is a mode of expressing disapproval of the individuals whom the Crown employs for the time being in the transaction of the business of government.

Differs from an address for removal of a judge.

And thus we are led by graduated stages from the direct and legal exercise by Parliament of judicial power, in cases of supreme importance, to the exercise of that constant criticism and control of the executive which our system of Cabinet government puts into the hands of the legislature. By questions addressed to Ministers of the Crown, by motions for papers on matters of present interest, the members of either House can keep a check on current business and obtain explanation of its conduct, so far as is not inconsistent with the public advantage. By votes of censure, or by votes expressing want of confidence, by adverse majorities in important questions, Parliament can pronounce judgment on those officers of state to whom the Queen has entrusted the conduct of affairs.

Control of Parliament over executive;

But here we pass outside the region of law and come to those conventions or constitutional understandings which, as

a matter of convention.

Professor Dicey has said, 'may be expressed with ease and technical correctness in the form of regulations in reference to the exercise of the prerogative[1].' As such they should be more properly deferred for treatment when I come to deal with the prerogative of the Crown in respect of the choice of Ministers and the determination of policy. But here it may be well to say this much.

Ultimate legal sanction.

The control that the House of Commons can exercise over the choice of Ministers by the Crown rests, so far as it has any legal basis, on precisely the same footing as the necessity for annual Sessions of Parliament. If Parliament does not meet, the army cannot be maintained, and much of the revenue of the year cannot legally be paid away. If Parliament does meet, the House of Commons has power, if so minded, to refuse to pass the Army Bill and the Appropriation Bill. The necessity for summoning a Parliament and the necessity for keeping on good terms with that Parliament are therefore the same; and I have spoken of the House of Commons as wielding power in these matters, because, though the refusal of *either* House to pass these necessary measures would be fatal to them, the Crown can, as we have seen, alter the composition of the House of Lords by a creation of Peers, while it can only alter the composition of the House of Commons by an appeal to the electorate.

If therefore the majority of the House of Commons and the Ministry are hopelessly at variance, and the House of Commons expresses its opinion by votes of censure, the Crown must do one of three things; it must either keep its Ministers and its Parliament, with the intention, should the necessary statutes not be passed, of maintaining an army, and spending the public money in defiance of law; or it must keep its Ministers and dissolve its Parliament; or it must keep its Parliament and change its Ministers.

The legal sanction not resorted to;

But practically these sanctions are not contemplated when a Ministry is changed. A Ministry may last for years which

[1] Dicey, Law of the Constitution (ed. 5), 356.

is in a permanent minority in the House of Lords, yet the House of Lords does not attempt, and nobody ever supposes that it will attempt, to throw out the Army Bill. When a Ministry is censured by the House of Commons, or is beaten on a division in a matter which it has declared to be vital to its existence, nobody ever supposes that it will remain in office and violate the law. We expect that the Queen will change her Ministers unless she has reason to believe that the House of Commons does not represent the feeling of the country, and in that case she will change her House of Commons by a dissolution of Parliament.

But we must not forget that the possible violation of the law is not the only reason why a Ministry should retire when it is shown to have lost the confidence of the House or of the country. Ministers are not only the servants of the Queen, they represent the public opinion of the United Kingdom. When they cease to impersonate public opinion they become a mere group of personages who must stand or fall by the prudence and success of their action. They may have to deal with disorders at home or hostile manifestations abroad; they would have to meet these with the knowledge that they had not the confidence or support of the country; and their opponents at home and abroad would know this too [1].

but necessitates harmony of Ministers and Commons,

We arrive then at this point, that the Crown, as represented by its Ministers, must, by the conventions of the constitution, be in harmony with public opinion as represented by the members of the House of Commons. The legal necessity lies in the background; it forms an ultimate sanction which is not often present to the minds of those who act upon it.

[1] It is possible for a Ministry to remain in office for a considerable time after undergoing a vote of censure without any risk of breaking the law. Lord Salisbury's government, in 1892, might have held office during the recess, for a period of five or six months, after a vote of want of confidence had been passed by the House of Commons. The practical and vital objection to such action on the part of a Ministry would be found in the weakness of its position if it had to discuss critical diplomatic questions with foreign powers.

as representing Crown and People.

The conventional necessity is wholly outside the contemplation of law. The will of the electorate can only be expressed through its representatives, just as the will of the Crown can only be expressed through its Ministers, and what is sometimes talked of as 'the mandate of the constituencies' has no more legal value than the private opinion of the Queen on a question of national policy.

A member of the House of Commons represents not merely the constituency which has returned him to Parliament but the entire kingdom[1]. He is bound to respect the wishes of his constituents, partly because he may have engaged himself at the time of his election to try and promote them, partly because he may fear rejection at the next occasion of his being a candidate if he does not act up to his professions. But he is bound also to remember that he represents the Commons of the realm, and that the interests of his constituency are but a fraction of the interests which he has in charge.

In this manner a vote of the majority of the House of Commons against a Ministry in the nature of a vote of censure is an indication, probable though not certain, that the majority of the electorate desire to see the policy of the country directed by other hands: it foreshadows remotely certain legal difficulties which have never as yet been allowed to arise.

It may seem fanciful to attribute to an expression of opinion, which, however important in its results, has no immediate legal operation, the character of a judicial proceeding. This mode of passing judgment upon the executive was certainly not present to those who first wrote and spoke of the High Court of Parliament. Yet the practical control thus acquired by modern Parliaments over the choice and policy of the Ministers of the Crown represents the successful issue of a struggle which began when the mediaeval Parliaments asked

[1] Coke, 4 Inst. 14.

that the officers of state should be chosen by themselves, or at least nominated in their presence. At any rate this appeared to me to be an attribute of Parliament which could not be passed by, and which if it was to be dealt with at all had better be dealt with here.

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