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CONSTITUTIONAL LAW

AND

LEGAL HISTORY

IN

A NUTSHELL

152843

INCLUDING

AN ALPHABETICAL TABLE OF THE MOST IMPORTANT
WRITS AND THEIR USES

AND

A COMPARATIVE TABLE OF THE CONSTITUTIONS
OF THE DOMINIONS

S. 1800

BY

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PREFACE.

THE subject of Constitutional Law and Legal History necessarily covers a wide area, and therefore cannot be wholly included in one small volume.

I have, however, attempted to deal with those points which are most essential to the student for the purposes of the Bar Examination.

The recent changes in the Law effected by the passing of several new statutes—and in particular the *Statute of Westminster, 1931*, which gave new powers to the Dominions—have necessitated the publishing of this new edition; but although I have been compelled to alter considerably the subject-matter of the book, I have endeavoured to maintain intact the scheme of the original work. •

The Table of Writs has been retained and enlarged, the chapters upon the dominions of the British Empire and their respective constitutions have been almost entirely re-written, and in response to numerous requests I have appended a table of the sovereigns since the conquest and their regnal years.

For a deeper and more comprehensive study of

the subject the student is advised to read Chalmers & Asquith's *Outlines of Constitutional Law* (4th edition), and Potter's *Legal History* (3rd edition), while Thomas & Bellot's *Leading Cases in Constitutional Law* (6th edition) will be found invaluable, and, indeed, constant reference is made to it throughout this book.

I still venture to hope that this little volume may continue to be of some value to Bar students, particularly as an aid to memory immediately prior to the Examination.

MARSTON GARSIA.

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THE SOVEREIGNS SINCE THE CONQUEST AND THEIR REGNAL YEARS.

House.	Name.	Accession.	Years reigned.
NORMAN	William I	1066	21
	William II	1087	13
	Henry I	1100	35
	Stephen	1135	19
PLANTAGENET	Henry II	1154	35
	Richard I	1189 (a)	10
	John	1199	17
	Henry III	1216	56
	Edward I	1272	35
	Edward II	1307	20
	Edward III	1327	50
	Richard II	1377	22
LAN- CASTER	Henry IV	1399	14
	Henry V	1418	9
	Henry VI	1422	39
YORK	Edward IV	1461	22
	Edward V	1483	2 months
	Richard III	1483	2
TUDOR	Henry VII	1485	24
	Henry VIII	1509	38
	Edward VI	1547	6
	Mary	1553	5
	Elizabeth	1558	45

(a) The "period of legal memory" dates from the accession of Richard I.

House.	Name.	Accession.	Years reigned.
STUART	James I	1608	22
	Charles I	1625	24
	[The Commonwealth	1649]	—
	[The Protectorate	1653]	—
	Charles II	1660	36 (b)
	James II	1685	4
	William III	1689	13
	Anne	1702	12
HANOVER (c)	George I	1714	13
	George II	1727	33
	George III	1760	60
	George IV	1820	10
	William IV	1830	7
	Victoria	1837	64
SAXE-COBURG-GOTHA (d)	Edward VII	1901	9
	George V	1910	—

(b) In accordance with the principle that immediately upon the death of the reigning Sovereign, his kingship by act of law vests in his heir (see *post*, p. 41), the reign of Charles II is deemed to commence from the death of Charles I and statutes passed during his reign are numbered accordingly—e.g., the *Abolition of Old Tenures Act*, 1660, is 12 Car. II, c. 24, and not 1 Car. II, c. 24.

(c) The family name of the House of Hanover was Guelph.

(d) The family name of the House of Saxe-Coburg-Gotha was Wettin; but during the Great War (1914-18) this was altered to Windsor.

PART I.

CONSTITUTIONAL LAW.

CHAPTER I.

LEADING FEATURES OF THE ENGLISH CONSTITUTION.

(I) UNWRITTEN.

- (i) A "Written Constitution" is one the *whole* of which is contained in one or more documents which possess the force of law.
- (ii) An "Unwritten Constitution" is one the legal rules of which are not *entirely* set out in any formal documents.

(A) The English Constitution is not the Product of any Express Legislative Act or Acts.

- (a) It is the result of centuries of growth.
- (b) Many of its rules are embodied in various statutes, *e.g.*, *Magna Carta* (a), *Bill of Rights* (b), *Act of Settlement* (c).
- (c) But the whole of the English Constitution cannot be found in any one statute nor in any number of statutes combined. •
- (d) This is what de Torqueville meant when he said "the English Constitution does not exist."

(B) The English Constitution in this respect Differs Widely from Written Constitutions.

In such countries as U.S.A., Switzerland, Belgium, and France, as well as in our own dominions (d), the whole of the Constitution is embodied in one or more written instruments.

(a) See *post*, p. 118.
(b) See *post*, p. 123.
(c) See *post*, p. 124.
(d) See *post*, p. 64.

(II) CONVENTIONAL.**(A) The English Constitution is Based Largely upon Rules of Practice or Convention.**

- (a) Many of our rules of constitutional government possess merely a conventional character.
- (b) This is shewn by the fact that no legal proceedings can be taken for a breach of their established terms, since they are merely matters of practice, and no Court of law can take direct cognisance of them.
- (c) Yet they are as rigidly observed as though they were embodied in a statute.

(B) How is Obedience to these Rules of Convention so Uniformly Enforced that a Breach of them has become Inconceivable?

- (a) The conventions of the Constitution are in the last resort founded upon the law of the land.
- (b) They have their sanction in the force of law, a statement proved by a concrete illustration :—

IT IS A MERE CONVENTION THAT PARLIAMENT MUST MEET AT LEAST ONCE A YEAR.

This convention is uniformly obeyed because any breach of it would necessarily involve a breach of several rules which are rules of law :—

- (1) If Parliament did not meet annually to renew the *Army (Annual) Act*, a standing army could not lawfully be maintained for the defence of the country; nor would there be any legal authority for enforcing discipline among the troops.
- (2) If Parliament did not meet annually to pass the *Appropriation Act* or the *Finance Act*, a large part of the public revenue could not lawfully be collected, and a still larger part could not lawfully be expended.

Hence, if Ministers persisted in their course, they would be obliged to commit many illegalities in order to meet the needs of the Government.

(III) FLEXIBLE.**(A) The most Fundamental Changes may be effected by an Ordinary Act of Legislation passed in the Ordinary Way.**

- (a) In the English Constitution the rules of Constitutional Law stand upon no higher level than any other rules of law.

- (b) All laws, whether affecting the Constitution or not, can be altered by the same machinery.

(B) Contrast this with a Rigid Constitution which can only be Altered by some Special Legislative Process.

- (a) In a rigid Constitution a marked distinction must be drawn between fundamental laws—*i.e.*, laws dealing with the framework of the Constitution—and such rules of law as are derived from the powers which the Constitution confers.
- (b) The latter can be altered quite easily; whereas the former can be altered only by a special machinery provided by the Constitution for that purpose (*e*).
- (c) A written Constitution is of necessity rigid.

(C) A Flexible Constitution may bend but it will not break.

- (a) Since a rigid Constitution is wholly embodied in writing, it follows that by altering it you automatically destroy it and create a new Constitution.
- (b) But since in a flexible Constitution all the rules are nowhere definitely embodied, by altering it you merely add a new rule or remove an existing rule and the Constitution (as altered) continues to subsist.

(IV) UNITARY.

(A) All States are either Unitary or Federal.

- (a) In a Federal State the sovereign power is apportioned among a central Government and a number of local Legislatures.
- (b) Two useful examples of how this may be attained are provided by the United States of America and Canada.

UNITED STATES OF AMERICA.

The Constitution is so arranged that the power flows from the States to the Federal Government, which has no powers apart from those delegated to it by the States.

CANADA.

The exact opposite prevails.

The power flows from the Dominion Government to the Provinces, which have no powers apart

(e) Cf. *post*, p. 66, Canada, Australia, South Africa.

from those delegated to them by the Dominion Government.

(c) A Federal Union therefore presupposes the two following conditions :—

(i) The countries it comprises must be capable of union,

(ii) and must desire union but not unity.

(d) “ The aim of Federalism is to reconcile nationality, unity and power with the maintenance of State rights ” (f).

(e) Hence it follows that the characteristics of Federalism are :—

(1) SUPREMACY OF THE CONSTITUTION.

Therefore :—

(i) Constitution must be written.

(ii) Constitution must be rigid.

(iii) Every Legislature must be non-sovereign.

(2) DISTRIBUTION OF POWERS.

(i) Between Federal Government and State Governments.

(ii) Between Executive, Legislature, and Judiciary.

(f) And the natural results of Federalism are :—

(i) Conservatism.

(ii) Legalism.

(iii) Weaker government.

(g) DIFFERENCE BETWEEN A FEDERATION AND A CONFEDERATION.

(i) Federal Constitutions are divided into Federations and Confederations.

(ii) In a Confederation, the amount of sovereignty left to the constituent States is complete, and if the central Government wishes to get at an individual in one of the States it has to act through the Government of that State.

(iii) In a Federation, each citizen is subject to two authorities, *viz.*, his own State Government and the Federal Government.

(iv) The difference, therefore, is that in a Confederation the central Government acts directly on communities, whereas

in a Federation it acts directly on individuals.

(B) The English Constitution is Unitary, i.e., it involves one central Government which pervades the whole country.

(a) The supreme legislative authority is exercised by one central power, *viz.*, Parliament, which is sovereign.

(b) PARLIAMENTARY SOVEREIGNTY AND FEDERALISM COMPARED.

Parliamentary Sovereignty.

The exercise of supreme legislative authority by one central power.

Federalism.

The distribution of executive, legislative and judicial authority among bodies each co-ordinate with, and independent of, the other (g).

THE SEPARATION OF POWERS.

- (a) The traditional separation of the powers of the Government is into Executive, Legislature and Judiciary.
- (b) This doctrine was the invention of Montesquieu, and is supported in France to this day.
- (c) It is also popular in the United States of America, where the Executive is independent of the Legislature and the Judges are free from interference from the Executive.

How far is this doctrine present in England?

This is best seen by examining the relations between

(i) The Executive and the Legislature.

(ii) The Legislature and the Judiciary.

(iii) The Judiciary and the Executive.

(1) THE EXECUTIVE AND THE LEGISLATURE.

(a) The aim of the British Constitutionalists up to 1688 was to keep the Executive and the Legislature distinct, *i.e.*, to prevent the Crown from interfering with Parliament.

(b) Friction was constantly arising between the two (h) and this is particularly marked in the Stuart periods.

(c) The friction finally came to a head in the Revolution of 1688 and the passing of the *Bill of*

(g) Dicey, *cap.* III.

(h) See *post*, p. 45 *et seq.*

Rights (i), which put an end to many of the causes of the trouble.

- (d) To-day the two powers of the Executive and the Legislature may be compared to a pair of horses being driven side by side, separate yet working in harmony.
- (e) The closeness of these two powers is one of the secrets of the efficiency of the English Constitution.

(2) THE LEGISLATURE AND THE JUDICIARY.

- (a) Both Houses of Parliament have certain judicial functions.

- (i) The House of Lords has jurisdiction both as a Court of Appeal and as a Court of First Instance (*j*).

- (ii) The House of Commons has a certain judicial function in the right to commit for contempt (*k*).

- (b) The Judges have no power either to make new laws or to declare any statute void.

- (c) They are not critics of the Legislature, but interpreters of the law.

- (d) The expression "Judge-made law" means the interpretation put by the judiciary upon the statute.

- (e) Any such decision can be overruled by the Legislature.

- (f) On the other hand, the Courts have nearly always vindicated the rights of individuals against interference from Parliament in anything less than a statute (*l*).

Ashby v. White (m).

Stockdale v. Hansard (n).

- (g) Thus the separate Houses of the Legislature are kept in their proper places by the judiciary, while the Judges are kept in their proper places by the Legislature.

(3) THE JUDICIARY AND THE EXECUTIVE.

- (a) Up till 1700 the Judges were dependent upon the

(i) See *post*, p. 123.

(j) See *post*, p. 29.

(k) See *post*, p. 33.

(l) See *post*, p. 34.

(m) (1702), 14 S. T. 695—888; Thomas 29.

(n) (1839), 9 A. & E. 1; Thomas 40.

Crown for their position and salary and consequently were servile to the Crown.

- (b) The Crown used this control over the Judges to obtain decisions favourable to itself (o).

Bate's Case (p).

Hampden's Case (q).

- (c) This control of the Judiciary by the Executive has been described as "the greatest engine of Stuart misrule."

- (d) The *Act of Settlement, 1700* (r), provided that the Judges should hold office not at the King's good pleasure but during good behaviour (*quamdiu se bene gesserint*) and that they could only be removed by an address presented by both Houses of Parliament.

- (e) From that date all fear of Royal tyranny disappeared and the Bench began to support constitutional rights and principles, even against the Executive (s).

Wilkes v. Wood (t).

Beatty v. Gillbanks (u).

- (f) The present position is that the Executive does not interfere with the Judges nor take any actual part in the deciding of cases.

- (g) The Crown cannot set up extraordinary Courts like the Court of Star Chamber (v) and in practice does not establish any Court or appoint any Judge without the approval of Parliament.

(o) See *post*, p. 46.

(p) (1606), 2 S. T. 371; Thomas 17.

(q) (1637), 3 S. T. 825; Thomas 21.

(r) See *post*, p. 124.

(s) See *post*, pp. 10, 20.

(t) (1763), 19 S. T. 1153; Thomas 123.

(u) (1882), 9 Q. B. D. 308; Thomas 109.

(v) See *post*, p. 97.

CHAPTER II.

CHARACTERISTICS OF CONSTITUTIONAL LAW

LEADING PRINCIPLES.

THE RULE OF LAW.

“The undisputed supremacy throughout the whole country of the central government and the security given under the English Constitution to the rights of individuals” (a).

The rule of law is illustrated by the following principles :—

- (I) The Sovereignty of Parliament.
- (II) The Right to Personal Freedom.
- (III) Equality before the Law.
- (IV) Induction of general principles from judicial decisions in particular cases.

I. THE SOVEREIGNTY OF PARLIAMENT.

(1) The Unlimited Legislative Sovereignty of Parliament.

Parliament can make or unmake any law.

Examples of this are afforded by :—

- (i) *The Act of Settlement, 1700* (b).
By which Parliament altered the succession to the Throne.
- (ii) *The Septennial Act, 1715* (c).
By which Parliament prolonged its own existence.
- (iii) *Acts of Indemnity*.
Statutes, the objects of which are :—
 - (a) To legalise transactions which when they took place were illegal.
 - (b) To free individuals from liability for having broken the law.

(a) Dicey, p. 180.

(b) 12 & 13 Will. III, c. 2.

(c) 1 Geo. I, st. 2, c. 38, and see *post*, p. 26.

(2) The absence of any Competing Power in the State capable of overriding Acts of Parliament.

“ Unsuccessful Rivals.”

(a) THE KING.

The King has no legislative authority apart from Parliament (*d*).

(b) RESOLUTIONS OF EITHER HOUSE.

The resolution of either House cannot alter the law of the land.

Stockdale v. Hansard (*e*).

Bowles v. The Bank of England (*f*).

(c) THE JUDGES.

Judicial legislation is subordinate to, carried on with the assent and subject to the supervision of, Parliament.

(3) The Inability to Bind subsequent Parliaments.

An example is afforded by the following :—

The Union with Ireland Act, 1800 (*g*).

The maintenance of the Irish Established Church was made a fundamental condition of the Union of Great Britain and Ireland.

The Irish Church Disestablishment Act, 1869 (*h*).

Disestablished the Irish Church.

Irish Free State Constitution Act, 1922 (*i*).

The Union abolished.

Southern Ireland (*j*) to have dominion status, and to be known as the Irish Free State (*k*).

(4) The Power to Delegate Authority.

STATUTORY RULES AND ORDERS.

- (a) Many statutes contain provisions authorising the King in Council, a Government Department or a local authority to make Rules and Orders on a particular subject.**

(*d*) See *post*, cap. IV.

(*e*) (1839), 9 A. & E. 1; Thomas 40.

(*f*) [1913] 1 Ch. 57; Thomas 24.

(*g*) 39 & 40 Geo. III, c. 67.

(*h*) 32 & 33 Vict. c. 42.

(*i*) 13 Geo. V, c. 1.

(*j*) By the *Government of Ireland Act, 1920* (10 & 11 Geo. V, c. 17), Ireland was divided into Northern Ireland and Southern Ireland. Northern Ireland consists of the six counties of Ulster; the rest of the country constitutes Southern Ireland. Northern Ireland remains part of the United Kingdom.

(*k*) See *post*, pp. 65 *et seq.*, for its Constitution.

- (b) Such Rules and Orders have the same effect as if they had been enacted by Parliament.
- (c) If a statute contain a provision that any such Rule or Order shall be laid before Parliament and be of no effect if either House resolve that it be annulled, then, in the absence of any such resolution, no Court of law can question the validity of the Rule or Order (*kk*).

LIMITATIONS TO PARLIAMENTARY SOVEREIGNTY.

(A) No Legal Limitations.

(B) Actual Limitations.

(1) THE CABINET.

Which introduces most of the legislative measures, and consequently practically monopolises legislation.

(2) THE ELECTORATE.

Which ultimately can enforce its will.

(3) LEAGUES FOR POLITICAL OR INDUSTRIAL PURPOSES.

E.g., combinations of labour, political organisations, etc.

(4) THE LEAGUE OF NATIONS.

While having no direct power, the opinion of the League must have some effect upon individual members of the Commons.

(5) THE PRESS.

History of the Freedom of the Press.

- (a) In the sixteenth century printing was considered a monopoly of the Crown.
- (b) In 1586 the Court of Star Chamber claimed the regulation of all press matters, and established a system of press censorship.
- (c) *The First Press Licensing Act, 1662 (l)*.
Periodically renewed until 1679, when it was temporarily suspended.
- (d) *Carr's Case, 1680 (m)*.
"No man has a right to say anything of the Government": *per* Scroggs, C.J.
- (e) In 1685 the *Press Licensing Act* was renewed for seven years, and in 1692 for one year.

(*kk*) Otherwise a Court of law may inquire and decide whether the Rule or Order be *ultra vires* or not.

(*l*) 13 & 14 Car. II, c. 33.

(*m*) 7 S. T. 929.

(f) An attempt was made to renew it in 1695, but it proved unsuccessful.

(g) THE ILLEGALITY OF GENERAL WARRANTS.

General Warrant = A warrant issued by a Secretary of State to seize a person or his papers.

(1) This question arose on account of the attacks made on the Government by Wilkes in a paper called "The North Briton." A general warrant was issued "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper entitled 'The North Briton,' No. 45, and these or any of them having found, to apprehend and seize together with their papers."

Acting upon this, Wood broke into Wilkes' house and seized his papers. On an action for trespass brought by Wilkes, it was held that :—

A general warrant to search for and seize the papers of the *unnamed* author of a seditious libel is illegal.

Wilkes v. Wood, 1763 (n).

(2) A general warrant to search for and seize the papers of the *named* author of a seditious libel is illegal.

Entick v. Carrington, 1765 (o).

(3) A general warrant to search for and seize the *unnamed* author of a seditious libel is illegal.

Leach v. Money, 1765 (p).

(h) PRESENT POSITION OF THE PRESS.

(1) Power to print without previous licence, subject to the consequences of the ordinary law.

(2) Press offences are tried by the ordinary Courts.

RELATION BETWEEN PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW (q).

(1) "Parliamentary Sovereignty favours the Rule of Law because :—

(a) The commands of Parliament can only be uttered

(n) 19 S. T. 1153; Thomas 123.

(p) 19 S. T. 1001; Thomas 122.

(o) 19 S. T. 1030; Thomas 124.

(q) Dicey, cap. XIII.

through the combined action of its three constituent parts, and therefore take the shape of formal and deliberate legislation.

(b) Parliament never exercises direct executive power.

- (2) The Rule of Law favours Parliamentary Sovereignty because :—

The rigidity of the Law hampers the action of the Executive, and the Government can only escape by obtaining authority from Parliament.”

II. THE RIGHT TO PERSONAL FREEDOM. SAFEGUARDS OF PERSONAL FREEDOM.

(I) Means of obtaining Redress when Deprived of Liberty.

- (1) Civil proceedings for damages for false imprisonment or malicious prosecution.
- (2) Criminal prosecution for assault or battery.

(II) The Writ of Habeas Corpus (r).

- (1) (a) Issues from the K.B.D.
 (b) Upon application by prisoner or on his behalf.
 (c) Addressed to custodian of prisoner.
 (d) Directing him to state in his return to the Writ all reasons for the detention of the prisoner,
 (e) and to produce the prisoner before the K.B.D.
- (2) When the prisoner is produced, the Court may
 - (i) Make no order.
 - (ii) Discharge him.
 - (iii) Grant bail.

(III) The Habeas Corpus Acts.

- (1) *Habeas Corpus Act, 1679 (s)*.
 - (a) Before this Act there were various Writs in existence for the purpose of securing personal liberty to the subject when deprived of the same (t).
 - (b) But the right to release under any of them could be, and frequently was, easily evaded.
Darnell's Case (u).
Jenks' Case (v).
 - (c) To remedy this, the *Habeas Corpus Act, 1679 (s)*, was passed which :—
 - (i) Made the granting of a writ of *habeas corpus*

(r) This existed in a slightly different form long before 1679 and was known as *Habeas Corpus ad subjiciendum* : see *post*, p. 130.

(s) 31 Car. II, c. 2.

(t) See *post*, p. 131.

(u) (1627), 3 S. T. 1; Thomas 98.

(v) (1676), 6 S. T. 1189; Thomas 99.

compulsory in the case of a person charged with crime and imprisoned without a legal cause being assigned in the warrant of committal.

- (ii) Provided for the speedy trial of persons imprisoned for treason or felony.
- (d) Hence it has been observed that the *Habeas Corpus Act, 1679*, introduced no new principle nor conferred any new right upon the subject.
- (2) *Habeas Corpus Act, 1816 (w)*.
 - (a) The *Habeas Corpus Act, 1679*, applied to criminal cases only.
 - (b) The *Habeas Corpus Act, 1816*:—
 - (i) Extended the procedure to persons imprisoned on a civil matter.
 - (ii) Provided for the issue and return of a writ of *habeas corpus* in vacation, as well as in term time.
 - (iii) Provided for the examination into the truth of the facts stated in any return to a writ of *habeas corpus*.
- (3) *Habeas Corpus Act, 1862 (x)*.
 - (a) No writ of *habeas corpus* shall issue out of England into any colony or foreign dominion of the Crown where there is a Court having authority to issue the writ.
 - (b) Subject to this limitation, the writ extends into all parts of the dominions of the Crown.

These Acts are sometimes suspended by Parliament in cases of national emergency, but Acts of Indemnity are always subsequently passed.

MARTIAL LAW.

Two meanings :—

- (1) The common law right and duty of every citizen to maintain public order by the exercise of any necessary degree of force in time of invasion, rebellion, riot or insurrection.
- (2) The suspension of the ordinary law and the substitution for it of discretionary government by the Executive exercised through the military.

Points to Note.

- (a) The Crown's prerogative to declare martial law does not exist in time of peace.

(w) 56 Geo. III, c. 100.

(x) 25 & 26 Vict. c. 20.

- (b) Its exercise is limited by and ceases with the necessity which gave rise to it.

Wolfe Tone's Case (y).

- (c) The Government would probably obtain Parliamentary sanction before declaring martial law in England; but should martial law have been already declared, owing to extreme urgency, Acts of Indemnity would be introduced.
- (d) Acts done by military authorities and all proceedings and sentences of Courts-martial are examinable and may be reviewed by the civil Courts, whether a state of war exists or not.

HISTORY OF THIS RULE.

- (i) *The Case of Mr. Marais, 1902.*

During the South African War, M. (a civilian), who had been placed under military arrest, appealed against such arrest to the Privy Council. It was held that the action of the military authorities was justified, as a state of war then existed in the colony.

Ex p. D. F. Marais (z).

- (ii) As a result of this case the rule was established that where a state of war existed and was recognised by the Courts, the Courts had no jurisdiction over the military authorities.
- (iii) This decision was hotly contested.
- It was followed in *R. v. Allen* (a) and *R. v. Strickland* (b).

But was rejected in *Heddon v. Evans* (c) and *Egan v. Macready* (d).

- (e) If the proceedings of any Court-martial are proved to be necessary, the Courts will not interfere; but it is for the Courts to determine whether the proceedings are necessary or not and whether they will or will not interfere.
- (f) THE EMERGENCY POWERS ACT, 1920 (e).

- (i) A "state of emergency" may be declared if at any time the tranquillity of the State has been disturbed by combinations which have a tendency to deprive the public of fuel, light, food or means of locomotion.
- (ii) When a "state of emergency" has been declared, His Majesty may by Order in Council make regula-

(y) (1798), 27 S. T. 613.

(z) [1902] A. C. 109; Thomas 130.

(a) [1921] 2 I. R. 241.

(b) [1921] 1 I. R. 265.

(c) (1919), 35 T. L. R. 642.

(d) [1921] 1 I. R. 265.

(e) 10 & 11 Geo. V, c. 55.

tions creating summary offences punishable by fine or imprisonment, or both (f).

MILITARY LAW.

- (1) Military law is the law which at all times, whether in peace or war, at home or abroad, governs the soldier.
- (2) Civilians are in no case subject to it.
- (3) Soldiers and sailors are subject to both
 - (a) The ordinary law of the land, and
 - (b) Military law (in virtue of their profession).
- (4) They are primarily bound to obey the civil law, even though such obedience may render them liable to trial by Court-martial.
- (5) Soldiers or sailors refusing to obey the orders of a superior officer are liable to be tried by Court-martial.
- (6) If acting honestly in discharge of his duty, a soldier or sailor will not be liable for wrongful acts done under orders, unless it can be shewn that such orders were clearly and manifestly illegal.

Keighley v. Bell (g).

- (7) No action lies by a person subject to military discipline against a military tribunal or superior officer for any act causing injury to person or liberty if that act be within jurisdiction and in the course of military discipline, even though it be done maliciously and without reasonable and probable cause.

Sutton v. Johnstone (h).

Darckins v. Paulet (i).

Darckins v. Lord Rokeby (j).

Heddon v. Evans (k).

- (8) An action for damages will lie if a man be imprisoned because he disobeys an order made by a military superior which that military superior has no jurisdiction to make.

Warden v. Bailey (l).

- (9) A military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they do to another military man what amounts to assault, false imprisonment, or any actionable wrong, even though the injury purport to be done in the course of military discipline.

Heddon v. Evans (k).

(f) Fine up to £100, imprisonment up to three months.

(g) (1866), 4 F. & F. 763; Thomas 142.

(h) (1787), 1 T. R. 498; Thomas 138.

(i) (1869), L. R. 5 Q. B. 94; Thomas 137.

(j) (1875), L. R. 7 H. L. 744; Thomas 136.

(k) (1919), 35 T. L. R. 642; Thomas 138.

- (10) The Courts will not entertain an action for wrongful dismissal.

Courts-Martial.

- (1) Courts to try military offences held under the authority of the Army Annual Acts.
- (2) A soldier can be tried by Court-martial for :—
 - (i) Military offences.
 - (ii) Crimes against civilians when
 - (a) his regiment is out of England, and
 - (b) there is no civil Court competent to try him within 100 miles.
- (3) The members of Courts-martial are judges of fact, as well as of law.
- (4) The Courts have power to determine who are the persons subject to military law, and whether a given proceeding is really justified by the rules of law which govern the Army.
- (5) A soldier or sailor, though sentenced or acquitted by a Court-martial, may afterwards (in cases triable by a civil Court) be tried by a civil Court.

THE RIGHT OF SELF-DEFENCE.

- (a) Every man is justified in using against an assailant a proportionate amount of force in defence of himself.
- (b) Therefore if a man be attacked by an assailant in such a manner as to cause him reasonable fear of danger, he is justified in adopting proportionate means to ward it off.
- (c) If, having retreated as far as he can until he has no means left of escaping from the attack, he turn upon his assailant and kill him in order to avoid destruction, he will not be guilty.
- (d) When an assailant is not attacking a human being but is interfering unlawfully with property, the possessor of that property is allowed to use proportionate force to prevent such interference, but is not as a rule justified in killing the trespasser.
- (e) But in defence of a man's house, the owner may kill a trespasser who would forcibly dispossess him of it in the same manner as he might by law kill in self-defence a man who attacked him personally, with this distinction, that in defending his house, he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary (m).

R. v. Hussey (n).

(l) (1811), 4 Taunt. 89.

(n) (1924), 18 Cr. App. Rep. 160.

(m) 1 Hale 485-6.

III. EQUALITY BEFORE THE LAW.

General Rule.

All persons are subject to the same law and liable to be tried in the ordinary Courts.

- (a) In France a system obtains known as “*Le droit administratif*” by which officials are tried before special Courts consisting of officials for acts done in an official capacity (o).
- (b) No such system exists in England, but there are certain exceptions to the general rule.

Exceptions.

(1) THE CROWN.

A petition of right cannot be maintained against the Crown to recover damages for any tort.

Tobin v. The Queen (p).

(2) PUBLIC OFFICERS.

- (a) Are not liable for the negligence or default of subordinates.

Lane v. Cotton (q).

Bainbridge v. P.M.G. and Crane (r).

- (b) Are not held personally liable for contracts made by them on behalf of the public in performance of their duties.

Macbeath v. Haldimand (s).

- (c) Are not liable to be sued in respect of acts done in the performance of their public duties.

Gidley v. Lord Palmerston (t).

Unless :—

- (i) Circumstances shew intention to be liable—

Graham v. Commissioners of Public Works (u).

- (ii) They are made liable by statute.

- (d) In actions of tort, they are liable to be sued in their personal or individual capacity, but not in their official capacity or as a body.

Raleigh v. Goschen (v).

(o) Dicey, cap. XII.

(p) (1864), 16 C. B. (N.S.) 310; Thomas 78.

(q) (1701), 1 Ld. Ray. 646; Thomas 75.

(r) [1906] 1 K. B. 178; Thomas 80.

(s) (1786), 1 T. R. 172; Thomas 72.

(t) (1822), 3 B. & B. 275; Thomas 73.

(u) [1901] 2 K. B. 781; Thomas 86.

(v) [1898] 1 Ch. 73; Thomas 87.

(e) Are to a certain extent protected by the *Public Authorities Protection Act, 1893* (w) :—

- (i) Every action brought against any person in respect of any official act or any act in pursuance or execution of statutory or public authority must be brought within 6 months.
- (ii) The defendant is entitled to plead “Tender of Amends” before the action was commenced.
- (iii) If such action be unsuccessful, the defendant can recover costs on a higher scale than could an ordinary individual.

(3) ACTS OF STATE.

(a) An “act of State” is either

- (i) An act done by a foreign ruler or his representative in his political capacity.
- (ii) An act done by a representative of the Crown (previously sanctioned or subsequently ratified) affecting the person or property of someone not a British subject.

Madrazo v. Wills (x).

Buron v. Denman (y).

(b) The plea of an act of State is a defence only to actions brought by foreigners in respect of acts done by representatives of the Crown abroad in pursuance of their authority.

(c) It is no defence to an action respecting anything done within the Realm or to an action brought by a British subject.

(4) JUDGES OF THE HIGH COURT.

Are not liable for any acts done in their official capacity.

(5) JUSTICES OF THE PEACE.

Are not exempt for acts done maliciously or outside their jurisdiction.

IV. THE INDUCTION OF GENERAL PRINCIPLES FROM JUDICIAL DECISIONS IN PARTICULAR CASES.

The importance of Judge-made law is illustrated by the fact that the independence of juries and the immunity of Judges were only established by judicial decisions in particular instances, viz. :—

Bushell's Case (juries) (z).

Hamond v. Howell (Judges) (a).

(w) 56 & 57 Vict. c. 61.

(x) (1820), 3 B. & A. 353; Thomas 140.

(y) (1848), 7 R. R. 554; 2 Ex. 167; Thomas 140.

(z) (1670), 6 S. T. 999; Thomas 151.

(a) (1678), 2 Mod. 218; Thomas 155; and see also the subsequent cases.

The Right to Freedom of Discussion.

Every person is permitted to say, write or publish what he pleases so long as he does not bring himself within the law relating to Defamation, Sedition, Blasphemy or Obscenity.

DEFAMATION.

- (a) A defamatory statement is one which exposes the person about whom it is published to hatred, ridicule or contempt or causes him to be shunned or avoided or tends to injure him in his office, profession or trade.
- (b) If written or made in any other permanent form it is Libel; if spoken or made by gestures it is Slander.

SEDITION.

- (a) To attempt to bring into hatred or contempt, or to excite disaffection against, His Majesty, the Government or either House of Parliament.
- (b) To incite His Majesty's subjects to attempt the alteration of any matters in Church or State as by law established otherwise than by lawful means.
- (c) To excite discontent or disaffection among His Majesty's subjects.
- (d) To promote feelings of ill-will and hostility between different classes of His Majesty's subjects.

BLASPHEMY.

Any publication or utterance relating to God or to the Christian Religion which is intended to wound the feelings of mankind or to excite contempt or hatred against the Church or to promote immorality.

OBSCENITY.

Any publication or utterance which has a tendency to deprave or corrupt those whose minds are open to immoral influence.

The Right of Public Meeting.

People may meet together when and where they please so long as they do not :—

- (1) Commit a nuisance.
- (2) Commit a trespass.
- (3) Constitute an unlawful assembly.

UNLAWFUL ASSEMBLY.

Three or more persons who :—

- (a) Assemble to commit, or when assembled do commit, a breach of the peace.
- (b) Assemble for any purpose in such a manner as to cause reasonable persons to fear a breach of the peace.
- (c) Assemble to commit a crime.

Points to note :—

- (1) All persons joining in or encouraging the proceedings are criminally liable.

R. v. Atkinson (b).

- (2) Mere presence does not necessarily constitute "encouragement," but, if unexplained, it may be evidence for the consideration of the jury.

R. v. Coney (c).

- (3) Persons meeting for a lawful purpose in a lawful manner do not constitute an unlawful assembly because they may, by so meeting, provoke others to commit a breach of the peace.

Beatty v. Gillbanks (d).

- (4) Persons meeting for a lawful purpose, but in an unlawful manner, constitute an unlawful assembly.

Wise v. Dunning (e).

- (5) The law recognises no right of public meeting in a public thoroughfare or place of public resort analogous to a public thoroughfare.

R. v. Cunninghame-Graham and Burns (f).

- (6) A proclamation by a Secretary of State does not make an otherwise lawful assembly unlawful, but it does make people cognisant of what is likely to occur.

R. v. Fursey (g).

- (7) Where a breach of the peace has occurred, the meeting may be called upon to disperse, but wrongdoers should first be arrested.

O'Kelly v. Harvey (h).

- (8) Persons taking part in a lawful assembly are not justified in using extreme measures to resist the police.

R. v. Ernest Jones (i).

ROUT AND RIOT AT COMMON LAW.

- (a) An Unlawful Assembly becomes a *Rout* as soon as it starts from its place of meeting to carry out the purpose for which it assembled.

- (b) It becomes a *Riot* as soon as it begins to carry out that purpose with a show of violence.

Field v. Receiver of Metropolitan Police (j).

(b) 11 Cox 332.

(c) 8 Q. B. D. 552.

(d) (1882), 9 Q. B. D. 308; Thomas 109.

(e) [1902] 1 K. B. 167; Thomas 111.

(f) (1888), 16 Cox C. C. 426; Thomas 214.

(g) (1883), 6 C. & P. 81; Thomas 213.

(h) (1882), 14 L. R. Ir. 105.

(i) (1848), 6 S. T. (N.S.) 783; Thomas 226.

(j) [1907] 2 K. B. 869.

RIOTOUS ASSEMBLY.

- (a) *Twelve* or more persons who do not disperse within an hour after a J.P. has read to them a proclamation calling upon them to do so.

Riot Act, 1715 (k).

- (b) It is a misdemeanour for any person to refuse to help to suppress a Riot or Riotous Assembly when called upon by a constable or J.P. to do so.
- (c) A magistrate is guilty of criminal negligence if he does not use every means in his power to prevent a breach of the peace.

R. v. Pinney (l).

- (d) The military may be called in by the civil authorities to help to suppress a riot or riotous assembly, but this should only be done as a last resort.
- (e) But if the military authority be invoked, it must
- (i) act under the direction of the civil authority (usually a magistrate);
 - (ii) not fire without his orders;
 - (iii) not refuse or omit to fire if so ordered by him.

Rights of the Crown in Dealing with an Unlawful Assembly.

- (1) To prosecute every participant for misdemeanour.
- (2) To disperse it, if necessary by force.
- (3) To deal with a riotous assembly under the provisions of the *Riot Act, 1715 (k)*.
- (4) To call for sureties for good behaviour.
- (5) To call upon a lawful assembly to disperse, if the peace can be restored by no other means.
- (6) To proclaim the meeting beforehand in order to warn citizens that they attend at their own risk.

PUBLIC MEETING ACT, 1908 (m).

Any person creating or inciting to disorder in order to prevent the transaction of business at a public meeting is guilty:—

- (a) Of an offence punishable summarily, if the meeting is a lawful one.
- (b) Of an illegal practice within the meaning of the *Corrupt and Illegal Practices Prevention Act, 1883 (n)*, if the meeting is a political meeting held between the issue and return to a writ for the election of a Member of Parliament.

(k) 1 Geo. I, st. 2, c. 5.

(l) (1832), 5 C. & P. 254; Thomas 218.

(m) 8 Edw. VII, c. 66.

(n) 46 & 47 Vict. c. 51.

TRADES DISPUTES ACT, 1927 (o).

- (a) Any strike or lock-out (*p*) is illegal which
 - (i) has any object other than the furtherance of a trade dispute within the trade in which the strikers are engaged—or—
 - (ii) is designed to coerce the Government by inflicting hardship on the public.
 - (b) It is an offence to take part in any such illegal strike or lock-out.
 - (c) The funds of any trade union may be prevented from being applied to support any such illegal strike or lock-out (*q*).
-

(o) 17 & 18 Geo. V, c. 22. Passed in consequence of the General Strike in May, 1927.

(*p*) A "strike" is a cessation of work by employees on account of some trade dispute;

A "lock-out" is a refusal by an employer to continue to employ his workmen in consequence of some trade dispute;

and see 17 & 18 Geo. V, c. 22, s. 8.

(*q*) This is done by an injunction at the suit of the Attorney-General.

CHAPTER III.

THE LEGISLATURE.

THE MEETING OF PARLIAMENT.

(A) The Summons.

Writs are issued by the Crown Office to :—

- (1) The Spiritual Peers.
- (2) The Temporal Peers.
- (3) The Judges and Law Officers (in a subordinate capacity).
- (4) The Returning Officers (*viz.* sheriff of a county; mayor of a borough) for the election of members of the House of Commons.

(B) The Election.

- (1) CONDITIONS UPON WHICH PERSONS OF EITHER SEX ARE ENTITLED TO BE REGISTERED AS PARLIAMENTARY ELECTORS.

Representation of the People Act, 1918 (a).

- (i) British subject.

s. 9 (3).

- (ii) Of full age.
- (iii) Under no legal incapacity.
- (iv) Has the necessary residential or business premises qualification.
- (v) Is the husband or wife of a person entitled to be registered in respect of a business premises qualification.

s. 1 (1).

- (2) The necessary residential or business premises qualification means—

- (i) During the qualifying period (b) has resided or occupied business premises (c) in or near the constituency.

(a) 7 & 8 Geo. V, c. 64, as amended by the Acts of 1926 and 1928.

(b) The qualifying period = three months ending June 1 [*Representation of the People (Economy Provisions) Act, 1926* (16 & 17 Geo. V, c. 9, s. 9, Sched. III)].

(c) Business premises = land or other premises of the yearly value of not less than £10 occupied for business, profession or trade: section 1, subsection 3.

- (ii) On the last day of the qualifying period is residing or occupying business premises in the constituency.
s. 1 (2).

(8) SHORT HISTORY OF THE FRANCHISE.

- (a) Before 1832 there were two franchises, viz., County and Borough, based entirely upon a property qualification.

(i) The county franchise was confined to freeholder residents in the county owning land of the yearly value of 40s. or upwards, fixed by a statute of 1480.

(ii) The borough franchise was in a corrupt and unsatisfactory condition, the Crown having granted the franchise to those upon whom it could rely.

- (b) By 1800 the House of Commons was anything but a body representing the majority of the people.

- (c) An attempt was made to remedy matters in 1832 by the *Reform Act* (d) which

(i) Raised the qualifying yearly value of the land from 40s. to £10 in the counties.

(ii) Conferred a £10 occupation franchise on the inhabitants of boroughs.

- (iii) Gave the franchise to:—

Copyholders of land worth £10.

Leaseholders of land worth £10 on a lease for sixty years or £50 for twenty years, or those paying a yearly rental of £50.

- (d) The franchise was further extended by the *Reform Act, 1867* (e), and the *Representation of the People Act, 1884* (f), which gave votes to lodgers and domestic servants.

- (e) The *Representation of the People Act, 1918* (a), inaugurated the principle of "one man one vote" and gave for the first time the franchise to women, but made certain qualifications, viz.:—

(i) her age must be thirty;

(ii) if she were the wife of a person entitled to be registered as an elector she was entitled to be registered as a local government elector but not as a Parliamentary elector.

- (f) The *Representation of the People (Equal Franchise)*

(d) 2 & 3 Will. IV, c. 45.

(e) 30 & 31 Vict. c. 102.

(f) 48 & 49 Vict. c. 3.

Act, 1928 (g), gave women equal rights with men as regards the franchise.

(C) The Parliamentary Oath.

(a) Formerly there were three oaths, viz. :—

(1) *Supremacy (h)*.

Repudiating the spiritual or ecclesiastical authority of any foreign prince, person or prelate.

(2) *Allegiance (i)*.

To this was added a declaration against transubstantiation (*j*).

(3) *Abjuration (k)*.

Renouncing all adherence to the son of James II. "upon the faith of a Christian."

Roman Catholics were debarred by (1) and (2) and Jews by (3).

(b) *Catholic Emancipation Act, 1829 (l)*.

Provided a form of oath for Roman Catholics and abolished the declaration against transubstantiation.

(c) *Jews Relief Act, 1858 (m)*.

Provision made for the Jews.

(d) *Parliamentary Oaths Act, 1866 (n)*.

Substituted a simple oath of allegiance for the three oaths.

(e) *The case of Mr. Bradlaugh, 1880-1886*.

In 1880 Mr. B. (an atheist) was returned as member for Northampton. He declared that an oath would not bind his conscience, and claimed the right merely to affirm. An action was successfully brought against him because he sat and voted without taking the oath. He then tried to take the oath, but was not permitted to do so, as he had himself declared that it would not bind his conscience. In 1884 he administered the oath to himself, and sat and voted. In an action subsequently brought by the Attorney-General it was held that, as Mr. B. was an atheist, the self-administered oath was no oath at all. In 1886 Mr. B. was again returned as member.

(f) *Parliamentary Oaths Act, 1888 (o)*.

A solemn affirmation may be used instead of an oath.

(g) 18 & 19 Geo. V, c. 12.

(i) 7 Jac. I, c. 6.

(k) 13 Will. III, c. 16.

(l) 10 Geo. IV, c. 7.

(m) 21 & 22 Vict. c. 49.

(n) 29 & 30 Vict. c. 19.

(o) 51 & 52 Vict. c. 46.

(h) 5 Eliz., c. 1, s. 16.

(j) 30 Car. II, st. 2.

THE DURATION OF PARLIAMENT.

- (1) *The Bill of Rights, 1689, s. 13 (p).*
 "For the redress of all grievances and for the amending, strengthening and preserving of the laws, Parliament ought to be held frequently."
- (2) *The Triennial Act, 1694 (q).*
 Forbids Parliament to endure for longer than three years.
- (3) *The Septennial Act, 1715 (r).*
 Parliament prolongs its own life (and that of all future Parliaments) to seven years.
- (4) *The Parliament Act, 1911 (s).*
 Parliament curtails its existence (and that of all future Parliaments) to five years.

THE TERMINATION OF PARLIAMENT.

- (I) **Dissolution.**
 - (a) Terminates the *existence* of a Parliament.
 - (b) Effected
 - (1) By exercise of the Crown's Prerogative; or
 - (2) By effluxion of time (five years).
- (II) **Prorogation.**
 - (a) Terminates a *session* of Parliament.
 - (b) Effected by the exercise of the Crown's Prerogative.
 - (c) All Bills have to start afresh in the next session.
- (III) **Adjournment.**
 - (a) Postpones the further transaction of business for a specified time.
 - (b) Effected by a resolution of either House.

THE "SPEAKERS."

- (1) **House of Lords.**
 - (a) The Speaker of the Lords is the Lord Chancellor.
 - (b) He sits on the Woolsack.
 - (c) Has no ruling on points of order, questions of order being settled by the House itself.
 - (d) Has no casting vote.
- (2) **House of Commons.**
 - (a) The Speaker is elected at the commencement of each Parliament.

(p) 1 W. & M., sess. 2, c. 2.

(q) 6 W. & M., c. 2.

(r) 1 Geo. I, st. 2, c. 38.

(s) 1 & 2 Geo. V, c. 13.

- (b) He rules on points of order.
- (c) Maintains order in the House, and names members guilty of disorder.
- (d) Has a casting vote.

THE HOUSE OF LORDS.

(A) CONSTITUTION.

Temporal Peers.

(1) BARONY BY TENURE.

- (a) Originally a Barony by Tenure was a barony running with and inherent in certain lands and transferable by deed or will with the lands.
 - (b) Barons by Tenure claimed to sit as of right in the House of Lords.
 - (c) *Present Position.*
 - (i) Barony by Tenure no longer exists.
 - (ii) A peerage is inalienable.
 - (iii) No one can sit in the House of Lords without a Writ of Summons.
- Berkeley Peerage Case (t).*

(2) BARONY BY WRIT.

- (a) The delivery of a Writ of Summons does not of itself confer a peerage.
- Lord Abergavenny's Case (u).*
- (b) A Writ of Summons followed by taking a seat in the House of Lords confers a peerage.
- The Clifton Case (v).*
- (c) But the sitting must be proved.
- De Freschville's Case (w).*

(3) BARONY BY LETTERS PATENT.

- (a) If the King create any Baron by Letters Patent under the Great Seal to him and to his heirs or the heirs of his body, he is ennobled.
- Lord Abergavenny's Case (u).*
- (b) The present method of creating Peers is by Letters Patent followed by a Writ of Summons to the newly created Peer to take his seat in the House of Lords, which he does.

Spiritual Peers.

Crown summons 26, which must include the two Archbishops and the Bishops of London, Durham and Winchester.

(t) (1861), 8 H. L. Cas. 21.

(v) (1673), Collins 292.

(w) (1677), Lds. Rep. III, 29.

(u) (1610), 12 Co. Rep. 70

Scottish Peers.

- (a) The Scottish Peers are directed by proclamation to elect 16 Representative Peers for each Parliament.
- (b) No new Scottish Peer may be created (since the *Union with Scotland Act, 1706* (x), makes no provision for so doing).
- (c) No vacancy is created by the bestowal of an English Peerage upon a Scottish Representative Peer.

Irish Peers.

- (a) The number of Irish Peers is 100.
- (b) One new Irish Peer may be created for every 3 becoming extinct.
- (c) The Irish Peers elect 28 of their number for life to sit in the House of Lords as Representative Peers for Ireland.
Union with Ireland Act, 1800 (y).
- (d) The *Government of Ireland Act, 1920* (z), which establishes Parliaments for Southern and Northern Ireland does not affect the Irish Peerage.

Lords of Appeal in Ordinary.

There are six by virtue of the *Appellate Jurisdiction Acts, 1876 and 1913* (a). (Four are appointed under the former and two under the latter.) They are entitled to sit and vote in the House for life.

"The Peerage is not co-terminous with the House of Lords—since the King can make Peers, but he cannot make a House of Lords."

- (1) The King cannot create a new Peer of Scotland.
- (2) The King may create new Irish Peers up to 100, but only 28 may sit in the House of Lords and they must be elected by their fellow Irish Peers.
- (3) The King may create Lords Spiritual, but only 26 may sit in the House of Lords.
- (4) The King may create anyone a Peer for life, but the Life-Peer is not entitled to sit in the House of Lords.
Wensleydale Peerage Case (b).
- (5) The King cannot grant a peerage which shall descend in a manner unknown to the law.
Buckhurst Peerage Case (c).

(x) 6 Anne, c. 11.

(y) 39 & 40 Geo. III, c. 67.

(z) 10 & 11 Geo. V, c. 67.

(a) 39 & 40 Vict. c. 50, ss. 6, 14; and 3 & 4 Geo. V, c. 21, s. 1.

(b) (1856), 5 H. L. C. 958.

(c) (1876), 2 A. C. 1.

(B) PRIVILEGES.**(1) Judicial Privileges.**

- (a) Right to act as a Court of final appeal.
- (b) Right to act as a Court of first instance.

(i) Impeachment.

Any person impeached by the House of Commons must be tried by the House of Lords (d).

(ii) Indictment.

Peers accused of treason, felony or misprision must be tried by the House of Lords.
R. v. Earl Russell (e).

(2) Freedom from Arrest.

On the same basis as the Commons (f).

(3) Freedom of Speech.**(4) Freedom from Jury Service.**

Jurics Act, 1870 (g).

Should a Peer be empanelled on a jury he may be challenged by a prisoner *propter honoris respectum*.

(5) Individual Access to the Crown.**(6) Right to Commit for Contempt.**

The case of Lord Shaftesbury, 1677 (h).

- (a) The Lords may commit for a definite or indefinite period.
- (b) If for a definite period, the imprisonment is not terminated by prorogation.
- (c) If for an indefinite period, the person committed is released if Parliament be prorogued.

(7) Right to Determine its due Constitution.

Includes settling disputed peerage claims.

(8) Right to Record Protests.

In the journals of the House against a measure disapproved of.

Committee of Privileges.

- (a) A standing committee of the whole House of Lords, presided over by the Chairman of Committees.
- (b) It is re-appointed at the beginning of each session.
- (c) It is concerned with the privileges of Peers generally and more especially with the claims to peerages.

(d) Peers accused of misdemeanour are tried in the ordinary Courts.

(e) [1901] A. C. 446.

(f) See *post*, p. 30.

(g) 33 & 34 Vict. c. 77.

(h) 6 S. T. 1269; Thomas 33.

THE HOUSE OF COMMONS.

PRIVILEGES.

(A) THOSE CLAIMED BY THE SPEAKER AT THE OPENING OF PARLIAMENT.

(1) Freedom from Arrest.

(a) The idea of this privilege is probably as old as the early Anglo-Saxon Councils.

(b) *Bishop of St. David's Case, 1290.*

The Master of the Temple petitioned the King for leave to distrain for the rent of a house held of him by the Bishop, and was answered: "It does not seem fit that the King should grant that they who are of his Council should be distrained in time of Parliament."

(c) *Thorpe's Case, 1453.*

T., the Speaker of the Commons, was imprisoned by the Court of Exchequer for non-payment of a fine due to the King. The Commons complained to the Lords and the King, and demanded his release. The Lords consulted the Judges, who expressed the opinion that "if a Member of Parliament were arrested . . . he should be released . . . so that he might be free to attend Parliament." The King, however, directed the Commons to elect another Speaker, which they did; but they stated that the whole case was "begotten by the iniquity of the times."

(d) *Ferrer's Case, 1543.*

F., a Member of the House of Commons, was arrested as surety for the debt of another. The Commons sent their Serjeant, without a writ and with no further authority than his mace, to demand F.'s release. After some resistance, this was obtained. The Commons then committed the sheriffs and the gaolers to prison for contempt, and this action was upheld by the King.

(e) *Shirley's Case, 1603.*

S., a member of the House of Commons, was imprisoned for debt. The Commons demanded his release and on this being refused committed the Warden of the prison to the Tower for contempt. The King procured the release of S. and

the Warden was then released from the Tower after having been reprimanded.

(f) *1 Jac. I, c. 13, 1603.*

Passed as a result of *Shirley's Case*.

It recognised as law :—

- (i) The privilege of freedom from arrest.
 - (ii) The right of either House to set a privileged person at liberty.
 - (iii) The right to punish those who caused the arrest.
- (g) The privilege of freedom from arrest is now recognised for 40 days before and after session.
Goudy v. Duncombe (i).

Exceptions :—

Treason, felony, breach of the peace, seditious libel, criminal contempt of Court.

Long Wellesley's Case (j).

(2) **Freedom of Speech.**

(a) *Strode's Case, 1512.*

S. was imprisoned by order of the Stannary Court (*k*) for having introduced into Parliament certain Bills which that Court did not like.

(b) *Strode's Act (l).*

Three weeks later S. was released, and the above Act was passed stating that "all . . . punishments, &c., against all persons . . . of any Parliament . . . for speaking . . . of any matter concerning the Parliament be of none effect."

(c) *R. v. Elliot, Hollis & Valentine, 1629 (m).*

These men were imprisoned for seditious words spoken in Parliament. The court held that *Strode's Act* was not a public Act and gave judgment for the Crown.

(d) In 1667 both Houses passed a resolution that *Strode's Act* was a general law declaratory of the ancient and necessary rights and privileges of Parliament.

(e) In 1668 the Lords reversed the judgment in *Elliot's Case*.

(i) (1847), 1 Ex. 430; Thomas 39.

(j) (1831), Journ. H. of C. LXXXVI, 701.

(k) See *post*, p. 104.

(l) 4 Hen. VIII, c. 8.

(m) 3 S. T. 294; Thomas 36.

(f) *Bill of Rights, 1689 (n).*

“ The freedom of speech . . . in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.”

(3) **Access to the Crown through the Speaker.**

(4) **Most Favourable Construction.**

That the Crown will place the most favourable construction upon the proceedings of the Commons.

(B) THOSE NOT CLAIMED BY THE SPEAKER.

(1) **Right to Regulate its own Constitution.**

(A) **RIGHT TO SETTLE DISPUTED ELECTIONS.**

(i) The right to determine election disputes was originally vested in the King and his Council.

(ii) The first intervention of the Commons in determining election disputes occurred in 1384, when the borough of Shaftesbury presented a petition to “ The King, Lords and Commons,” complaining of a false return by the Sheriff of Dorset and asking for a remedy.

(iii) *The Case of Goodwin and Fortescue, 1604.* James I, in summoning his first Parliament, forbade the election of bankrupts and outlaws. G. was elected for Buckingham, but the King refused to recognise his return on the ground that he had been outlawed some years before. Another writ was issued and F. was elected. The Commons voted that G. was elected and ordered him to take his seat. After a long dispute, the King admitted that the Commons were the proper judges of the returns.

(iv) *Ashby v. White, 1702 (o).*

As a result of a dispute between the Commons and the Lords, the Commons passed a resolution that “ the determination of the right of election of members to serve in Parliament is the proper business of the House of Commons. . . .”

(n) 1 W. & M., sess. 2, c. 2.

(o) 14 S. T. 695—888; Thomas 29; and see *post*, p. 34.

- (v) The exclusive jurisdiction which the Commons eventually obtained in matters of election became abused by being used for party purposes.
- (vi) *Parliamentary Elections Acts, 1868 and 1879 (p)*. The trial of disputed elections is vested in the Judges of the High Court. Two Judges from the rota of election Judges now decide these cases, and effect is given to their decisions by the Commons.

(B) RIGHT TO SUSPEND OR EXPEL MEMBERS.

Mitchell's Case (q).

Davitt's Case (r).

The House of Commons cannot prevent the re-election of a man who has been expelled; but it can expel him again when re-elected.

(2) Right to Regulate its Own Proceedings.

A Court of law will not interfere with the entire control of the House over its own proceedings.

Bradlaugh v. Gossett (s).

(3) Right to Exclude Strangers.

(4) Right to Prohibit Publication of Debates.

Fair and accurate reports are privileged.

Wason v. Walter (t).

(5) Right to Commit for Contempt.

- (a) The House of Commons may commit for a breach of its privileges.

Burdett v. Abbot (u).

- (b) A person not a member can be committed.

Howard v. Gossett (v).

- (c) A Court of law will not inquire into the ground of a commitment by the House of Commons.

Case of the Sheriff of Middlesex (w).

- (d) The person committed is released if Parliament be prorogued.

(p) 31 & 32 Vict. c. 125, amended by 42 & 43 Vict. c. 75.

(q) (1875), Journ. H. of C., CXXX, 235.

(r) (1882), *ibid.* CXXXVII, 140.

(s) (1884), 12 Q. B. D. 271; Thomas 45.

(t) (1868), L. R. 4 Q. B. 73; Thomas 166.

(u) (1811), 4 Taunt. 491; Thomas 34.

(v) 10 Q. B. 451; Thomas 45.

(w) (1840), 11 A. & E. 273; Thomas 44.

THE COMMONS IN CONFLICT WITH THE LAW COURTS AND THE LORDS.

- (1) *Ashby v. White, 1704 (x).*

A. was refused a vote by the returning officer. Judgment was recovered although no damage had been sustained, since the candidate for whom A. would have voted was elected. On a motion in arrest of judgment it was held that no action lay, but the Lords on appeal decided otherwise. The Commons then passed a resolution that this constituted a breach of their privilege; the Lords in their turn passed counter-resolutions.

- (2) *The case of the five Aylesbury men (y).*

Five men brought similar actions and were sent by the Commons to prison. On a writ of *habeas corpus* being unsuccessfully applied for, the men applied for a writ of error to take the question to the House of Lords. The Commons resolved that no writ of error lay, and petitioned Queen Anne not to grant it. The Lords then presented an address to the Queen stating that writs of error from inferior tribunals were *ex debito justitiæ* writs of right. The Queen referred the question to the Judges and 10 out of 12 certified to that effect. The Queen solved the difficulty by proroguing Parliament. This set the men at liberty and allowed them to pursue their legal remedies unfettered by Privilege, and they obtained verdicts in their favour.

The principle determined by these two cases is that the House of Commons has a right to determine all matters touching the election of its own members, but not to determine the rights of the electors.

- (3) *Stockdale v. Hansard, 1839 (z).*

The House of Commons instructed Messrs. Hansard to publish copies of reports of certain inspectors of prisons. Stockdale, considering himself libelled by these reports, sued Messrs. Hansard, and won, the Court holding that the House of Commons, by ordering a report to be printed, could not legalise the publication of libellous matter. In consequence of these proceedings, the *Parliamentary Papers Act, 1840 (a)*, was passed, which provided that all similar actions should be stayed on production of a certificate or affidavit that the paper complained of had been published by order of either House.

(x) 14 S. T. 695—888; Thomas 29.

(z) 9 A. & E. 1; Thomas 40.

(a) 3 & 4 Vict. c. 9.

(y) 2 Ld. Ray. 1105; Thomas 30.

CONFLICT BETWEEN THE TWO HOUSES.**(A) Before 1911.**

A Bill, to become law, had to receive the assent of both Houses before being sent to the King for the Royal Assent. The Lords had an absolute right of veto over any measure sent up for their assent by the Commons.

(B) The Parliament Act, 1911 (b).**(1) LORDS' VETO OVER MONEY BILLS ABOLISHED.**

If a money Bill is not passed by the Lords at least one month before the end of the session, it is presented to the King for the Royal Assent.

(2) SUSPENSIVE VETO OF TWO YEARS SUBSTITUTED FOR ABSOLUTE VETO.

If a Bill other than a money Bill is passed by the Commons in three successive sessions and rejected by the Lords in each of these sessions, such Bill shall (providing two years have elapsed between the first and third sessions) be presented to the King for the Royal Assent.

This Act was only assented to by the Lords on their being informed that if they rejected it the King would create a sufficient number of Peers to carry the measure over their heads.

PROCEDURE WITH REGARD TO BILLS.**PUBLIC BILLS**

May originate in either House.

Stages**(1) Either (a) MOTION FOR LEAVE TO INTRODUCE,**

Which is either carried or negatived without debate;

or (b) NOTICE OF MOTION.

Since 1902 a member wishing to introduce a Bill may, after notice, present it at the table without an order of the House.

Neither (a) nor (b) is necessary in the Lords; any member may, without notice or leave, present a Bill at the table.

(2) FIRST READING.

No amendment or debate.

(3) SECOND READING.**(a)** Main principles discussed.**(b)** If carried it goes**(i)** to a committee of the whole House if a money Bill or if the House so directs;**(ii)** otherwise to one of the six standing committees.**(4) COMMITTEE STAGE.**

Bill taken clause by clause and amendments made.

(5) REPORT STAGE.

The Bill is reported to the House; it is then considered in its amended form and further amendments made.

(6) THIRD READING.**(a)** *In the Commons*

Only verbal amendments can be made.

(b) *In the Lords*

New clauses may be added.

(7) SENDING ON THE BILL.

The Bill is then sent to the other House to receive its assent.

(8) THREE READINGS IN THE OTHER HOUSE.**(9) ROYAL ASSENT.****PRIVATE BILLS** (Acts concerning schemes of public utility affecting private interests, private persons or local Acts).

- (a)** Standing Orders 32 and 33 require that a petition + a copy of the Bill be lodged at the Private Bill Office, and a printed copy of the Bill at the Treasury and the G.P.O.
- (b)** Within one month any owners or occupiers of any land which would be affected by the scheme must be served by post with notice of the Bill.
- (c)** If Standing Orders be not complied with, a report to that effect is sent to the Select Committee on Standing Orders which has power to dispense with compliance.
- (d)** When these requirements have been complied with the Bill goes through stages similar to those of a public Bill.
- (e)** During the past 30 years Private Bill legislation has declined, chiefly owing to the machinery provided by Provisional Orders.

Provisional Order.

- (a)** Under various Acts of Parliament, public bodies and departments of the Government are authorised to inquire into matters which, in the ordinary course, could only be dealt with by a private Act of Parliament.
- (b)** These departments may make Orders for the regulation of such matters.

- (c) These Orders have no effect unless they are confirmed by an Act of Parliament, and are therefore called Provisional Orders.
- (d) Several Orders may be confirmed by one Act.
- (e) The object of this mode of proceeding is to save the trouble and expense of promoting a number of Private Bills.

MONEY BILLS.

- (a) Originate in the Commons only.
- (b) Shall not contain any other matter.
- (c) Lords cannot amend.
The Parliament Act, 1911 (c).
- (d) If the Lords do not assent, the Bill is sent over their heads to the King for Royal Assent.

THE REVENUE.

I. SOURCES OF PUBLIC REVENUE.

- (1) Hereditary Revenues of the Crown.
 - (a) These are commuted for a fixed Civil List (d).
 - (b) The whole of the hereditary revenues is now paid into the national Exchequer, and forms part of the income of the nation.
- (2) Taxes Imposed by Parliament.
 - (a) Those made payable by permanent Acts, and which would continue to be payable even if Parliament were not convened for several years, *e.g.*, stamp duties.
 - (b) Those made payable by yearly Acts, and which would not be payable if Parliament were not convened for a year, *e.g.*, income tax.

Therefore the revenue to-day is raised almost entirely by taxes which are imposed by statute, and it may be said to be the creation of Acts of Parliament.

II. AUTHORITY FOR EXPENDING THE PUBLIC REVENUE.

- (1) The Consolidated Fund.
 - (a) The whole revenue of the nation is paid into the

(c) 1 & 2 Geo. V, c. 13.

(d) The "Civil List" is the sum awarded to the King, Queen and certain members of the Royal Family in consideration of the King's assigning to the nation his life interest in the hereditary revenues of the Crown. It is audited by the auditor of the Civil List.

Bank of England to the account of His Majesty's Exchequer.

- (b) This account is known as the Consolidated Fund.
- (2) **Acts Sanctioning Expenditure (Appropriation Acts).**
 - (a) Not a penny of the revenue can be legally expended, except under authority of some Act of Parliament.
 - (b) These Acts are of two kinds :—
 - (i) **PERMANENT ACTS.**
 These create certain charges on the Consolidated Fund, known as *Consolidated Fund Charges* or *Services*.
E.g., The Civil List.
 Certain fixed salaries, *c.g.*, Judges, the Comptroller and Auditor General, the Speaker, etc.
 - (ii) **YEARLY ACTS.**
 The payments are voted every year by Parliament in Committee of Supply, and are known as *Supply Services*.
E.g., Army, Navy, Civil Service, and most of the expenses incurred by the Government.

III. SECURITY FOR PROPER APPROPRIATION.

An elaborate scheme of control and audit under an official called the Comptroller and Auditor General.

- (1) **The Comptroller and Auditor General.**
 - (a) Is independent of any change of Government.
 - (b) Is appointed by a patent under the Great Seal.
 - (c) Holds office during good behaviour.
 - (d) Is removable only on an address from both Houses of Parliament.
 - (e) His duties are regulated by statute (e) and include :—
 - (i) To see that no money leaves the Consolidated Fund without statutory authority.
 - (ii) To see that the money after it has left is properly applied.
 - (iii) To prepare accounts of income and expenditure for the Public Accounts Committee of the Commons.

(e) The *Exchequer and Audit Departments Act, 1866* (29 & 30 Vict. c. 39), as amended by the *Exchequer and Audit Act, 1921* (11 & 12 Geo. V, c. 52).

- (iv) To examine all appropriation accounts, accounts of receipts of revenue, stock and store accounts, cash accounts.
- (f) The Comptroller and Auditor General used to be assisted by an assistant Comptroller and Auditor, but this office was abolished in 1921.
Exchequer and Audit Act, 1921.
- (2) **The Paymaster General.**
 - (a) The officer who makes the various payments out of the public money required for the different departments of the State by issuing drafts on the Bank of England.
 - (b) He also has certain duties (regulated by the *Supreme Court Fund Rules, 1915*) which include :—
 - (i) The issuing of directions for the payment and transfer into Court of the moneys and securities belonging to the suitors.
 - (ii) The payment by drafts on the Bank of England of sums payable out of Court, and of the interest on funds in Court.
 - (iii) The keeping of the necessary accounts and the issuing of certificates and transcripts of accounts.

IV. FISCAL COMMITTEES AND ACTS.

- (1) **Committee of Supply.**
A committee of the whole House of Commons which :—
 - (1) Considers the estimates for the expenditure of the ensuing year.
 - (2) Votes the requisite grants of money.
- (2) **Committee of Ways and Means.**
After the Committee of Supply has voted the requisite grants the Committee of Ways and Means :—
 - (1) Authorises the imposition of any given tax.
 - (2) Passes resolutions that any sums of money voted shall issue out of the Consolidated Fund.
- (3) **Appropriation Act.**
 - (a) An Act settling what sums are to be paid out of the Consolidated Fund to the various Departments.
 - (b) It is passed at the end of each financial year.

(4) **Finance Act.**

- (a) Authorises and legalises the decisions as to taxation arrived at in the Committee of Ways and Means.
- (b) It is passed annually.

(5) **Consolidated Fund Acts.**

- (a) If money is wanted by Departments before the passing of the Appropriation Act, temporary statutes, authorising such payments, are passed.
- (b) These statutes are afterwards embodied in the Appropriation Act.

(6) **Public Accounts Committee.**

- (a) A standing committee of 15 members appointed at the beginning of every session.
- (b) They examine the accounts of the Consolidated Fund prepared and submitted to them by the Comptroller and Auditor General and report them to the House.
- (c) They do not check extravagance (the House does this) but merely check irregularity.

(7) **Select Committee.**

- (a) A committee composed of 11 members and formed at the commencement of Parliament.
- (b) It sorts out the Private Bills and sends them to the necessary committees for investigation.
- (c) It also appoints members of the Standing Committees and sometimes other committees.

CHAPTER IV.

THE EXECUTIVE.

THE CROWN.

TITLE.

(1) **BY STATUTE.**

Under the *Act of Settlement, 1700* (a).

(2) **AT COMMON LAW.**

Lineally :—males always take before females ; females take subject to primogeniture.

ACCESSION.

(a) “ *The King never dies.* ”

Immediately upon the decease of the reigning Prince his kingship by act of law, without any interregnum or interval, vests in the King's heir (b).

(b) *Representation of the People Act, 1867* (c).

The death of the King is not to affect the existence of Parliament at all.

(c) *Demise of the Crown Act, 1901* (d).

The holding of any office under the Crown shall not be affected by the demise of the Crown.

ALLEGIANCE.

(a) Allegiance = The natural and legal obedience which every subject owes to his Prince in exchange for the protection extended by the Prince to the subject.

(b) The *de facto* Sovereign is the head of the executive power, and as such is entitled to allegiance.

(c) *Calvin's Case* (e).

This case decided that Scottish *postnati* (i.e. born after the accession of James I to the throne of England) were not aliens, and that therefore the union of the two crowns

(a) 12 & 13 Will. III, c. 2.

(b) Bl. I, 249 : this is sometimes expressed by the statement “ The King is dead—Long live the King.”

(c) 30 & 31 Vict. c. 102, s. 51, ss. 8, 9.

(d) 1 Edw. VII, c. 5.

(e) (1608), 2 S. T. 559 ; Thomas 50.

conferred mutual naturalization upon the English and Scottish subjects of James I.

(d) The duty of allegiance is :—

- (1) Natural (birth).
- (2) Local (residence).
- (3) Acquired (naturalization).

NATURALIZATION.

Naturalization takes place when a person becomes the subject of a State to which he was previously an alien.

- (a) He acquires all political and other rights.
- (b) He becomes subject to all obligations to which natural-born members of the State are subject.

Before 1844.

A special Act of Parliament was required for an alien to become a British subject.

Naturalization Act, 1844 (Hutt's Act) (f).

On obtaining a certificate from the Home Secretary, and taking the oath of allegiance, an alien could acquire all the rights and capacities of a natural-born British subject, except certain specially excepted capacities, including that of becoming a Member of Parliament or a Privy Councillor.

Naturalization Act, 1870 (g).

Repealed and amended the Act of 1844.

- (a) An alien could acquire, hold and dispose of real and personal property in the United Kingdom (except British ships) in all respects as a natural-born British subject, but without the right to any office or franchise.
- (b) On obtaining a certificate of naturalization from the Home Secretary he became entitled to all political and other rights of a natural-born British subject.
- (c) A natural-born British subject might become a "statutory alien" by being voluntarily naturalized in a foreign State, and might re-acquire his British nationality by permission of the Home Secretary.

British Nationality and Status of Aliens Act, 1914 (h).

Repealed all previous legislation and amended and consolidated the law upon the subject.

(A) NATURAL-BORN BRITISH SUBJECTS.

- (1) Any person born within His Majesty's dominions and allegiance.

(f) 7 & 8 Vict. c. 66.

(g) 33 & 34 Vict. c. 14, amended by 35 & 36 Vict. c. 39.

(h) 4 & 5 Geo. V, c. 17.

(2) Any person born out of His Majesty's dominions whose father was a British subject at the time of that person's birth.

(8) Any person born on a British ship.

s. 1.

(B) NATURALIZED BRITISH SUBJECTS.

A certificate of naturalization will be granted by the Home Secretary to an applicant who :—

(1) Has resided five years in His Majesty's dominions.

(2) Is of good character.

(3) Has an adequate knowledge of English.

(4) Intends to continue to reside in His Majesty's dominions.

s. 2.

(C) WIVES.

(1) A female British subject who marries an alien takes her husband's nationality.

(2) A female alien who marries a British subject becomes a British subject.

(3) A woman who is a British subject, either by birth or marriage, may, if her husband ceases to be a British subject, retain her British nationality by making a declaration.

s. 10.

(4) By the *Aliens Order, 1920, s. 21.*

A female alien who has been deported from this country cannot (unless the Secretary of State otherwise directs) subsequently acquire British nationality by marriage or in any other way.

(D) LOSS OF BRITISH NATIONALITY.

(1) A British subject may become naturalized in a foreign country and thus cease to be a British subject.

(2) If he returns to his native land to reside permanently he may apply to the Home Secretary for readmission to his former status.

(3) A British subject cannot renounce his allegiance and become naturalized in a country with which this country is at the time at war.

R. v. Lynch (i).

British Nationality and Status of Aliens Act, 1918 (k).

(1) RESTRICTS THE GRANT OF CERTIFICATES OF NATURALIZATION.

No certificate shall for 10 years after the Great War

1914-18 be granted to any subject of a country which at the time of the passing of the Act was at war with His Majesty.

(2) **FACILITATES THE REVOCATION OF CERTIFICATES OF NATURALIZATION.**

- (a) Before 1914 certificates could not be revoked.
- (b) Act of 1914 enables a certificate to be revoked if obtained by fraud or false representation.
- (c) Act of 1918 provides many more grounds :—
E.g., Holder of certificate has traded with the enemy; or, been disloyal to His Majesty; &c.

(3) **WIVES.**

The British-born wife of an enemy alien may resume her British nationality on making a declaration that she desires to do so.

TREASON.

(A) **By the Statute of Treasons, 1351 (l).**

- (1) Compassing the death of the King, Queen or eldest son and heir.
- (2) Violating the King's consort, eldest daughter unmarried or the wife of the eldest son and heir.
- (3) Levying war against the King in his realm.
- (4) Slaying the King's chancellor, treasurer or justices when "doing their offices."
- (5) Adhering to the King's enemies in his realm, giving them aid or comfort in the realm, or elsewhere.

R. v. Lynch (m).

POINTS TO NOTE.

- (i) "*King's enemies.*"
 - (a) The subjects of all States against which His Majesty may have declared war are his enemies.
 - (b) So are the subjects of States in actual hostility with His Majesty, whether war has been declared or not.
 - (c) British subjects can never be deemed to be the King's enemies, and therefore to give relief or assistance to a rebel would not be treason within this branch of this statute.
- (ii) "*or elsewhere.*"
 These words refer to "adhering to the King's enemies": the words "giving them aid or comfort

(l) 25 Edw. III, c. 2.

(m) [1903] 1 K. B. 444; Thomas 180.

in the realm" being merely explanatory of the words "adhering to the King's enemies."

R. v. Casement (n).

(B) By Statutes of Anne (o).

- (1) Endeavouring by any overt act (p) to prevent the person entitled under the *Act of Settlement, 1700*, from succeeding to the Crown.
- (2) Maintaining by writing or printing that any person has any right to the Crown otherwise than by the *Act of Settlement*.

(C) By Statutes of George III (q).

- (1) The compassing or imagining or intending, either within the realm or without, of the King's death, destruction or bodily harm tending to death, destruction, maiming or wounding, imprisonment or restraint of the King's person, his heirs and successors.
- (2) Uttering or declaring any such treasonable intent by any overt act.

(D) Liability of Aliens.

- (a) An alien resident within British territory owes allegiance to the Crown and is therefore liable for treason.
- (b) He is still so liable even if an enemy is in military occupation of the territory in which he resides.

De Jager v. Att.-Gen. of Natal (r).

THE ROYAL PREROGATIVE.

"That pre-eminence which the King hath above all manner of men, and out of the course of the Common Law in right of his Royal Dignity" (s).

"THE KING CAN DO NO WRONG."

- (a) By no proceeding known to the law can the King be made personally responsible for any act done by him.
- (b) No one can plead the orders of the Crown in defence of any act not otherwise justifiable by law.

Sources of Friction with Parliament.

(1) ARBITRARY IMPRISONMENT.

- (a) *Magna Carta, 1215, s. 39 (t).*

"Nullus liber homo capiatur vel imprisonetur . . . nisi

(n) [1917] 1 K. B. 98; 12 Cr. App. Rep. 99.

(o) *Treason Act, 1702* (1 Anne, st. 2, c. 21), and 6 Anne, c. 4.

(p) "Overt act" = any act manifesting the criminal intention and tending towards the accomplishment of the criminal object.

(q) *Treason Act, 1795* (36 Geo. III, c. 7), and 56 Geo. III, c. 6.

(r) [1907] A. C. 326.

(s) Bl. vol. III.

(t) See *post*, p. 118.

per legale iudicium parium suorum vel per legem terrae.”

(“No freeman shall be seized or imprisoned . . . except by the legal judgment of his peers or by the law of the land.”)

- (b) *The Case of the Five Knights (Darnell's Case)*, 1627 (u).

A writ of *habeas corpus* was refused on the ground that they were imprisoned by the King's special command (“per speciale mandatum regis”).

- (c) *The Petition of Right*, 1628 (v).

Referring to the Case of the Five Knights, cites *Magna Carta*, s. 39, as its authority for declaring arbitrary imprisonment to be illegal.

- (d) *The Habeas Corpus Act*, 1679 (w).

An Act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas.

This Act is the greatest safeguard against arbitrary imprisonment.

(2) ARBITRARY TAXATION.

- (a) *Bate's Case*, 1606 (x).

James I imposed a customs duty without the consent of Parliament. Held to be legal.

- (b) *The forced loan in Middlesex*, 1626.

Charles I's attempt to raise money is pronounced by the Judges to be illegal.

- (c) *The Petition of Right*, 1628 (y).

Declares that a tax cannot be levied without the consent of Parliament.

- (d) *Hampden's Case*, 1637 (z).

Charles I causes writs to be issued for the collection of ship-money without Parliamentary authority. Held to be legal.

- (e) In 1640 the Long Parliament cancelled the judgment in the above case.

- (f) *The Bill of Rights*, 1689 (a).

“The levying money for or to the use of the Crown, by

(u) S. T. III, 114—139; Thomas 98.

(v) 3 Car. I, c. 1; see *post*, p. 122.

(w) 31 Car. II, c. 2; and see *ante*, p. 12.

(x) 2 S. T. 371; Thomas 17.

(y) 3 Car. I, c. 1; and see *post*, p. 122.

(z) 3 S. T. 825; Thomas 21.

(a) 1 W. & M., sess. 2, c. 2; see *post*, p. 123.

pretence of prerogative, without grant of Parliament . . . is illegal."

- (g) This has been rigidly upheld in several recent cases. *Att.-Gen. v. Wilts United Dairies, Ltd.* (b).
T. & J. Brocklebank, Ltd. v. The King (c).

(3) MAINTENANCE OF A STANDING ARMY.

- (a) Declared illegal by the *Bill of Rights, 1689*.
- (b) Legalised annually for one year by the *Army (Annual) Act*.

(4) MONOPOLIES.

- (a) A monopoly was a grant by the Crown to a subject of the sole right to "make, use, excise and vend" a particular article or commodity.

- (b) *The Case of Monopolies, 1602*.

The granting of a monopoly for the exclusive right of making, selling, buying or using any particular commodity was held to be illegal.

Darcy v. Allein (d).

- (c) *Statute of Monopolies, 1623* (e).

- (i) Monopolies in general declared illegal.

- (ii) Made it legal to grant a patent for the sole working of an invention.

- (d) *The great case of monopolies, 1683-5*.

East India Co. v. Sandys (f).

- (i) The grant of sole trading to the company held to be good.

- (ii) In 1694 the company obtained a further charter, upon which the House of Commons passed a resolution that "All subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament."

- (e) Before 1883 the Crown could use a patented invention without any payment to the patentee.

Feather v. The Queen (g).

- (f) By the *Patents Act, 1883* (h), the King could not use any invention protected by a patent.

(5) SUSPENDING AND DISPENSING POWER.

Suspending power = The Royal claim to suspend altogether the operation of any statute.

(b) (1922), 38 T. L. R. 781; Thomas 27.

(c) (1924), 40 T. L. R. 237; Thomas 28.

(d) 11 Rep. 85; Thomas 1.

(e) 21 Jac. I, c. 3.

(f) 10 S. T. 371; Thomas 1.

(g) (1865), 6 B. & S. 257.

(h) 46 & 47 Vict. c. 57: now repealed and replaced, with amendments, by the Patent Acts, 1907 (7 Edw. VII, c. 29) and 1919 (9 & 10 Geo. V, c. 80).

Dispensing power = The Royal claim to exempt individuals from the operation of the penal laws.

- (a) *Godden v. Hales*, 1686 (i).

Dispensing power of the Crown held to be legal.

- (b) *The Seven Bishops' Case*, 1688 (j).

Where a petition stating that the dispensing power was illegal was held not to be seditious libel.

N.B.—Suspending power never was legal.

Dispensing power seems legal if the power to pardon is legal.

- (c) *The Bill of Rights*, 1689 (k).

(1) Suspending power declared illegal.

(2) Dispensing power “*as exercised of late*” declared illegal.

(3) King is not prevented from pardoning *after conviction*.

(4) Dispensing power made illegal unless allowed by statute. (It never has been allowed, and therefore is illegal to this day.)

(6) CONTROL OF THE JUDICIARY.

- (a) Before 1700 Judges were appointed by the Crown, and held office during the King's good pleasure (*durante bene placito*).

- (b) The Stuarts used this to bring undue pressure to bear upon the Judges in order to obtain verdicts in favour of the Crown.

- (c) *The Act of Settlement*, 1700 (l).

(1) Judges are to hold office during good behaviour (*quamdiu se bene gesserint*).

(2) They are to be removable only on an address presented by both Houses of Parliament.

- (d) These provisions were confirmed by the *Judicature Act*, 1875 (m), and again in 1925 by the *Supreme Court of Judicature (Consolidation) Act*, (n).

(7) LEGISLATION BY PROCLAMATION.

- (a) In the sixteenth century the Crown frequently created new laws by Proclamation, and enforced them in the Court of Star Chamber.

(i) 11 S. T. 1165; Thomas 8.

(j) 12 S. T. 183; Thomas 9.

(k) 1 W. & M., sess. 2, c. 2.

(l) 12 & 13 Will. III.

(m) 38 & 39 Vict. c. 77, s. 5.

(n) 15 & 16 Geo. V, c. 49, s. 12.

- (b) *Statute of Proclamations, 1539 (o).*
The King might set forth Proclamations as obligatory on the subject as an Act of Parliament.
- (c) Repealed by statute in 1547 (p).
- (d) *The Case of Proclamations, 1610 (q).*
The King cannot legislate by Proclamation unless the Proclamation is authorised by some Act of Parliament.
- Att.-Gen. v. Brown (r).*
- (e) Legislation by Proclamation is allowed in the case of Crown colonies.

Present State of the Prerogative.

The King is nominally the supreme executive power, but there are several constitutional restraints upon the improper exercise of the Prerogative :—

- (1) OBEDIENCE ONLY ENFORCED IN THE COURTS.
 - (a) The King cannot determine any cause or proceeding save by the mouth of his Judges.
 - (b) He cannot legally authorise any Court to proceed contrary to English law.
- (2) THE KING'S COMMAND IS NO EXCUSE FOR A WRONGFUL ACT.
 - (a) *Ministerial responsibility.*
The King's ministers can be prosecuted and sued even for acts done by the King's express command, and they are responsible before the Courts of law even for the highest acts of State.
 - (b) *Liability of servants of the Crown.*
If the King commands an act which is unlawful, the Courts take no cognisance of the command, so that an action will lie against the King's servant in respect of the unlawful act.
- (3) PETITION OF RIGHT (PETITION DE DROIT).
 - (a) The mode by which a subject can claim relief from the Crown for certain kinds of injury arising from the acts of the Crown or its servants.
 - (b) The petition is a document in which the petitioner sets out his claim and prays the King to do him right and justice.
 - (c) The petition may be presented in any division of the High Court on the Home Secretary granting his fiat for that purpose.
 - (d) The right of every subject to petition the Crown or

(o) 31 Hen. VIII, c. 8.

(q) 12 Rep. 74.

(r) [1921] 3 K. B. 29; Thomas 4.

(p) 1 Edw. VI, c. 12, s. 4.

Parliament was denied by James II, but was affirmed by the Court in the *Seven Bishops' Case* (s) and finally by the *Bill of Rights, 1689* (t).

(e) The procedure is now regulated by the *Petition of Right Act, 1860* (u).

(f) A petition of right will lie :—

(i) To recover land, goods or money from the Crown.

Re X's Petition of Right (v).

De Keyser's Royal Hotel, Ltd. v. The King (w).

Robinson & Co., Ltd. v. The King (x).

(ii) To recover money due under a contract made with the Crown.

(iii) To recover unliquidated damages for breach of contract by the Crown or made on behalf of the Crown by a duly authorised agent.

Thomas v. The Queen (y).

(iv) For money payable to the suppliant under a grant by the Crown.

Lord Mayor, &c., of Dublin v. The King (z).

(4) NECESSITY FOR OBTAINING SUPPLIES.

The Treaty-making Power of the Crown.

(a) "It is the Sovereign's prerogative to make treaties, leagues and alliances with foreign States" (a).

(b) But no treaty should collide with the rights of the subject.

(c) A treaty affecting private rights requires the sanction of the Legislature.

The Parlement Belge (b).

It is a rule of international law that a ship of war, being Government property, is outside the jurisdiction of a foreign Court. The Crown, by a Convention concluded with Belgium, had arranged for the carrying of English mails by certain Belgian packet boats "belonging to the Belgian Government or freighted by order of the Government." The *Parlement Belge*, a Belgian packet boat, carrying English mails under this Convention, collided with an English boat in Dover Harbour. The question

(s) 12 S. T. 183; Thomas 9.

(t) 1 W. & M., sess. 2, c. 2.

(u) 23 & 24 Vict. c. 34.

(v) [1915] 3 K. B. 649; Thomas 63.

(w) [1920] A. C. 508; Thomas 64.

(x) (1921), 90 L. J. K. B. 1177; Thomas 66.

(y) (1874), L. R. 10 Q. B. 31; Thomas 75.

(z) [1911] 1 I. R. Rep. 83; Thomas 68.

(a) Blackstone.

(b) (1879), 4 P. D. 429; Thomas 335.

arose whether the Crown, by this Convention, had conferred upon such Belgian packet boats the status of Belgian ships of war when in British ports.

Held: The Crown has no authority to clothe with immunity foreign vessels which are really not vessels of war.

Judgment was therefore given against the *Parlement Belge* (c).

- (d) The Crown can legally, without Parliamentary sanction, make treaties—
 - (i) Ceding territory,
 - (ii) Concluding peace,
 - (iii) Declaring war.
- (e) By making a treaty the Crown may bind the Legislature, by a moral obligation, to carry it into effect.

THE PRIVY COUNCIL, THE CABINET AND THE MINISTRY.

THE PRIVY COUNCIL.

- (a) Much of the work formerly done by the Privy Council has passed into the hands of other departments of the Government.
- (b) Its duties are now mainly confined to:—
 - (1) FORMAL EXECUTIVE ACTS.
The machinery by which the Cabinet expresses the Royal pleasure.
 - (a) By Proclamation.
 - (b) By Order in Council.
 - (2) ACTS EXERCISED BY COMMITTEES.
The most important of these committees is the one known as *The Judicial Committee of the Privy Council* (d).
 - (3) APPOINTMENTS, &c.
Appointment to and resignation of offices under the Crown.

THE CABINET.

The Rise and Development of the "Cabinet System."

- (1) **The Cabal of Charles II, 1671.**

- (a) The King, finding the large Privy Council unwieldy for practical purposes, formed the habit, previous

(c) This judgment was subsequently reversed in the Court of Appeal, but on the ground that the *Parlement Belge* was outside the jurisdiction, because it was in the employ of the Belgian Government, quite independently of the Convention.

(d) See *post*, p. 110.

- to matters being introduced into the Privy Council, of consulting favourites who were members of it (e).
- (b) And so there grew up this small irregular body consisting of persons of the King's choice, who gave the King private advice but performed no executive functions.
 - (c) Thus the "Cabinet" had its origin in the Privy Council itself.
- (2) **The "Cabinet," 1690.**
- (a) This inner body of councillors became known as the "Cabinet," owing to the fact that it was in the habit of meeting in the King's Cabinet.
 - (b) It gradually grew in importance, until by the reign of William III it had become the *de facto* adviser of the King.
 - (c) But the Privy Council continued to be the *de jure* adviser of the King.
- (3) **The unpopularity of the Cabinet System with Parliament.**
Reasons :—
- (a) It brought the conduct of the Executive more immediately under the personal influence of the Sovereign.
 - (b) It lessened the responsibility to Parliament for the advice given to the Crown.
- (4) **The Act of Settlement, 1700 (f), attempts to stop the Cabinet System.**
- (a) Matters which were formerly transacted by the Privy Council are to continue to be transacted there.
 - (b) No person holding office under the Crown is to be capable of sitting in the House of Commons.
- (5) **The Cabinet System continues to develop until it supersedes the Privy Council.**
The above provisions of the *Act of Settlement, 1700*, are virtually repealed :—
- (a) *The Succession to the Crown Act, 1707 (g).*
Any member of the House of Commons who accepted any office of profit under the Crown should automatically lose his seat but might seek re-election, and if re-elected should be capable of sitting.

(e) The names of these men were Clifford, Arlington, Buckingham, Ashley and Lauderdale. From the initial letters of their names the word CABAL was formed.

(f) 12 & 13 Will. III, c. 2, s. 3, ss. 4 and 6.

(g) 6 Anne, c. 41, s. 25.

(b) *The Re-election of Ministers Act, 1919 (h).*

A member of the House of Commons shall not vacate his seat by reason of his acceptance of an office of profit under the Crown if that office be an office the holder of which is capable of being elected to or voting in the House.

(6) Present position of the Cabinet.

- (a) It is at the present day a body unknown to substantive law.
- (b) Its members are known to law only as Privy Councillors.
- (c) Nevertheless the King is constitutionally bound to take the Cabinet's advice.

THE MINISTRY.**The Prime Minister.**

- (a) An official unknown to substantive law.
- (b) The law only recognises him as a member of the Privy Council.
- (c) By royal warrant 1905 he is granted precedence next after the Archbishop of York (i).
- (d) He is head of the Cabinet.

Ministerial Responsibility.**THREE MEANINGS :—**

- (1) Individually and personally responsible for tortious and criminal acts.
- (2) Immediately responsible to Parliament and ultimately to the electorate for their official conduct.
- (3) In theory, still constitutionally responsible to the Crown.

Access to the Crown.

Individual Ministers have the right of access to the Crown.

Dissolution of the Ministry.

- (1) By resignation.
- (2) On dismissal by the Sovereign.

IMPORTANT INDIVIDUAL MEMBERS OF THE EXECUTIVE.**The Lord Chancellor.**

- (a) Appointed by the Crown on the advice of the Prime Minister.

(h) 9 & 10 Geo. V, c. 2, as amended by the *Re-election of Ministers Act (1919) Amendment Act, 1926* (16 & 17 Geo. V, c. 19).

(i) The order of precedence after members of the Royal Family is :—Ambassadors, the Archbishop of Canterbury, the Lord Chancellor, the Archbishop of York, the Prime Minister.

- (b) Is always a member of the Cabinet, and changes when the Ministry changes.
- (c) The principal legal dignitary.
- (d) *Ex officio* Speaker of the House of Lords.
- (e) Recommends for appointment by the Crown the Judges of the High Court (except the Lord Chief Justice, who is recommended by the Prime Minister), and County Court Judges.
- (f) He also recommends for appointment by the Crown the justices of the peace (on the recommendation of the lord-lieutenant of the county), and removes them from office.

The Law Officers.

- (a) The heads of the Bar in their respective countries, *viz.* :—

Attorney General	} for England.
Solicitor General	
Lord Advocate	} for Scotland.
Solicitor General	
- (b) They change with the Government, but are not, as a rule, in the Cabinet.
- (c) They are appointed by letters patent.

The Chancellor of the Exchequer.

- (a) Settles the amount of money to be paid out of the Consolidated Fund each year.
- (b) Sees that public money is properly spent.
- (c) Represents the Treasury in Parliament.
- (d) Prepares the Budget each year.
- (e) Adjusts taxation.

The Secretaries of State.

- (1) THE SECRETARY OF STATE FOR HOME AFFAIRS.
 - (a) The principal officer for maintaining the peace.
 - (b) Has general superintendence of prisons, criminal lunatic asylums, reformatories and the Metropolitan Police.
 - (c) Advises the Crown as to the exercise of the prerogative of mercy.
 - (d) Recommends for appointment borough recorders and Metropolitan stipendiary magistrates.
 - (e) Petitions of right are addressed to him.
 - (f) Numerous other duties dealing with naturalization, extradition, etc.
- (2) THE SECRETARY OF STATE FOR THE COLONIES AND THE DOMINIONS.
 - (a) Originally Colonial affairs were attended to by the Home Secretary.

- (b) In 1801 they were handed over to the Secretary of State for War.
 - (c) In 1859 (owing to the Crimean War) it was found necessary to separate the two offices, and Colonial affairs have since been attended to by the Colonial Secretary.
 - (d) In 1925 a separate Secretaryship of State was established for the Dominions (j).
 - (e) Though these two offices are kept separate and distinct, they are in fact held by the same person.
 - (f) Recommends for appointment by the Crown the Colonial Governors.
- (3) THE SECRETARY OF STATE FOR FOREIGN AFFAIRS.
- (a) Attends to communications from diplomatic and consular agents.
 - (b) Regulates the foreign policy of this country.
- (4) THE SECRETARY OF STATE FOR WAR.
- (a) Originally there were two secretaries for war.
 - (1) Secretary-at-War.
 - (2) Secretary of State for War (who also discharged the duties of Colonial Secretary).
 - (b) In 1859 the duties of Colonial Secretary and Secretary of State for War were separated.
 - (c) In 1863 the office of Secretary-at-War was abolished and his duties were amalgamated with those of the Secretary of State for War.
 - (d) In 1904 the Army Council was created to assist the Secretary of State for War.
- Duties :—
- (a) President of the Army Council.
 - (b) Responsible to the King and Parliament for all the business of the Army Council.
 - (c) Can reserve certain business to be transacted by himself.
- (5) THE SECRETARY OF STATE FOR INDIA.
- (6) THE SECRETARY OF STATE FOR AIR.
- Air Force Constitution Act, 1917 (k).*
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(j) See *post*, p. 60.

(k) 7 & 8 Geo. V, c. 51.

CHAPTER V.

THE EMPIRE.

THE BRITISH EMPIRE CONSISTS OF:—

The British Islands.

The United Kingdom (*a*), the Channel Islands (*b*) and the Isle of Man.

British Possessions.

Any part of His Majesty's dominions (*c*) exclusive of the United Kingdom.

India.

India is divided into :—

(1) BRITISH INDIA.

That part of India exclusive of native State territory and governed by His Majesty through the Governor General of India (*d*).

Interpretation Act, 1889 (e).

(2) Certain States possessing native rulers whose powers are subject to the control of the Governor General in Council,

e.g., Alwar, Patiala, Nabha.

(3) Independent native States whose rulers have absolute power to regulate internal affairs but whose foreign affairs are regulated by the British Government through a political agent,

e.g., Kashmir, Hyderabad (Deccan).

(*a*) By the *Royal and Parliamentary Titles Act, 1927* (17 Geo. V, c. 4), the "United Kingdom" = Great Britain and Northern Ireland: and by the *Interpretation Act, 1889* (52 & 53 Vict. c. 63), "Great Britain" = England, Scotland and Wales.

(*b*) The Channel Islands are Jersey, Guernsey, Alderney and Sark.

(*c*) For the purposes of this book the expression "dominion" (as opposed to "Dominion") means "any territory under the authority of His Majesty."

(*d*) The official designation of the Governor General is the title "Viceroy"; but all legislative Acts must receive the assent of "The Governor General in Council."

(*e*) 52 & 53 Vict. c. 63.

Protectorates (f).

- (a) Territory outside His Majesty's dominions and over which the Crown exercises some jurisdiction, *e.g.*,
 - (i) Regulates its foreign relations,
 - (ii) Exercises a veto on its legislation.
- (b) By the *Foreign Jurisdiction Act, 1890* (g).
 - (i) His Majesty has a wide jurisdiction to legislate for Protectorates by Order in Council.
 - s. 5.*
 - (ii) Every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament as soon as possible.
 - s. 11.*
 - (iii) Any Order in Council which is repugnant to any Act of Parliament affecting the Protectorate shall be void to the extent of its repugnancy.
 - s. 12.*
 - (iv) Officials acting under the *Foreign Jurisdiction Act, 1890*, are given certain protection.

Dependencies.

- (a) Places which have not been formally annexed to the British Crown and are therefore foreign territory, but which are practically governed by the British Crown and represented by it in any relations with other countries.
- (b) Most Dependencies are Protectorates.

Spheres of Influence.

- (a) Territory over which, by mutual arrangement, a particular State has the moral right to exclude other States from interference and to exercise a certain amount of control.
- (b) The administration of such territory is left in the hands of the native rulers, control being exercised merely in encouraging commerce and obtaining security for traders.
- (c) Spheres of Influence generally end in becoming Protectorates of the controlling State.

Mandated Territories.

- (a) Territory placed (h) under the jurisdiction of the British Crown to be administered under a mandate given to it by the League of Nations.

(f) "There is no statutory definition of a Protectorate": *per* Farwell, J., in *R. v. Crewe* (1910), 2 I. L. P., at p. 611.

(g) 53 & 54 Vict. c. 37.

(h) By the *Treaty of Versailles, 1919*, and the *Treaty of Lausanne, 1923*.

- (b) The territory is not British territory, nor are the inhabitants British subjects.
- (c) Such territories are :—
 - (i) Certain nations under Turkish rule.
 - (ii) Certain Central African territories.
 - (iii) Certain South West African territories.
- (d) The mandatory has to furnish annually to the League of Nations a report of the administration.

Colonies.

Any part of His Majesty's dominions exclusive of—

- (i) The British Islands and British India.

Interpretation Act, 1889 (i).

- (ii) The Dominions (j).

Statute of Westminster, 1931 (k).

Dominions.

The following are " Dominions " :—

- (i) Canada.
- (ii) Australia.
- (iii) South Africa.
- (iv) New Zealand.
- (v) Newfoundland.
- (vi) The Irish Free State (l).

Statute of Westminster, 1931 (m).

CLASSIFICATION OF COLONIES.

(I) Settled Colonies.

- (a) A place where British people have settled, and which at the time of settlement was either uninhabited or had no civilised government.
- (b) The settlers carry with them as much of the English Common Law and English Statute Law as is applicable to them in their particular circumstances.
- (c) The King in Council may

(1) Establish such laws and constitutions (2) Constitute such Courts and officers (8) Make such regulations for the administration of justice	}	as he may think fit in any British Settlement.
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(i) 52 & 53 Vict. c. 63, s. 18.

(j) For the purposes of this book the expression " Dominion " (as opposed to " dominion ") means one of those parts of the Empire which are by the *Statute of Westminster, 1931*, given the title of " Dominions."

(k) 22 & 23 Geo. V, c. 24, s. 11.

(l) *I.e.*, Southern Ireland; and see *ante*, p. 9, n. (j).

(m) 22 & 23 Geo. V, c. 24, s. 1.

- (d) (c) is not applicable where Representative Government has been granted.

British Settlements Act, 1887 (n).

(II) Conquered Colonies.

- (a) The conquered territory belongs to the King, and is subject to the legislation of the Imperial Parliament.
- (b) The conquered inhabitants become the subjects of the King.
- (c) Where a system of civilised law already exists it continues in force until altered.
- (d) Laws contrary to the fundamental principles of the British Constitution cease at the moment of conquest.
- (e) Where no system of law exists, British law is introduced.
- (f) By virtue of the prerogative, the Crown may, by Order in Council, proclamation or letters patent—
 - (1) Legislate,
 - (2) Appoint executive officers,
 - (3) Establish Courts of Justice.
- (g) The Crown cannot :—
 - (1) Make laws contrary to the fundamental principles of the British Constitution,
 - (2) Exempt persons from the laws of trade,
 - (3) Grant exclusive privileges,
 - (4) Legislate when a Representative Government has been granted, unless the right has been specially reserved.

(III) Ceded Colonies.

- (a) Territory which has been surrendered by treaty.
- (b) The rules applying to conquered colonies apply equally to ceded colonies, but the treaty of cession may place the inhabitants in a more favourable position than if they had been conquered.

CROWN COLONIES.

(a) DEFINITION.

- (1) Colonies in which the Crown has the sole power of legislation exercised through a Governor.
- (2) Colonies which possess executive and legislative councils, but in which the Crown nevertheless has the control of administration and legislation exercised through a Governor.

(b) Two KINDS :—

- (1) Those possessing two legislative chambers;
Upper, nominated by the Crown;
Lower, elected.
E.g., Bahamas, Barbados, Bermuda.
- (2) Those possessing one legislative chamber only, partly nominated by the Crown and partly elected.
E.g., British Guiana, Jamaica, Malta, Ceylon.
- (c) The Crown retains the right of veto but has not the right of legislation (unless expressly reserved).
- (d) The public officers are under the control of and responsible to the Crown.
- (e) Extra-territorial legislation is not as a rule allowed.
- (f) All laws repugnant to an Act of the Imperial Parliament extending to the Colony shall be void and inoperative in so far as they are so repugnant.

Colonial Laws Validity Act, 1865 (o).

DOMINIONS.

(a) THREE KINDS :—

- (1) Upper Chamber nominated } Canada, New Zealand,
Lower Chamber elected } Newfoundland.
- (2) Upper Chamber partly nominated }
Lower Chamber elected } South Africa.
- (3) Both Chambers elected—Australia, Irish Free State.
- (b) All Dominions possess representative and responsible Governments.
- (c) The public officers are responsible to the Dominion Legislature.
- (d) The Parliament of a Dominion has full power to make laws having extra-territorial operation (oo).
Statute of Westminster, 1931, s. 3.
- (e) The *Colonial Laws Validity Act, 1865 (o)*, shall not apply to any law made after 1931 by the Parliament of a Dominion.
Statute of Westminster, 1931.
 - (i) No law shall be void or inoperative on the ground that it is repugnant to any Act of the Imperial Parliament.

s. 2 (2).

- (ii) This provision will not apply to Australia, New Zealand or Newfoundland unless adopted by any one of them.

s. 10.

(o) 28 & 29 Vict. c. 63.

(oo) This section does not extend to the Legislatures of the Provinces or States of any Dominion.

- (f) No Act of the Imperial Parliament passed after 1931 shall extend to a Dominion unless the Dominion has requested and consented to the enactment thereof.
s. 4.
- (g) The Parliament of any Dominion has power to repeal or amend any Act of the Imperial Parliament in so far as the same is part of the law of the Dominion.
s. 2 (2).
- (h) An English Court cannot enter into the propriety or impropriety of any statute passed by a Dominion Parliament after 1931 (p).

POSITION OF A COLONIAL GOVERNOR.

- (1) Executive, legislative and military head of the colony.
- (2) All Bills must receive his assent.
- (3) Exercises the prerogative of mercy.
- (4) Issues warrants for the expenditure of public money.
- (5) Appoints and dismisses public servants.
- (6) Must not leave the colony without His Majesty's permission.
- (7) Is responsible to the Crown only.
- (8) Has absolute discretion within the limits of his authority, which are strictly defined.

Liability.

- (1) CIVIL LIABILITY.
 - (a) Both in the colony and in England for acts done in his private capacity.
Hill v. Bigge (q).
Musgrave v. Pulido (r).
 - (b) Liable in England for acts done in his official capacity outside the limits of his authority.
Mostyn v. Fabrigas (s).
- (2) CRIMINAL LIABILITY.
Liable in the King's Bench Division.

POSITION OF A DOMINION GOVERNOR.

He takes the place of a constitutional monarch and must act on the advice of his Ministers.

(p) Before 1931 an English Court could do so if the statute were *ultra vires*: *Tilonko v. The Att.-Gen. of Natal*, [1907] A. C. 93.

(q) (1841), 3 Moo. P. C. C. 465; Thomas 92.

(r) (1880), 5 A. C. 102; Thomas 94.

(s) (1774), 1 Sm. L. C. 591; Thomas 91.

POWER TO MAKE TREATIES.

(A) Colonies.

- (1) The treaty-making power resides in the Crown and the authority to make treaties is not possessed by any Colonial Government.
- (2) It may, however, be expressly allowed by Act of Parliament.
- (3) Imperial treaties bind the Colonies, but to-day the Imperial Government would not ratify any treaty without consulting the Legislature of any Colony likely to be affected by it.

(B) Dominions.

- (1) As the Parliament of any Dominion has full power to make laws having extra-territorial operation (*t*), it appears that any Dominion Parliament has power to make treaties.
- (2) The Parliament of any Dominion is free to determine whether it will or will not give effect to a treaty between the Imperial Government and a foreign Power.
- (3) If a Dominion Government has had an opportunity of shewing its attitude towards a treaty and has made no adverse comment, it is presumed to have concurred in the treaty.

NATURALIZATION.

- (a) A certificate may be granted by the Governments of Canada, Australia and New Zealand, and with the sanction of the Secretary of State by any other British Possession.
- (b) Such certificate may be revoked by the like authorities.

APPEALS FROM THE DOMINIONS AND THE COLONIES.

- (a) Are heard by the Judicial Committee of the Privy Council.
- (b) Appeals are either :—

(1) APPEALS OF RIGHT.

It is a general rule of law that an appeal to the King in Council does not lie as of right unless given by express enactment or express grant.

Where no appeal lies as of right, a petition must be addressed to the Crown for leave to appeal.

(2) APPEALS BY SPECIAL LEAVE.

The Crown retains the prerogative right to grant

(*t*) *Statute of Westminster, 1931* (22 Geo. V, c. 4).

special leave to appeal in every case, unless there is a special statute to the contrary.

Nadan v. The King (u).

Leave to appeal will not be granted save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of a considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

It is not usually granted in criminal cases. It is generally allowed where the rights of a Dominion or Colonial Legislature are involved.

(3) APPEALS BY LEAVE OF THE COURT APPEALED FROM.

(u) [1926] A. C. 482.

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CHAPTER VI.

THE CONSTITUTIONS OF THE DOMINIONS.

	CANADA.	AUSTRALIA.	SOUTH AFRICA.
Statutes upon which the Constitutions rest :—	British North America Acts, 1867 to 1915 (a).	Commonwealth of Australia Constitution Act, 1900 (b).	South Africa Act, 1909 (c).
Executive (h).	Governor General. Privy Council.	Governor General. Federal Executive Council.	Governor General. Executive Council.
Legislature (i).	Governor General. Senate. House of Commons.	Governor General. Senate. House of Representatives.	Governor General. Senate. House of Assembly.
Upper House.	96 members appointed by the Governor General for life (j).	6 members chosen for 6 years from each State. The number may be increased or diminished so long as each State is equally represented and no original State (k) has less than 6 Senators.	40 members who hold office for 10 years. 8 nominated by the Governor General. 8 elected for each of the 4 Provinces by the Provincial Councils and the House of Assembly.

(a) 30 & 31 Vict. c. 3; 34 & 35 Vict. c. 28; 49 & 50 Vict. c. 35; 5 & 6 Geo. V, c. 45.

(b) 63 & 64 Vict. c. 12.

(c) 9 Edw. VII, c. 9.

(d) 15 & 16 Vict. c. 72, as amended by the *N. Z. Constitution (Amendment) Act, 1857* (20 & 21 Vict. c. 53).

(e) 5 Geo. IV, c. 67, and 5 & 6 Vict. c. 120.

(f) 13 Geo. V, c. 1.

(g) 13 Geo. V, c. 2.

NEW ZEALAND.	NEWFOUNDLAND.	IRISH FREE STATE.
New Zealand Constitution Act, 1852 (d).	Newfoundland Acts, 1824 and 1842 (e).	Irish Free State Constitution Act, 1922 (f). Irish Free State (Consequential Provisions) Act, 1922 (g).
Governor. Executive Council.	Governor. Executive Council.	Governor General. Executive Council.
Governor. Legislative Council. House of Representatives.	Governor. Legislative Council. House of Assembly.	Governor General. Senate (Seanad Éireann). Chamber of Deputies (Dáil Éireann).
Appointed by the Governor for 7 years.	18 members, including the President, nominated by the Crown and holding office during pleasure. The Governor has power to fill up vacancies provisionally but not beyond 15.	60 members elected for 12 years, one-quarter being elected every 3 years.

(h) The various Acts state that the executive power is vested in the Crown: this table gives, as part of the Executive, the representative of the Crown.

(i) In the Irish Free State the Legislature is called "Oireachtas."

(j) By the Act of 1867 the number of Senators was seventy-two; which number was raised to ninety-six by the Act of 1915.

(k) "Original States" are such States as were parts of the Commonwealth at its establishment.

	CANADA.	AUSTRALIA.	SOUTH AFRICA.
Lower House elected for :—	5 years.	3 years.	5 years.
Conflict between the two Houses.	The only remedy is for the Governor General to nominate sufficient new Senators to pass the Bill. This he has power to do under s. 6 of the Act of 1867 as amended by s. 1 (1) (iii) of the Act of 1915.	Bill passed twice within 3 months by the Lower House. Governor General dissolves both Houses. Bill passed a third time. Joint sitting of both Houses at which an absolute majority will pass the Bill.	Bill passed twice in consecutive sessions in the Lower House (<i>i.e.</i> , once in each session). Joint sitting of both Houses at which an absolute majority will pass the Bill.
To amend the Constitution.	Can be done only by an Act of the Imperial Parliament.	(1) Proposed amendment passed by an absolute majority of both Houses. Referendum not less than 2 and not more than 6 months after such passage. The Referendum must be by— (i) A majority of the electors in a majority of the States; and (ii) A majority of the electors of the whole Commonwealth. (2) If the proposed amendment be passed by one House twice, 3 months elapsing between each passage, the Governor General may send it to a Referendum.	Both Houses sit together. At the third reading the proposed amendment must be agreed to by two-thirds of the total number of both Houses.

NEW ZEALAND.	NEWFOUNDLAND.	IRISH FREE STATE.
	4 years.	4 years.
Joint sitting of both Houses. If an agreement cannot be arrived at, both Houses are dissolved.	The powers of the Upper House are regulated by provisions somewhat similar to those of the <i>Parliament Act, 1911</i> (1).	The Seanad can hold up a Bill passed by the Dail for 270 days. At the end of that time, if no agreement be reached, the Bill is deemed to have been passed by both Houses.
The General Assembly (m) may legislate to amend the Constitution (with certain exceptions) (n).	Can be done only by an Act of the Imperial Parliament.	The proposed amendment must be submitted to a Referendum. A majority of the registered electors must poll their votes. Either— (i) a majority of the registered electors, or (ii) two-thirds of those who poll, must support the proposed amendment.

(1) 1 & 2 Geo. V, c. 13; and see *ante*, p. 35.(m) *I.e.*, the Dominion Parliament.(n) This power was conferred by the *N. Z. Constitution (Amendment) Act, 1857* (20 & 21 Vict. c. 53).

	CANADA.	AUSTRALIA.	SOUTH AFRICA.
LEGISLATIVE PROCEDURE.			
(A) Governor General (or Governor) <i>re</i> Bills passed.	Governor General may :— (a) Assent. (b) Reject. (c) Reserve for the Crown.	Governor General may :— (a) Assent. (b) Reject. (c) Reserve for the Crown. (d) <i>S u g g e s t</i> amendments.	Governor General may :— (a) Assent. (b) Reject. (c) Reserve for the Crown. (d) <i>S u g g e s t</i> amendments.
(B) Crown may disallow within	2 years.	1 year.	1 year.
(C) Reserved Bill must be approved within	2 years.	2 years.	1 year.
(D) Money Bills.	(a) Originate in the Lower House. (b) Must not contain any other matter.	(a) Same. (b) Same. (c) Senate may not amend, but may request the Lower House to do so.	(a) Same. (b) Same. (c) Senate may not amend.
JUDICATURE.			
(A) Courts of first instance.	Supreme Court.	High Court.	Supreme Court.

NEW ZEALAND.	NEWFOUNDLAND.	IRISH FREE STATE.
Governor may :— (a) Assent. (b) Refuse assent. (c) Reserve for the Crown.		Governor General may :— (a) Assent. (b) Withhold assent. (c) Reserve for the Crown.
2 years.		1 year.
2 years.		1 year.
(a) Same. (b) Same. (c) Powers of the Upper House are curtailed by provisions similar to the <i>Parliament Act, 1911.</i>	(a) Same. (b) Same. (c) <i>Same as in New Zealand.</i>	(a) Same. (b) Same. (c) Seanad may not amend but may recommend amendments. (d) After 21 days the Seanad must return the Bill to the Dail, which may pass it with or without any or all of the recommendations. (e) If after 21 days the Seanad has not returned the Bill to the Dail, the Bill is deemed to have been passed by both Houses.
Supreme Court.	Supreme Court.	High Court.

	CANADA.	AUSTRALIA.	SOUTH AFRICA.
J U D I C A T U R E— <i>continued.</i> (B) Appeals from (A) to—	(i) The Supreme Court of Appeal (p). (ii) Thence to the Judicial Committee of the Privy Council by special leave obtained by a Petition of Right.	Same, by leave of the High Court.	(i) The Appellate Division of the Supreme Court. (ii) Thence to the Judicial Committee of the Privy Council by leave of the Supreme Court.
(C) State Courts.	Each Province has a Supreme Court.	Same.	No State Courts. There are local and provincial divisions of the Supreme Court.
(D) Judges—ap- pointed by :—	Governor General.	Governor General in Council. Removable only on an address from both Houses.	Governor General in Council.
P R O V I N C E S. (A) Provincial Governors.	Lieutenant Governor appointed by the Governor General. He holds office during pleasure of the Governor General but cannot be removed within 5 years from his appointment except for cause assigned.	Governor appointed by the Crown.	Administrator appointed by the Governor General for 5 years.

NEW ZEALAND.	NEWFOUNDLAND.	IRISH FREE STATE.
	Judicial Committee of the Privy Council by special leave obtained by a Petition of Right.	(i) The Supreme Court. (ii) Thence to the Judicial Committee of the Privy Council by special leave obtained by a Petition of Right.
—	Crown.	Governor General on the advice of the Executive Council. Removable only on an address from both Houses.
—	—	—

(p) Established in 1875 under section 101 of the Act of 1867 by 38 Vict. c. 11, re-enacted in 1906 by 6 Edw. VII, c. 139.

	CANADA.	AUSTRALIA.	SOUTH AFRICA.		NEW ZEALAND.	NEWFOUNDLAND.	IRISH FREE STATE.
PROVINCES— <i>continued.</i> (B) Provincial Legislatures.	Ontario New Brunswick Manitoba British Columbia Prince Ed-ward I. Alberta Saskatchewan Quebec Nova Scotia (a) Legislative Council nominated by Lt. Gov. (b) Elected Legislative Assembly. Dominion Government may disallow provincial legis-lation within one year. The Parliament of Canada may estab-lish new Provinces and provide for the Constitution there-of (q).	N.S.W. } (a) Legis- Queens- } lative land (r) } Council } nominated } by the } Crown. (b) Elected Assembly. Victoria } (a) Elected S. Aus- } Legisla- tralia } tive Coun- W. Aus- } cil. tralia } (b) Elected Tas- } Assembly. mania } Federal Government has no control over State legislation. The Federal Parlia- ment may admit new States to the Commonwealth on such conditions as it may think fit (s).	Cape Colony. Natal. Transvaal. Orange Free State. Each have (a) Legislative Coun- cil elected for 3 years. (b) Executive Com- mittee composed of Administra- tors and 4 Members elected by the Legis- lative Council. Ordinances to Gover- nor General for assent, veto or reservation. The Parliament may alter the bound- aries of any Province or form a new Province out of Provinces within the Union (t).				

(q) *British North America Act, 1871* (34 & 35 Vict. c. 28).

(r) In Queensland the second chamber was abolished in 1922.

(s) *Commonwealth of Australia Act, 1900*, art. 121.(t) *South Africa Act, 1909*, art. 149.

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PART II.

LEGAL HISTORY.

CHAPTER I.

SOURCES OF THE COMMON LAW.

(I) ROMAN LAW.

- (a) The history of English Law may be said to begin about the time when the history of Roman Law comes to an end, A.D. 560.
- (b) The influence of Roman jurisprudence was hardly felt.
- (c) No passage in the Anglo-Saxon Doms shows any knowledge of Roman Law books.
- (d) But though Roman jurisprudence did not survive in Britain, the traditions of Roman civilisation were of great importance.
- (e) The main force which made for the improvement of law was the Church, Catholic and Roman, which carried with it wherever it went the institutions and traditions of Roman civilisation.
- (f) For example, the making of wills, a Roman institution, was a common practice among the Anglo-Saxons; and this practice is due to the Church, which was herself a great recipient of testamentary gifts.
- (g) But though the Anglo-Saxons got the *idea* of making wills from Rome, they had no knowledge of the Roman *law* of wills.
- (h) The Church in fact discouraged the study of Roman Law; Pope Honorius III forbade it to be taught in the schools of Paris, and, following this example, Henry III issued a similar prohibition to the schools of London in 1234.
- (i) Whatever influences Roman Law had in England, therefore, were secret and almost illicit.

(II) THE ANGLO-SAXON DOOMS.

- (a) The first English laws put into writing were those of Ethelbert, King of Kent, A.D. 600.
- (b) Of the existing Anglo-Saxon laws, those of Ethelbert, Hlothere and Eadric, Withred, Ini, Edward the Elder, Athelstan, Edmund and Edgar are of the nature of amendments of custom.
- (c) Those of Alfred, Ethelred, Canute, and those described as Edward the Confessor's, aspire to the character of codes.
- (d) But English Law, from its first to its latest phase, has never been embodied in an authoritative, exhaustive and systematic code.
- (e) There have been several publications of these "Dooms," which were largely written in Anglo-Saxon, though there are some Latin versions of the Norman period.

(III) THE LEX TERRAE.**Three Compilations of Law during the Norman Period.**

- (1) **LEGES EDWARDI CONFESSORIS.**
Purporting to be an official compilation of the old Anglo-Saxon laws.
- (2) **LEGES WILLELMI PRIMI.**
 - (a) An unofficial compilation of old English Dooms illustrative of the Feudal System.
 - (b) It consists of three books :—
 - (i) Anglo-Norman laws.
 - (ii) Civil law.
 - (iii) The Dooms of Canute.
- (3) **LEGES HENRICI PRIMI.**
 - (a) A collection of legal memoranda and records of custom, illustrated by reference to the civil and canon laws, and containing many traces of English jurisprudence.
 - (b) Not laws of Henry I at all, but probably compiled under Henry II, and shew the state of the land at that time.

(IV) CANON LAW.

- (a) William I by an Ordinance severed the ecclesiastical jurisdiction from the temporal.
- (b) This gave immense power to the Church Courts, the business of which rapidly increased.

- (c) Any matter which could be claimed to pertain to the cure of souls was immediately allocated to these Courts.
- (d) Examples of matters thus claimed are those affecting matrimony, disputes with regard to wills, and the distribution of property for pious uses.
- (e) To this day Probate and Divorce are dealt with by the same Division of the High Court of Justice.
- (f) The law administered in these Church Courts was known as Canon Law; it was a series of rules culled from various Papal Decretals, *e.g.*, those of Gregory IX (1234), those of Boniface VIII (1298), and those of Clement V (1317).
- (g) In matters properly cognisable in the Church Courts, this Canon Law, which was sanctioned by the Pope, was binding on all persons in England.

(V) CHARTERS.

- (a) These "Charters" were formal grants of rights and recognitions of claims ceded by the Norman conquerors to their conquered subjects.
- (b) Important examples are :—
 - (i) William I's Charter to the City of London.
 - (ii) Henry I's Charter of Liberties, 1100.
 - (iii) Henry I's Charter to the citizens of London.
- (c) As the royal power diminished, the Charters took the form of "Concordats" or agreements between the King and his subjects.
- (d) Examples of this are afforded by :—
 - (i) The Constitutions of Clarendon, 1164.
 - (ii) The Provisions of Oxford, 1258.

(VI) RECORDS.

- (1) **Domesday Book, 1086.**
 - (a) This has been described as "the greatest legal monument of the Conqueror's reign."
 - (b) It was
 - (i) A record of local customs before the Conquest.
 - (ii) A great census roll of the nation, and of the taxes that could be levied.
 - (c) It definitely laid down the principle that ownership (not possession) of all land belonged to the King, and that everyone held of him, thus insisting that every man was the King's man and owed allegiance to him.

(2) **The Pipe Rolls.**

- (a) Henry I established an orderly system of national finance, of which a record was kept.
- (b) The sheriffs' accounts for 1132 are still extant on what is called the Pipe Roll of 31 Hen. I, and is one of our most valuable sources of information.

(3) **The Plea Rolls.**

- (a) These were the Rolls of the various Courts recording the facts of each case, the judgment and often a note stating the reasons for the judgment.
- (b) Pleas heard by the Curia Regis were enrolled as early as Henry II.
- (c) The earliest now existing is 27 Hen. II.
- (d) At first these Rolls made no distinction between Courts, since all pleas were heard in the Curia Regis.
- (e) But as the Curia Regis split up into different divisions, so each of these divisions had its Plea Rolls, viz. :—
 - (i) Exchequer Rolls—those of the Court of Exchequer.
 - (ii) De Banco Rolls—those of the Court of Common Pleas.
 - (iii) Coram Rege Rolls—those of the Court of King's Bench.
- (f) These names first appear in the reign of Henry III.

(VII) TEXT BOOKS.(1) **Glanville.**

- (a) Justiciar of Henry II.
- (b) Author of *De Legibus et Consuetudinibus Angliæ*, 1187-9, the earliest treatise on English law.
- (c) Deals only with the working of the King's Court.
- (d) States that the customs of the local Courts are so various and confused that it would be impossible to put them into writing.
- (e) The law contained in this work is mostly land law, since it was with land that the Royal Court was chiefly concerned.

(2) **Bracton.**

- (a) Justice of the Court of King's Bench of Henry III.
- (b) Author of a work also called *De Legibus et Consuetudinibus Angliæ*.

- (c) This is the greatest authority on English mediæval law.
 - (d) It has been suggested that the immediate object which Bracton had in view in composing his work was to draw up a manual of the Common Law of England for the use and instruction of the Justices in Eyre.
 - (e) The work is largely influenced by Roman legal ideas.
- (3) **Littleton.**
- (a) A Yorkist Judge.
 - (b) Author of a treatise called *The New Tenures*, 1475.
 - (c) This was the first attempt to codify the law of Real Property.
 - (d) It is in the form of letters addressed to the author's son, supposed to be an undergraduate at Cambridge.
 - (e) Though, as family correspondence, it is somewhat heavy in style, as a legal text-book it is clear and brief.
- (4) **Fortescue.**
- (a) A Lancastrian, contemporary of Littleton.
 - (b) Author of *De Laudibus Legum Angliæ*.
 - (c) But he was more politician than lawyer, and his treatise is therefore more useful as a history of the times than as a legal text-book.
- (5) **Fitzherbert.**
- (a) A Judge of the reign of Henry VIII.
 - (b) His works include :—
 - (i) *Graunde Abridgement*.
An abridgment of the Year Books.
 - (ii) *New Natura Brevium*.
A treatise upon writs.
 - (iii) *The Diversity of the Courts*.
 - (iv) *The Justice of the Peace*.
A treatise on the criminal procedure of the period, and as such of great value.
- (6) **Coke.**
- (a) Sir Edward Coke was Attorney General in 1594, Chief Justice of the Common Pleas in 1606, Chief Justice of the King's Bench in 1613, and was dismissed in 1616 as a result of various quarrels with James I.

(b) As a result of his dismissal, he became strongly anti-royalist, and this bias is apparent in his writings.

(c) His principal works are :—

(i) *The Reports*.

A series of Law Reports, some of which could not be published until after his death in view of the opinions therein expressed.

(ii) *Institutes of the Laws of England, 1628*.

Published in four parts :—

(1) A translation and commentary of Littleton's *Tenures*.

(2) Treatise upon various old statutes and Magna Carta.

(3) Criminal Law.

(4) The Jurisdiction of the Courts.

The last two are disfigured by the heat of the political combat into which he was drawn.

(d) Coke worshipped the Common Law, and stubbornly defended what he believed to be its rights.

(e) It has been said that this very stubbornness was largely responsible for that Rule of Law which is to-day a characteristic of our Constitution.

(7) **Hale.**

(a) Sir Matthew Hale took the side of the King in his struggle with Parliament in 1649.

(b) Later on he subscribed the engagement to be faithful to the Commonwealth and in 1654 was made a Judge of the Common Pleas.

(c) In 1660 he was made Chief Baron of the Exchequer and Lord Chief Justice in 1671.

(d) His chief works are *History of the Common Law*, *Analysis of Law*, and *Treatise on Pleas of the Crown*, all of which are works of authority.

(e) He was distinguished by his candour, kindly disposition and piety; his habits and tastes were most simple, and to the end of his days he was an earnest student of theology and law.

(8) **Blackstone.**

(a) Sir William Blackstone was Solicitor General in 1763, Judge of the King's Bench in 1770, and shortly afterwards of the Common Pleas.

(b) His most famous work is the *Commentaries on the Laws of England* written in 1765.

- (c) As a writer upon law he has been criticised as being guilty of a loose terminology and an unscientific arrangement.
- (d) But Bentham, while exposing these faults, states that Blackstone, "first of all institutional writers, taught jurisprudence to speak the language of a scholar and a gentleman."

(VIII) THE YEAR BOOKS.

- (a) Profess to be reports of cases decided in the King's Courts from the thirteenth to the sixteenth century.
- (b) They begin in the reign of Edward I and come to an end in the reign of Henry VIII.
- (c) Entirely anonymous, and probably without even quasi-official authority.
- (d) Derive their name from the fact that they were grouped under the regnal years of the various Kings with whose reigns they deal.
- (e) Contain accounts of arguments often without decisions.
- (f) Originally were not regarded as authoritative.
- (g) The idea that they were so is due to the writings of Plowden, Coke, Sir Francis Bacon, and others.
- (h) This idea spread until in the eighteenth century it was the accepted view (a).
- (i) The modern idea of the Year Books is that they are a series of informal notes jotted down by law students who frequented the Courts and noted anything which they thought might be worth remembering.

HISTORY OF LANGUAGES OF THE LAW.

(1) Reports.

- (a) In legal terms there is a great preponderance of words of French origin—*e.g.*, Sovereign, Baron, Parliament.
- (b) A certain number are of English origin—*e.g.*, King, Queen, Sheriff.
- (c) French did not become the language of the law till long after the Norman Conquest.
- (d) French was the language of the King's Courts, and as the Common Law developed became the legal language, remaining so till 1362, when an Act was passed (in French) that all legal proceedings should be in English.

(a) Blackstone, I, 72.

- (e) The Plea Rolls were in Latin, but in 1731 an Act was passed that they should be in English.
- (f) Law Reports were originally in French.
- (g) The Year Books start in French but finish in English.
- (h) French did not entirely cease until after Charles I.

(2) Statutes.

- (a) Before 1258 the chief legislative enactments were in Latin.
- (b) The first statute in French is the *Provisions of Oxford*, 1258.
- (c) From that date they were in Latin, French and English.
- (d) From 1483 all statutes are in English.

(3) Text-Books.

- (a) Glanville and Bracton in Latin.
- (b) Littleton in French.
- (c) Fortescue probably the first in English.
- (d) Coke upon Littleton in English; and from Coke on the text-books are in English.

CHAPTER II.

HISTORICAL SURVEY OF THE COURTS OF JUSTICE.

PART I.

ANGLO-SAXON PERIOD.

- (1) The earliest form of redress for injuries suffered was personal vengeance.
- (2) This gradually became limited by the idea of payment in lieu of corporal revenge.
- (3) *The Wergild or Blood Fine.*
 - (a) The payment made by the murderer to the kinsmen of the murdered man.
 - (b) It varied according to the rank of the person slain.
- (4) A distinction soon grew up between the payments made :—
 - (a) As compensation to the injured (*bot*).
 - (b) As punishment (*wite*).

COURTS OF JUSTICE.

- (1) **The Sheriff's Tourn.**
Held every six months for criminal cases, under the Shire Reeve (or Sheriff), who presided over the landowners.
- (2) **The Hundred Court.**
Held every four weeks for civil cases.
- (3) **The Witanagemote ("Council of Wise Men").**
 - (a) The highest council in the land.
 - (b) The supreme Court for deliberation, administration, and judicial and taxative purposes.
 - (c) Consisted of the King, bishops, ealdormen, and King's thegns.

PROCEDURE.

Four forms of proof :—

- (1) **Compurgation.**
 - (a) A man accused of any crime might purge himself by denying the accusation on oath, and bringing twelve

freeholders to swear that he was oathworthy, *i.e.*, a person whose oath ought to be believed.

- (b) These "oath helpers" or "compurgators" were not concerned with the truth or falsity of the facts in issue; they had merely to state their personal belief in the oath of the accused.

(2) **Ordeal.**

(a) **FIRE.**

Accused person required to carry a red-hot bar of iron for three feet.

(b) **WATER.**

Accused person required to plunge his hand into boiling water and draw out a stone.

If within three days his hand had healed, he was innocent; if it had not healed, he was guilty.

(3) **Witnesses.**

These gave evidence of facts which they had seen and heard (*de visu et auditu*), according to a set formula, and apparently were not subject to examination or cross-examination.

(4) **Charters.**

(a) These were superior to all other forms of proof.

(b) If old or illegible, they might be reinforced by other evidence.

PART II.

NORMAN PERIOD, 1066-1272.

INFLUENCE OF THE NORMAN CONQUEST.

- (1) Before the Conquest England was divided into three Laws, *viz.*, West Saxon, Mercian, and Danish.
- (2) The Normans knitted the three together under the centralised system.
- (3) William I declared that "All should have the law of King Edward" with additions of his own established, "for the good of the English people."
- (4) But the Conquest did not sweep away or supersede the old Anglo-Saxon laws.
- (5) The Normans had very little written law of their own, and therefore no compact body of law to bring with them.
- (6) William I therefore did not bring with him a novel system

of jurisprudence; he confirmed the English laws, as also did Henry I.

- (7) The main thing the Norman Conquest gave us was a strong kingship and a centralised system of government, which was instrumental in bringing about national unity.
- (8) But not one of the Norman Kings (William I to Stephen) was a great legislator.
- (9) William I and Henry I, the two great Norman Kings, were active rather as administrators than as legislators.

COURTS OF JUSTICE UNDER THE NORMANS.

(I) The Curia Regis.

(1) THE MAGNUM CONCILIUM.

- (a) The term "Curia Regis" originally signified the Magnum Concilium or Great Council of the Realm.
- (b) It was a combination of the old Saxon Witanagemote and the Norman Feudal Court.

(2) THE CURIA REGIS PROPER.

- (a) Henry I, finding the Magnum Concilium too unwieldy for practical purposes, formed a small committee out of the most important of its members.
- (b) This inner council consisted of :
 - (i) The great officers of State (Justiciar (b), Chancellor, Treasurer).
 - (ii) The members of the Royal Household (Constable, Marshal, etc.).
 - (iii) Certain clerks chosen by the Crown.
- (c) It is the origin of the Privy Council.

(3) THE EXCHEQUER.

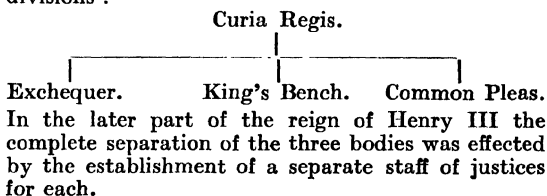
- (a) To transact its financial business the Curia Regis formed a small committee of its members.
- (b) After the organisation of the Exchequer, the Curia Regis confined itself mainly to judicial work.

(4) THE FIVE JUDGES IN BANCO.

- (a) The Curia Regis still continued to sit collectively, accompanying the King's movements from place to place.

(b) The name given to the chief Minister of the Norman and Angevin Kings. He acted as permanent Prime Minister, Regent during the King's absence, and President of the judicial and financial system. Hubert de Burgh, 1232, was the last Justiciar. By the reign of Edward I the office had become that of Lord Chief Justice.

- (b) In 1178 Henry II established a committee of five of its Judges to be fixed in one place and to hear the pleas of the Crown.
- (c) This is the origin of the Court of King's Bench.
- (5) **THE COMMON PLEAS.**
By *Magna Carta*, s. 17, it was declared that "The Common Pleas shall not follow our Court but shall be held in some fixed place" (Westminster).
- (6) **THE THREE DIVISIONS OF THE CURIA REGIS.**
Thus by 1216 the Curia Regis had split into three divisions :—



- (7) There remained, however, in the King in Council, a residuary jurisdiction Criminal, Civil and Appellate. The Criminal became exercised by the Court of Star Chamber (abolished 1640). The Civil passed to the Court of Requests (abolished 1642). The Appellate was, and still is, exercised by the House of Lords.
- (II) **The Exchequer (c).**
 - (a) Presided over by the Justiciar.
 - (b) Consisted of two Courts :—
 - (i) *Lower* (of receipt).
Received the Danegeld from the Sheriff twice a year.
 - (ii) *Upper* (of audit).
Acted as a check upon the Lower Court.
 - (c) It is the origin of our Court of Exchequer.
- (III) **The County Court or Shire Moot.**
 - (a) Presided over by the Sheriff.
 - (b) Sat once every month.
 - (c) Had a jurisdiction both criminal and civil.

(c) The name "Exchequer" arose from the chequered cloth with which the tables in this Court were covered, and upon which the royal officials and the sheriffs played the "Game of the Exchequer."

- (d) Tried cases which could not be brought in the Manor or Hundred Courts.
- (e) Heard appeals from the Hundred Courts.
- (IV) **The Hundred Court** (d).
 - (a) Presided over by the Bailiff of the Hundred.
 - (b) Held at least once every year.
 - (c) Had a jurisdiction both criminal and civil.
 - (d) Tried cases which could not be brought in the Manor Court.
- (V) **The Manor Court.**
 - (a) Held by the Lord of the Manor to administer justice among his tenants.
 - (b) *Court Baron*—for freehold tenants.
Customary Court—for copyhold tenants.
 - (c) Depended for jurisdiction upon charter or long usage.
 - (d) Made bye-laws and transacted local business.
 - (e) Tried personal actions up to 40s.
 - (f) By *Writ of Right* tried actions relating to land in the Manor.
 - (g) In some cases exercised a criminal jurisdiction, and was then called a *Court Leet*.

FEATURES OF THE NORMAN PERIOD.

(I) Rise of the Royal Justice by Means of Writs.

- (a) The whole object of the Kings was to weaken the power of the nobles, and therefore of the local Courts in which they were supreme.
- (b) One of the ways of doing this was by attempting to bring up as much work as possible from these local Courts into the Royal Courts.
- (c) This was effected by means of Writs, e.g. :—
 - (1) *Writ of Right* (e).
For land. Returnable in the King's Court or in the Manor Court.
 - (2) *Præcipe quod reddat* (ee).
For land or debt. Returnable only in the King's Court.

(d) The country was divided into counties which in their turn were divided into districts known as "hundreds." This division is attributed to Alfred. In the twelfth century the hundreds were fast becoming dependent upon the great lords, who managed and took the profits of the Hundred Courts, and thence onwards the hundreds ceased to be of much political importance.

(e) See *post*, p. 135.

(ee) See *post*, p. 133.

(3) Writs of Removal.

- (i) *Tolt*. From Manor Court to Shire Court.
- (ii) *Pone*. From Shire Court to King's Court.
- (iii) *Error*. From any Court to King's Court.
- (iv) *Recordari Facias*. From a Court not of record to King's Bench.

(II) The Inquest or Assize.

A method of procedure by which title to land was tried by an inquest of neighbours, who gave their verdict from their personal knowledge of the facts.

(1) THE GRAND ASSIZE (Henry II) (f).

- (a) To determine possession of a freehold.
- (b) Tried by sixteen knights in the Royal Courts.
- (c) After the introduction of the Grand Assize, Trial by Battle declined and was gradually superseded by trial by the Grand Assize.
- (d) The origin of our Petty Jury.

(2) THE PETTY ASSIZES, 1166.

(A) *The Three Possessory Assizes*.

(a) These consisted of :—

- (i) *Novel Disseisin*. For a man dispossessed to regain possession.
- (ii) *Mort d'Ancestor*. To put the heir into possession.
- (iii) *Darrein Presentment*. To decide the title to an advowson.
- (b) The object of these Assizes was to protect mere possession without raising the question of ownership, and thus to discourage the use of force by those whose claims to possession were challenged.
- (c) The writs by which these proceedings were commenced were known as Possessory Writs.
- (d) The procedure was as follows :—
A writ was directed to the Sheriff to summon twelve *legales homines*, who had to decide the question in issue and report their verdict to the Judge of Assize, who delivered judgment accordingly.

(B) *The Assize Utrum*.

- (a) To decide whether certain lands were ecclesiastical or lay.
- (b) If it was decided that they were ecclesi-

(f) See Writ of Right, *post*, p. 135.

astical, the Common Law Courts had no further jurisdiction over them.

(3) ASSIZE OF CLARENDON, 1166.

- (a) A commission sent round to each shire to whom juries of the county were to present accused or suspected persons.
- (b) The duty of this commission was to bring to the notice of the Judges all cases of crime in order that justice might be done, and not to decide whether the persons so accused were guilty or not.
- (c) The origin of our Grand Jury.

(III) The Introduction of Trial by Battle.

(1) CIVIL CASES.

- (a) In an action for the recovery of land the defendant might choose either Battle or Inquest (*ff*).
- (b) If he chose Battle, it was fought out by champions, not by the parties themselves. Trial by Battle in civil cases became obsolete by the close of the reign of Edward I.

(2) CRIMINAL CASES.

- (a) Trial by Battle was chiefly used in APPEALS OF FELONY, *i.e.*, any accusation of felony made by a private individual as distinguished from a presentment by a grand jury.
- (b) The accused had the right of Trial by Battle, which was fought out by the parties themselves.
- (c) The method of fighting was with leather shields and cudgels, and the battle lasted for a whole day or until one of the combatants cried "craven."
- (d) Trial by Battle in criminal cases became obsolete by the close of the reign of Henry VIII, but was not actually abolished till 1820.

(3) THORNTON'S CASE, 1820.

- (a) An Appeal of Felony was brought against T. for murder after he had been acquitted by a jury (*g*). When called on to plead, T. threw his glove on the floor of the Court and said, "Not guilty, and I am ready to defend the same with my body." Counsel for the accuser cried out "Don't touch that glove." The Court allowed the challenge,

(*ff*) See Writ of Right, *post*, p. 135.

(*g*) This was allowed by 3 Hen. VII, c. 46.

and, as the accuser refused to accept it, T. was discharged.

- (b) As a result of this case, which revived the long obsolete Trial by Battle, 59 Geo. III, c. 46, was passed, which abolished all Appeals of Felony and Trials by Battle.

(IV) The Introduction of the Circuit System.

- (a) Henry II divided England into circuits, over which the King's Judges (Justices in Itinere) travelled and tried the more important civil and criminal cases in the County Courts.
- (b) These itinerant justices had a further duty, viz., to inquire into the pleas of the Crown from which revenue might accrue.
- (c) These inquiries were held periodically, and were known as Eyres.
- (d) They were not at first held at any fixed intervals, though Henry III promised not to hold one more often than once every seven years.
- (e) This *General Eyre*, as it was called, was very unpopular.
- (f) The procedure was as follows :—
A writ was sent to the Sheriff, informing him of the coming of the Eyre, and ordering him to prepare an account of all the doings, misdoings, and non-doings in the county since the last Eyre.
- (g) When the justices arrived they required all who held franchises to claim them, and failure to do so was punished with fines.
- (h) If a crime had been committed and the criminal not apprehended, the district was fined.
- (i) The Eyre reached the height of its importance in the reign of Edward I; then it steadily declined, until by Richard II it had entirely disappeared.

PART III.

PERIOD OF EDWARD I.

EDWARD I HAS BEEN CALLED "THE ENGLISH JUSTINIAN."

- (a) During the reign of Edward I the judicial institutions of the country became settled upon a basis which remained practically unaltered until the *Judicature Act, 1873*.
- (b) Under Edward I the law made a very great and sudden

advancement, which was undoubtedly due to the labours of the King to improve our judicial polity in all its parts.

- (c) It is on account of this that he has been called the English Justinian, but the term is somewhat misleading. Justinian merely codified the existing law. Edward I substantially altered the existing institutions and established them upon a new and permanent basis.

COURTS OF JUSTICE UNDER EDWARD I.

(I) The King's Bench.

Three jurisdictions :—

(1) CRIMINAL.

Over any offence which amounted to a breach of the King's Peace.

Theory of the King's Peace.

- (a) Originated in the idea that a stranger who broke the peace of a house must make atonement to the head of that house.
- (b) In Anglo-Saxon times the life of anyone who offered violence to another in the King's house was forfeit to the King, for all guests of the King were deemed to be under the King's protection.
- (c) This theory was first extended beyond the Royal Residence by a proclamation that the King's Peace should be observed throughout all the land during Christmas, Easter, and Whitsun every year.
- (d) William I put the whole country permanently under his Peace.
- (e) This rendered it an offence against the Crown for anyone to commit an act of violence anywhere within the realm, since the whole realm was under the King's Peace, and such an act would therefore be a breach of the King's Peace.
- (f) When any such act was committed, the King was entitled to prosecute the offender.
- (g) The term "Pleas of the Crown" was applied to these cases.
- (h) This idea of certain offences being Breaches of the King's Peace is the origin of our Criminal Law and Procedure as opposed to Civil Law and Procedure.

(2) CIVIL.

By encroaching upon the jurisdiction of the Common Pleas by means of the *Bill of Middlesex* and the *Writ of Latitat*.

(3) OVER INFERIOR COURTS.

By means of Writs :—

(A) The Three Prerogative Writs (gg).

(i) *Mandamus* (h).

Directing an inferior Court to do some act.

(ii) *Prohibition* (i).

To stop proceedings in an inferior Court.

(iii) *Certiorari* (j).

To remove proceedings from an inferior Court up to the King's Bench.

(B) *The Writ of Error* (k).

For some error of law or fact on the face of the pleadings.

(II) The Common Pleas.

For cases between subject and subject not amounting to a breach of the King's Peace.

(III) The Exchequer.

(a) Presided over by the Treasurer and the Barons of the Exchequer.

(b) Originally for Treasury business only, it gradually trespassed upon the jurisdiction of the Common Pleas by means of the *Writ of Quominus* (l).

(IV) The Court of Chancery.

(a) Originally every subject had a right to appeal to the King against the decision of the Courts.

(b) This arose from the fact that the King was deemed to be "The fountain head of all justice," and Equity (i.e., what was fair and just) was said to "flow from the conscience of the King."

(c) As this practice of appealing grew more and more popular, the King looked for someone suitable to whom he could delegate the hearing of appeals.

(d) His choice fell upon the Chancellor, who (up till the Reformation) was always a cleric and *ex-officio*

(gg) A Prerogative Writ was an extraordinary remedy issued on cause being shown that the ordinary legal remedy was inadequate or inapplicable.

(h) See *post*, p. 131.

(i) See *post*, p. 133.

(j) See *post*, p. 127.

(k) See *post*, p. 129.

(l) See *post*, p. 134.

father confessor to the King, and on this account was said to "keep the King's conscience."

- (e) The Chancellor, therefore, considered cases for which the ordinary law gave no remedy, and heard appeals from the Common Law Courts.
- (f) Thus there grew up a special body of law, known as "Equity," claiming :—
 - (i) To be based upon rules inherently superior to the Common Law.
 - (ii) To supersede the Common Law on account of this superiority.
- (g) Common Law and Equity were administered in separate Courts, and were in constant conflict.
- (h) Any litigant who was dissatisfied with the decision of the Common Law Courts filed a Bill in Equity for relief—in other words, appealed to the Chancellor against the decision.
- (i) *Jurisdiction of Chancery.*
Uses, Frauds, Trusts, Unfair or Inequitable Transactions.
- (j) *Introductions.*
Specific Performance, Injunctions, Interrogatories.
- (k) Chancery could not issue writs of execution, but acted *in personam*.
- (l) *Actions on the Case.*

By the *Provisions of Oxford, 1258*, the Chancellor was prevented from making new laws by being forbidden to seal any writ for which there was not an exact precedent on the Register (m).

Therefore, if there was no writ on the Register with a formula to fit the case of an injured person, that person had no remedy.

By the *Statute of Westminster II, 1285* (n), the Chancellor might seal a writ where there was one resembling it on the Register.

These were called Writs *in consimili casu*, i.e., in like case, and the actions to which they gave rise became known as "Actions on the case."

FEATURES OF THE REIGN OF EDWARD I.

(I) IMPORTANT STATUTES.

- (1) *De Donis Conditionalibus, 1285* (o).

Attempted to make estates tail inalienable.

(m) See *post*, p. 135.

(o) See *post*, p. 119.

(n) 13 Edw. I, st. 1, c. 24.

(2) **Quia Emptores, 1290 (p).**

Prohibited subinfeudation.

These two statutes affected great changes in the then Law of Real Property (q).

(II) THE DECLINE OF THE SHERIFF.(1) **Criminal Jurisdiction.**(a) **THE JUSTICES IN EYRE (Henry II).**

The Sheriff was entitled to try the Pleas of the Crown, "unless or until the Royal Eyre comes," and, as it always *did* come, this criminal jurisdiction of the Sheriff was virtually removed.

(b) **JUDICIAL VISITATION (Richard I).**

"No Sheriff shall be Justice Itinerant in his own shire."

(c) **MAGNA CARTA, 1215, s. 24.**

Sheriff forbidden to hold criminal pleas.

(2) **Civil Jurisdiction.**

By the *Statute of Gloucester, 1278 (r)*, pleas above 40s. were to be taken to the King's Court.

(III) THE DECLINE OF THE MANOR COURTS.

By the Writ of *Quo Warranto (s)* Edward I called upon the Lords of Manors to shew title to their jurisdiction; and where no grant or charter could be shewn, they were forbidden to exercise jurisdiction in the future.

(IV) THE RISE OF THE JURY SYSTEM IN CRIMINAL CASES.(a) The Grand Jury, which had originated in the *Assize of Clarendon, 1166*, and been further developed by the *Assize of Northampton, 1176*, had (by the close of the reign of Edward I) become an established institution.(b) Trial by Petty Jury (which had originated in the *Grand Assize, 1166*) was at the disposal of anyone accused of crime, and in order to establish it the more firmly, if anyone indicted on the presentation of a Grand Jury refused to plead to the indictment or to be tried by a Petty Jury he was tortured by the *peine forte et dure* until he consented to plead and be so tried.

(p) See *post*, p. 120.

(q) For a full account of these changes see *post*, Chap. IV, pp. 119, 120.

(r) 6 Edw. I, c. 8.

(s) See *post*, p. 134.

PART IV.

SURVEY OF THE COURTS OF JUSTICE FROM
1307 TO 1873.

THE HIGH COURT OF PARLIAMENT.

(1) **Impeachment.**

- (a) The prosecution of an offender by the Commons before the Lords.
- (b) The Lords cannot pass sentence until the Commons demand it.
- (c) A famous instance of Impeachment was that of Warren Hastings, 1788.
- (d) The last case of Impeachment was that of Lord Melville, 1805.

(2) **Bill of Attainder.**

- (a) A legislative Act of the two Houses (introduced and passed like any other Bill and requiring the Royal Assent) declaring a person "attainted."
- (b) A person was said to be attainted when, having been found guilty of treason or felony, he was sentenced to death or outlawry.
- (c) A famous instance is that of the Earl of Strafford, 1641, where the Commons, dissatisfied with the slow procedure of Impeachment, rushed through a Bill of Attainder.
- (d) The last case of a Bill of Attainder being passed was that of Sir John Fenwick, 1697.

(3) **Peer's Right of Trial by House of Lords for Treason or Felony (t).**

- (a) Under *Magna Carta*.
- (b) Any temporal peer or peeress.
- (c) Privilege cannot be waived.
- (d) Case is brought by *Certiorari*.

(4) **Original Civil Jurisdiction.**

Fallen into disuse since

Skinner v. East India Co. (u).

Skinner petitioned the King, complaining that the company had seized his ship and committed other injuries. The case, after having been referred to a com-

(t) Peers accused of misdemeanour are tried before the ordinary Courts.

(u) (1666), 6 S. T. 710.

mittee, who reported favourably to the petitioner, was heard by the Lords, who awarded Skinner £5,000 damages. The company then petitioned the Commons, who declared the trial by the Lords illegal. A dispute between the two Houses ensued, and Parliament was prorogued. The matter was finally settled by the King's intervention in 1670, and the records of the case erased by both Houses.

THE COURT OF THE LORD HIGH STEWARD.

- (a) Sits for the purpose of trying peers for treason or felony when Parliament is dissolved or in recess.
- (b) The decision is by a majority of not less than 12; therefore at least 23 must be present.
- (c) The Lord High Steward sits as Judge and therefore cannot vote.

THE COURT OF THE CONSTABLE AND EARL MARSHAL (or "COURT OF CHIVALRY").

- (a) Jurisdiction regulated by statute (*v*).
 - (i) To enforce military discipline.
 - (ii) To deal with any other military matters, *e.g.*, prisoners of war, prize, etc.
 - (iii) To settle disputes between military men.
- (b) The offices of Constable and Earl Marshal were distinct and hereditary in different families.
 - (i) The office of Constable became extinct in 1521 and the office reverted to the Crown.
 - (ii) The office of Earl Marshal still exists (*w*).
- (c) The Earl Marshal cannot hold the Court in the absence of the Constable (*x*).
- (d) The jurisdiction of this Court became oppressive under the Stuarts.
- (e) The issue of commissions of martial law in times of peace was one of the grievances of the *Petition of Right* (*y*), and was finally declared illegal by the *Bill of Rights* (*z*).
- (f) The place of this Court is now taken by Courts-Martial (*a*).

(*v*) 13 Rich. II, c. 2.

(*w*) It is hereditary in the family of the Duke of Norfolk.

(*x*) The last case to be tried in this Court was that of Sir H. Blount, 1737.

(*y*) See *post*, p. 122.

(*z*) See *post*, p. 123.

(*a*) See *ante*, p. 15.

THE COURT OF WARDS AND LIVERIES.

- (a) Established by Henry VIII.
- (b) Dealt with wards who held *in capite* of the Crown.
- (c) *Functions* :—
 - (i) To manage their property.
 - (ii) To act as their guardian.
 - (iii) To control their marriage.
 - (iv) To levy fines for marrying without the King's consent.
 - (v) To fix the amount payable to the Crown for "suing out livery" by an heir on attaining his majority.
- (d) Only had jurisdiction over land held on Military Tenure.
- (e) Abolished by the *Abolition of Old Tenures Act, 1660* (b).

THE COURT OF STAR CHAMBER.

- (a) So called because it sat in a room the ceiling of which was ornamented with stars.
- (b) This Court exercised the criminal jurisdiction of the King in Council.
- (c) It was very unpopular for the following reasons :—
 - (i) Severity of sentence.
 - (ii) Arbitrary procedure.
 - (iii) No records kept.
- (d) It has been called "A Court of criminal equity," because its proceedings were conducted upon lines similar to those obtaining in Chancery :—

Similarities.

- (1) Based upon "Grace," not "Right."
- (2) "Bill," not "Writ."
- (3) Written pleadings, not oral.
- (4) Defendant could give evidence on oath, whereas in the Common Law Courts he was not allowed to do so.
- (5) Judgment was discretionary.
- (6) No jury.
- (7) Execution *in personam*, not *in rem*.

Differences.

- (1) No reason given for judgment.
- (2) Accuser was unknown.
- (e) Abolished 1640.

THE COURT OF HIGH COMMISSION.

- (a) A branch of the Court of Star Chamber with unlimited authority over questions of Church discipline.
- (b) Consisted of 44 commissioners of whom 12 were bishops.
- (c) The procedure of the Court was based upon canon law.
- (d) The accused was compelled to answer a long series of questions on oath and was not allowed the advantage of the Common Law maxim that no one is bound to incriminate himself.
- (e) The Court had power to punish with spiritual censure, fines or imprisonment.
- (f) Abolished 1640.

THE COURT OF REQUESTS.

- (a) A minor Court of Equity.
- (b) Exercised the civil jurisdiction of the King in Council.
- (c) Dealt with complaints of poor persons and persons of the Household, and small actions not sufficiently important to be brought in the Court of Chancery itself.
- (d) It was very popular because the remedies were cheap and easy.
- (e) Abolished 1642.

THE COURT OF CHANCERY.

- (a) After the Reformation, the Chancellor ceased to be a cleric and a great lawyer was usually appointed; but he still continued to hold his Court and administer equitable relief as before.
- (b) The Lord Chancellor held his Court in the Old Hall, Lincoln's Inn, while the Lord Chief Justice presided over the Common Law Courts at Westminster.
- (c) As the Court of Chancery became more and more important, so did the conflict between these two Courts become more bitter.
- (d) This conflict finally came to a head in the reign of James I by the famous series of quarrels between Coke, L.C.J., and Ellesmere, L.C.

The Quarrel between Coke and Ellesmere.**(1) *Courtney v. Glanvil.***

A had sold to B jewels worth £150 on the representation that they were worth £600, and had taken as payment a bond for £600. B failed to pay and A obtained judgment for the full amount, the Court of Exchequer Chamber confirming the

judgment. B filed a Bill in Equity to obtain relief, and it was ordered that upon B paying £150 A should release him. A refused and was committed for contempt. The Common Law Judges granted a *habeas corpus* and released him, Coke declaring that the decree in Equity and the imprisonment were illegal.

(2) *The Earl of Oxford's Case.*

M. College had been granted a lease of Covent Garden for seventy-two years at £9 a year. Fifty years later M. College sold the fee to the Earl's predecessor for £15 a year. M. College then took possession of part of it, on the ground that under 13 Eliz. (against alienations of ecclesiastical and college lands) the conveyance was void. The Earl brought an Action of Ejectment, and the Common Law Judges found in favour of M. College. The Earl filed a Bill in Equity for relief and Ellesmere granted it, stating that the claim of M. College was against all good conscience.

(8) In a later case, Plaintiff obtained judgment at law by enticing Defendant's witnesses into a beer-house while the action was being tried. D. filed a Bill for relief in Equity, and P. was ordered not to proceed with his judgment. Coke thereupon advised P.'s attorney to prosecute D. under 27 Edw. III, which forbade the King's subjects to impeach the judgments of the King's Court in another Court.

(4) At length Coke tried to persuade a Grand Jury to indict under this statute anyone who had applied to the Chancellor for relief against judgments.

(5) He further announced his intention to refuse to hear any counsel "who had art or part" in presenting bills in Equity for relief against Common Law judgments.

(6) Ellesmere appealed to the King.

(7) James I consulted Bacon (Attorney-General) and other lawyers who decided in favour of Chancery.

(8) The King ratified this opinion July 14, 1616.

(e) The two systems of law continued to be administered separately until the *Judicature Act, 1873* (c).

(c) 36 & 37 Vict. c. 66; now repealed and consolidated with the *Judicature Acts, 1875 to 1910*, by the *Supreme Court of Judicature (Consolidation) Act, 1925* (16 & 16 Geo. V, c. 49).

- (f) This Act fused the administration of Law and Equity, and laid down that every Judge of the High Court was to administer Law and Equity alike, but where the rules of Equity conflicted with those of Common Law, the former were to prevail.
- (g) *The Exclusive Jurisdiction of Chancery.*
There were certain matters which had always been administered by Chancery and with which the Common Law Courts had never been concerned. These matters were assigned exclusively to the Chancery Division of the High Court of Justice. They were :—
 - (i) Administration of the estates of deceased persons.
 - (ii) Dissolution of partnerships.
 - (iii) Mortgages.
 - (iv) Charges on land.
 - (v) Sale of property subject to any lien or charge.
 - (vi) Trusts.
 - (vii) Rectification or cancellation of deeds.
 - (viii) Specific performance of contracts.
 - (ix) Partition or sale of real estate.
 - (x) Wardship of infants and care of infants' estates.

THE COURTS OF APPEAL.

- (1) **The Court of Exchequer Chamber.**
 - (a) In 1358 Judges from the King's Bench and Common Pleas were appointed to hear appeals from the Court of Exchequer.
 - (b) By 1385 they were also hearing appeals from the King's Bench.
 - (c) This was the Court for appeal until 1873, when its jurisdiction was transferred to the Court of Appeal founded by the Judicature Act of that year.
- (2) **The Court of Delegates.**
 - (a) Heard appeals from the Ecclesiastical and Admiralty Courts.
 - (b) Abolished in 1832 and its jurisdiction transferred to the Privy Council (d).
- (3) **The House of Lords.**
 - (a) The highest appeal Court in the realm.

(d) Ecclesiastical appeals are still heard by the Judicial Committee of the Privy Council; but since 1873 (see *post*, p. 108) most Admiralty appeals are heard by the Court of Appeal.

- (b) It exercised the appellate jurisdiction of the King in Council.

THE COUNTY COURTS.

- (a) After the Sheriff lost his criminal and civil jurisdiction, the old County Courts or Shire Moots fell into disuse and were finally abolished by the *County Courts Act, 1846 (e)*.
 (b) This Act set up the new County Courts, the jurisdiction of which was settled by the *County Courts Act, 1888 (f)*, which gave them jurisdiction over debts, demands, or damages of small amount (*g*), and certain matters in Equity, Bankruptcy and Admiralty.
 (c) This Act was amended by the *County Courts Acts, 1903, 1919 and 1924 (h)*, which increased their jurisdiction.

THE COURT OF ADMIRALTY.

- (a) Originally presided over by the Lord High Admiral.
 (b) THE LORD HIGH ADMIRAL.
 (1) One of the great officers of State who was specially concerned with the government of the Navy and the administration of maritime affairs.
 (2) The definite organisation of the Admiralty dates from Edward I who, in 1306, appointed three Admirals with jurisdiction over the eastern, western and southern coasts respectively.
 (3) In 1360 a single Lord High Admiral was appointed, whose duties were to act as
 (i) Naval Commander in Chief.
 (ii) Minister of Marine.
 (iii) President of the Court of Admiralty.
 (4) During the Commonwealth, naval affairs were managed by a committee under Cromwell.
 (5) After the Restoration, the office of the Lord High Admiral was held by the King.
 (6) By 1 Geo. IV, c. 90, the powers of the Lord High Admiral were vested in the Lords Commissioners of the Admiralty, chief of whom is the First Lord of the Admiralty.
 (7) The First Lord is the sole and responsible Minister for the Navy, and is always a member of the Cabinet.

(e) 9 & 10 Vict. c. 95.

(f) 51 & 52 Vict. c. 43.

(g) £100, by 3 Edw. VII, c. 42.

(h) 3 Edw. VII, c. 42; 9 & 10 Geo. V, c. 73; 14 & 15 Geo. V, c. 17.

(c) CRIMINAL JURISDICTION.

- (1) The ancient Court of the Lord High Admiral had jurisdiction for the trial of offences at sea or on board ships lying in the rivers below bridge (i).
- (2) By the *Offences at Sea Acts, 1536 and 1799* (j) the King was authorised to issue commissions under the Great Seal to try offences committed at sea within the jurisdiction of the Admiral in the same way as if committed upon land.
- (3) This jurisdiction was in practice exercised by the Judge of the Admiralty Court.
- (4) By the *Central Criminal Court Act, 1834* (k), the Central Criminal Court and the Justices of Assize and Commissioners of Oyer and Terminer and General Gaol Delivery have power to try all offences committed on the high seas or within the jurisdiction of the Admiral.
- (5) The *Territorial Waters Jurisdiction Act, 1878* (l), defines the expression "jurisdiction of the Admiral."
 - (i) In the case of British ships and all persons on board them, the jurisdiction extends not only over the high seas, but also on foreign rivers as far as great ships go.
 - (ii) In the case of foreign ships and persons other than British subjects, the jurisdiction extends over the territorial waters of H.M. Dominions, which include the high seas to a distance of one marine league from low water mark.

By this Act :—"an offence committed by a person, whether he is or is not a subject of H.M., on the open sea, within the territorial waters of H.M. Dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly."

(d) CIVIL JURISDICTION.

- (1) Ill defined until 1840, when it was given full

(i) *Jurisdiction of the Admiral Act, 1391* (15 Rich. II, c. 3).

(j) 28 Hen. VIII, c. 15, and 39 Geo. III, c. 37.

(k) 4 & 5 Will. IV, c. 36.

(l) 41 & 42 Vict. c. 73.

jurisdiction over all maritime matters by the *Admiralty Court Acts, 1840-1861* (m).

- (2) By the *County Courts Admiralty Jurisdiction Acts, 1868-1869* (n), smaller cases were transferred to the County Courts.
- (8) By the *Judicature Act, 1873* (o), it was merged into the High Court of Justice—Probate, Admiralty and Divorce Division.

THE ASSIZES.

The Circuit Judges eventually superseded the Justices in Eyre, and the various circuits were regulated by Order in Council.

COMMISSIONS OF ASSIZE.

(A) Originally there were four :—

- (1) *Nisi Prius* (p).

Writs directed to the Sheriff to summon juries should be framed to summon them to Westminster unless before the date therein mentioned the Justices of Assize should come into the county and take their verdict.

- (2) *Oyer and Terminer*.

Directed to the persons therein named to hear and determine all pleas presented by the presenting juries of the county for which the commission issued.

- (3) *Gaol Delivery*.

To deliver the gaols of the county of all persons lying therein by trying the actions against them.

- (4) *Trailbaston*.

(a) A commission to make inquiry as to persons who ill-treated jurors, sheltered malefactors or otherwise disturbed the peace.

(b) First issued about 1296 and fell into disuse before the end of the fourteenth century.

(c) Its chief interest consists in the fact that its inquiries were both criminal and civil in character.

(d) Thus it may be said to have been the connecting link between the Commission in Eyre and the Commission of Oyer and Terminer, and to have prepared the way for the time when criminal and civil cases should be taken at the same Assizes.

(m) 2 & 3 Vict. cc. 65, 66; 17 & 18 Vict. cc. 78, 104; 24 & 25 Vict. c. 10.

(n) 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(o) 36 & 37 Vict. c. 66; now repealed and consolidated with the *Judicature Acts, 1875 to 1910*, by the *Supreme Court of Judicature (Consolidation) Act, 1925* (15 & 16 Geo. V, c. 49).

(p) Stat. of Westminster II, c. 30.

(B) At the present day the Justices of Assize sit under three Commissions :—

(1) *Oyer and Terminer*.

Empowering them to try all persons against whom an indictment has been presented within the county of that Assize.

(2) *General Gaol Delivery*.

Empowering them to try any prisoner in gaol or released on bail.

(3) *Assize*.

By the *Judicature Act, 1873 (pp)*, a Judge of Assize shall have all the powers of a High Court Judge sitting in the High Court.

THE CIRCUIT SYSTEM.

England and Wales are divided into eight Circuits over each of which the Justices of Assize travel holding a Court in the Assize Town of each county two, three or four times a year.

The eight Circuits are :—

- | | |
|---------------------|---------------------|
| (i) Northern. | (v) Oxford. |
| (ii) North Eastern. | (vi) Western. |
| (iii) Midland. | (vii) North Wales. |
| (iv) South Eastern. | (viii) South Wales. |

Various meanings assigned to the word "Assize" in the course of English Legal History.

- (1) A sitting of the King in his Great Council (*Magnum Concilium*) (q).
- (2) A law made at such a meeting.
- (3) The Inquest or Assize (r).
- (4) The mediæval equivalent for a jury (r).
- (5) A commission issued by the King under authority of which the Justices in Eyre acted (s).
- (6) The King's Commission under which the Judges of the High Court go on circuit and sit to try criminal and civil cases.
- (7) The sittings of the Judge on circuit are to-day spoken of as "The Assizes."

COURTS OF THE STANNARIES.

- (a) "The Stannaries" was the name given to those districts of Devon and Cornwall where any tin works were situated.

(pp) 36 & 37 Vict. c. 66; now repealed and consolidated with the *Judicature Acts, 1875 to 1910*, by the *Supreme Court of Judicature (Consolidation) Act, 1925* (15 & 16 Geo. V, c. 49).

(q) See *ante*, p. 85.

(r) See *ante*, p. 88.

(s) See *ante*, p. 103.

- (b) The tin miners of "The Stannaries" had certain peculiar customs and privileges.
- (c) Originally any civil actions arising within "The Stannaries" and relating to the tin mines or miners were tried in a special Court, called the Court of the Stannaries.
- (d) There was a Court in each county and the Vice-Warden of the Stannaries presided as Judge.
- (e) Appeal lay to the Lord Warden of the Stannaries and from him to the Privy Council.
- (f) These Courts were abolished in 1896 (*u*) and their jurisdiction transferred to the County Courts of Cornwall.

THE LIVERPOOL COURT OF PASSAGE.

- (a) A very ancient inferior Court of Record.
- (b) Originally held before the mayor and bailiffs.
- (c) The *Court of Passage Act, 1834* (*v*), provided that it should not sit without a legal assessor.
- (d) This Assessor, who must be a barrister of not less than seven years' standing, is the presiding Judge of the Court, and by the *Liverpool Court of Passage Act, 1893* (*w*), was given the powers of a High Court Judge sitting in chambers.
- (e) *Jurisdiction*:—
 - (i) Personal actions up to any amount if the defendant resides or carries on business within the jurisdiction.
 - (ii) No action under £20 can be commenced in this Court if the County Court has jurisdiction.
 - (iii) Slight Admiralty jurisdiction.
 - (iv) The High Court may order certain actions of contract or tort to be tried in this Court.
- (f) This Court affords an instance of the adaptation to the needs of a great modern city of a Court with an antiquated procedure which had in ancient times served the needs of what was but a small village.

THE TOLZEY COURT OF BRISTOL.

- (a) Originally the Court of the bailiffs of the Hundred of Bristol.
- (b) Subsequently merged into the Court of the Lord Steward of the King's Household.

(*u*) *Stannary Court (Abolition) Act, 1896* (59 & 60 Vict. c. 45).

(*v*) 4 & 5 Will. IV, c. xcii.

(*w*) 56 & 57 Vict. c. 37.

- (c) Richard II revived its separate jurisdiction by charter, and it now sits under a charter of Anne, 1710.
- (d) The Recorder of Bristol is *ex officio* the Judge.
- (e) Its jurisdiction includes mixed and personal actions up to any amount provided the cause of action arises within the city.

THE CENTRAL CRIMINAL COURT.

- (a) Created in 1834 by the *Central Criminal Court Act* (x).
- (b) It is the Assize Court for Middlesex and London and certain specified portions of Essex, Kent and Surrey.

THE PALATINE COURTS.

- (a) A County Palatine was a county the owner of which had sovereign rights and jurisdiction.
- (b) Thus he could pardon crimes and appoint Judges and officers within his county.
- (c) Three Counties Palatine still exist, *viz.* :—Chester, Durham and Lancaster, but they have long been united to the Crown and assimilated in all important respects to the rest of the Kingdom.
- (d) Each County Palatine had its own Courts.
- (e) In 1873 four such Courts existed, *viz.* :—
 - (i) The Court of Common Pleas, Lancaster.
 - (ii) The Court of Pleas, Durham.
 - (iii) The Chancery, Lancaster.
 - (iv) The Chancery, Durham.
- (f) The first two were abolished by the *Judicature Act, 1873*, and their jurisdiction transferred to the High Court of Justice.
- (g) The last two still exist with a purely local jurisdiction.

THE LAW MERCHANT.

The law relating to merchants' transactions did not originally form part of the Common Law, but was administered in its own particular Courts :—

(1) COURTS OF THE STAPLES.

The Staples were marts for the sale of the chief commodities of England, established by Edward I and Edward II. They had special Courts which exercised a jurisdiction over the transactions in the Staples and the merchants' trafficking therein.

(2) COURTS OF PIEDS POWDRES (OR PIE POWDER).

A Court was held at every market or fair before the

(x) 4 & 5 Will. IV, c. 36.

steward of the market for trying summarily cases which might arise out of transactions in that particular fair or market.

Such Courts are obsolete except in the single instance of the Bristol Court of *Pieds Poudres*, which is still held before the Recorder of that city.

The influence of Lord Mansfield, 1705-1793.

- (a) He sought to make the Law Merchant part of the Common Law of England.
- (b) He introduced the rule that once a considered judgment on a custom had been given, that custom was judicially noticed and therefore need not be proved. (Previously the custom of merchants had each time to be specially proved.)
- (c) Thus he made what was international and customary law a national and fixed body of law.
- (d) The Law Merchant is to-day practically a part of the Common Law, *but* its principles may be extended by a new custom, provided it does not contradict any rule.

PART V.

SURVEY OF THE COURTS FROM 1873 TO THE PRESENT DAY.

THE JUDICATURE ACT, 1873 (*y*).

(I) Fusion of the Courts.

Before the Act.	By the Act.
(1) The Queen's Bench (<i>z</i>). (2) The Common Pleas. (3) The Exchequer. (4) The Chancery. (5) The High Court of Admiralty. (6) The Court of Probate. (7) The Court for Divorce. (8) The Court of Common Pleas, Lancaster. (9) The Court of Pleas, Durham. (10) The Court of Exchequer Chamber.	The Supreme Court of Judicature.

(*y*) 36 & 37 Vict. c. 66.

(*z*) As Queen Victoria was then upon the throne the Court of King's Bench was then called the Court of Queen's Bench.

(II) Divisions of the Supreme Court.**(1) THE HIGH COURT OF JUSTICE.**

- (i) Exchequer Division.
- (ii) Common Pleas Division (a).
- (iii) Queen's Bench Division.
- (iv) Chancery Division.
- (v) Probate, Divorce, and Admiralty Division.

(2) THE COURT OF APPEAL.

- (a) The Court of Exchequer Chamber was merged into this Court.
- (b) This Court was to hear appeals from
 - (i) Any Division of the High Court.
 - (ii) The Courts of the Stannaries (b).

THE SUPREME COURT OF JUDICATURE AT THE PRESENT DAY.**(I) The High Court of Justice.****(1) THE KING'S BENCH DIVISION (c).**

(The King's Bench, The Common Pleas, The Exchequer).

Consists of the Lord Chief Justice and Judges.

(2) THE CHANCERY DIVISION.

Consists of the Lord Chancellor and five Judges.

(3) THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Consists of the President and two Judges (d).

(II) The Courts of Appeal.**(1) THE COURT OF APPEAL.**

(a) Consists of :—

Lord Chancellor.

Lord Chief Justice.

President of the Probate, Divorce, and Admiralty Division.

Six Lords of Appeal in Ordinary.

Six permanent Judges (Master of the Rolls and five Lords Justices of Appeal).

(b) This Court hears appeals from :—

(i) Any Division of the High Court.

(a) In this Division were merged the Court of Common Pleas, Lancaster, and the Court of Pleas, Durham.

(b) This continued to be the case until the Stannaries Courts were abolished in 1896 (see *ante*, p. 105).

(c) By an Order in Council made in 1800 under section 31 of the *Judicature Act, 1873*, the Exchequer Division and Common Pleas Division were merged into the Queen's Bench Division, which on the accession of King Edward VII became the King's Bench Division.

(d) Before 1925 this Division consisted of the President and one Judge.

- (ii) The Chancery Courts of Lancaster and Durham.
- (iii) Convictions for non-repair of a highway.
- (iv) Divisional Court (with leave either of the Divisional Court or the Court of Appeal).

(2) THE COURT OF CRIMINAL APPEAL.

- (a) Created by the *Criminal Appeal Act, 1907* (e).
- (b) Consists of the Lord Chief Justice and the Judges of the K. B. D.
- (c) Three Judges are usually present.

N.B.—1. THE WRIT OF ERROR, AND THE COURT FOR CROWN CASES RESERVED.

- (a) Before 1908 a convicted prisoner could, if any defect in point of *law* appeared upon the face of the record, apply to the Attorney-General for a *Writ of Error* which could be argued in the K. B. D. and even up to the House of Lords.
- (b) But he had no direct right of appeal.
- (c) In 1848 the Court for the Consideration of Crown Cases Reserved was created, for the opinion of which a Judge could state the facts upon which any intricate point of law arose.
- (d) The C. C. C. R. could, if it thought fit, set aside the verdict and quash the conviction.
- (e) The *Criminal Appeal Act, 1907*, abolished both the *Writ of Error* and the C. C. C. R., and transferred the jurisdiction of the latter to the Court of Criminal Appeal.

N.B.—2. BILL OF EXCEPTIONS.

- (a) The Writ of Error also lay in civil cases for any error which appeared on the face of the record (f).
- (b) But if, in a civil case, the Judge misdirected the jury or improperly received or excluded evidence, though no error would appear on the face of the record and therefore no Writ of Error would lie, he might be required to seal a *Bill of Exceptions*.
- (c) This was a statement of the objections taken by the party aggrieved.
- (d) The Bill was argued before a higher Court, and, if upheld, a new trial was ordered.

(e) 7 Edw. VII, c. 23, s. 1, as amended by 8 Edw. VII, c. 46, s. 1.

(f) See *post*, p. 129.

- (e) Proceedings could be taken against a Justice of the Supreme Court for refusing to seal a *Bill of Exceptions*.
- (f) The Bill of Exceptions was abolished by the *Common Law Procedure Act, 1852* (g), and the same result is now obtained by a motion for a new trial.
- (3) **THE DIVISIONAL COURT.**
Two (or in special cases more) Judges sitting to transact certain kinds of business which cannot be disposed of by one Judge :—
 - (a) Crown and Election Petitions.
 - (b) Appeals from County Courts.
 - (c) Cases of *Habeas Corpus* in which a Judge has directed that the writ be made returnable before a Divisional Court.
 - (d) Appeals from chambers in K. B. D.
 - (e) Proceedings directed by statute to be taken before the Court.

OTHER COURTS OF APPEAL.

(1) The House of Lords.

The highest Court of Appeal in the land for both criminal and civil cases.

If a certificate be obtained from the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of such exceptional importance that it is desirable to have the highest decision upon it, an appeal may be brought to the House of Lords.

Criminal Appeal Act, 1907.

In such a case the Court is composed only of Lords of Appeal, of whom at least three must be present.

Appellate Jurisdiction Act, 1876 (h).

This Court may sit during the dissolution of Parliament.

(2) The Judicial Committee of the Privy Council.

(a) Created in 1833.

(b) Originally consisted of lawyers and ecclesiastics, whose functions were to administer any judicial matters falling within the jurisdiction of the Privy Council.

(c) Now consists of :—

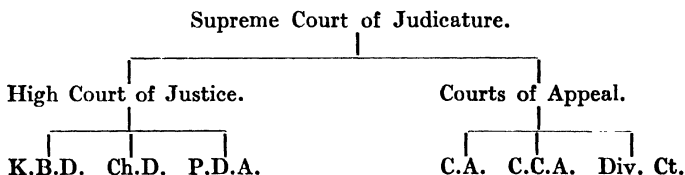
- (i) Lord President.
- (ii) Lord Chancellor.

(g) 15 & 16 Vict. c. 76.

(h) 39 & 40 Vict. c. 59.

- (iii) Six Lords of Appeal in Ordinary.
- (iv) Former Judges of superior Courts in the Colonies (not exceeding seven).
- (v) Ditto of the High Court of India (not exceeding two).
- (d) Three form a quorum.
- (e) Functions.
 - (i) Hears appeals from :—
 - India and the dominions,
 - Ecclesiastical Courts,
 - British Courts abroad.
 - (ii) Grants extension of time for patents.

TABLE SHEWING THE DIVISIONS OF THE SUPREME COURT OF JUDICATURE.



CHAPTER III.
ACTIONS, WILLS, CONVEYANCES.

FORMS OF ACTION.

(1) **Personal Actions.**

(A) **ON CONTRACT.**

(a) *Debt.*

For a specific sum.

(b) *Covenant.*

For damages for breach of agreement by deed.

(c) *Assumpsit.*

For damages for breach of agreement not by deed.

(d) *Trespass on the Case on promises.*

(B) **ON TORT.**

(a) *Detinue.*

For recovery of property + damages for the detention.

(b) *Trespass.*

For damages for injury accompanied by force.

(c) *Trespass on the case.*

For damages for injury not covered by the other forms.

(d) *Trover (a).*

For recovering the value of goods against defendant, who, having obtained them by lawful means, had wrongfully converted them to his own use.

(e) *Replevin.*

For recovery of goods.

(2) **Real Actions.**

(a) Involving the right to real property.

(b) Gave way to the Action of Ejectment.

(a) Abolished by the *Common Law Procedure Act, 1852* (15 & 16 Vict. c. 76).

REMEDIES FOR THE RECOVERY OF LAND.**(I) Before 1852.****(A) THE WRITS OF EJECTMENT.****(1) *Quare ejecit infra terminum.***

Could only be brought by a leaseholder against :—

(a) His landlord.

(b) A purchaser from his landlord.

(2) *Ejectio firmæ.*

A variety of trespass.

The possessor for a term of years could recover damages if ejected.

(B) HISTORY.

(a) Until the fifteenth century only damages could be recovered by a possessor for a term of years.

(b) But the idea was growing that not only damages but possession of the land itself should be recovered by the Writ.

(c) This was finally decided in 1499, when judgment was given in Ejectment not only for damages but “for the recovery of the house and appurtenances.”

(C) THE LEASE, ENTRY AND OUSTER.

(a) Plaintiff enters on the land and hands a lease to X.

(b) X enters under this lease and is ejected by the Defendant.

(c) X brings an action against the Defendant.

(d) This raises the question of the validity of X's lease.

(e) If X got judgment in his favour, his lease was valid, therefore Plaintiff who granted it had a good title.

(D) THE FICTITIOUS EJECTMENT (superseded (C)).

(a) Plaintiff pretends that he has taken John Doe on the land and leased it to him, and that Richard Roe, who has received a lease from the Defendant, has ejected John Doe.

(b) This the Defendant is not allowed to dispute.

(c) Plaintiff in the name of John Doe brings an action for recovery of possession against the Defendant in the name of Richard Roe.

(d) The action is called “Doe on a demise from Plaintiff *v.* Roe on a demise from Defendant,” or, more shortly, “Doe *d.* Plaintiff *v.* Roe *d.* Defendant.”

(II) After 1852.

- (a) *The Common Law Procedure Act, 1852* (b).
Abolished the Fictitious Ejectment and substituted a special form of writ.
- (b) *The Judicature Act, 1873* (c).
Anyone claiming land commences an action by writ in the K. B. D. in the same manner as most other actions.

WILLS OF REALTY (LAND).

- (a) Originally land could not be devised by will.
- (b) This was obviated by "wills of uses." (A trustworthy person was enfeoffed before the testator's death to the uses of his will.)
- (c) *Statute of Uses, 1535* (d).
Put a stop to (b) by abolishing Trusts and Uses.
- (d) *Statute of Wills, 1540* (e).
Enabled a testator to devise by will any legal estates held by socage tenure and two-thirds of any estates held by military tenure.
- (e) *Abolition of Old Tenures Act, 1660* (f).
Abolished military tenures and thus enabled the whole of estates in fee simple to be devised.
- (f) *Wills Act, 1837* (g).
Enabled copyholds to be devised, thus making all property devisable by will.

WILLS OF PERSONALTY.

- (a) The earliest form resembled a settlement which named one or two great men and commended the will to them, entreating them of their good will to enforce it.
- (b) These men were not strictly executors in that they were not liable unless they actually intermeddled with the estate.
- (c) By the thirteenth century the practice of appointing executors in the strict sense of the word had grown up.
- (d) The will might be either written, oral, or partly written and partly oral.
- (e) Proof of such a will was made in an Ecclesiastical Court by the witnesses who had been present when it was made.

(b) 15 & 16 Vict. c. 76.

(c) 36 & 37 Vict. c. 66.

(d) 27 Hen. VIII, c. 10.

(e) 32 Hen. VIII, c. 34.

(f) 12 Car. II, c. 24.

(g) 7 Will. IV & 1 Vict. c. 26.

(f) *Statute of Frauds, 1677 (h).*

If a will of personalty worth more than £30 were not proved for six months after it had been made, it must be evidenced by writing made within six days of the execution of the will.

ANCIENT METHODS OF CONVEYANCE OF FREEHOLDS.

(I) FEOFFMENT WITH LIVERY OF SEISIN.

(A) Two Kinds.

(1) LIVERY IN DEED.

(a) The parties went *upon* the land, and the grantor delivered to the grantee some corporeal part of the land, *e.g.*, a twig or clod of earth.

(b) The conveyance was complete as soon as the grantor vacated the land.

(2) LIVERY IN LAW.

(a) The parties went *within sight of* the land and performed a similar ceremony.

(b) The conveyance was complete as soon as the grantee entered into possession during the lifetime of the grantor.

(B) Necessary Words.

In both cases the grantor used words necessary to :—

(a) Confer upon the grantee the appropriate interest (or estate) in the land.

(b) Specify the nature of the services due to him (*i*).

(C) Written Evidence of Conveyance.

(1) Until 1677 no written evidence was necessary.

(2) *Statute of Frauds, 1677 (k).*

(a) Parol conveyances of land, unless put into writing, . . . have the effect of leases at will only.

(b) Grants or surrenders must be by deed or writing.

(3) *Real Property Act, 1845 (l).*

Feoffments must be evidenced by deed.

(h) 29 Car. II, c. 3, and see *post*, p. 122.

(i) Abolished by *Quia Emptores*, 1290.

(k) 29 Car. II, c. 3, ss. 1 and 3; now repealed and replaced by section 53 of the *Law of Property Act, 1925* (15 Geo. V, c. 20).

(l) 8 & 9 Vict. c. 106, s. 3; now repealed and replaced by section 52, sub-section 1 of the *Law of Property Act, 1925*.

(II) THE LEASE AND RELEASE.**(A) Before the Statute of Uses, 1535 (m).**

- (a) A leased land to B for one year.
- (b) B entered on the land.
- (c) A then released his reversion to B by deed.

(B) The "Secret Conveyance."

- (a) A bargained and sold his interest in the land to B.
- (b) This was held to raise a use in favour of B.
- (c) The *Statute of Uses* operated upon this use, and gave B the legal estate.
- (d) Thus, by such a bargain and sale, the purchaser straightway became seised of his interest without any formal conveyance by feoffment.

(C) Statute of Enrolments, 1535 (n).

Attempted to stop the "Secret Conveyance" by enacting that all bargains and sales were to be enrolled within six months, otherwise they were void.

(D) Improved Form of Lease and Release.

- (a) A agreed to sell the land to B for one year.
- (b) B paid 5s.
- (c) A was then deemed to have bargained and sold a lease of his land to B, which was deemed to raise a use in favour of B for one year.
- (d) A then released his freehold reversion to B by deed.

(E) 4 & 5 Vict. c. 21, 1841 (o).

A simple statutory release would suffice without the formality of bargain and sale.

(F) Real Property Act, 1845 (p).

A simple deed of grant was substituted for the statutory release.

(III) THE COMMON RECOVERY (q).**(A) Parties to the Action.**

- A the tenant in tail.
- D the demandant.
- C the common vouchee (usually the crier of the Court).
- T the tenant to the *præcipe*.

(m) 27 Hen. VIII, c. 10.

(n) 27 Hen. VIII, c. 16; repealed 1924 (15 Geo. V, c. 5).

(o) Repealed *S. L. R. Act, 1874*.

(p) 8 & 9 Vict. c. 106; repealed by the *Law of Property Act, 1925*.

(q) Abolished in 1833 by the *Fines and Recoveries Act* (3 & 4 Will. IV, c. 74).

(B) Procedure.

- (a) A conveys his life interest to T.
- (b) D brings an action for recovery of the land against T.
- (c) T vouches A to warranty (*i.e.*, calls upon him to prove that he had a good title to the land before he conveyed it).
- (d) A vouches C to warranty.
- (e) C fails to appear.
- (f) Judgment is given by default that the land belongs to D in fee simple, and that C must give lands of equal value to T and the issue of A.

(IV) THE FINE.

- (a) A similar action was brought, and a compromise agreed to, by which D was to have the land in fee simple in return for a money payment to A.
- (b) This was entered on the rolls of the Court, and put an end (*finis*) to the proceedings.

CHAPTER IV.

IMPORTANT STATUTES.

MAGNA CARTA, 1215.

Ecclesiastical.

Freedom promised to the Church, especially in the case of elections of bishops.

Constitutional.

The Common Council summoned to assess an aid other than the three customary aids must consist of :—

- (i) The archbishops, bishops, abbots, earls, and greater barons summoned separately.
- (ii) The lesser barons and tenants *in capite* summoned generally through the sheriff.

Urban.

London and all other “ cities ” to have their ancient liberties and free customs.

Judicial.

- (1) The Court of Common Pleas to be fixed at Westminster.
- (2) Judges to go on circuit four times a year.
- (3) Sheriff forbidden to hold criminal pleas.
- (4) Justice not to be sold, denied or delayed to anyone.
- (5) NO FREEMAN TO BE SEIZED, IMPRISONED OR PUNISHED EXCEPT BY THE LEGAL JUDGMENT OF HIS PEERS AND BY THE LAW OF THE LAND.

Commercial.

- (1) Merchants to be allowed to come in and go out of England freely.
- (2) One system of weights and measures to be established.
- (3) All rivers to be open for navigation.

Rural.

- (1) All forests made since the accession of John to be disforested.
- (2) Forest laws to apply only to those dwelling in the forests.

Feudal.

- (1) Reform promised in the abuses of Aids, Wardships, Reliefs, and Marriages.
- (2) No aid to be collected save with the consent of the

Common Council of the realm except in the three following cases :—

- (i) Ransoming the King's body.
- (ii) Knighting his eldest son.
- (iii) Marrying his eldest daughter once.

Royal.

- (1) No sheriff or bailiff to impress conveyances or take wood for the King's service without the owner's consent.
- (2) Goods taken for the King's use to be paid for at once.

Securities for the Preservation of the Charter.

- (1) The King to dismiss his foreign mercenaries.
- (2) 25 men (24 barons and the Lord Mayor of London) were to see that the Charter was observed by the King.

DE DONIS CONDITIONALIBUS, 1285 (a).

(*Statute of Westminster II.*)

- (a) Before this date, if land were granted "To A and the heirs of his body," the grant meant that if A died without issue or his issue ever became extinct the land should revert to the grantor.
- (b) Later, such a grant was construed to be a fee simple conditional upon birth of issue, *i.e.*, that upon birth of issue A could alienate the land.
- (c) The result of this was that much land, which on the death without issue of the tenant would have escheated to the King, was lost to the Crown.
- (d) *De Donis* attempted to put a stop to this by enacting that on failure of the donee's heirs the land should revert to the donor, notwithstanding any intervening alienation.
- (e) The object of *De Donis* was defeated by three judicial decisions which gave rise to the Common Recovery (b), which became the method of barring entails and thus defeating the rights of the grantor and his issue.
- (f) The Common Recovery was abolished by the *Fines and Recoveries Act, 1833* (c), and entails could then be barred by a deed enrolled within 6 months in the Court of Chancery and after 1873 (d) in the Central Office of the Supreme Court.
- (g) Since the *Law of Property Act, 1925* (e), legal estates tail can no longer be created though an equivalent equitable estate may be, which, however, can be easily barred by deed or will.

(a) 13 Edw. I, c. 1.

(c) 3 & 4 Will. IV, c. 74.

(d) *Judicature Act, 1873* (36 & 37 Vict. c. 66), and see *ante*, p. 107.

(e) 15 Geo. V, c. 20.

(b) See *ante*, p. 116.

QUIA EMPTORES, 1290 (f).*(Statute of Westminster III.)***(1) Prohibited Subinfeudation.****(a) Subinfeudation.**

The granting of lands by a tenant in fee simple (A) to another person (B) in fee simple to hold of him (A).

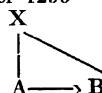
- (b) The statute forbade this by enacting that the tenant (A) might grant the lands to B, but that B should hold them, not of A, but of the same lord (X) from whom A held.

(c) Thus :—

Before 1290



After 1290



- (d) Thus the Statute placed the feoffee in the same relation to the chief lord as the feoffor had been.

(2) Allowed alienation by sale of estates in fee simple.**PRAEMUNIRE, 1393 (g).***Object :—*

To check the power of the Pope in England.

Provisions :—

- (1) The right of recovering the presentation to a church benefice “belongeth only to the King’s Court.”
- (2) The three Estates of the Realm (*viz.*, Clergy, Lords, and Commons) are to support the King in his rights.
- (3) Anyone purchasing from the Papal Court any “Process, Excommunication, Translation or Bull” shall forfeit his lands and chattels to the King, and shall be attached and proceeded against by the *Writ of Praemunire Facias*.

STATUTE OF USES, 1535 (h).**Transformed Use into Possession.**

“Whenever A is seised to the use of B of any interest in land, B shall be deemed to have a corresponding legal estate.”

(A) Objects :—

- (1) To secure for the Crown the estates of the monasteries.

This it achieved.

(f) 18 Edw. I, st. 1.

(h) 27 Hen. VIII, c. 10.

(g) 16 Rich. II, c. 5.

(2) To end Uses and thus put a stop to :—

- (a) Devises of land.
- (b) The creation of Equitable Estates.

Equitable Estate.

The beneficial interest in land which at Common Law is owned by another, *e.g.*, the interest of a *cestui que trust*.

Such estates were created by means of Uses.

E.g., Land was granted "To A to the use of B," which gave A the legal estate and B the beneficial interest (i).

- (c) The Statute enacted that whenever A was seised to the use of B of any interest in land, B should be deemed to have the legal estate.

(B) Failure of the Statute.

The Statute of Uses failed to achieve its second object for three reasons :—

(1) ACTIVE TRUSTS WERE NOT WITHIN THE STATUTE.

The Statute was held not to include those arrangements under which the feoffee to uses did not merely lend his name as a cover for the *cestui que use*, but conducted himself as manager of the estate and handed over the net profits to the *cestui que use*.

(2) A TENANT FOR A TERM OF YEARS WAS NOT SEISED.

An assignment of a term of years to A to the use of B was not "executed" by the Statute so as to make B legal owner, though a feoffment to "A and his heirs to the use of B" would have that effect.

(3) THE DECISION IN JANE TYRREL'S CASE, 1557 (j).

"*There cannot be a use upon a use.*"

- (a) If the donor of lands has enfeoffed A "to the use of B to the use of C," the second use is not "executed" by the Statute.
- (b) This means that at Law A gets nothing, B gets the legal estate, and C gets nothing, but Equity steps in and enforces the second use in favour of C.
- (c) By the *Law of Property Act, 1925* (k), the *Statute of Uses* is repealed, and the position is therefore the same as it was in 1535.

(i) A was called the "Feoffee to Uses" and B was called the "Cestui que use."

(j) Dyer 155.

(k) 15 Geo. V, c. 20.

STATUTE OF FRAUDS, 1677 (l).*Object :—*

To take away the facilities for fraud and the temptation to perjury which arose in verbal obligations, the proof of which depended upon unwritten evidence.

Chief Provisions :—

- (1) Parol Conveyances, leases, etc., of land, unless put into writing and signed by the parties making the same, have the effect of leases at will only. (S. 1.)
- (2) Grants and surrenders must be by deed or writing signed by the party granting or surrendering. (S. 3.)
(The above sections were altered by 8 & 9 Vict. c. 106, which requires a deed instead of writing.)
- (3) The following must be in writing :—(S. 4.)
 - (a) Promise by a personal representative to answer damages out of his own estate.
 - (b) Promise to answer for the debt, default or miscarriage of another.
 - (c) Agreements made in consideration of marriage.
 - (d) Contracts for sale of lands or any interest in or concerning them.
 - (e) Agreements not to be performed within one year.
- (4) Contracts for the sale of goods for the price of £10 or upwards must be in writing, unless the buyer :—
 - (a) Accept or actually receive part of the goods; or
 - (b) Give something in earnest to bind the bargain or in part-payment. (S. 17.)

THE PETITION OF RIGHT, 1628.

The Petition consists of two parts :—

(I) A Recital of Four Grievances.**(1) ARBITRARY TAXATION.**

Reference is made to the Forced Loan in Middlesex, and it is asserted that no “ tax, tallage, aid or other like charge ” can be levied without the consent of Parliament.

(2) ARBITRARY IMPRISONMENT.

Reference is made to the case of the five knights who were imprisoned *per speciale mandatum Regis*, and the *nullus liber homo* clause of *Magna Carta* is cited as an authority that such a proceeding is illegal.

(l) 29 Car. II, c. 3; sections 1 and 3 repealed by the *Law of Property Act, 1925* (15 Geo. V, c. 20), and replaced by sections 53—55 of that Act.

(3) **BILLETING OF SOLDIERS.**

This clause asserts that great companies of soldiers have been billeted upon the inhabitants of various counties against their will.

(4) **COMMISSIONS OF MARTIAL LAW.**

This clause states that, whereas no offender is exempt from the ordinary law of the land, yet the King has issued commissions of martial law far too frequently and without there being any necessity for them.

(II) **A Comprehensive Request that these Grievances may Cease.**

The Commons therefore “do humbly pray . . .

- (1) that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without the consent of Parliament . . .
- (2) that no freeman in any such manner before mentioned be imprisoned or detained . . .
- (3) that Your Majesty will be pleased to remove the said soldiers . . .
- (4) and that the foresaid commissions for proceeding by Martial Law be revoked and annulled and that hereafter no commissions of like nature may issue forth. . . .”

THE BILL OF RIGHTS, 1689 (m).

(1) **Idea that the King is above the Law Destroyed.**

This is done by twelve sections naming various official acts of James II, and stating them to be illegal.

If the King's official acts are illegal, the King in his official capacity cannot be above the law.

From that time onwards the sovereign power = The King in Parliament.

(2) **The Doctrine of Divine Hereditary Right Attacked.**

This is done by :—

- (a) Stating that the throne is vacant (owing to the abdication of James II).
- (b) Passing over the son of James II.
- (c) Giving the throne to the Prince of Orange.
- (3) Suspending power declared illegal.
- (4) Dispensing power declared illegal if exercised without the consent of Parliament.
- (5) Arbitrary taxation declared illegal.

- (6) Commissions of Martial Law declared illegal.
- (7) Subject's right to petition the Crown declared legal.
- (8) Standing army forbidden without the consent of Parliament (n).
- (9) Excessive bail disallowed.
- (10) Parliament to meet frequently.
- (11) Freedom of speech in Parliament not to be questioned outside Parliament.
- (12) **The Monarchy made Conditional.**
 - (a) King must not be a papist or marry a papist.
 - (b) King must repeat the declaration against Roman Catholics in the *Test Act, 1678* (o).
Abolished by the *Accession Declaration Act, 1910* (p).

THE ACT OF SETTLEMENT, 1700 (q).

- (1) **The Succession Altered.**
Crown to go to Sophia, Electress of Hanover, and her heirs in default of issue of Mary II, or Anne.
- (2) **The Monarchy made Conditional.**
 - (a) No papist can be King.
 - (b) King must repeat the Coronation Oath.
 - (c) King must be a member of the Church of England.
 - (d) King cannot leave the country without the consent of Parliament.
- (3) **Two Attempts to Stop the Cabinet System (r).**
 - (a) Attempt to revive the Privy Council.
 - (b) No person holding office under the Crown can be in the House of Commons (repealed 1705).
- (4) **Power of the Crown over the Judges Removed.**
Judges are to hold office *quamdiu se bene gesserint* instead of *durante bene placito*.
- (5) **Ministers made Responsible for Executive Acts of the Crown.**
No pardon under the Great Seal of England is to be pleaded to an Impeachment by the Commons in Parliament.

(n) No Parliamentary sanction is required for the maintenance of the navy, but the necessary supply must be voted annually.

(o) 30 Car. II, st. 2, c. 1.

(p) 10 Edw. VII & 1 Geo. V, c. 29.

(q) 12 & 13 Will. III, c. 2.

(r) See *ante*, p. 52.

CHAPTER V.

A Table of the Most Important Writs in Alphabetical Order with an Explanation of their uses.

Attachment.	(a) For the arrest of a person for contempt of Court, <i>e.g.</i>, disobedience to an order or judgment, etc. (b) The writ is issued by leave of a Judge on notice to the person concerned and directs the sheriff to arrest him. (c) He remains in prison until he has cleared his contempt or is discharged. (d) In cases under the <i>Debtors Act, 1869</i> (a), he cannot be kept in prison for more than a year.
Attaint.	(a) “ To inquire whether a jury of twelve men gave a false verdict, so that the judgment following upon it may be reversed and the party restored to all that he has lost.” (b) A jury of twenty-four was summoned by the writ to try the validity of the verdict of the first jury. (c) If the verdict of this second jury were contrary to that of the first :— (i) the first verdict was set aside. (ii) the first jury were punished by imprisonment and forfeiture and later by a fine. (d) Proceedings by Attaint were abolished by the <i>County Juries Act, 1825</i> (b). (e) To-day, when a verdict in a civil case is suspected of being false or erroneous, a motion is made for a new trial.

(a) 32 & 33 Vict. c. 62.

(b) 6 Geo. IV, c. 50.

Capias ad Respondendum.	(a) In common law actions before 1832 this was the writ by which an ordinary action was commenced. (b) The defendant was not arrested on it, but was required to appear and put in common bail. (c) If the cause of action was over a certain sum, he might be arrested or required to put in special bail. (d) To-day this writ may be issued for the arrest of a person against whom an indictment for misdemeanour has been found in order that he may be arraigned; but in practice a justice's warrant is always used.
Capias ad Satisfaciendum (Ca. Sa.).	(a) For the arrest of the defendant in a civil action when judgment has been recovered against him for a sum of money and has not been satisfied. (b) Abolished by the <i>Debtors Act, 1869</i> (a), unless the defendant could but would not pay. (c) In practice, it has been superseded either by an order for committal or a writ of attachment.
Capias Utlegatum.	There were two kinds of Outlawry :— (1) <i>In Civil Proceedings.</i> (a) If the defendant did not appear in an action, he could be outlawed and then arrested under this writ and brought into Court. (b) Outlawry was also used as a means of execution to enforce a judgment. (2) <i>In Criminal Proceedings.</i> Where an indictment has been found against a person and summary process proves ineffectual to compel him to appear, he may be outlawed by means of this writ. N.B. The issue of this writ has been abolished in civil cases and is practically obsolete in criminal cases.

Casu Consimill.	(a) Where a tenant <i>by the curtesy</i> or for life had alienated the land to the prejudice of the reversioner, the latter could obtain a writ of entry against him. (b) This writ was called <i>casu consimili</i> and took its name from the fact that it had been framed after the likeness of a writ called <i>casu proviso</i>, which was granted to a reversioner where a tenant <i>in dower</i> had alienated to his prejudice. (c) Both were abolished by the <i>Real Property Limitation Act, 1833</i> (c).
Certiorari.	(a) Issues from a superior to an inferior Court in either civil or criminal proceedings to remove a case from the inferior to the superior Court in order that the parties may have a better or more speedy trial. (b) This writ is also used to bring up for the purpose of being quashed orders, alleged to be erroneous, of Courts of summary jurisdiction. (c) Where a peer or peeress is indicted for treason or felony, the indictment is removed into the House of Lords by this writ.
Covenant.	(a) At Common Law this writ lay for one claiming damages for breach of a contract under seal. (b) It was superseded by :— (i) Action of debt if the damages were liquidated. (ii) Action of covenant if the damages were unliquidated. (c) The writ itself was actually abolished by the <i>Real Property Limitation Act, 1833</i> (c), and the two actions of debt and covenant respectively were abolished by the <i>Judicature Act, 1875</i> (d).

(c) 3 & 4 Will. IV, c. 27.

(d) 38 & 39 Vict. c. 77.

Ejectment.	(1) <i>Quare ejecit infra terminum</i>. Could only be brought against a lessor or his feoffees. (2) <i>Ejectio firmæ</i>. A variety of trespass. The possessor for a term of years could recover damages if ejected. N.B. Both writs are now abolished.
Elegit.	(a) Issued to the sheriff commanding him to hold an inquiry by means of a jury as to what lands are held by any given judgment debtor. (b) The written verdict of the jury, signed by the sheriff, is called the Return to the Writ. (c) A judgment creditor who obtains the issue of this writ is deemed to be in possession of the land of the debtor as soon as the return to the writ is complete. (d) He is said to have an "Estate by Elegit" and may take possession of the land or sell it under an order of the Court. (e) This writ is "Elegit" from the fact that originally the creditor had the choice of either :— (i) a Writ of Fi. Fa. (ii) delivery by the sheriff of all the debtor's chattels and <i>half</i> his land. It was extended to <i>all</i> the debtor's land by the <i>Judgments Act, 1838</i> (e).
Entry.	(a) Writs of Entry generally were for actions which lay for one from whom lands were wrongfully withheld. (b) They originally extended not only to the ejector and the ejected, but also to persons who derived title through them. (c) They differed from the Writ of Right in that in the Writ of Right the whole title was in issue; but in writs of

Entry (continued).	Entry, only the defect of title alleged in the writ. (d) Writs of Entry were abolished by the <i>Real Property Limitation Act, 1833</i> (f).
Error.	(1) <i>Civil.</i> (a) The method by which appeals from certain inferior Courts of record were brought to the Common Pleas. (b) Also a means of bringing the records of the Court of Common Pleas to be reviewed by the Court of Exchequer Chamber (the then Court of Appeal). (c) Abolished by the <i>Judicature Act, 1875</i> (d). (2) <i>Criminal.</i> (a) For review by the K. B. D. (and thence to the House of Lords) of the lower Court for any defect in point of law (whether errors in the indictment or in judgment) which appeared upon the face of the record. (b) Abolished by the <i>Criminal Appeal Act, 1907</i> (g).
Fieri Facias (Fl. Fa.).	(a) This is a writ of execution to levy a judgment debt. (b) It is directed to the sheriff and commands him to levy of the goods and chattels of the debtor the sum recovered by the judgment with interest. (c) In executing the writ, the sheriff's officer enters upon the debtor's premises and then remains in possession. (d) An inventory is then made of the goods and they are sold by auction. (e) A judgment creditor is entitled to this writ on production of a judgment or an office copy thereof.

(f) 3 & 4 Will. IV, c. 27.

(g) 7 Edw. VII, c. 23, as amended by 8 Edw. VII, c. 46.

Formedon.	(a) Writs of Formedon were brought by persons who claimed land under a gift in tail when it was in the possession of a person not entitled to it. (b) There were three kinds :— (i) In Descender; brought by the issue in tail. (ii) In Remainder; brought by the remainderman. (iii) In Reverter; brought by the reversioner or donor. (c) They were all abolished by the <i>Real Property Limitation Act, 1833</i> (h).
Habeas Corpus (ad subjiciendum). THE CHIEF HABEAS CORPUS WRIT.	(a) A Prerogative Writ addressed to the custodian of the prisoner commanding him to produce the body of the prisoner with the day and cause of his caption and detention and to do, submit to and receive whatever the Court or Judge should ordain in that behalf. (b) This writ was the chief remedy of a person deprived of his liberty and was the writ which was improved upon by the <i>Habeas Corpus Act, 1679</i> (hh).
Habeas Corpus (ad recipiendum or cum causa).	To remove a cause from an inferior Court into a superior Court when the prisoner is in custody in the Court below.
Habeas Corpus (ad respondendum).	To bring up a prisoner in the custody of an inferior Court to charge him with a fresh action in a superior Court.
Habeas Corpus (ad satisfaciendum).	To bring up a prisoner against whom an adverse judgment had been obtained in an inferior Court.
Other	Writs similar to Habeas Corpus.
(1) De odio et atia.	Directing the sheriff to inquire whether a prisoner charged with murder was committed to trial on reasonable grounds or maliciously, and if the latter, to allow bail.

(h) 3 & 4 Will. IV, c. 27.

(hh) 31 Car. II, c. 2, and see *ante*, pp. 12, 46.

(2) Mainprize.	Directing the sheriff to take sureties for the appearance of a prisoner and subject to such sureties being forthcoming, to set him at liberty.
(3) De homine replegiando. (These three writs are all obsolete.)	Directing the sheriff to release a prisoner on sureties binding themselves that the prisoner should appear and answer the charge against him.
Justices.	A writ directed to the sheriff empowering him to try in the old county court a plea of debt for a sum exceeding the 40s. to which his jurisdiction was restricted by the <i>Statute of Gloucester, 1278 (i)</i>.
Mandamus.	(a) A Prerogative Writ issued to compel the performance of a duty. (b) It is directed to the person who is subject to the duty. (c) In the fifteenth century it took the form of a letter missive from the sovereign. (d) In the sixteenth century it was directed to issue on a petition to Parliament for redress; and thus became a Parliamentary writ. (e) It was chiefly used to enforce restitution to public offices and was known as the "Writ of Restitution." (f) Finally it became an original writ issuing from the Court of King's Bench (since 1873 from the King's Bench Division) in all cases where there was a legal right but no other specific remedy; especially where the obligation arises out of the official status of the respondent and is therefore of a public character.
Bill of Middlesex & Writ of Latitat.	<i>The King's Bench extends its jurisdiction to purely civil matters.</i> (a) A writ was issued to the Sheriff of Middlesex commanding him to arrest

**Bill of Middlesex
&
Writ of Latitat**
(continued).

- the defendant for an imaginary trespass and to bring him before the Court of King's Bench.
- (b) When he was brought before the Court he was proceeded against for any cause of action.
 - (c) If the defendant was not in Middlesex the sheriff returned the writ marked "not found."
 - (d) The Writ of Latitat was then issued to the sheriff of the county where the defendant lived stating that the defendant "lurks and lies hid" in that county and commanding the sheriff to arrest him.
 - (e) In course of time the Writ of Latitat alone was issued and came to be known as the Bill of Middlesex.
 - (f) This procedure was abolished in 1832 (j).

Monstrans de Droit.

- (a) A remedy which a subject had when the Crown was in possession of property belonging to him and the title of the Crown appeared from the facts set forth upon record.
- (b) Practically superseded by Petition of Right.

Original Writ.

- (a) The ancient method of commencing every action at Common Law.
- (b) Issued out of the Common Law side of the Chancery and was under the Great Seal.
- (c) To avoid the expense of original writs other methods of commencing actions were devised, but they were all abolished and the modern Writ of Summons introduced by 2 & 3 Will. IV, c. 39.
- (d) Original Writs continued to exist for some time as a method of appealing from one Court to another, *e.g.*, Writ of Error (*q.v.*).

(j) 2 Will. IV, c. 39.

Pone.	To remove a case from the Shire Court to the King's Court; now obsolete.
Præcipe.	(a) Formerly, a species of original writ, so called because it required the sheriff to command the defendant either to do a certain thing or to show cause why he had not done it. (b) To-day a <i>Præcipe</i> is a slip of paper on which a party to a proceeding in the High Court writes the particulars of a document which he wishes to have prepared or issued and hands to the officer of the Court, whose duty it is to prepare or issue such document (<i>k</i>).
Præcipe quod Reddat.	(a) The writ by which a Common Recovery was commenced against the tenant of the freehold. (b) It commanded the defendant to give up the land to the demandant. (c) Abolished by the <i>Fines and Recoveries Act, 1833</i> (<i>l</i>).
Prerogative Writs.	(a) Writs issued by virtue of the Crown's Prerogative and not as part of the public administration of justice (called "Writs as of Right"). (b) Such writs are : Certiorari, Mandamus, Prohibition, Quo Warranto, etc.
Prohibition.	(a) A writ issuing out of the High Court to restrain an inferior Court within the limits of its jurisdiction and to prevent it from exceeding those limits. (b) Three kinds :— (i) <i>Absolute</i>. (ii) <i>Temporary</i>. Operative only until a particular act is done and then discharged. (iii) <i>Partial</i>. Extending only to that part of the proceeding which exceeds the jurisdiction of the inferior Court and allowing the rest to proceed.

(*k*) R. S. C. Ord. 42, r. 12.(*l*) 3 & 4 Will. IV, c. 74.

Quod Permittat.	(a) Writ of Right adapted to servitudes and also to abate a nuisance. (b) Abolished by the <i>Real Property Limitation Act, 1833</i> (m).
Quominus.	<i>The Court of Exchequer extends its jurisdiction.</i> (a) In an action for personal debt the plaintiff was allowed to plead that he was a debtor to the King, and that by reason of the cause of action pleaded, he had become less able to pay his fictitious debt to the King. (b) <i>E.g.</i>, B owes A £100 which he will not pay. A pleads that he owes the King £100 but that he cannot pay it, because B will not pay the £100 which is owing to him. (c) This brought the case within the jurisdiction of the Court of Exchequer and the matter was tried there. (d) The writ was abolished in 1832 (n).
Quo Warranto.	(a) Issued by Edward I to inquire :— (1) What were the Royal Manors. (2) By what warrant (a) Estates that were formerly Crown lands ; or (b) Judicial rights that were once exercised by the Crown had passed into the hands of private individuals or corporations. (b) Where no grant or charter could be shewn, the lords of the manors were forbidden to exercise such jurisdiction in the future. (c) This writ has long fallen into disuse and has been supplanted by an "Information in the nature of a writ of <i>quo warranto</i>." (d) This may be brought, with leave of the Court, against any person who claims or usurps any office, franchise or liberty to inquire "by what authority" he supports his claim.

Recordari Facias.	(a) A writ to remove a suit from an inferior Court not of record into one of the superior Courts of Common Law. (b) It has become obsolete and been superseded by the writ of Certiorari.
Registrum Brevium (Register of Writs).	A collection of original writs, kept by the Chancellor, which really became an encyclopædia of the Common Law.
Right (Breve de Recto).	(a) A writ to decide whether the demandant (plaintiff) or the tenant (defendant) owned the land in dispute. (b) Originally the title was decided by the "Trial by battle"; but Henry II directed that the defendant might claim to have his right determined by the Grand Assize providing he could purchase the appropriate writ. (c) There were many forms of this writ, but the two most important were :— (i) <i>Writ of Right Close.</i> This lay for tenants in ancient demesne (o) who had been ousted from their lands. It was addressed to the lord of the manor and commanded him to do full right in his Court. It further contained a clause saying that in default of the lord so doing, the matter would be tried in the sheriff's Court. (ii) <i>Writ of Right Patent.</i> This lay for tenants other than those in ancient demesne and was tried by the Grand Assize. It was addressed to the sheriff commanding him to summon four knights who in their turn chose twelve more. These sixteen knights sat in the King's Court and decided whether the plaintiff or defendant had a better title to the land.

(o) Manors in ancient demesne are manors which were in the actual possession of the Crown during the reign of William the Conqueror.

Right (Breve de Recto) (continued).	(d) The Writs of Right were abolished by the <i>Real Property Limitation Act, 1833</i> (p).
Subpœna.	(a) A writ issued in an action requiring the person to whom it is directed to be present at a given place and time for a specified purpose under penalty (<i>sub pœna</i>) of £100. (b) This writ was devised in the reign of Richard II and was one of the means by which Chancery increased its jurisdiction. (c) The two chief forms of this writ are :— (i) <i>Ad Testificandum</i> . To compel a witness to attend and give evidence. (ii) <i>Duces Tecum</i> . To compel a witness to attend and give evidence and to bring with him certain documents specified in the writ. (d) Under the old Chancery practice every suit was commenced by a writ of subpœna requiring the defendant to appear. (e) Now, every action is commenced by a writ of summons.
Solre Facias.	(a) A writ founded upon a judgment, directing the sheriff to make known or warn the person against whom it is brought to show cause why the person bringing it should not have the advantage of the judgment. (b) Sometimes it was a continuation of a former action, being merely an interlocutory proceeding and in the nature of an execution. (c) <i>Statute of Westminster II</i> gave the writ in personal actions to revive a judgment; but this has been superseded by a simple application to the Court (q).

(p) 3 & 4 Will. IV, c. 27.

(q) R. S. C. Ord. 42, r. 23.

Scire Facias (continued).	(d) There were several kinds of <i>Scire Facias</i>, each kind having a distinctive name; e.g., <i>scire facias ad rehabendam terram</i>, to enable a judgment debtor to recover his lands taken under an <i>elegit</i> when the judgment creditor has been paid the amount of his judgment. (e) All kinds of <i>Scire Facias</i> are either obsolete or very rare. (f) The most important recent instance of <i>Scire Facias</i> was where it was required to enforce a judgment against the shareholders of a company.
Tolt.	To remove trial from Lord's Court to Shire Court; now obsolete.
Trespass.	(a) The idea of Trespass was founded upon a breach of the King's Peace (r). (b) Trespass could be either to land, to person or to goods. (c) The writ of Trespass was introduced during the twelfth century and alleged "<i>vi et armis</i>"; <i>"Quare clausum fregis vi et armis contra pacem nostram."</i> Actions in Tort and Contract arise out of Trespass. Trespass = Malfeasance, i.e., wrongfully seizing plaintiff's land, goods or person. Trespass on the case = Misfeasance, i.e., improperly or negligently doing what had been agreed to be done, i.e., Tort. Trespass on the case on promises = Nonfeasance, i.e., failing to do what had been promised to be done, i.e., Breach of Contract.
Warrantia Cartæ.	(a) "Warranty" was an obligation by the feoffor (or donor) of land to defend the feoffee (or donee) in the possession of the land and to give him land of equal value if he were evicted from it.

(r) See *ante*, p. 91.

Warrantia Cartæ
(continued).

- (b) If the feoffee were sued for the recovery of the land, he could "vouch the feoffor to warranty," i.e., call him into Court and require him to defend the title or give him lands of equal value.
 - (c) The writ of Warrantia Cartæ lay to enforce a warranty of title to land where the tenant was unable to avail himself of warranty by voucher.
 - (d) Both Voucher and Warrantia Cartæ were abolished by the *Real Property Limitation Act, 1833* (s).
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(s) 3 & 4 Will. IV, c. 27.

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(See also Conflict of Laws.)

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