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Peerage privileges since the House of Lords Act 1999

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PEERAGE PRIVILEGES SINCE THE HOUSE OF LORDS ACT 1999

ABSTRACT

The recent and ongoing reform of the House of Lords in the United Kingdom, which has thus far seen the passage of the House of Lords Act 1999, which excluded almost all hereditary peers and peeresses from the House, has focused attention upon the appointment process for membership of the upper house, whether hereditary, appointed, or elected. Less attention has been paid to the role of the peerage. Though officially it is said that any proposals for substantial reform of the composition of the Lords will have to look at the Lords' role, powers and procedures and its relationship with the House of Commons, there has been little attention paid to the role of the peerage per se.

The purpose of this article is to seek to identify the surviving privileges of peerage. It begins with a review of the nature of peerage. It then examines membership of the House of Lords, as the principal privilege of peerage historically. The effect of the House of Lords Act 1999 is then assessed. Finally, the remaining privileges of peerage are examined.

I. INTRODUCTION

The recent and ongoing reform of the House of Lords, which has thus far seen the passage of the House of Lords Act 1999, which excluded almost all hereditary peers and peeresses from the House, has focused attention upon the appointment process for membership of the upper house, whether hereditary, appointed, or elected. Less attention has been paid to the role of the peerage. Though officially it is said that any proposals for substantial reform of the composition of the Lords will have to look at the Lords' role, powers and procedures and its relationship with the House of Commons, there has been little attention paid to the role of the peerage per se.

Still less attention has been paid to the status of the hereditary peers who are not now automatically members of the House, though they remain, for the present, the source of the only elected element of the House. The question of the privileges of peers, whether hereditary without a seat, hereditary with a seat by election or office, or indeed of life peers, has been subject to even less attention.

The purpose of this article is to seek to identify the surviving privileges of peerage. It begins with a review of the nature of peerage. It then examines membership of the House of Lords, as the principal privilege of peerage historically. The effect of the House of Lords Act 1999 is then assessed. Finally, the remaining privileges of peerage are examined.

II. THE NATURE OF PEERAGE

Although membership of Parliament has always been central to peerage, it is not the total extent of its nature. As Lord Wrenbury observed in the *Rhondda Case*:

A peerage is an inalienable incorporeal hereditament created by the act of the Sovereign in which, if and when he creates it, carries with it certain attributes which attach to it not by reason of any grant of those attributes by the Crown, but as essentially existing at common law by reason of the ennoblement created by grant of the peerage.¹

The first element of the peerage is that it is a title or dignity created by the Crown. The Sovereign cannot herself hold a dignity.² The Sovereign has traditionally claimed the title of Duke of Lancaster, somewhat oddly, even when a Queen Regnant. This title, dating from a grant to John of Gaunt in 1362, merged with the Crown with the accession of King Henry VI. The title, being a peerage governed by the ordinary rules of descent, could not have been inherited by Queen Elizabeth I, nor have descended to the present Queen. As the Sovereign is font of honour, they can use whatever title they wish, provided it does not conflict with the royal style and title established by law.³ A peerage is also in the form of inalienable (or normally inalienable) property. English law – and the law in Scotland in relation to peerages differs from that in England and Wales in some respects – recognises a peerage as an incorporeal and impartible hereditament, inalienable and descendable according to the words of limitation in the grant, if any.⁴ If the peerage is a barony by writ, there will, of course, be no words of limitation. In English law, letters patent purporting to create a peerage without including words of limitation will be held to be bad. In Scotland a grant in fee would be presumed.⁵ This presumption is, however, rebuttable.⁶

As a descendable dignity, it was covered by the Statute of Westminster the Second 1285 (England) (*De Donis Conditionalibus*).⁷ A peerage is descendable as an estate in fee tail, rather than as a fee simple conditional,⁸ whether it is conferred with any territorial qualification or not.⁹ A peerage does not have any connection with the tenure of land. This was not always so, however. From the time of King Henry VI until 1861 it was believed that peerages by tenure were possible.¹⁰ But it is customary for viscounts and

¹ *Rhondda's (Viscountess) Claim* [1922] 2 A.C. 339.

² *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, per Lord Cairns LC; considered by *Rhondda's (Viscountess) Claim* [1922] 2 A.C. 339.

³ *Norfolk Earldom Case*, *ibid*, 17, per Lord Davey.

⁴ *Nevil's Case* (1604) 7 Co Rep 33a; 77 E.R. 460; *R v. Purbeck (Viscount)* (1678) Show Parl Cas 1, 5; 1 E.R. 1; *Norfolk Earldom Case* [1907] A.C. 10; *Rhondda's (Viscountess) Claim* [1922] 2 A.C. 339.

⁵ *Perth Earldom Case* (1848) 2 H.L. Cas 865; 9 E.R. 1322; *Herries Peerage Case* (1858) LR 2 Sc & Div 258; *Mar Peerage Case* (1875) 1 App. Cas. 1, 24, 36.

⁶ *Herries Peerage Case*, *ibid*; *Mar Peerage Case*, *ibid*.

⁷ 13 Edw I c 1.

⁸ *Re Rivett-Carnac's Will* (1885) 30 ChD 136.

⁹ *Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 E.R. 942.

¹⁰ *Arundel Case* (1433) 4 Rot Parl 441; *Berkeley Peerage Case* (1861) 8 H.L.C 21; 11 E.R. 333.

barons at least to have a territorial designation (“Baron [...] of [...] in Our County of [...]”).¹¹ The naming of a place is not, however, essential to the creation of a peerage.¹² Indeed, with a peerage created by writ of summons this would not be possible.

The estate in fee tail of the peerage, also called an estate tail, is limited to a person and the heirs of his body, or to a person and the particular heirs of his body. Each successive heir to a peerage succeeds to the peerage in the terms of the original grant. A declaration of legitimacy obtained pursuant to the provisions of the Legitimacy Declaration Act 1858 (21 & 22 Vict c 93) (UK) is good for peerages and other dignities.¹³ While the laws governing legitimacy have become more liberal since the nineteenth century, they do not in general allow the inheritance of dignities by illegitimate issue. A limitation to “his heirs” will not carry the peerage to collateral heirs¹⁴ though a grant to the grantee and his heirs male will, but not to his heirs general, as would a grant of land to the grantee and his heirs male.¹⁵ A peerage cannot be created with a limitation of descent which is unknown to the law of real property.¹⁶ Nor can a peerage be the subject of a trust, nor pass to a trustee in bankruptcy.¹⁷ Members of the House of Commons are disqualified from sitting or voting if bankrupt.¹⁸

There are other aspects in which a peerage is quite dissimilar to real or personal property. Just as a peerage is a special type of property that is also a dignity or honour¹⁹ – so the method of creation for a peerage differs from that required for ordinary property.²⁰ An hereditary peerage could be created either by the issue of a writ of summons to the House of Lords,²¹ followed by the taking of his seat by the recipient of the writ²² or by letters patent, the latter method having being invariably adopted since very early times. The first peerage created by letters patent was that for John de Beauchamp, created Lord de Beauchamp and Baron of Kidderminster in 1388. Limitation was to his heirs male of

¹¹ See the Crown Office (Forms and Proclamations Rules) Order 1992 (UK), SI 1992/1730, art 2, Schedule, Part III, Forms D-G.

¹² *R v. Knollys* (1694) 1 Ld Raym 10; 91 E.R. 904; *Re Rivett-Carnac’s Will*, (1885) 30 ChD 136, 136.

¹³ *Ampthill Peerage Case* [1977] A.C. 547.

¹⁴ *Wiltes Peerage Case* (1869) LR 4 H.L. 26, not following *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 E.R. 293.

¹⁵ *Wiltes Peerage Case* (1869) LR 4 H.L. 26.

¹⁶ *Wiltes Peerage Case* (1869) LR 4 H.L. 26; *Cope v. De La Warr (Earl)* (1873) 8 Ch App 982; *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, 20, per Lord Cairns, LC.

¹⁷ *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, *Re Earl of Aylesford’s Settled Estates* (1886) 32 ChD 162.

¹⁸ Insolvency Act 1986 (UK), s 427.

¹⁹ *Norfolk Earldom Case* [1907] A.C. 10, 17 (H.L.) per Lord Davey.

²⁰ For the creation of new types of dignities, see the *Parliamentary Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829, first published 25 May 1820), vol. 2, 37.

²¹ *Le Power and Coroghmore Barony Case* (1921) Report of the Attorney-General 5, 6.

²² *Abergavenny’s (Lord) Case* (1610) 12 Co Rep 70; 77 E.R. 1348; *Verney’s Case* (1695) Skin 432; 90 E.R. 191.

his body.²³ Where letters patents were used, the necessity of taking a seat was removed, although formal investiture remained common until the early seventeenth century. The formal investiture of the Prince of Wales and Earl of Chester, revived in 1911, provides a good example of the older form. Some peerages have been created by act of Parliament, or by charter,²⁴ and in the early years it was not always clear which method had in fact been used.²⁵ The actual taking of the seat must be proven.²⁶ The existence of the writ may be presumed.²⁷ Where a writ alone is used, a barony by writ, or barony in fee is created. A writ alone was usual till the middle of the reign of Henry VII. Somewhat different rules apply to Irish and Scottish peerages, but as the rules for British and United Kingdom peers follows that of the English peerage, and the majority of peers belong to one or both of these, the rules of the English peerage are what principally concern us here.

Early Irish baronies were prescriptive, and descent was always to the heirs male of the body of the presumed grantee.²⁸ There is, however, only one Irish barony by writ in existence, that of Le Poer (now held by the Marquess of Waterford), whose ancestor was called to the Irish House of Lords in 1375.²⁹

The ending of the right of hereditary peers to a writ of summons – unless otherwise qualified (by office or election) – by the House of Lords Act 1999 (UK), would appear to render the first method of creation obsolete as well as obsolescent.

A peerage created by letters patent descends according to the limitation expressed in the letters patent, which is almost always to the heirs male of the body of the grantee. A grant of a peerage to the grantee and his heirs male is valid, though a similar grant of land would be void,³⁰ that is to and through the male line in direct lineal descent from the grantee. A grant to “heirs male” rather than “heirs male of the body” will be void.³¹ The patent must specify the patentee, the name of the dignity and its limitation.³² A subject cannot refuse a peerage, even if it is conferred in infancy.³³

A peerage created by writ of summons is presumed to be limited to the heirs of the body of the grantee, that is, to his heirs male or female, lineal or collateral.³⁴ Although

²³ See the *Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829), vol. v. p 81.

²⁴ *De Vere's Case* (1385) 8 State Tr NS 646.

²⁵ See *The Prince's Case* (1606) 8 Co Rep 1 13b; 77 E.R. 496.

²⁶ *De Wahull Peerage Case* (1892) cited in *St John Peerage Case* [1915] A.C. 282, 291.

²⁷ *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 E.R. 882.

²⁸ *R v. Levet* (1612) 1 Bulst 194; 80 E.R. 882.

²⁹ *Le Power and Coroghmore Barony Case* (1921) Report of the Attorney-General 5, 6.

³⁰ *Wiltes Peerage Case* (1869) LR 4 H.L. 26.

³¹ *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 E.R. 293; *Wiltes Peerage Case* (1869) LR 4 H.L. 26.

³² Modern practice may be seen in Crown Office (Forms and Proclamations Rules) Order 1992, SI 1992/1730, art 2 (1), Schedule, Part III.

³³ *Egerton v. Brownlow (Earl of)* (1853) 4 H.L. 1 Cas 1; 10 E.R. 359; *Mortimer Sackville's Case* (1719) cited in *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, 6n; *Queensberry's (Duke of) Case* (1719) 1 P Wms 582; 24 E.R. 527.

³⁴ *Vaux Peerage Case* (1837) 5 Cl & Fin 526; 7 E.R. 505; *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 E.R. 882; *Hastings Peerage Case* (1841) 8 Cl & Fin 144; 8 E.R. 58. Re collateral heirs, *Roos Barony Case* (1666) 1 Dy 5b; 73 E.R. 13, re heirs of the half-blood:

new peers may not now be created by this means (though one might speculate as to the legal effect of issuing a writ of summons to an individual, not being a peer, in the absence of letters patent), there are a number of existing peers whose titles descend in this manner.

Without a special limitation in the letters patent – such limitations were commonly used as a special honour, to for example, some of the military leaders of the Second World War who lacked sons but had daughters – only a peerage created by writ of summons could ever devolve upon a female. Lord Louis Mountbatten was created Earl Mountbatten of Burma, with special remainder to his daughters in order of seniority. They were used for commoners only 13 times between 1643 and 1831, but after 1876 became more common, with seven used 1876-92. The doctrine that these baronies by writ (also called baronies in fee) were descendable to the heir general is historically unsound, but now well entrenched in law.³⁵ Scottish peerages however are presumed in similar circumstances – creation by writ of summons – to be limited to the heirs male general.³⁶ Life Peers until 1887 were merely entitled to sit and vote in the House for so long as they held judicial office, and it was only in 1897 that the sons and daughters of Lords of Appeals in Ordinary were given the style “honourable” borne by the children of other peers of the degree of baron.

The patent in English peerages in effect provides a limitation and definition of the effect of the issue of a writ of summons. It was because of these rules of descent were regarded as essential to the nature of a peerage that statutory authority was needed to create peerages for life.³⁷ Despite the Life Peerages Act 1958 (6 & 7 Eliz II c 21) (UK) the Crown still does not have the power to confer peerages for life. Creations must be in accordance with one or other of the statutory measures.³⁸

The right to a peerage is distinct from a title of honour conferring a particular rank in the peerage, which is merely a collateral matter.³⁹ Only earls and barons preceded the establishment of Parliament, and a writ of summons does not create any peerage except that of the degree of baron, whatever style is used in the writ.⁴⁰

Fitzwalter's Case (1669) Collins's Baronies by writ (London: privately printed, 1734), 268.

³⁵ *Grey's (Lord) Case* (1640) Cro Cas 601; 79 E.R. 1117; *Clifton Barony Case* (1673) in Sir Edward Coke, *Coke upon Littleton* (“*First Institutes*”) (New York: Garland Publishing, reprint 1979 of 19th ed. 1832), 16b; *Vaux Peerage Case* (1837) 5 Cl & Fin 526; 7 E.R. 505; *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 E.R. 882; *Hastings Peerage Case* (1841) 8 Cl & Fin 144 at 157; 8 E.R. 58; *Wharton Peerage Case* (1845) 12 Cl & Fin 295; 8 E.R. 1419.

³⁶ *Sutherland Earldom Case* (1771) Mair's Reports of Peerage Claims 55, applied *Herries Peerage Case* (1858) LR 2 Sc & Div 258; *Mar Peerage Case* (1875) 1 App. Cas. 1; also *Annandale Peerage Case* (1844) 1 Scots Peerage 269, considered in *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 E.R. 293.

³⁷ Appellate Jurisdiction Acts 1876-1947.

³⁸ *Wensleydale Peerage Case* (1856) 5 H.L.C 958; 10 E.R. 1181.

³⁹ *Norfolk Earldom Case* [1907] A.C. 10, 17, per Lord Davey. Degrees are added by an exercise of the prerogative: *Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829), vol. II p 37.

⁴⁰ *Norfolk Earldom Case*, *ibid*, 17.

A peer, once created by the Crown in the exercise of the royal prerogative, is ennobled in blood,⁴¹ so that no one can be deprived of a peerage except by or under the authority of an Act of Parliament.⁴² This is true whether or not the peerage confers membership of the House of Lords. Nor, could a peer lose his title by attainder for treason or felony.⁴³ Attainder, or corruption of blood, was in any case abolished by s 1 Forfeiture Act 1870 (33 & 34 Vict c 23) (UK).

But the ennoblement in blood does not make the peerage the same as the nobility of much of Europe, which was – and in some cases remains – a distinct legal caste. Members of the family of a peer, even his heir apparent, are, in law, commoners. Nor, once conferred, may a peerage be renounced, although an heir, upon succeeding to a peerage, may renounce the dignity for his lifetime, under the Peerage Act 1963 (UK). Although no one could be deprived of a peerage without Act of Parliament, it was once not unknown for peerages to be surrendered to the Crown, though it is now held that they may not be alienated. Until 1660 there were many instances where surrenders were made, the last being by the Earl of Buckingham, son of Viscountess Purbeck. It was held in the *Purbeck Case* of 1678 that a titular dignity could be surrendered, though not a feudal dignity. A peerage was held to be a feudal dignity rather than a titular dignity, and therefore unalienable.

The peerage is attached to the individual and his or her heirs and successors without regard to their personal opinion. The existence of a writ of summons to Parliament is another matter, which we shall come to shortly.

III. LOSING MEMBERSHIP OF THE HOUSE OF LORDS AND THE SUBSTANCE OF PEERAGE

Membership of the House of Lords has historically been the primary privilege – even duty – of the peerage. It has in the past been suggested that the House of Lords cannot be abolished,⁴⁴ but it was, in 1911, 1949, and 1999, progressively reformed almost out of recognition of its former self.

By long-standing custom, it was said that the oath of allegiance must be taken by all newly created or succeeded peers and baronets, and by knights on their creation, though this is now apparently obsolescent for all except life peers and hereditary peers elected to represent their fellow peers in the House of Lords. The form of the oaths to be taken were not affected by the Promissory Oaths Act 1868 (31 & 32 Vict c 72) (UK), s 14 (5) of which provided however that in place of the oaths of allegiance, supremacy, or abjuration there be an oath in the form of the new oath of allegiance provided in the act.

Upon taking the oath, it was the duty of Lords of Parliament to sit in the House of Lords, if they could prove their right to do so. They were however disqualified from

⁴¹ *Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829), vol. I 393.

⁴² *Shrewsbury's (Countess of) Case* (1612) 12 Co Rep 106; 77 E.R. 1369; *R v. Purbeck (Viscount)* (1678) Show Parl Cas 1, 5; 1 E.R. 1.

⁴³ *Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 E.R. 942.

⁴⁴ George Winterton, "Is the House of Lords Immortal?" (1979) 95 *Law Quarterly Review* 386.

sitting if they were an alien, a bankrupt,⁴⁵ or under twenty-one years of age.⁴⁶ Aliens were excluded by the common law, and the Act of Settlement 1700 (12 & 13 Will III c 2) (England), s 3, and British Nationality Act 1948 (11 & 12 Geo VI c 56) (UK), s 31 schedule 4 part I. Citizens of the Irish Republic are however acceptable, being deemed to not be aliens.⁴⁷

Every peer, unless disqualified by some specific cause, was entitled to the issue of a writ of summons.⁴⁸ A peer, once he has received his writ, must attend as often as he reasonably can, or obtain leave of absence for the duration of a parliament.⁴⁹ The House of Lords Act 1999 (UK) overruled the first of these principles, with respect to hereditary peers.

Those peers who were convicted of treasonable activities could not receive a writ of summons until they had served their sentence or been pardoned.⁵⁰ This was originally provided for by the Treason and Sedition Act 1661 (England) (13 Chas II st 1 c 1), s 7. Members of the House of Commons convicted of treason were likewise disqualified from membership.⁵¹ Arthur Lynch was disqualified in 1903.⁵²

Once a peerage has been granted by the Crown it is very difficult to deprive the holder of his peerage, a matter which has exercised the authorities (and the news media) in recent years with a high profile case of a peer convicted of an offence that would, had he been a member of the House of Commons, have deprived him of his seat. But the distinction between deprivation of peerage, and loss of a seat in the House of Lords, is not one that has been clearly made in the past, perhaps partially justifiable since the great majority of peers were members of the House.

Although there have been various means by which peers have been excluded from the House of Lords in the past, the most common method in recent times has been the Peerage Act 1963. This allowed hereditary peers and peeresses to disclaim their title for life.⁵³ Such former peers who choose to use the Act would then sit in the House of Commons, and vote for the same House. The Act also allowed Irish peers to sit and vote

⁴⁵ Bankruptcy Disqualification Act 1871 (34 & 35 Vict c 30), s 6; *Bankruptcy Act 1883* (46 & 47 Vict c 52), s 32 (1) (a), s 32 (3); Bankruptcy (Scotland) Act 1913 (3 & 4 Geo v. c 20), s 183; Bankruptcy Act 1914 (4 & 5 Geo v. c 59), s 106 (1).

⁴⁶ House of Lords Standing Orders (1979) (Public Business) no 2. Order originally passed 22 May 1685. The Union with Scotland Act 1706 (England) (5 Ann c 8), ss 6, 7 has similar provisions.

⁴⁷ British Nationality Act 1948 (11 & 12 Geo VI c 56), s 10; *R v. Speyer*, *R v. Cassel* [1916] 1 K.B. 595 (DC); affirmed [1916] 2 K.B. 858.

⁴⁸ *Bristol's (Earl of) Case* (1626) 3 Lords Journals 537, 563.

⁴⁹ House of Lords Standing Orders (1979) (Public Business) no 20 (1).

⁵⁰ Forfeiture Act 1870 (33 & 34 Vict c 23), s 2; Criminal Justice Act 1948 (11 & 12 Geo VI c 58), ss 79, 83 (3), Schedule 9, Schedule 10, Part I.

⁵¹ Forfeiture Act 1870 (33 & 34 Vict c 23); Criminal Law Act 1967.

⁵² House of Commons Debates 4th series vol 118 c1121-1148, 2nd March 1903.

⁵³ s 1.

in House of Commons.⁵⁴ The Act does not apply to Life Peers under Life Peerage Act 1958⁵⁵, who remain unable to disclaim their titles.

The Peerage Act 1963 allows the voluntary surrender of a peerage for a lifetime, and once the Law of England allowed peers to surrender their dignity, as Scots law still allows. If the heir to a peerage was for some reason disqualified from receiving a writ of summons, for example, if he was an alien barred by the Act of Settlement, then the right to a writ of summons was lost. The peerage however remained.

Section 1 of the Peerage Act 1963 required certain conditions to apply, for a peerage to be voluntarily surrendered in certain circumstances. It is necessary to make such a disclaimer, intended to enable the heirs to hereditary peerages to stand for, and be elected to, the House of Commons, within twelve months from succession or their coming of age, or within one month if the heir is a member of the House of Commons. It does not affect the courtesy titles of children, or the future succession of the title. Peers of first creation cannot disclaim their titles, and a peer who has disclaimed his title cannot subsequently receive a hereditary title, though he can receive a life peerage.

Upon disclaimer, a peer (and his wife) is divested of all his rights and interests to and in the peerage, and all titles, rights, offices, privileges and precedence attaching to it. It does not however affect any rights limited or settled to devolve with the peerage, such as land.⁵⁶

Prior to the passage of the House of Lords Act 1999 peers were disqualified from voting for, or themselves obtaining membership of, the House of Commons. This was excepting Irish peers not possessing a peerage otherwise entitling them to membership. Many Irish peers now possess such titles. Those who do not may stand for, and be elected to, the House of Commons, and may vote at parliamentary elections.⁵⁷ But no peer automatically lost his seat in the House of Lords upon conviction for a lesser crime than treason, unlike members of the House of Commons, who were disqualified from sitting and voting upon conviction and sentence to imprisonment for one year or more.⁵⁸ This did not however mean that a peer might remain in the House of Lords whatever he did. Indeed, there have been a number of ways in which peers have been disciplined in the past, including expulsion from the House. It was simply that, as the peers were permanent counsellors of the Sovereign, their position was not simply a personal one. Sanctions normally, though not invariably, took this into account.

The surrender of peerages was allowed by the law as late as 1639.⁵⁹ But in 1640 the judges resolved “that no peer of the Realm can drown, or extinguish his honour (but that it descends unto his descendants) neither by surrender, grant, fine, nor any other conveyance to the king”.⁶⁰ The case of Viscount Purbeck settled the matter in 1678. The point was made that the title of viscount and other dignities were not so much private

⁵⁴ s 5.

⁵⁵ 6 & 7 Eliz II c 21.

⁵⁶ Peerage Act 1963, ss 3 (1), 3 (1) (a), 3 (2), 3 (3).

⁵⁷ Peerage Act 1963, s 5 (a), 5 (b); *Re Parliamentary Election for Bristol South East* [1964] 2 Q.B. 257.

⁵⁸ Representation of the People Act 1981, ss 1, 2; Repatriation of Prisoners Act 1984, s 7.

⁵⁹ Baron Stafford.

⁶⁰ *Grey de Ruthyn Peerage Case* Collins’s Baronies by writ (London: private printed, 1734), 195, 256.

interests as public rights, as peers were counsellors of state and part of the legislative body, and so each peer was not only a lord for himself, but was also a peer for all the House of Lords.⁶¹

In no case had they ever been surrendered to the prejudice of their blood or removed themselves out of the House of Lords. Surrender had generally only occurred where peers have gained greater honours to their advantage.

A much more ancient, and now disused means of excluding peers from the House, was the attainder. Attainder was judgement of death after proceedings for treason and in earlier times, felony also. At common law on attainder for treason a man forfeited to the Crown all his property, including any titles. In early times this led to corruption of blood, which meant that no one could inherit from him or through him.

The Statute of Westminster the Second 1285 (England) (*De Donis Conditionalibus*)⁶² meant that there was thereafter no corruption of blood on being attainted for treason or felony. The 1535 statute 6 Hen VIII c 13 revived corruption of blood and forfeiture for treason, though not for felony.⁶³ An entailed dignity was not forfeited for felony, although a dignity descendible to heirs general was forfeited by the person possessed of it.⁶⁴

In 1870 the Forfeiture Act⁶⁵ abolished forfeiture for treason. Instead, it provided that anyone convicted of treason should be disqualified from sitting or voting in the House of Lords until completing their sentence or receiving a pardon. Peers no longer lost their titles even for treason, in a time when it was thought unjust to punish a family for the wrongdoing of an individual. Felony was abolished 1967 by the Criminal Law Act, but the Forfeiture Act 1870⁶⁶ as amended still disqualifies any member of Parliament, peer or commoner, from sitting or voting while labouring under a sentence for treasonable conduct.

Where a dignity had been forfeited by an Act of Attainder, the Crown has no power to restore the dignity, which can only be restored by Act of Parliament. The whole process of exclusion by Act of Parliament is unwieldy, and with its ad hoc nature, is unlikely to commend itself to modern use. Disqualification for treason, governed by the Forfeiture Act 1870,⁶⁷ is relatively uncommon in this day and age.

An example of a lesser penalty than attainder, and yet more serious than disqualification, is the suspension of peerage represented by the Titles Deprivation Act 1917.⁶⁸ Section 2 of the Act provides that:

⁶¹ This was stated to be the law by the *Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829), vol. 2, pp 245, 46.

⁶² 13 Edw I c 1.

⁶³ *Stourton Peerage Case* Collins's Baronies by writ (London: privately printed, 1734), vol. 1 448.

⁶⁴ Generally, see the *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 E.R. 293, following *Neville's Case* (1694) MIL 2 Jacobi 7 Coke. See Sir Harris Nicolas, *Earldom of Devon Claim* (London: J. & W T Clarke, 1832), Annex VI.

⁶⁵ 33 & 34 Vict c 23.

⁶⁶ 33 & 34 Vict c 23.

⁶⁷ 33 & 34 Vict c 23.

⁶⁸ 7 & 8 Geo v. c 47.

It shall be lawful for the successor of any peer whose name has been removed, to present a petition to His Majesty praying to have the peerage restored and his name placed on the Peerage Roll; and His Majesty may refer such petition to a committee of the Privy Council constituted as aforesaid; and should the committee be satisfied that such person has incurred no disability under this Act, and is well affected to His Majesty's Person and Government. His Majesty may thereupon direct that the peerage be restored and the name of the petitioner be placed on the Peerage Roll; thereupon all rights and privileges of the holder of the peerage shall revive and be in force as if the name of the peer had never been removed from the Roll.

Although the Act is entitled the "Titles Deprivation Act" (and the long title is "An Act to deprive Enemy Peers and Princes of British Dignities and Titles") it is clear that this is something distinct from the former attainder for treason, as corruption of blood is excluded. The procedure to be followed for a deprivation was given in s 1(1):

His Majesty may appoint a committee of the Privy Council, of which two members at least shall be members of the Judicial Committee of the Privy Council, to enquire into and report the names of any persons enjoying any dignity or title as a peer or British prince who have, during the present war, borne arms against His Majesty or His Allies, or who have adhered to His Majesty's enemies:

Section 1(2) continued:

The committee shall have power to take evidence on oath and to administer an oath for the purpose, and may, if they think fit, act upon any evidence given either orally or by affidavit based on information and belief, the grounds of which are stated.

The committee must be satisfied that the petitioner is not disqualified under the Act (by having, during the "present war" (which can in the context mean World War One), borne arms against His Majesty or His Allies, or who had adhered to His Majesty's enemies). This can be done by proving that the petitioner was not born under after the end of World War One.

Being "well affected to His Majesty's Person and Government" means more, and less, than being in good standing with the Queen and known to her. It implies a degree of political support – though not going so far as to require allegiance. This might be shown by cultural, economic, educational, social or other contacts with the United Kingdom. Affidavits from community, business and social figures would be appropriate to show this.

The Enemy Peers and Princes Forfeiture of British Titles Order in Council 1919⁶⁹ was eventually passed, depriving the Dukes of Albany, and Cumberland and Teviotdale, and Viscount Taaffe of their titles. As all these men are long since dead the Order is now regarded as spent, though it has never been formally revoked. The men who lost their titles were HRH Charles Edward, 2nd Duke of Albany, Earl of Clarence and Baron Arklow (1884-1954, reigning Duke of Saxe-Coburg and Gotha); HRH Ernest Augustus II

⁶⁹ SR & O 1919/475.

of Hanover, 3rd Duke of Cumberland and Teviotdale, Earl of Armagh (1845-1923, Crown Prince 1866-78 and de jure King of Hanover from 1878); and Henry Taaffe, 12th Viscount Taaffe, Baron Ballymote (1871-1918, Count of the Holy Roman Empire). HRH Ernest Augustus of Hanover (1887-1953, reigning Duke of Brunswick-Lüneburg), who didn't hold a peerage, was deprived of his status as a British Prince.

The heir to the Dukedom of Albany is HH Hubert, Prince of Saxe-Coburg-Gotha; to the Dukedom of Cumberland and Teviotdale is HRH Ernest Augustus, Prince of Hanover.⁷⁰

Although the original report of the committee was submitted to Parliament, and its recommendations put into effect by Order in Council, it seems that the provisions for restoration are less complex. Following receipt of a favourable report The Queen may direct that the peerage be restored.

For a peerage claim to succeed generally it is first necessary to prove the creation of the peerage. This appears to not be strictly necessary for peerages covered by this legislation. However, the descent of the dignity from the peer who lost the title to the petitioner must be proven. This would require the production of birth, death and marriage certificates (or examined copies – as would be necessary in any event since the originals are doubtless in German). Statutory declarations from near relatives, without a personal interest in the outcome of the petition, identifying the petitioner would also be useful. Whether any of the suspended peerages will ever be restored is uncertain, but it would be regrettable if no effort were to be made to restore them, as two of the three are royal dukedoms of historic interest.

Short of deprivation by attainder, or suspension, it was possible for a peer to be excluded, at least temporarily, by the House itself. The House of Lords as a court can itself expel one of its own members and disqualify a peer from sitting or voting. This is a power which is also enjoyed by the lower house, and which was exercised there three times in the twentieth century for Horatio Bottomley 1922 (fraudulent conversion of property), Garry Allingham 1947 (lying to a committee, gross contempt of the House), and Peter Baker 1954 (forgery).⁷¹ The disqualification can be removed by pardon from the Crown. Examples are the Viscount St Albans (1621), and the Earl of Middlesex (1624).⁷² The jurisdiction to determine a claim to a dignity is vested solely in the Crown.⁷³ The House of Lords can only decide existing peerages, including those temporarily in abeyance, if the claim is referred to it by the Crown. Neither can a question of dignity or honour be tried by a court of law.⁷⁴ However, in practice all claims are referred to the House of Lords, which then refers the matter to the Committee for Privileges. Here the actual judicial process is undertaken by several Lords of Appeal in Ordinary, thereby giving the decision very strong juridical value. However, the House of Lords of course also claims the right to decide the entitlement of a newly created peer to vote in the

⁷⁰ See also Ann Lyon, "A Reaction to Popular Hysteria: The Titles Deprivation Act 1917" (2000) 22(2/3) *Liverpool Law Review* 173-203.

⁷¹ "Disciplinary and Penal Powers House of Commons" (House of Commons, London, nd) Factsheet G6.

⁷² Collins's *Baronies by writ* (London: privately printed, 1734), vol. VIII pp 689-690.

⁷³ *King's Prerogative in Dignities* (c.1607) 12 Co Rep 112; 77 E.R. 1388.

⁷⁴ *Cowley (Earl) v. Cowley (Countess)* [1901] A.C. 450.

House.⁷⁵ The inherent jurisdiction of the House is limited to claims to a right to vote. The House also claimed the right to decide Irish peerages, under article 4 of the Union with Ireland Act 1800 (GB) (39 & 40 Geo III c 67).⁷⁶ It can be assumed that this power of self-regulation survives the expulsion of most hereditary peers from the House.

However, when the last hereditary peers are expelled from the House of Lords a claim to a dormant or abeyant peerage could be taken to the Crown, without it being referred to the Lords, as the jurisdiction to determine a claim to a dignity is vested solely in the Crown,⁷⁷ and the possession of an hereditary peerage would not be a matter of parliamentary privilege or other interest.

Much of the purpose of the Peerage Act 1963 is now gone, since hereditary peers do not now receive a writ of summons, and may be elected to the House of Commons. In 2001 John Sinclair, 3rd Viscount Thurso became the first hereditary peer to be elected to the House of Commons and to take his seat. Later that same year Douglas Hogg, 3rd Viscount Hailsham, inherited his father's peerage and did not have to disclaim the title but continued to sit in the House of Commons. The House of Lords Act 1999, having excluded hereditary peers and peeresses from the House, means that it is unlikely that the Peerage Act 1963 will be much used in future, except by those peers who choose to disclaim their titles as a matter of principle.

Peers who have disclaimed their titles under this Act include (excluding subsidiary titles) the Earls of Durham (1970-2006), Home (1963-95), Sandwich (1964-95), and Selkirk (1994), the Viscounts Camrose (1995-2001), Hailsham (1963-2001), and Stansgate (1963), and Barons Altrincham (1963-2001), Archibald (1975-96), Beaverbrook (1964-85), Fraser of Allander (1966-87), Merthyr (1977), Monkswell (1964-84), Reith (1972), Sanderson of Ayot (1971), Silkin (1972-2001 and since 2002), and Southampton (1964-89). In the majority of instances the disclaimer was expressly to allow the former peer to obtain and hold a seat in the House of Lords.

This may not in practice occur very frequently, because since 2004 there has been another device that has the effect of enabling a peer to renounce the style and title of a peerage, if not its substance.

Until 1999 the Clerk of the Parliaments maintained the Roll of Lords Spiritual and Temporal. Once the majority of hereditary peers were excluded from the House, perhaps surprisingly this Roll was no longer updated. The Clerk of the Parliaments did, however, maintain a list of those wishing to stand for election.⁷⁸ This was an unsatisfactory decision, given that life peers remained in the House, and that hereditary peers remained entitled to elect their representative. Perhaps this was a sign of the more radical reforms that were intended to follow. However, by royal warrant in 2004, a new Roll of the Peerage has been established.⁷⁹ It is the responsibility of the Secretary, through a

⁷⁵ *Wensleydale Peerage Case* (1856) 5 H.L.C 958; 10 E.R. 1181.

⁷⁶ *Waterford's (Earl of) Case* (1832) 6 Cl & Fin 133; 7 E.R. 648.

⁷⁷ *King's Prerogative in Dignities* (c.1607) 12 Co Rep 112; 77 E.R. 1388.

⁷⁸ The Standing Orders of the House of Lords, rule 10(5) "The Clerk of the Parliaments shall maintain, and publish annually, a register of hereditary peers (other than peers of Ireland) who wish to stand in any by-election".

⁷⁹ Warrant providing for the creation and operation of the Roll of the Peerage, 1 June 2004.

Registrar of the Peerage,⁸⁰ and is prepared in consultation with Garter Principal King of Arms and Lord Lyon King of Arms “according to their respective heraldic jurisdictions”.⁸¹

Crucially, no peer not appearing on the Roll may be officially recognised.⁸² The Roll is the responsibility of the Department of Constitutional Affairs, so the “Secretary of State” responsible is the Lord Chancellor.

Failure to seek entry in the Roll of the Peerage will act in the same way as omission from the Roll of the Baronetage. It does not affect the legal status of the title – unlike the Peerage Act 1963 – but prevents the use of the title by the holder. This of course has no bearing upon membership of the House of Lords. The House of Lords Act 1999 has the opposite effect.

The House of Lords Act 1999 excluded hereditary peers and peeresses per se from membership of the upper house, but it did not deprive them of their status as peers, nor affect their other rights and privileges – including the official recognition of their titles. Those peers created under the Life Peers Act 1958⁸³ and the Appellate Jurisdiction Acts 1876-1947 retained both membership rights and the other privileges of peerage. Despite the Life Peerages Act 1958 (6 & 7 Eliz II c 21) the Crown still does not have the power to confer peerages for life. Creations must be in accordance with one or other of the statutory measures.⁸⁴ Although membership of the House of Lords has possibly been the most conspicuous function of the peerage for many centuries, it is not its sole, or perhaps even principle, purpose.

IV. THE HOUSE OF LORDS ACT 1999

The House of Lords Act 1999 excluded hereditary peers from the House of Lords, subject to a temporary “stay of execution” for a nominal group of representative peers.

Section 1 of the House of Lords Act 1999 provides that:

No-one shall be a member of the House of Lords by virtue of a hereditary peerage.

“Hereditary peerage” is defined by s 6(1) as including the Principality of Wales and Earldom of Chester, which are strictly not hereditary since they are vested in the eldest son of the Sovereign. Whereas the Sovereign’s eldest son is born Duke of Cornwall he must be made or created Earl of Chester (and Prince of Wales).⁸⁵ HRH Charles Prince of Wales was created Earl of Chester on 26th July 1958, when he was also made Prince of Wales and Earl of Carrick. Whilst certain provisions allowed a representative group of hereditary peers to remain in the House of Lords, the clear intention of the Government was that would be only temporary.

⁸⁰ Ibid, cl 2.

⁸¹ Ibid, cl 1.

⁸² Ibid, cl 3.

⁸³ 6 & 7 Eliz II c 21.

⁸⁴ *Wensleydale Peerage Case* (1856) 5 H.L.C 958; 10 E.R. 1181.

⁸⁵ *Prince Henry’s Charter Case* (1611) 1 Bulst 133; 80 E.R. 827.

Section 2(1) states that:

Section 1 shall not apply in relation to anyone excepted from it by or in accordance with Standing Orders of the House.

Section 2(2) provides that:

At any one time 90 people shall be excepted from section 1; but anyone excepted as holder of the office of Earl Marshal, or as performing the office of Lord Great Chamberlain, shall not count towards that limit.

Section 2(3) states that:

Once excepted from section 1, a person shall continue to be so throughout his life (*until an Act of Parliament provides to the contrary*). [italics added]

Section 2(4) provides that “Standing Orders shall make provision for filling vacancies among the people excepted from section 1; ...”.

On 20th June 2001 The Queen announced Her Government’s intention to complete the reform of the House of Lords, following consultation with the opposition parties. It was to be based on the report of the Wakeham Commission, which recommended a largely appointed Upper House with either 65, 87 or 195 members elected. The Government was thought to favour the 87-elected option and, although it intended to consult on its final plans, it was expected that they would be founded on the Wakeham Report because “there is no intention to begin from first principles”.⁸⁶ The Bill would also remove the 92 hereditary peers left in the Lords, and set up a statutory Appointments Commission.

The Wakeham Report was not well received, and a subsequent joint committee failed to break the deadlock that resulted.

So far the privilege and duty to be a member of the House of Lords has been replaced by the privilege of standing for election to membership as a representative peer. It seems likely, however, that the remaining hereditary peers will ultimately be excluded from the House of Lords, though there has been little work done to show any clear empirical or theoretical justification for preferring an appointed or even elected upper house over one that relied, at least in part, on hereditary members.

Further reforms are expected, but whether these affect the privileges of peers, aside from their (former) right to a writ of summons, remains unknown. Currently, however, the House of Lords Act 1999 implicitly preserves existing privileges of peerage. This is an interpretation supported by the Explanatory Note to the House of Lords Act 1999, para 9: “The Act does not affect the rights of holders of a hereditary peerage excluded from the House of Lords to keep all the other titles, rights, offices, privileges and precedents attaching to the peerage which are unconnected with membership of the House of Lords”.

Unfortunately the Act does not provide any guidance as to what these privileges are, and as we shall see with respect to the privilege of civil arrest, there may be some uncertainty as to whether a privilege is a parliamentary privilege or a privilege of

⁸⁶ *The Times* (London), 21 June 2001.

peerage. This is likely to be especially true of the hereditary counsellor role, though as we shall see, it is reasonably clear that this is distinct from membership of the House of Lords.

V. PARLIAMENTARY PRIVILEGE

Members of the House of Lords enjoyed similar privileges and burdens to those of the House of Commons, subject only to differences inherent upon the permanent nature of membership of the upper house. Temporal and spiritual peers enjoyed their privileges for the same reasons as their more transitory colleagues in the Commons, to promote the work of the House. But because of the differences between an elected “knight of the shire”, and a hereditary peer, peers enjoyed, and in some cases still enjoy certain additional privileges, not necessarily related to membership of Parliament.

The Privilege of Peerage is distinct from the Parliamentary Privilege, which applies to only those peers serving in the House of Lords, as well as the members of the House of Commons, while Parliament is in session and forty days before and after a Parliamentary session. Minor peers (those under 21 years of age), peeresses by marriage, or widows of peers – and now hereditary peers who are not members of the House of Lords by office or election – do not share the parliamentary immunity, though they enjoy the general privileges of peerage.⁸⁷

The most important parliamentary privileges relate, in one manner or other, to freedom of speech in Parliament. Parliamentary privilege is one of the ways in which the constitutional separation of powers is respected. McLachlan J, in the Supreme Court of Canada in *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)*⁸⁸ observed that both Parliament and the courts respect “the legitimate sphere of activity of the other”:

It is fundamental to the working of government as a whole that all these parts [of government] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.⁸⁹

This is a consequence of both the functional separation of powers between the executive and the judiciary, and the nature of the historical evolution of Parliament. Parliamentary privilege was partially codified in article 9 of the Bill of Rights 1688⁹⁰ – “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” – but the freedom of speech to which it refers was asserted at least as early as 1523.⁹¹ Parliamentary privilege

⁸⁷ *Anon* (1676) 1 Vent 298; 86 E.R. 192.

⁸⁸ [1993] 1 SCR 319 (S.C.C.).

⁸⁹ [1993] 1 SCR 319 at 389 (S.C.C.).

⁹⁰ 1 Will & Mar sess 2 c 2.

⁹¹ *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd edn, London: Butterworths, 2004), 80. See also *Bradlaugh v. Gossett* (1884) 12

is a principle common to all countries based on the Westminster system, and has a loose counterpart in the Speech or Debate Clause of the United States Constitution.⁹² It is an inherent privilege,⁹³ and one that is a direct consequence of the conflicts between Crown and Parliament during the fourteenth and fifteenth centuries.⁹⁴

Several hundred years after the Speaker of the House of Commons first asserted the privilege of freedom of speech in 1541,⁹⁵ a separate Continental tradition of parliamentary immunity, based in part on the English system, developed in France in the wake of the French Revolution.⁹⁶ Note that by this time the parliament of Scotland had merged with that of England (1707) to form that of Great Britain. Whilst the constitutional laws of England were followed, Scottish practice had recognised similar parliamentary privileges. The Scottish Petition of Right 1689 contained equivalent provisions to the Bill of Rights 1688. Although based on a common rationale, the details of these privileges often differ from those of the Westminster tradition. However, the protection of members of legislative assemblies everywhere requires a degree of privilege – though it cannot be unlimited. The recent tendency has been for it to become more restricted.

Over the years the assertion of parliamentary privilege has varied in its scope and extent. In the leading English case of *Stockdale v. Hansard*⁹⁷ the court was advised that “[t]he most trifling civil injuries to members [of Parliament], even trespasses committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been repeatedly the subject of enquiry [by either Chamber of Parliament] under the head of privilege” (pp 1116-17) including “[k]illing Lord Galway’s rabbits” and “[f]ishing in Mr Joliffe’s pond” (p 1117). This would be justified only on a very wide interpretation of Article 9 – one much wider than its literal meaning.

However, the court in *Stockdale v. Hansard* commented on the evidence that privilege “did not and could not extend to such a case” (p 1156). A leading Canadian authority, *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th ed 1989) records at pp 11-12 a ruling of the Speaker of the Canadian House of Commons on 29th April 1971 asserting a much narrower concept of privilege, as follows:

QBD 271 (Q.B.); Jerre S. Williams, “The Parliamentary Privilege Limitation on Freedom to Criticise the British House of Commons” (1963) 42 Texas Law Review 1.

⁹² Article 1 § 6, cl. 1. See *United States v. Johnson*, 383 US 169 (1966); *Tenney v. Brandhove*, 341 US 367, 372 (1951).

⁹³ *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 (S.C.C.).

⁹⁴ James E. Castello, “The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure” (1986) 74 California Law Review 491, 530-532.

⁹⁵ Bradford E. Biegon, “Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone’s Commentaries” (1996) 82 Virginia Law Review 677, 682-687.

⁹⁶ Scott P. Boylan and Catherine L. Newcombe, “Parliamentary Immunity: A Comparison between established democracies and Russia: A crisis of democratic legitimacy for Russia” (1997) 3 Journal of International Legal Studies 205, 208-209.

⁹⁷ (1839) 9 Ad. & El. 1; 112 E.R. 1112 (Q.B.).

O a number of occasions I have defined what I consider to be parliamentary privilege. Privilege is what sets Hon. Members apart from other citizens giving them rights which the public does not possess. I suggest that we should be careful in construing any particular circumstance which might add to the privileges which have been recognised over the years and perhaps over the centuries as belonging to members of the House of Commons. In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a Member to discharge his duties in the House as a member of the House of Commons.⁹⁸

This is much closer to the literal meaning of Article 9. There has been variation in the extent of privilege asserted by Parliament over the years as well as a difference on occasion between the scope of a privilege asserted by parliamentarians and the scope of a privilege the courts have recognised as justified.⁹⁹ It has also been observed that there is a deliberate element of uncertainty.¹⁰⁰

Historically the courts have interpreted “proceedings in Parliament” quite liberally,¹⁰¹ though not so broad as counsel in *Stockdale v. Hansard* would have the court believe. Increasingly, however, they have sought to limit parliamentary privileges, especially where it hinders a private person’s access to the courts.¹⁰²

Such privileges do not confer personal protection to members of Parliament per se, but only to their activities insofar as they can be said to be part of the collegial parliamentary process:

The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, i.e., the so-called privileges of such bodies.¹⁰³

Nor is all conduct within Parliament privileged. As stated in *Erskine May*:

not everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more

⁹⁸ *House of Commons Debates* [Canada], vol. V, 3rd Sess, 28th Parl, 29 April 1971, at p 5338.

⁹⁹ *House of Commons & Parent v. Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 24.

¹⁰⁰ Sandra Williams, *Conflict of Interest: The Ethical Dilemma in Politics* (Aldershot: Gower, 1985), 37.

¹⁰¹ Patricia M. Leopold, “Proceedings in Parliament: The Grey Area” (1990) *Public Law* 475, 476.

¹⁰² *Ibid*, 476.

¹⁰³ *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 370-71 per McLacH.L.in J. (S.C.C.).

general sense before the House as having been ordered to come before it in due course.¹⁰⁴

This however would appear to be limited to actions which have no real connection with parliamentary business, such as charging members with conspiracy to bring about a change in the government by bribing members of a provincial legislature.¹⁰⁵ Its scope has not, however, been fully explored.

Privilege “does not embrace and protect activities of individuals, whether members or non-members, simply because they take place with the precincts of Parliament”.¹⁰⁶ Parliamentary privilege includes the “necessary immunity” that the law provides for Members of Parliament, in order for the legislature to do its legislative work.¹⁰⁷ The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.¹⁰⁸ This means that statements made outside or inside Parliament are not inherently privileged.

The historical foundation of every privilege of Parliament is therefore necessity.¹⁰⁹ If a sphere of the legislative body’s activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly’s ability to fulfil its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist.¹¹⁰ If the proceedings of Parliament were not affected by statements made outside Parliament then these statements ought not to be privileged.

When the existence of a category (or sphere of activity) for which the inherent privilege is claimed is questioned the court must not only look at the historical roots of the claim, but also determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today.¹¹¹

¹⁰⁴ *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (19th edn, London: Butterworths: 1976), 89 [passage referred to with approval in *Clark v. Canada (Attorney-General)* (1977) 17 OR (2d) 593 (Ont H.C.)].

¹⁰⁵ *R v. Bunting* (1885) 7 OR 524 (Ont CA).

¹⁰⁶ Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) H.L. Paper 43-I, H.C. 214-I, para 242.

¹⁰⁷ *Fielding v. Thomas* [1896] A.C. 600 at 610-11 (Nova Scotia PC); *Kielley v. Carson* (1843) 4 Moo PC 63; 13 E.R. 225 at 235-36 (Newfoundland PC).

¹⁰⁸ *House of Commons & Parent v. Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

¹⁰⁹ *House of Commons & Parent v. Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

¹¹⁰ *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th edn, Toronto: Carswell, 1989), 11; J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd edn, Ottawa: House of Commons and McGill-Queen’s University Press, 1997), 12; *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd edn, London: Butterworths, 2004), 75; *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; 112 E.R. 1112 at 1169 (Q.B.); *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 343 and 382 per McLachlin J. (S.C.C.).

¹¹¹ *House of Commons & Parent v. Satnam Vaid & Canadian Human Rights Commission* [2005] SCC 30; 2005 CLLC 230-061, para 29.

“Necessity” is to be read broadly. We must ask what the “dignity and efficiency” of the legislature requires:

If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.¹¹²

The purposive connection between necessity and the legislative function was emphasised in the British Joint Committee Report on privilege:

The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly.¹¹³

Proof of necessity may rest in part in “shewing that it has been long exercised and acquiesced in”.¹¹⁴ The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence as it is prima facie contrary to the common law.¹¹⁵

These categories include freedom of speech.¹¹⁶ While in each case the specific instance of an exercise of the privilege is not reviewable by the courts, the role of the courts is to ensure that a claim of privilege does not isolate from the common and statute law the consequence of conduct by Parliament or by its officers or members that exceeds the necessary scope of the category of privilege.¹¹⁷

Article 9 of the Bill of Rights 1688 prevents a Court from entertaining any action against a member of the legislature which seeks to make the member liable, whether criminally or civilly, for acts done or things said in Parliament. There is an embargo on questioning the propriety of parliamentary events.¹¹⁸ But this privilege is not unlimited.

¹¹² *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 387 per McLachH.L.in J. (S.C.C.).

¹¹³ Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) H.L. Paper 43-I, H.C. 214-I, para 247.

¹¹⁴ *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; 112 E.R. 1112 at 1189 (Q.B.).

¹¹⁵ *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; 112 E.R. 1112 at 1189 (Q.B.).

¹¹⁶ *Stopforth v. Goyer* (1979) 23 OR (2d) 696 at 700 (Ont CA); *Clark v. Canada (Attorney-General)* (1977) 17 OR (2d) 593 (Ont H.C.); *Prebble v. Television New Zealand Ltd* [1995] 1 A.C. 321 (New Zealand PC); *Hamilton v. Al-Fayed (No 1)* [2000] 2 All E.R. 224 (H.L.); Bill of Rights 1688, article 9.

¹¹⁷ *R v. Atlantic Sugar Refineries Co* (1976) 67 DLR (3d) 73 at 87 (Que SC).

¹¹⁸ *Prebble v. Television NZ Ltd* [1994] 3 NZLR 1 (New Zealand PC); McGee “Parliament and the Law – Some Recent Developments” (1997) 6 Canterbury Law Review 195. Cf also *Hamilton v. Al Fayed* [1999] 1 W.L.R. 1569. On *Rost v. Edwards*

The use of Hansard by the Courts as an aid to interpretation of legislation is not a breach of parliamentary privilege.¹¹⁹

In 1839 the courts rejected the authority of a formal resolution of the House of Commons that the court believed overstated the true limits of the privilege claimed.¹²⁰ The jurisdiction of the courts in adjudicating claims of privilege has since been accepted by authorities on parliamentary practice in the United Kingdom and Canada.¹²¹

It is clear that Article 9 cannot be read literally,¹²² for to do so would, in the words of Lord Nicholls of Birkenhead, “be absurd”.¹²³ As the British Joint Committee observed in its executive summary:

This legal immunity is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear.¹²⁴

It is also important to note that courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those that involve matters entirely internal to the legislature.¹²⁵

The parliamentary privileges have survived the expulsion of most hereditary peers from the House of Lords, being preserved for those peers who remain members of the House. This has, however, led to some lack of clarity as to which privileges are parliamentary privileges (and possessed only by members) and which are privileges of peerage (and so enjoyed by all peers, peeresses *suo jure*, and wives and widows of peers).

In general, the House of Lords enjoys the same parliamentary privileges as the House of Commons. These privileges include:

- freedom of speech;

[1990] 2 Q.B. 460, which the Privy Council doubted, see McGee “The Application of Article 9 of the Bill of Rights 1688” [1990] New Zealand Law Journal 346.

¹¹⁹ See *Pepper (Inspector of Taxes) v. Hart* [1993] 1 All E.R. 42.

¹²⁰ *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; 112 E.R. 1112 at 1156 per Denman C.J., 1177 per Littleton J., 1192 per Patteson J., 1194 per Coleridge J. (Q.B.).

¹²¹ *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd edn, London: Butterworths, 2004) 185-86; *Landers v. Woodworth* (1878) 2 SCR 158 at 196 per Richards C.J. (S.C.C.); J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd edn, Ottawa: House of Commons and McGill-Queen's University Press, 1997), 66.

¹²² *Jennings v. Buchanan* [2004] U.K.P.C. 36 at para 9; [2005] 2 All E.R. 273 (New Zealand PC).

¹²³ Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) H.L. Paper 43-I, H.C. 214-I, para 91.

¹²⁴ Joint Committee on Parliamentary Privilege, vol I, *Report and Proceedings of the Committee* (Session 1998-1999) H.L. Paper 43-I, H.C. 214-I, p 1.

¹²⁵ *New Brunswick Broadcasting Co v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 350 per McLachlin J. (S.C.C.); *Bear v. State of South Australia* (1981) 48 SAIR 604 (Australia Indus Rel Ct); *Thompson v. McLean* (1998) 37 CCEL (2d) 170 (Ont Gen Div) para 21; *Stockdale v. Hansard* (1839) 9 Ad. & El. 1; 112 E.R. 1112 at 1192 (Q.B.).

- control by the House of its affairs (“exclusive cognizance”);
- power to discipline its own Members for misconduct and punish anyone, whether a Member or not, for contempt of Parliament;
- exemption from Acts of Parliament within the precincts of either House unless there is express provision that they should apply;
- freedom from interference in going to, attending at, and going away from Parliament;
- freedom from arrest in civil cases;
- exemption from subpoenas to attend court as a witness;
- freedom from service of court documents within the parliamentary precincts;
- absolute protection of all papers published by order of either House.¹²⁶

Aside from freedom from arrest in civil cases, which will be dealt with as a privilege of peerage, there are only a few parliamentary privileges which attaches to a peer or a Member of the House of Commons, in a personal capacity. One of these is the privilege with respect to witnesses.

Currently members of both Houses are exempt from any obligation to attend as a witness in court. The exemption applies to criminal proceedings as well as civil proceedings. The privilege is absolute, and may be used in a personal matter, unconnected with membership of the House.

Peers enjoyed a right to be excused from serving as a witness.¹²⁷ This also is a common law right, but, as with all the parliamentary immunities and privileges, a Lord of Parliament must have taken the oath of allegiance to claim the privileges. Those hereditary peers who are not in receipt of a writ of summons could, in theory, argue that this privilege survives, on an analogy with the privilege of immunity from civil arrest, which is clearly a privilege of peerage as well as a parliamentary privilege. However, it is quite possible that a court, in determining whether the privilege has survived, might conclude that it had not, in light of the general expulsion of hereditary peers from the House. The privilege of exemption from serving as a witness is a parliamentary privilege, and so survived the House of Lords Act 1999 – but only for those peers who remained members of the House. The doctrine of necessity would justify its retention for Lords of Parliament, but not for other peers.

The Explanatory Note to the House of Lords Act 1999 described it thus:

The Act deprives excluded hereditary peers of all the privileges of membership of the House of Lords, including the privileges they enjoyed as members of Parliament. Parliamentary privileges cover various matters, many of which relate to the House of Lords as a whole (such as punishing improper conduct within the House itself), but include some that are personal to individual peers. One of the most important personal privileges is that no action can be taken against a peer for what he or she may say in Parliament. Hereditary peers excluded by the Act also lose the right to be paid allowances and to use the facilities of the House that are

¹²⁶ Companion to the Standing Orders and guide to the Proceedings of the House of Lords, Para 11.2.

¹²⁷ *Chesterfield’s (Earl of) Case* (1720) 21 Lords Journals 327. To subpoena a peer as a witness is a breach of privilege: *Salisbury’s (Earl of) Case* (1626) 3 Lords Journals 630.

available to members, such as its library, research and restaurant facilities. The removal of these rights does not prevent the House from deciding to grant some rights to use the facilities of the House to a hereditary peer under the exercise of its own authority.¹²⁸

It is unfortunate that this Note refers to parliamentary privileges in the same paragraph as “library, research and restaurant facilities”, and can perhaps be taken to reflect a degree of contempt for the House of Lords. The privilege of freedom of speech, referred to at greater length above, is of course fundamental to the role of a Member of Parliament. But it is clearly a parliamentary privilege, and so is only allowed to those peers who are members of the House of Lords.

Peers enjoyed a privilege to be excused as of right from jury service.¹²⁹ The House of Lords Act 1999 however ended the exemption from jury service.¹³⁰ This is an extension of the immunity from attachment enjoyed by peers, and is founded both on the common law and the statutory exemption. A peer, if summoned for jury service, was subject to the challenge *prompter honoris respectam*.¹³¹ It had also been held that Irish peers ought not to serve on a grand jury unless they were members of the House of Commons.¹³² Holders of a hereditary peerage whose membership of the House of Lords is ended by the Act cease to be excusable as of right from jury service, and the position of peers is brought into conformity with that of the lower chamber.

VI. PRIVILEGES OF PEERAGE

The parliamentary privileges are now, subject to uncertainty as to their nature – an uncertainty equally great with respect to the House of Commons – confined to those peers who are members of the House of Lords. This does not, however, end all the privileges of the peerage.

The Privilege of Peerage extends to all temporal peers and peeresses regardless of their position in relation to the House of Lords; Scottish and Irish peers, therefore, had, and retain, the Privilege of Peerage. The Privilege of Peerage also extends to the wives and widows of peers. A peeress by marriage loses the privilege upon marrying a commoner, but a peeress *suo jure* does not. Lords Spiritual do not have the Privilege of Peerage, as they are Lords of Parliament, and not peers. This was not always so. In 1621

¹²⁸ Explanatory Note to the House of Lords Act 1999, para 7.

¹²⁹ *Enfield's (Viscount) Case* (1861) *The Times* (London), 8 February 1861; Juries Act 1974, s 19 (1), Schedule 1, Part III.

¹³⁰ s 1. Peers no longer fall within Part III of Schedule 1 to the Juries Act 1974, or Part III of Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, or Schedule 3 to the Juries (Northern Ireland) Order 1996.

¹³¹ *Clifton Barony Case* (1673) in Sir Edward Coke, *Coke upon Littleton* (“*First Institutes*”) (19th edn, New York: Garland Publishing, reprint 1979 of 1832) 16b, 156b; Sir William Blackstone, *Commentaries on the Laws of England* (New York: Garland Publishing, reprint 1978 of 1783 edn), vol. III 361.

¹³² *Irish Peer Case* (1806) Russ & Ry 117; 168 E.R. 713.

the Lords adopted a standing order that, in its present form, reads “Bishops to whom a writ of summons has been issued are not Peers but are Lords of Parliament”.

Nor do individuals who hold courtesy titles have such privileges by virtue of those titles, as they are commoners not peers – unless they were in receipt of a writ of acceleration, and so elevated to the House of Lords by virtue of a secondary title of their father. This is in marked contrast to the rule in Spain, for instance, where a noble can pass their secondary titles to their heirs, without relevance to their legislative status – none are Members of Parliament. In the United Kingdom a dignity, as such, cannot be delegated. In the Spanish system only the Grandees are peers in the British sense, and even grandee status can be surrendered to an heir. This did not, of course, survive the expulsion of hereditary peers from the House of Lords, and it would appear that the writ is now obsolete.

We now turn to the privileges of peerage. These are unrelated – or at least not directly or inextricably related – to membership of the House of Lords, and are ostensibly unaffected by the House of Lords Act 1999. Nor should they be affected by any subsequent reform of the House of Lords.

As stated in the First Report on Parliamentary Privileges, “The extent of the privilege [of peerage, rather than parliamentary privilege] has long been obscure and ill-defined, and for that reason alone the present situation is unsatisfactory”.¹³³ Three of its features survived into the twentieth century. The first was the right of trial by peers, which was abolished by the Criminal Justice Act 1948, and will not be considered further here.

At one time, the honour of peers was especially protected by the law; while defamation of a commoner was known as libel or slander, the defamation of a peer (or of a Great Officer of State) was called *scandalum magnatum*. The Statute of Westminster of 1275 provided that “from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm.” *Scandalum magnatum* was punishable under the Statute of Westminster 1275 (3 Edw c 15) as well as under further laws passed during the reign of Richard II. *Scandalum magnatum* was both a tort and a criminal offence. In civil trials, peers could recover damages from those committing *scandalum magnatum* without even having to prove that the words caused harm to them or their reputation, as commoners would have had to do in normal defamation cases. In criminal cases, meanwhile, punishment was often arbitrary. In 1771, for instance, during one of the last ever *scandalum magnatum* cases, the publisher of the *Morning Chronicle* was fined £100 and sentenced to imprisonment for one month.

The prohibition on *scandalum magnatum* was first enforced by the Privy Council. During the reign of James I, the Star Chamber, a court formerly reserved for trial of serious offences such as rioting, assumed jurisdiction over *scandalum magnatum*, as well as libel and slander, cases. After its abolition in 1641 its functions in respect of defamation cases passed to the common law courts. Already, however, the number of cases had begun dwindling. By the end of the eighteenth century, *scandalum magnatum* became obsolete. The prohibition on it was finally repealed in 1887 by the Statute Law Revision Act 1887 (50 & 51 Vict c 59), which did not, however revive the obsolete *scandalum magnatum*.

¹³³ “First Report on Parliamentary Privilege” 30th March 1999, para 329.

The second is the right of access to the Sovereign at any time. The third is freedom from arrest in civil causes (which is both a parliamentary privilege and a privilege of peerage). The Committee recommended that privilege of peerage should be abolished, without however having considered the nature of the second privilege, that of access to the Sovereign. It might also be said that they did not draw a clear distinction between parliamentary privilege, and the privilege of peerage, as the latter was outside their remit. There are other, minor privileges, which will be briefly considered also.

The first privilege of peerage to be considered is freedom from arrest in civil causes or cases. Peers are free from arrest for contempt, but only where the action and consequences are civil.¹³⁴ Civil immunity against imprisonment or restraint for Lords of Parliament, without the order or sentence of the House, extends to a period of forty days before and after a meeting of Parliament.¹³⁵ It is necessary to emphasise again that these privileges have not been affected by the House of Lords Act 1999. Peers' immunity, however, does not extend (and never has extended) to criminal charges, or to refusing to give security for the peace.¹³⁶ Peers may also be compelled to give recognisances to keep the peace.¹³⁷ Whether the cause is civil or criminal of course depends upon the motive for the proposed arrest. The immunity from civil arrest was said to be founded on the fact that the peerage was an essential part of the constitution and working of Parliament. The members of the House should be able to attend to their duties without interruption or molestation. Until 1770, a peer's domestic servants were also covered by the privilege of freedom from arrest in civil matters. However, peers who are arrested will not be discharged if they have never sat in Parliament.¹³⁸ As a corollary of the latter exemption, peers should not be appointed receivers,¹³⁹ because they could not be arrested to compel performance. Nor can they give surety of cognisance.¹⁴⁰ However a court order can be enforced by sequestration.¹⁴¹ The immunity from arrest has been held to apply whether or

¹³⁴ *Anon* (1572) Dal 83; 123 E.R. 292; *Story v. Pawlet* (1580) Cary 73; 21 E.R. 39; *Pheasant v. Pheasant* (1670) 2 Vent 340n; 86 E.R. 475; *Thornby d Hamilton (Duke of) v. Fleetwood* (1713) Cooke Pr Cas 8; 125 E.R. 924; *Wellesley v. Beaufort (Earl of)* (1831) 2 Russ & M 639, 665; 39 E.R. 538; *Stourton v. Stourton* [1963] 1 All E.R. 606.

¹³⁵ *Shrewsbury's (Countess of) Case* (1612) 12 Co Rep 94; 77 E.R. 1369; House of Lords Standing Orders (1979) (Public Business) no 77, 78.

¹³⁶ *R v. Carmarthen (Marquis of)* (c.1720) Fortes Rep 35a; 92 E.R. 890; *Couche v. Arundel (Lord)* (1802) 3 East 127; 102 E.R. 545; *Cassidy v. Steuart* (1841) 2 Man & G 437; 133 E.R. 817.

¹³⁷ *R v. Sevenoaks (Inhabitants)* (1845) 7 Q.B. 136; 115 E.R. 440.

¹³⁸ *Banbury's (Lord) Case* (1706) 2 Ld Raym 1247; 92 E.R. 321; *Re Hanley (Lord)* (1849) 7 State Tr NS App A 1130.

¹³⁹ *A-G v. Gee* (1813) 2 Ves & B 208; 35 E.R. 298.

¹⁴⁰ *Graham v. Sturt* (1812) 4 Taunt 249; 128 E.R. 324; *Burton v. Hill* (1822) 1 Dow & Ry K.B. 126.

¹⁴¹ *Pheasant v. Pheasant* (1670) 2 Vent 340n; 86 E.R. 475; *Eyre v. Shaftesbury (Countess of)* (1722) 2 P Wms 103, 110; 24 E.R. 659.

not Parliament was actually sitting, under the general privilege of peers,¹⁴² nor can it be waived.¹⁴³

When imprisonment for debt was abolished in 1870,¹⁴⁴ the freedom became extremely limited in practical application. Now, civil proceedings involve arrests only when an individual disobeys a court order. Since 1945, the privilege of freedom from arrest in civil cases has only arisen in two cases: *Stourton v. Stourton* (1963)¹⁴⁵ and *Peden International Transport, Moss Bros, The Rowe Veterinary Group and Barclays Bank plc v. Lord Mancroft* (1989).¹⁴⁶

Freedom from arrest in civil causes would appear to be both a parliamentary privilege, and a privilege of peerage.¹⁴⁷ Since privileges of peerage are not directly related to membership of the upper house they should be unaffected by the loss of membership. However, it is likely that freedom from civil arrest, although a privilege of peerage, is obsolescent. One might argue however, that just as the parliamentary privileges should be justified by necessity, so the privileges of peers should meet a similar test – or at least should do so if they infringe upon the rights of others.

Freedom from arrest in civil causes is unlikely to present a great challenge to a court, given that a peer will not be discharged if they have never sat in Parliament,¹⁴⁸ even if he successfully claims his privilege. It is also difficult to reconcile the claimed origins of the privilege as an essential part of the constitution and working of Parliament with the notion of it being both a parliamentary privilege, and a privilege of peerage. It might be possible to argue that it derives from the role of the peer as perpetual counsellor to the Sovereign, but though attractive, this argument is inconsistent with the rule that an assertion of the privilege will fail if the peer have never sat in Parliament.

It is probably more accurate to classify it as solely a parliamentary privilege, and therefore unavailable to the majority of hereditary peers. The privilege itself may be said to be obsolescent, but it is not yet obsolete.

In many respects the most important privilege of peerage remaining – if not, in fact, the only one (we of course exclude here the parliamentary privileges available to members of the House of Lords) – is perhaps also the least understood. It was generally accepted that peers, being the hereditary counsellors of the Sovereign,¹⁴⁹ have freedom of access to the monarch in relation to public affairs.¹⁵⁰ Pike believed that the claim that peers were individually hereditary counsellors to the Sovereign only dated from relatively

¹⁴² *Foster v. Jackson* (1615) Hob 52, 61; 80 E.R. 201; *Couche v. Arundel (Lord)* (1802) 3 East 127; 102 E.R. 545; *Stourton v. Stourton* [1963] 1 All E.R. 606.

¹⁴³ *Walker v. Grosvenor (Earl of)* (1797) 7 Term Rep 171; 101 E.R. 915.

¹⁴⁴ Debtors Act 1869 (32 & 33 Vict. c. 62).

¹⁴⁵ [1963] 1 All E.R. 606.

¹⁴⁶ Cited in the Companion to the Standing Orders and guide to the Proceedings of the House of Lords, Para 11.10 n 516.

¹⁴⁷ *Foster v. Jackson* (1615) Hob 52, 61; 80 E.R. 201; *Couche v. Arundel (Lord)* (1802) 3 East 127; 102 E.R. 545; *Stourton v. Stourton* [1963] 1 All E.R. 606.

¹⁴⁸ *Banbury's (Lord) Case* (1706) 2 Ld Raym 1247; 92 E.R. 321; *Re Hanley (Lord)* (1849) 7 State Tr NS App A 1130.

¹⁴⁹ See, generally, Luke Pike, *Pike's Constitutional History of the House of Lords* (London: Macmillans, 1894), 251-254.

¹⁵⁰ *Report as to the Dignity of a Peer of the Realm* (London: HMSO, 1829), vol. I p 14;

late times, being based upon the original role of the *curia regis*. The idea led to Charles I summoning the peers to York in 1640 for advice, and to the meeting of the peers in 1688 when James II had fled. The peers' right of access is based upon the articles in the accusations against Hugh le Despenser the elder and younger, in the reign of Edward II, and is of doubtful authority.

Members of the House of Commons enjoy this right collectively, but only those individual members who are Privy Counsellors or members of the Royal Household enjoy it individually. These latter include the Government whips in the House of Commons, including the Treasurer, Comptroller, and Vice-Chamberlain of the Household. This privilege is not, for peers, a parliamentary privilege, but a privilege of peerage. It is also unaffected by the House of Lords Act 1999, and arguably would survive the final expulsion of the remaining hereditary peers (or even life peers) from the House, since it is unrelated to membership of the House of Lords.

Peers formed the *magnum concilium*, or Great Council, which was one of the four councils belonging to the Sovereign. The most famous of the King's councils is the Privy Council. Another council is Parliament, which is called the *commune concilium*, or Common Council. Finally, judges are considered counsellors of the Sovereign on legal matters.

A council composed only of peers was often summoned by some early English Kings. Such a council, having been in disuse for centuries, was revived in 1640, when Charles I summoned all of the Peers of the Realm using writs issued under the Great Seal of the Realm. Though such a council has not been summoned since then, each peer remains a counsellor of the Sovereign, and, according to Sir William Blackstone, has the right "to demand an audience of the King, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal". This privilege would appear to have been very rarely exercised in modern times, if at all.

Whether hereditary peers still counsellors of the Sovereign, even though they are not ipso facto members of Parliament, is uncertain. The nature of the peerage was intimately linked with their political role. It was for this reason that it might be said that "the whole kingdom has an interest in a peerage".¹⁵¹ The same may be said of Scottish peers.¹⁵² But this role included both legislative and executive aspects. Membership of the House of Lords represented one; the right to be hereditary counsellors to the Sovereign is another.

It is important to note that Members of the House of Commons being Privy Counsellors or members of the Royal Household enjoy individual right of access to the Sovereign, not because of their membership of the lower chamber, but because of their executive positions in the Privy Council and the Royal Household respectively.

It is probably difficult to be sure what the precise scope of this privilege is, but it would appear to allow individual peers the right of access to the Sovereign. Eldon thought that peers could only tender advice, not, as of right, carry an address or petition to

¹⁵¹ *Calvin's Case* (1607) 7 Co Rep 156 16a; 77 E.R. 377, 396. Also considered in *Earldom of Norfolk Case* [1907] A.C. 10 (H.L.) and the later cases such as *Rhondda's (Viscountess) Claim* [1922] 2 A.C. 339.

¹⁵² Sir Harris Nicholas, *History of the Earldoms of Strathearn, Monteith and Airth* (London: Stevens & Norton, 1842), 100-108.

the Sovereign.¹⁵³ In practice, an audience must be sought through an officer of the Royal Household, but there would appear to be a strong argument that such a request should not be declined without good cause to do so.

This is an important privilege, though probably of less moment than it would have been some two hundred years ago, when the Sovereign was allowed to have a personal say in government, and was not constrained (or believed to be constrained) to act as little more than a cipher.

There are other miscellaneous – but still important – privileges attaching to the possession of a peerage. These include special positions in the order of precedent, the right to certain distinctions in their coats of arms, to wear coronation and parliamentary robes, and of course to use the style and titles of peerage. They are not however legal privileges in the same sense as the exemption from jury service, appearing as a witness, or of access to the Sovereign, which relate to the constitutional functions of the peerage.

There is one exception to this, however, where a “minor” privilege actually reflects the constitutional role of the peerage, and which may indeed be said to be an example of the right of peers to have access to the Sovereign. This is the right to attend a coronation. This remains a very great privilege, and one that, like the privilege of being hereditary counsellors to the Sovereign, would appear to be distinct from the right of membership of the House of Lords – indeed it predates the House, and Parliament itself, by many centuries. This privilege is one which may well be challenged in the not-too-distant future. The coronation of our next Sovereign can realistically be expected with the next two decades.

Attendance at a coronation is dependent upon invitation by the Earl Marshal. However, for some seven hundred years a Court of Claims has been held to hear petitions relating to attendance and service at coronations.¹⁵⁴ Indeed, at an earlier stage, a new Sovereign is proclaimed by the Accession Council, which although ephemeral, is one of the oldest institutions in the kingdom. This comprises Lords Temporal and Spiritual, the Lord Mayor of London and many others by long-standing custom if not strict right. It would be dangerous to exclude hereditary peers from such a body merely on the assumption that, as former members of the House of Lords, they had no further constitutional role. This may be true, but for the sake of constitutional legitimacy, it is a dangerous assumption to make.

Certainly there would be many peers who would petition the Court of Claims for an invitation to a coronation, and it is doubtful that the Court could rightly exclude them. Aside from the Archbishops and Bishops, the peers have been the most regular participants in the coronation service for a thousand years – and arguably not in their legislative capacity.

Parsons believed that it was the “coronation and admission that maketh a perfect and true king”.¹⁵⁵ The succession was based on consent and acceptance, rather than heredity. Wentworth compromised, and maintained that a coronation was a declaration rather than

¹⁵³ Charles Lord Colchester (ed), *The Diary and Correspondence of Charles Abbot Lord Colchester* (London: John Murray, 1861), vol. III 606 (12 March 1829).

¹⁵⁴ Sir Gerald Wollaston, *The Court of Claims* (London: Harrison & Sons, 1903).

¹⁵⁵ Alban Doleman [Robert Persons], *Conference About the Next Succession* (Antwerp: private printed, 1594), 136; Marie Axton, *The Queen's Two Bodies; Drama and the Elizabethan Succession* (London: Royal Historical Society, 1977), 94.

a creation of right.¹⁵⁶ *Calvin's Case*¹⁵⁷ found that a coronation, as a consequence of hereditary succession, was not a legal necessity. However, it is to be doubted whether a Sovereign would be fully accepted without a coronation, as may be seen with the still-current attitude towards King Edward VIII. It is rarely a wise move to make radical changes at the beginning of a reign. Equally, the question of who may be included or excluded is one that is fraught with difficulties. We still recall with some amusement or pathos depending upon our view of the rights of the parties, the exclusion of Queen Caroline from the coronation of her husband, King George IV in 1821.

Caroline of Brunswick-Wolfenbüttel (1768-1821) and the Prince of Wales, later the Prince Regent, were ill-matched, and within a year of their marriage they lived apart. After an official inquiry into allegations of adultery it was said that Caroline's behaviour was open to "very unfavourable interpretations". Later, after the Prince of Wales became King, the government prepared a Bill of Pains and Penalties, to deprive her of the status of Queen, and to divorce her. This was heard in the House of Lords. Although few people thought her to be innocent, many of those at the hearing disliked the whole procedure, and the Bill was withdrawn before it could go to the House of Commons. She sought to attend the coronation of her husband, although she did not have an invitation; she tried to gain admittance at every door but was turned away because she did not have a ticket. Her activities provoked hostility from the crowd. She was hooted and hissed until she left.¹⁵⁸

The coronation ceremonial itself was treated in cavalier fashion in the 1700s and 1800s. Hanoverian coronations lacked the attention to detail that characterised those of earlier periods. The coronation of William IV was a mean affair; that of Victoria, only marginally better. After 1685 the constitutional and social significance of the coronation went into decline. By the time of Victoria's coronation, however, there were signs of a desire for the revival of a ceremony of some splendour.¹⁵⁹ But always the peerage were leading participants, both as office holders and as witnesses and observers.

The Queen's coronation in 1953 was in the latter days of empire. It was marked by a significant coronation parade in which figures such as Queen Salote of Tonga stood out. It was also in the early days of the development of the realms as clearly distinct. Theoretically future coronations could follow the 1953 model exactly – so far as the service itself is concerned at least – and in principle there is no reason why they should not do so. But care would have to be taken to ensure clarity of understanding of its exact role. In 1953 elements were further changed to incorporate Scotland – where the last

¹⁵⁶ Peter Wentworth, *A Pithie Exhortation to Her Majestie for Establishing Her Successor to the Crowne. Whereunto is Added a Discourse Containing the Authors Opinion of the True and Lawfull Successor to her Majestie* (London: private printed, 1598), 54; Sir Thomas Craig, *The Right of Succession to the Kingdom of England* (London: Dan Brown, 1703, first published 1602), 21.

¹⁵⁷ (1608) 7 Co Rep 1a; 77 E.R. 377.

¹⁵⁸ Jane Robins, *The trial of Queen Caroline: the scandalous affair that nearly ended a monarchy* (New York: Simon & Schuster, 2006); *Queen Caroline's Claim to be Crowned* (1821) 1 State Trials NS 949.

¹⁵⁹ David J. Sturdy, "Continuity versus change: Historians and English coronation in the Medieval and Early Modern Periods" in János Bak (ed), *Coronation: Medieval and Early Modern Monarchic Ritual* (Berkeley: University of California Press, 1990), 243.

coronation was in 1633 (Scottish peers and officers of state had been involved in the London ceremony from 1714) – and the realms.

In an ideal world it might be thought that the realms could have their own coronations (or at least inaugurations), but really this isn't necessary. The Queen is crowned for the whole Commonwealth. At the coronation of King Edgar in 973 (one of the earliest for which comprehensive details are available, and also one of the most important late Saxon coronations) there were five sub-kings present. It was truly an imperial occasion, just as in 1953 The Queen wore, figuratively speaking, many crowns.

Some changes may doubtless be required – and some are desirable for liturgical or historical reasons (such as the restoration of the sermon, abandoned in 1902) – and others to reflect the diminished role of the House of Lords. This could be achieved by including the Lord Speaker of the House of Lords, rather than by excluding the peers. Typically, and rather unsatisfactorily, the new post of Lord Speaker, first held by Baroness Hayman from 4th July 2006, was granted rank and precedence after the Speaker of the House of Commons, by royal warrant of 4th July 2006.¹⁶⁰ As the Speaker of the Upper House she should, of course, have had precedence before the Speaker of the House of Commons. But no Sovereign can risk their title being questioned – least not one succeeding to the Crown in an age of media hostility and vindictive and evilly-disposed opportunists – not to mention jaundiced and sceptical academics.

Peers have attended the coronation of their Sovereigns since coronations began, and were present at the inauguration of Kings before that. Their legislative role was, in a sense, immaterial. They represent the continuity of the constitution in a manner than the elected members of the House of Commons, however important they may be on a day-to-day basis, do.

VI. CONCLUSION

The paper began with a review of the nature of peerage. Peerage is more than simply the privilege of sitting and voting in Parliament, for it was enjoyed by men and latterly some women also, who were not members of Parliament. Some members of the upper House were not peers – the Lords Spiritual. Some peers were created for life, some held hereditary titles. What they had in common was a degree of permanence. They were not selected at regular intervals by the people. This meant that they were easily attacked as un-democratic. Yet, they proved an effective legislative body, in part because of the permanent nature of membership.

The parliamentary privileges of peers include freedom from civil arrest, and exemption from being compelled to be a witness. These are now only available to members of the House of Lords, and the tendency has been to bring the practice in the House of Lords down to the level of that in the Commons.

Separate privileges of peerage include freedom from civil arrest (though this may perhaps be more properly seen as a parliamentary privilege), and the right of access to the Sovereign. While civil arrest is obsolescent, the privilege of hereditary peers (and indeed life peers) being counsellors of the Sovereign is an important privilege and should be defended, however uncertain its application may be practice. This privilege of peerage

¹⁶⁰ College of Arms register I.85/194.

does not derive from membership of the House of Lords, and should be seen as surviving the evisceration (or should that be emasculation?) of that institution.