THE
CONSTITUTIONAL
HISTORY OF ENGLAND
PREFACE

"I have written a course of lectures in six months on Constitutional History. Do I publish it? No." The lectures written in six months, which Professor Maitland told the Cambridge Law Club would not be published, were delivered during the Michaelmas term of 1887 and the Lent term of 1888, and were specially designed for the needs of undergraduates of the University of Cambridge reading for the Law Tripos. The last word of the last lecture was written on April 7, 1888.

Let us observe the date. Maitland had been recalled to Cambridge as Reader in English Law in 1883 and this is one of his early courses of academic lectures delivered before his election to the Downing Chair in the summer of 1888. It was written seven years before the appearance of the History of English Law, nine years before Domesday Book and Beyond, ten years before Township and Borough, twelve years before the Introduction to Gierke's Political Theories of the Middle Ages. From internal evidence it would seem that some of the earlier lectures were composed before the completion of Bracton's Note Book in 1887. Much of the ground which is here covered was afterwards traversed with greater deliberation and more elaborate scrutiny; some part of the journey Maitland had never the leisure to retrace. Yet the student of his work will find in these early discourses many of the
Preface

seminal ideas which were subsequently developed in the History of English Law, and here, as elsewhere, will admire the union of high speculative power with exact and comprehensive knowledge of detail. This volume then is not a specimen of Maitland’s polished and mature work; it does not claim to be based upon original research; for much of his information the Reader of English Law was confessedly content to draw upon the classical text-books, Hallam, Stubbs, Dicey, Anson, the study of which he frequently commends to the attention of his audience. Yet although the manuscript was laid aside, and the larger theme was abandoned for more special researches into medieval law, the author would sometimes admit that, did time allow, the course of lectures upon Constitutional History might be worked up into a shape worthy of publication.

There is much to be said against printing work which was not intended for the press, and I should not have ventured to recommend the publication of these lectures but for three compelling reasons. The first is that the lectures cannot detract from Maitland’s reputation; but must, on the contrary, if possible, enhance it, showing, as they do, that the profound student was also a brilliant populariser of knowledge. The second is that the lectures contain several new and original ideas, which Maitland had no opportunity of expressing in his later work and which we cannot afford to lose. The third is that there is no book, to my knowledge, which provides so good an introduction to the study of English Constitutional History or which is likely to be more highly valued by practical teachers of the subject at our Universities. I can vouch good and lawful men to warranty. Professor Dicey, Sir Courtenay Ilbert and Mr C. R. L. Fletcher were kind enough to look over the manuscript and concurred in urging its publication.
Preface

The editor's part has been insignificant. The lectures are printed as they were delivered, and there has been no attempt to rewrite, expand or compress wherever the manuscript was fairly written out. In a few places however the manuscript took the form of brief notes which have been expanded with as strict an economy of words as is consistent with grammar. In one place the substance of a missing page was happily recovered from notebooks kindly lent to the editor by Dr Pierce Higgins of Downing College and Mr A. H. Chaytor of Clare College. For the references and remarks in the footnotes the editor is responsible, save where they are followed by the initials of the author. The references to the Statutes have been verified.

Help has been generously given by many friends, in particular by Sir Courtenay Ilbert, who has contributed many valuable suggestions with reference to the last section of the volume. The editor will be grateful to his readers for any further suggestions by means of which a second edition of the book, should one be called for, may be made more fully worthy of the author and the subject.

H. A. L. FISHER.

New College, Oxford.
May 1908.
ANALYSIS

Outline of the course. Sketch of public law at five periods, (I) 1307, (II) 1509, (III) 1625, (IV) 1702, (V) the present day. Reasons for this choice of periods. The first and last sketches will be the most thorough.

PERIOD I.

ENGLISH PUBLIC LAW AT THE DEATH OF EDWARD I.

A. General Characteristics of English Law and Review of Legislation.

(i) Before 1066. Dooms of the kings and witan; substratum of traditional law (folk right); local customs; theory of the three laws, West Saxon, Mercian, Danish; formalism of traditional law; Roman law unknown; influence of the church; characteristics of the dooms Pages 1—6


(iii) 1154—1215. Henry II as a legislator; Constitutions of Clarendon (1164); growth of Canon law; study of Roman law; ‘assizes’; possessory assizes and grand assize; assizes of Clarendon (1166) and Northampton (1176). Law books: Glanvill (circ. 1188); Dialogus de Scaccario; the first Plea Roll (1194) . . . 10—14

1 Printed copies of this analysis or syllabus were supplied to those who attended the course of lectures. A few slight changes have been made, where the order of topics in the lectures does not correspond with that laid down in the analysis.
Analysis

(iv) 1215—1272. The Charter: various editions, 1215, 1216, 1217, 1225; its character; beginning of statute book; Statute of Merton (1236), of Marlborough (1267); the Barons’ war. Study of jurisprudence: Bracton (ob. 1268); Roman law and English ‘case law’; evolution of common law . . . . . 14—18


B. The Land Law.

Reasons for starting with land law . . . . 23—24

Theory of tenure. Subinfeudation: stopped by Statute of Westminster II; the feudal formula A tenet terram de B. Tenure and service. Classification of tenures: (1) frank almoign; (2) knight’s service; the knight’s fee; homage, fealty; aids, reliefs, primer seisin, wardship, marriage, fines on alienation, escheat; (3) grand serjeanty; (4) petty serjeanty; (5) free socage; incidents of socage tenure; (Note, classification of tenures not a classification of lands; the same land may be held by several tenures. Note military service done only in the king’s army;) (6) villeinage; villein status and villein tenure; tenementum non mutat statum . 24—35

Definition of freehold; liberum tenementum opposed to villanum tenementum; afterwards also to chattel interests. Treatment of chattels; testamentary causes go to court christian; no wills of freehold; primogeniture, its gradual spread.

[The manor and its courts; court baron and customary court; who were the judges? Had every manor freeholders? No more manors to be created (1290).]

Feudal ideal;—no connection between lord and vassal’s vassal; this ideal to be had in mind that we may see how far it is realized 35—39

C. Divisions of the Realm and Local Government.

(i) The shire; its history; shire moot; ealdorman; sheriff; the Norman earl (comes) and Norman sheriff (viccomes). The county
Analysis

court (shire moot) not feudalized; its constitution; its political importance; quasi-corporate character of county; acts as a whole for many purposes; election of coroners (1194); struggle for elective sheriffs; the county (court) represented in parliament. 39–44

(ii) The hundred; its history; hundred moot: quasi-corporate character of the hundred; its duties; represented in the eyres by jurors. Hundreds in private hands; the court leet and the sheriffs turn; the serjeant of the hundred. . . . . 44–46

(iii) The vill or township; its duties; represented in the eyre by reeve and four men; election of the reeve. Relation of the township to the manor . . . . . . 47–52

(iv) The boroughs; each borough has its own history; generalization difficult. Privileges of boroughs may be brought under several heads: (a) immunities; (b) courts of their own, like hundred-courts; (c) elective officers, batilivi, praepositii; (d) collection of royal dues, the firma burgeri; (e) guilds. The city of London. The notion of a corporation (juristic person) not yet formed; but the greater towns have what are afterwards regarded as the powers of corporations 52–54

D. Central Government.

Retrospect:

(i) Before 1066. King and witan; actual composition of witenagemot; theory that it had been a folk moot; the bishop; the ealdorman; the thane (minister regis). Tendency towards feudalism. Powers of this assembly; election and deposition of kings, appointment of officers, legislation, judicature, etc.; but really there is little central government. Kingship increases in splendour; but rather in splendour than in power . . . . 54–60

(ii) 1066–1154. Title to the kingship; practical despotism of Norman kings; tradition of counsel and consent maintained. The Curia Regis, how far formed on feudal lines; number of tenants in chief; suit of court a burden. The curia Regis in a narrower sense; the administrative body; the officers of state, justiciar, chancellor; the exchequer and its routine . . . . . 60–64

(iii) 1154–1216. Definition in Charter (1215) of commune consilium regni. Who were the barones majores and what was a baronia? Line of demarcation gradually drawn among tenants in chief. Assemblies under Henry II; consent to legislation and taxation. The administrative and judicial body; professional judges under Henry II; itinerant judges; the barons of the exchequer
xiv

Analysis

(iv) 1216—1295. Changes in the Charter. Growth of representation; parliament of 1254; later parliaments; events of 1261, 1264, 1265; doubts as to constitution of later parliaments; parliament of 1295 becomes a model . . . . . . . 69—75

Constitution of parliament of three estates.

1 Clergy: the bishops, their two-fold title; abbots; the inferior clergy; praemunientes clause; parliament and the convocations . . . . . . . . . . . 75—78

2 Baronage: difficulties created by demand for a strict theory; tenure by barony and barony by tenure; barony by writ; a distinct theory of hereditary right supersedes a vaguer theory of right by tenure. Judges and other councillors summoned; their position 78—84

3 Commons: communes and communae; the electors in the shire; representation of the county court; the boroughs; demesne and other boroughs; the electors in the boroughs; non-representation of the palatinates . . . . . . . . . . . 85—90

Magna Concilia as contrasted with Parliaments: specification of terms . . . . . . . . . . . . . . . . . . . . . . . 90

The Concilium Regis; growth during minority of Henry III; relation of council to parliament, as yet undefined.

1. Legislation; in parliament, in a Magnum Concilium, in the permanent council. Line between statute and ordinance slowly drawn.

2. Taxation; sources of royal revenue, profits of demesne lands, feudal dues, profits of justice, sale of privileges and offices, ecclesiastical dues, tallage of demesne lands, customs; extraordinary revenue, Danegeld, carucage, taxes on moveables. Consent necessary to taxation; charter of 1215; practice under Henry III and Edward I; crisis of 1297; the Confirmatio Cartarum and De Tallagio non concedendo . . . . . . . 91—96

The kingship; becoming hereditary; coronation oaths. ‘The king can do no wrong’:—meaning of this. Theory of kingship in Bracton; the right to revolt. Modern notion of ‘sovereignty’ inapplicable; denied by current doctrine of church and state. The king as a legislator; Glanvill and Bracton on Quod principi placuit, etc. Legislation by means of new writs; can the king make new writs?—a limit set to this power . . . . . . . 97—105
Analysis

E. Administration of Justice.

The courts are (1) communal, (2) feudal, (3) royal, central and permanent, (4) royal, local and temporary (visitation), (5) ecclesiastical. General principles as to their competence.

The king’s court to start with, (a) a court of last resort when justice denied, (b) a court for the tenants in chief, (c) a court for pleas of the crown . . . . . . . . . 105—107

Growth of royal jurisdiction:—

(i) Criminal. Pleas of the crown; in Canute’s laws; in Leges Henrici Primi; gradual extension by means of the ideas of (a) king’s peace, (b) felony. The appeal and indictment . . . . . 107—I1I

(ii) Civil. Lines of progress, (1) evocation of causes quod nisi feceris, etc.; (2) no one need answer for freehold without writ; (3) royal procedure of grand assize; (4) royal possessory assizes; (5) writs of praecipe; contempt of king’s writ; (6) king’s peace; action of trespass. The king’s court offers advantages to suitors, e.g. trial by jury . . . . . . . . . . . 1 I I —115

History of procedure. Archaic procedure; proof comes after judgment and is an appeal to the supernatural: oaths; compurgation; formal witness procedure; ordeals; (after Conquest) battle. Germ of jury-trial not to be found in England; but in prerogative procedure of Frankish kings; the Frankish inquisitio; trial by the oath of presumably impartial neighbour-witnesses; introduced into England as a royal privilege; Domesday book. Generalization of inquest procedure under Henry II; regale beneficium; (1) grand assize, (2) possessory assizes, (3) the jurata in civil cases, (4) the accusing jury (connexion with Ethelred’s law disputed), (5) the jurata in appeals and indictments; pene forte et dure. Jurors still witnesses at end of thirteenth century. Local courts never attain to trial by jury . . . . . . . . . . . 115—132

The courts in the time of Edward I. Work of (a) communal, (b) feudal courts, rapidly diminishing: Statute of Gloucester. (c) The king’s central court has divided itself; extinction of the justiciarship; (i) king’s bench, (ii) common pleas, (iii) exchequer, (iv) king in parliament, (v) king in council. History of the (d) visitatorial courts; justices in eyre; the more modern commissions, (1) assize, (2) gaol delivery, (3) oyer et terminer . . . . . . . . . 132—141
Analysis

F. Retrospect of Feudalism.

Notion of a ‘feudal system,’ as a system of European common law introduced by Spelman, popularized by Wright and Blackstone; an early effort of comparative jurisprudence; it is valuable, but differences between various countries are great and should not be overlooked. . . . . . . . . . . 141—143

Attempts to define feudalism. How far was the feudal idea realised in England?

Tendency towards feudalism in Anglo-Saxon law; the territorialization of legal relationships; its economic causes. (1) The thegnage; the thegn as a landowner; military duty and land-owning; folkland becoming terra Regis. (2) The duty of having a lord imposed by the state. (3) Grants of jurisdiction. (4) Dependent landowners; villeinage . . . . . . . . . . . . . . . . 143—151

Feudalism in the Frank Empire; beneficium and feudum; the breaking up of the dominium. Jurisdiction in private hands. The king primus inter pares. Relation of the Duke of Normandy to the king of the French.

In what sense William introduced feudalism. The theory of tenure: all land brought within it; a quiet assumption; feudal tenure not the mark of a noble or military class. So far as feudalism is mere private law England is the most feudalised of all countries 152—158

Gradual development of doctrine of military service by means of particular bargains; not completed until scutage is imposed and feudalism is on the wane. Elaboration of ‘incidents of tenure’ is also gradual; burdens of wardship and marriage unusually heavy in England.

But political influence of feudalism is from the first limited. (1) Oath of allegiance exacted. (2) Man never bound by law to fight for any but the king; private war never legal. (3) Duty of all to serve in army irrespective of tenure is maintained. (4) Taxation not limited by feudalism. (5) Feudal justice has but a narrow sphere; communal courts retained and not feudalised. (6) King’s court and council not definitely feudalised . . . . 158—164
Analysis

PERIOD II.

SKETCH OF PUBLIC LAW AT THE DEATH OF HENRY VII.

A. Parliament.

1. Its Constitution.

History of the three estates.

(i) Clergy:—bishops, abbots; non-attendance of clerical proctors.


(iii) Commons:—Number of members. The county franchise; the forty shilling freehold. Number of boroughs represented. The borough franchises. Wages of members.

Arrangement of Parliament in two houses; when effected. Functions of the two houses. Wording of the writs. 165–177

2. Frequency and Duration of Parliaments.

Annual Parliaments. Statutes of 1330 and 1362. Intermissions of Parliaments become commoner under Edward IV. 177–178


We must not start with a theory of parliamentary sovereignty; such a theory the outcome of struggles. 179


xvi

Analysis

B. The King and his Council.

The king’s title: events of 1327 and 1399. Title of Henry IV, Edward VI and Henry VII. Legitimism of the Yorkists 190–195

His powers or ‘prerogatives’: their wide and indefinite extent. The character of the kingship varies with the character of the king; but law varies little. Thus the (so-called) ‘New Monarchy’ is introduced without change in the law. Fortescue’s theory of the kingship . . . . . . . . . . . . 195–199

The Council: its constitution; its constantly changing character. Royal minorities and regencies. The Council as a council of regency. Under Edward IV and Henry VII it becomes strong as against the people, weak as against the king. The king’s seals; ‘ministerial responsibility.’ Functions of the Council . 199–203

C. Administration of Justice.

Decay of feudal and communal courts. The justices of the peace; their history; their ever-growing powers; summary penal jurisdiction; their connexion with the council. The three courts of common law. The commissions of assize, etc. The nisi prius system. Trial by jury; changes in its character; in civil cases; in criminal cases; grand and petty juries; peine forte et dure. Appeals and indictments. Fortescue on the jury . . . . 204–213

Jurisdiction of the Parliament (i.e. for this purpose, House of Lords):—(i) trial of peers, (ii) writs of error, (iii) impeachments. Contrast between impeachments and acts of attainder; early instances . . . . . . . . . . . . 213–216

Jurisdiction of the Council, (1) as courts of error,—this suppressed; (2) as a criminal tribunal of first instance; statutes and petitions against it; gradual acquiescence of Parliament; jurisdiction of Council acknowledged by statute; question as to the legality of the jurisdiction; the Act of 1487. (3) Jurisdiction of Council in civil cases; growth of the Court of Chancery . . . 216–221

The chancellor and his powers. Petitions to the king for civil relief referred to the chancellor. He is warned off the field of common law; but acquires an ‘equitable’ jurisdiction. Nature of Equity; becomes a supplemental system of law . . . 221–226
Analysis

D. General Characteristics of English Law.

Common Law; its conservatism; its development under Edward IV and Henry VII; new forms of action. Text books and reports.
Statute law; characteristics of medieval statutes; growth of economic legislation.
Remarks on criminal procedure. History of the law of treason

226—236

PERIOD III.

Sketch of public law at the death of James I.

A. Parliament.

   (i) House of Lords. Disappearance of the abbots; legislation as to the appointment of bishops. Number of temporal lords.
   (ii) House of Commons. Number of members. Creation of new boroughs.
   The clergy have practically ceased to be an estate of the realm; taxes still voted in convocation, though confirmed by statute
   237—240

   ‘Privilege’ now an important topic.
   (a) Freedom of debate; Haecey’s case; Thorpe’s case; Strode’s case; Strickland’s case; Wentworth’s case; Elizabeth’s views and James’s; events of 1621.
   (b) Freedom from arrest; statute of 1433; Ferrer’s case; Shirley’s case; statute of 1604.
   (c) Punishment for contempt; cases of Storie, Parry, Bland, Floyd ...
   240—245

   i.e. of House of Lords, (a) as a court of error, (b) in trial of peers, (c) in impeachments: revival of impeachments; their importance. Jurisdiction as a ‘privilege’ of House of Lords. Acts of attainder
   245—246

4. Functions of the Commons in granting money.
   247

5. Right to determine disputed Elections.
   Claim of Commons to decide disputes as to elections; Nowell’s case; events of 1586 ...
   247—248

6. Parliamentary procedure.
   The outlines now drawn; proxies and protests of the lords; the king in the House of Lords ...
   248
Analysis

7. Frequency and Duration of Parliaments.

Long Parliaments of Henry VIII and Elizabeth; long intervals without a session; old statutes as to annual Parliaments not repealed. Important results of long Parliaments . 248—251

B. Relation of the King to Parliament.

Pliability of Tudor Parliaments; forced loans; forgiveness of the king’s debts; growing independence of Parliaments under Elizabeth and James.

Supremacy of king in Parliament made apparent by (1) acts of attainder; (2) forgiveness of the king’s debts; (3) repeated settlements of royal succession; will of Henry VIII; (4) ‘the Lex Regia of England’ (1539) and its repeal; (5) acts enabling the king to revoke statutes; their repeal; (6) interferences with religion. Sir Thomas Smith on supremacy of king-in-Parliament . 251—255

But in many directions the king’s power is ill defined; constitution of the Council. Want of definition illustrated:

(1) In legislation. The ordaining power; instances of proclamations; resolution of the judges in Mary’s reign; parliamentary protests. Council in Star Chamber enforces proclamations 255—258

(2) In fiscal matters. The ‘impositions’; Bates’ case; Coke’s opinion; difficulty caused by wide extent of undoubted prerogatives, e.g. as to debasing the coinage. Benevolences. Monopolies; statute against them; sale of privileges in the Middle Ages . 258—261

(3) In judicial matters. (i) The Court of Star Chamber; theories as to its origin and legality; Plowden’s opinion; statute of 1562; Coke’s opinion. Connexion with the now well-established Court of Chancery. Its procedure; arbitrary punishments; use of torture. (ii) The Council of the North. (iii) The Council of Wales; doubts as to its jurisdiction. Usefulness of these courts, owing to decay of old local courts. (iv) The High Commission; Coke’s opinion as to king’s ecclesiastical supremacy; his opinion as to the Commission. (v) Commissions of martial law; the Court of the Marshal and courts martial; precedents under Edward IV; proclamations of 1588 and 1595 . . . . 261—267

Prerogative and law; illustrations from Coke’s career; the quarrel with the ecclesiastical courts; the king no judge; quarrel with the High Commission; opinion as to impositions; as to taking extra-judicial opinions from the judges severally; quarrel with the Chancery; case of the commendams; his disgrace; the four p’s which ruined him.
Analysis

Why controversy collects round the writ of habeas corpus; its history; statutes as to bailing prisoners. Is the king’s command a cause for imprisonment? ‘The resolution in Anderson.’ Coke’s change of mind.

The gathering storm. Where is sovereignty? . . 267—275

C. History of the Army.

The feudal levy; its clumsiness; scutage. The Assize of Arms; the Statute of Winchester; the village constables. Commissions of array; statutes of Edward III and Henry IV. No standing army. Act of Philip and Mary as to musters; its repeal. Act of Philip and Mary as to keeping armour. Situation in James’ reign. Difficulty as to (1) martial law, (2) obtaining money for payment of troops. Pressing for the navy legal . . . 275—280

D1. Local Government.

E1. General Characteristics of Law, especially Criminal Law.

F1. Legal History of the Reformation.

PERIOD IV.

SKETCH OF PUBLIC LAW AT THE DEATH OF WILLIAM III

A. Constitution of the Kingship.

Legal theory of Restoration and Revolution. The Convention Parliament and the Convention; were they Parliaments? Attempts to legalize their acts. James’ ‘abdication’; its date; existence of an interregnum. Was there a Revolution?

Settlement of the succession; the forfeiture clause. New coronation oath; history of the old oath; charges against Laud of tampering with it; quarrel as to its meaning . . . 281—288


1 Maitland appended a note to the effect that these subjects would be treated ‘if time serves.’ Time did not serve, but the Legal History of the Reformation is briefly summarised later—pp. 506—13.
Analysis

(ii) House of Commons. Number of members; new boroughs; prerogative of giving members to towns falls into disuse. Constitution of Cromwell’s Parliaments. Electoral qualifications; forfeiture of borough charters. Qualification of members; the projected exclusion of place-men by the Act of Settlement. Disputes as to elections decided by the House. . . . . 288—292

C. Frequency and Duration of Parliaments.

Laws of 1641, 1664, 1696. Chronological summary of sessions 292—297

D. The Question of Sovereignty.

The theory of Hobbes. In 1625 three claimants for sovereignty: (1) king, (2) king-in-Parliament, (3) the Law. Opinion of the judges in the Ship-Money case; the king above statute. Logical flaw in the royalist argument:—it does not go far enough. The claim of ‘the Law’; Coke’s theory as to void statutes; past legislation renders it difficult to maintain this claim; what cannot statute do? The issue lies between (1) and (2), and is decided in favour of (2). The progress of the dispute may be seen in several different departments . . . . . . . . . 297—301

E. Legislation.

Dispute as to (1) ordaining power; proclamation of Charles I; abolition of Star Chamber; (2) dispensing power; doubts as to its limits; treatment of it at the Revolution; (3) suspending power; treatment of it at the Revolution; case of the Seven Bishops 302—306

F. Taxation and Control over Finance.

Under Charles I; the impositions; the forced loan; the Petition of Right; the ship money; legislation of 1641. Taxation by James II. The Bill of Rights.

Appropriation of supplies; events of 1624 and 1665; impeachment of Danby; beginnings of the civil list. The Commons and money bills; the ‘tackling’ in 1700. Taxation of the clergy. Abolition of military tenures, purveyance, preemption; grant of the hereditary excise . . . . . . . . . . 306—311
Analysis

G. Administration of Justice.

Abolition of Star Chamber, High Commission, Councils of the North and of Wales. Restoration of High Commission by James; denounced in Bill of Rights. Escape of the Chancery.

Change in the commission of the judges; enforced by Act of Settlement. Independence of jurors; Bushell's case.

The habeas corpus; Darnel's case; Eliot's case; the Act of 1679; excessive bail forbidden.

The era of impeachments; various points settled by decision. Changes in the law of treason. Acts of attainder. Disputes between the Houses as to the jurisdiction of the House of Lords, (a) as a court appeal from Chancery, (b) as a court of first instance.

Jurisdiction of the Council in admiralty and colonial cases

311—320

H. Privilege of Parliament.

(1) Freedom of speech; Eliot's case. (2) Freedom from arrest; arrest of the five members; extent of the privilege. (3) Power to punish for 'contempt'; what is contempt? Assertions of privilege above law . . . . . . . . . . 320—324

I. Military Affairs.

The commissions of martial law; billeting of troops; impressment, 'the power of the militia.' Settlement at the Restoration; growth of the standing army; commissions of martial law under Charles II and James II. Settlement at the Revolution; the first Mutiny Act; control of Parliament over the standing army. Necessity for annual sessions. The remodelled militia 324—329

PERIOD V.

Sketch of Public Law at the Present Day (1887–8).

Preliminary.

1. Though concerned chiefly with England we must remember that England is no longer a state but is a part of the United Kingdom.

Incorporation of Wales in England. Union with Scotland; 'personal union' in 1603; legislative union in 1707; scheme of the
xxii

Analysis

union; the ‘fundamental conditions.’ Relation of Ireland to England in Middle Ages; Poynings' law; questions as to authority of English statutes and judicial power of English House of Lords; Act of 1719; Act of 1783 freeing Irish Parliament from subjection; union of 1801; articles of the union. No federation of three kingdoms, but a complete merger in the United Kingdom of Great Britain and Ireland.

Colonies and Dependencies; general principles as to laws in force in them; subjection to legislature of Great Britain and Ireland; taxation of the American colonies. Abolition of slavery and other instances of legislation for colonies. Colonial constitutions; crown colonies and self-governing colonies; wide powers of legislation given to colonial assemblies.

Distinguish institutions which are merely English, from those common to Great Britain or to the United Kingdom or to all the king’s dominions; e.g. there is no English Parliament, no English nationality, but English courts of law, English domicile.

Now it becomes important to distinguish carefully rules of law from rules which however punctually observed are rules of ‘positive morality,’ ‘customs or conventions of the constitution,’ ‘constitutional understandings;’ these are much interwoven; reason of this, our conservatism of form . . . . . . . . . 330—343

A. The Sovereign Body.

I. The kingship; statutory settlement of succession; queens; queens’ husbands. ‘The king never dies.’ Coronation oath; declaration against Popery; king must ‘join in communion with’ English church. Royal Marriage Act. No legal mode of deposing king.

Infant and incapable kings; common law makes no provision; king never legally incapable; minorities provided for by occasional statutes; events of 1788 and 1810 when George III was insane; great seal used without king's assent . . . . . 343—346

II. The House of Lords. Lords Spiritual; legislation as to the new bishoprics. Irish bishops have come and gone. Mode of appointing bishops.

Lords Temporal; increase of numbers; representatives of Scottish and Irish peers; mode of making peers . . . . 347—351

III. The House of Commons. (1) Fluctuation in number; the Acts of Union . . . . . . . . . . . 351—352
Analysis

(2) Qualification of electors in counties and boroughs. The reforms of 1832–67–84. Present state of law.

 Distribution of seats. Parliamentary and municipal organizations become distinct. Tendency towards equal electoral districts, but still distinctions between borough and county qualifications. causes of disqualification . . . . . . . 352—364

 (3) Qualification of members. History of parliamentary oaths. History of ‘office’ as qualification . . . . 364—370

 Mode of election; introduction of the ballot . . . . 370

 Determination of disputed elections . . . . 370

 Modes of ceasing to be a member; expulsion; Wilkes’ case

 371—372

IV. Frequency and Duration of Parliament. Frequency depends on Triennial Act of 1694; (N.B. Act of 1664 repealed in 1887); duration on Septennial Act of 1715. Why annual sessions necessary. Legislation as to dissolution by demise of Crown . . . 373—374

V. Privileges of Parliament. (1) Freedom of speech; exception out of ordinary law as to defamation; Stockdale v. Hansard, Wason v. Walter. Reporting. (2) Freedom from arrest; now of little importance. (3) Power of punishing for contempt; treatment of this power by courts of law; actual use of it . . . 374—380

VI. The Work of Parliament. Other functions besides passing statutes; inquiry and criticism; examination of witnesses. Essentials of a statute; each House has large powers of regulating its own procedure; questions as to whether both Houses have really consented to what on its face professes to be a statute.

The omnimorpetence of statute; it may not be a ‘law’ in the jurists’ sense; instances of particular commands given by statute. In the eighteenth century Houses attempt to govern as well as legislate by statute. In the nineteenth century vast new powers have been given to ministers and law courts, and Parliament interferes less with particulars; but the power exists and is exercised, e.g. disfranchisement by statute of A, B, and C, corrupt voters, also Acts of Indemnity, also appropriation of supplies . . . . 380—387

B. The ‘Crown’ and the ‘Government.’

Difficulty of dealing with this subject owing to the growth of ‘constitutional understandings,’ maintenance of ancient forms, and unwillingness to expressly take power from the king . . . 387—388
xxiv

Analysis

Historical Review. Revolution settlement; large prerogatives left to William III which he was expected to exercise. Position of Privy Council and growth of Cabinet. How the Cabinet was legally possible. Attempt (1700) to stop by statute the growth of an inner council; repealed 1705 . . . . . . 387—390

History of the great officers; chancellor, treasurer, keeper of privy seal, president of council, secretaries of state, chancellor of exchequer, admiral; treasury and admiralty in commission. These or some of these form an irregular inner council, with whose concurrence a king can exercise prerogatives; they have the seals; importance of the seals of office; no need to summon other councillors 390—394

Cabinet government of modern type slowly evolved; king ceases to be present at cabinet meeting; solidarity of cabinet slowly established (1) political unanimity, (2) common responsibility to Parliament (though not to the law), (3) submission to a ‘Prime Minister.’ Gradual retirement of king behind his Ministers, who are now expected to be in Parliament; he ought to take their advice, and choose them in accordance with wishes of Parliament (later, of House of Commons). All this ‘extra-legal.’ King’s legal powers have not been diminished; on the contrary since the establishment of ministerial system have vastly grown owing to modern statutes. King’s own sign manual or consent given at a (formal) meeting of Privy Council necessary for countless purposes. Other powers given to this or that high officer (cabinet minister). Distinguish prerogatives (i.e. common law powers) from statutory powers of king 394—400

Present State. (1) Necessary existence of Privy Council. (2) Its legal constitution. (3) And actual composition. (4) King may consult such privy councillors as he pleases and this is legally a meeting of the Privy Council. (5) Large powers of king in Council. (6) Necessary that king should have certain high officers (e.g. two Lords of the treasury, otherwise he cannot lawfully get the money that Parliament has voted). (7) Customary composition of the ‘Cabinet’ out of these high officers; as a body it has no legal powers. (8) But almost every member has large legal powers. (9) Customary composition of ‘Ministry.’ (10) Solidarity of Ministry, maintained by customary rules as to resignation and acceptance of office, but not recognized by law; ultimate sanction a refusal of supplies. (11) Legal tenure of high offices during king’s pleasure. Choice of Prime Minister. (12) Relation of Cabinet to the Privy Council;
formal meetings of Privy Council (i.e. of king with a few ministers and sometimes a royal duke, or officer of household), at which king's powers are exercised in accordance with policy of Cabinet. (13) Many, but not all, royal powers must be exercised by Order in Council; but every (or almost every) exercise of royal power requires authentication by some high officer. Form of an Order in Council. Classification of delegated powers . . . . . 400—407

Of some of the high officers and their legal powers. (1) The Lords of the Treasury, (2) the Secretaries of State; large legal powers in governing England of (Home) Secretary. (5) Board of Trade. (6) Local Government Board. (7) Education Department, etc. Illustration of actual working of government system 407—414

Object of illustrating these statutory powers:—Blackstone's statement that the high officers (e.g. secretaries) have few (if any) legal powers of their own, has become utterly untrue, though still repeated by text writers. The old theory (never very true) that 'legislative power is in king and Parliament, executive power in king' now requires serious modifications. Many powers of great importance are given by statute not to the king but to some high officer—e.g. power of making rules for the government of police given to Secretary of State. The requisite harmony between those who have these powers is obtained by the (extra-legal) organization of the Cabinet. Our law now knows not so much 'the executive power' as many executive (better, governmental) powers. This is obscured by talk about 'the Crown'; 'the Crown' is often a cover for ignorance; the king has powers and the high officers have powers, but the crown lies in the Tower.

Difficulties as to limits of king's prerogative powers; because instead of them new statutory powers are used; but a prerogative does not become obsolete by disuse and the clear words of a statute are necessary to take it away . . . . . . 415—421

C. Classification of the Powers of the Crown.

Shall deal with many in subsequent sections; but here (1) recall powers relating to constitution, assembling and dissolving of Parliament and turning bills into statute; (not correct to speak of king as having a 'veto'; he must actively assent; assent last refused by Anne); (2) note power of making war or peace; question as to power of ceding territory; power to make treaties, but treaty does not alter English law; illustration, extradition treaties; ambassadors; aliens; (3) appointment of offices . . . . . . 422—430
xxvi

Analysis

D. The Fiscal System.

Retrospect: the Crown lands and king's private estates, the national revenue and king's private revenue, gradual establishment of these distinctions. The 'ordinary' and 'extraordinary' revenue; decline in importance of former. History of hereditary excise and civil list; a king with a salary . . . . . . . 430—438


E. The Military System.

Army. Annual Mutiny Acts; Army Act 1881; nature of its contents; 'Military law'; prerogative of making articles of war; billeting and impressment of carts; terms of soldiers' service how far fixed by statute; conscription in the eighteenth century; the command of the army. . . . . . . . 447—454

Militia. The 'constitutional force'; models of 1662, 1757, 1786, 1802, 1853; suspension of the ballot; present plan 455—459


F. Administration of Justice.

Put on one side Judicial Committee of Privy Council; its great importance . . . . . . . . . . . . 462—464

a. System of Civil Courts. The great changes of the nineteenth century. The (new) County Courts; the Court of Chancery; the domain of modern equity; Chancery procedure; fusion of Equity and Common Law; the High Court of Justice; the High Court of Appeal; the House of Lords.

Court of Appeal, House of Lords. General rules as to their competence. Present relation of Equity to Law . . 464—473

b. System of Criminal Courts. (1) Courts of Summary Jurisdiction formed by justices of peace. (2) Quarter Sessions. (3) High Court. Writs of error to (4) Court of Appeal and (5) House of
Analysis

Lords. (6) Court for Crown Cases Reserved. Trial of peers and impeachments before the House of Lords. Some notes on Criminal Law

473—478

c. Government and Justice:—(1) Independence of judges secured; (2) king has no powers over Civil Justice; but (3) has legally large powers over Criminal Justice; power of pardon; power to stop criminal proceedings; (4) ‘the king can do no wrong’; meaning of this; petitions of right; (5) king’s officers can be sued and prosecuted in ordinary way even for official acts

478—484

G. The Police System.

Continued decline and fall of sheriff; his present position. The parish constables; Act of 1842; special constables. The new constabulary; its government. Position of police constable; law of arrest; constant increase of police constable’s statutory powers. Suppression of tumults; Riot Act; use of military force

485—492

H. Social Affairs and Local Government.

Only possible to hint at the existence of this great field of law which constantly grows wider; but at least its existence should be known.

Organs of local government:

(1) Justices of Peace

493—495

(2) Municipal corporations; the reform of 1835

495—497

(3) Poor Law Guardians; the reform of 1834

497—498

(4) Sanitary authorities; acts of 1848 and 1875

498

(5) School Boards, 1870. Progress of democratic representative government; bill (Act?) of 1888 for County Councils

499—501

The new duties thus cast on the Englishman: some of which are active duties, e.g. to register child’s birth, have it vaccinated, and sent to public elementary school. Also notice Expropriation Acts.

501—506

J. The Church.

Medieval theory of church and state; a denial of ‘sovereignty.’ Jurisdiction of ecclesiastical courts; temporal effects of excommunication; the Canon Laws; statutes against heretics. Endowments, not of ‘the church,’ but of churches. The Reformation

506—511
xxviii

Analysis

Subjection of church to king and Parliament. Legislation as to dogma and ritual. History of convocations; their impotence

511—514

History of attempts to enforce conformity on Catholics and Protestant Dissenters; Blackstone’s account of laws against sectaries and papists. History of toleration. Present state of the case; remaining religious disabilities; laws against Jesuits; heresy an ecclesiastical offence. Present condition and powers of ecclesiastical courts. Legal position of clerk in English orders contrasted with that of catholic priest and dissenting minister; the former a ‘status’; ‘the church’ not a corporation, nor even a definite body of persons

514—526

K. The Definition of Constitutional Law.

Such terms as ‘public,’ ‘constitutional,’ ‘administrative’ law, not technical in England; Austria’s use of them, and Holland’s. Theory that constitutional law deals with structure, administrative with function; difficulty of taking this as outline for a code. Interdependence of all parts of the law; e.g. main outlines of ‘constitutional law’ of Middle Ages are determined by ‘real property law’; constitutional struggles of seventeenth century not to be understood without knowledge of criminal procedure. 526—539