ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY

ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY

by

S. B. CHRIMES
M.A. (Lond.), Ph.D. (Camb.), F.R.Hist.S.
Lecturer in Constitutional History in the University of Glasgow;
Sometime Lindley Student in the University of London
and Rouse Ball Research Student in
Trinity College, Cambridge

CAMBRIDGE
AT THE UNIVERSITY PRESS
1936

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107683334

First published 1936
First paperback edition 2013

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-68333-4 Paperback

CONTENTS

PREFACE

This work could not have been undertaken, completed, or published but for the liberality of the Council of Trinity College, Cambridge. The opportunity to undertake the work was given me by my election to the research studentship offered by that Council to graduates of other Universities, and I was able to continue it as a result of my subsequent election to a Rouse Ball research studentship in the same College. Publication of the work, moreover, was made possible by the Council's vote of a substantial grant-in-aid from the Rouse Ball Fund. My indebtedness to Trinity College is thus very heavy, but it cannot be expressed merely in terms of finance.

I am grateful to the Cambridge University Press for undertaking the remaining costs of publication, and for the courtesy and accurate work of its staff. I have had the advantage of consulting a number of scholars on various points; in particular Professors Sir William Holdsworth, H. F. Jolowicz, F. M. Powicke, M. T. Smiley, C. H. Williams; Miss H. Cam, and Rev. Dr A. J. Carlyle. Professors E. F. Jacob and T. F. T. Plucknett, and Mr K. Pickthorn read my manuscript in its early stages, and made many helpful suggestions.

Several friends have been long-suffering in the toll I have taken of them. Miss Mabel Keyser patiently searched my proofs for misprints. Mr R. R. Page applied his subtle logic to the improvement of the form of the book, and helped to prune away many infelicities. Mr A. S. Gilbert, of University College, London, and the Middle Temple, placed at my disposal his expert legal knowledge, which I have drawn on very freely, to the great benefit of my text. He read my proofs with extreme care, and his criticisms and suggestions have saved me numerous errors and inaccuracies, as well as indicated fresh points for

consideration. My most fundamental debt, however, is to a master of early constitutional history. The work was begun under the supervision of Dr Gaillard Lapsley, and his encouragement, criticism, and suggestions at every stage have been of inestimable value. Scarcely a page of the book has not, at one time or another, been improved in form or substance as a result of his comments. Where I have begged to differ from him, I have done so with an uncomfortable feeling that my confidence has probably sprung from ignorance. For the errors and defects that remain, I, of course, am alone responsible.

I have been obliged to the Council of the Royal Historical Society for permission to reprint my paper on 'Sir John Fortescue and his Theory of Dominion' which was published in the Society's *Transactions* for 1934, and to make use of the text of Bishop Russell's parliamentary sermons which was published in 1854 by Mr J. G. Nichols in vol. LX of the Camden Society's publications; also to the Editor of the *English Historical Review* for permission to reproduce my Note on 'The Terms House of Lords and House of Commons in the 15th century' published therein in 1934; also to the Honourable Societies of Lincoln's Inn and the Inner Temple for kind permission to consult the manuscripts in their libraries.

Some words of reservation and caution should be said here regarding the legal materials I have used. The bulk of the fresh material that has been embodied in the text has come from the Black-Letter *Year Books*. The dangers of using this source for the purpose I have had in mind are many, even though they may be obvious only to students who are more expert in the law than I. These dangers are not lessened by the fact that at present only two fifteenth-century *Year Books* are available in modern editions. I have not, however, attempted the task of editing the cases which I cite. Even had I wished to do so, the examination of the manuscripts of a century's *Year Books* would have been an impossible task. Consequently, I have

contented myself with printing in an Appendix the most relevant portions of the cases I have cited, and have reproduced them, without comment or amendment, in the form of the Black-Letter 'Vulgate' edition. No doubt corruptions appear in these texts, but on the whole I believe they are adequate for the strictly limited purposes I have had in view. A much more serious matter, to my mind, is the question of the evidential value of the *Year Books* for those very purposes. From one point of view these law reports are of the highest value as authentic evidence of the ideas of the times in which they were composed; they are almost the only *verbatim* reports of the living word that we have coming from the century, and as such possess an actuality which is lacking in nearly all other sources. From other points of view they seem to be of questionable value for the history of ideas: much of the pleading reported is necessarily special pleading; the arts of advocacy were often more ingenious than ingenuous then as they are now; judicial ruling and counsel's argument are two very different things; the one may give us the law, but which best reflects contemporary opinion? Moreover, whatever is said, by whomsoever it is said, in the courts, is necessarily said within the framework of the law, which may have been, and often was, rather out-of-date in matters of constitutional theory. Consequently, the precise value of any *Year Book* case for the history of constitutional ideas, and indeed of constitutional law, is a very delicate and complicated problem. I cannot hope that I have justly assessed the evidential value of each of the hundred odd cases cited in my pages, nor can I offer the reader the compensation of a complete text of each case. Nevertheless, in basing my conclusions on *Year Book* evidence, I have endeavoured to bear in mind the inevitable complications, and to apply the appropriate reservations, and in every instance I refer the reader to the extract printed in the Appendix; where this extract proves inadequate, the Black-Letter edition should be consulted.

I may say, in conclusion, that I had hoped to obtain additional material from some of the Serjeants' Readings to the Inns of Court. I examined, I believe, all the likely manuscripts of these Readings, but found nothing relevant to the purpose.

S. B. C.

University College Hall
Queen's Walk
Ealing, London
10 May 1936

ABBREVIATIONS

Chapters.	Tout's Chapters in Mediaeval Administrative History.
De Laudibus.	Fortescue's De Laudibus Legum Angliae.
Bull. I.H.R.	Bulletin of the Institute of Historical Research, London.
Bull. J.R.L.	Bulletin of John Rylands Library, Manchester.
E.E.T.S.	Early English Text Society.
E.H.R.	English Historical Review.
Hist. Eng. Law.	History of English Law.
Hist. Zeit.	Historische Zeitschrift.
L.Q.R.	Law Quarterly Review.
N.L.N.	Fortescue's De Natura Legis Naturae.
Procs. and Ords.	Proceedings and Ordinances of the Privy Council, ed. Sir Harris Nicolas.
Rot. Parl.	Rotuli Parliamentorum.
T.R.H.S.	Transactions of the Royal Historical Society.
Y.B.	Year Book.

INTRODUCTION

What men have done and said, and above all what they have thought—that is history MAITLAND

These studies are the outcome of a desire to pursue further the suggestions that were made by Mr T. F. T. Plucknett in his essay on 'The Lancastrian Constitution', which was published in 1924 in the volume of *Tudor Studies* presented to A. F. Pollard. In that essay, Mr Plucknett, on the basis of four significant Year Book cases which he was the first to bring into notice, raised afresh the whole problem of the character of the Lancastrian and Yorkist constitution. He pointed out that the 'later splendours of the constitution have been reflected back upon the fifteenth century, throwing certain features of it into undue relief and enveloping the whole structure with an appearance of maturity and completeness which is in fact illusory'.[1] He concluded, in the light of the evidence he adduced, that—though much would have to be done before a confident judgement could be given—the uneasy feeling which had long existed about the 'constitutionalism' of the Lancastrians seemed to be thoroughly justified. Beneath the strange modernity of its appearance there lay, he suggested, a fundamental deficiency which made it peculiarly difficult to understand, and he thought this was, in some measure at least, due to the fact that however familiar the forms of Lancastrian government might seem, the spirit within them was completely alien to modern thought.[2]

To investigate this spirit behind the forms of fifteenth-century government has been the object of the present writer. The task has not always been easy, for the materials for such a study are far from simple, and the *Year Books* in particular do not lend themselves readily to the purpose in hand. Moreover,

[1] *Loc. cit.* 161. [2] *Ibid.* 181.

the half-expressed concepts and ideas behind the machinery of government are often elusive and hard to interpret, because of the meagreness with which fifteenth-century people recorded what to them were assumptions that called for no statement. But something has been learned, and of that the reader may judge for himself.

The subject is not one which has greatly attracted the attention of historians. It is perhaps arguable that the whole field of the history of constitutional theory—as distinct from constitutional practice—is one that may with advantage be worked more fully than it has hitherto been, and might, if so worked as a theme in itself, yield some light on many dark places in the history of both political thought and constitutional development. However that may be, the bibliography of our present restricted subject is a very brief one. It begins, and—apart from Mr Plucknett's essay—very nearly, if not quite, ends,[1] with Stubbs's *Constitutional History of England*—the starting-point for all work in English mediaeval constitutional history.

Even Stubbs, however, was little concerned with the history of theory, and his classic exposition is mostly one of constitutional practice. His brief allusions to constitutional ideas no more than confirm his own general view of the constitutional significance of the period. He regarded the Lancastrian régime as having a double interest. It contained, he said, not only the foundation, consolidation, and destruction of a fabric of dynastic power, but, parallel therewith, the trial and failure of a great constitutional experiment, a premature testing of the strength of the parliamentary system.[2] 'The house of Lancaster', he believed, 'had risen by advocating constitutional principles, and on constitutional principles they governed.'[3] The case against the house of York, on the other hand, rested primarily on legal and moral grounds, but also upon an underlying spirit that defied and

[1] There is, of course, Plummer's edition of Fortescue's *Governance of England* (1885); but Plummer's views were manifestly dominated by Stubbs, and his erudition is more conspicuous than his insight.

[2] *Op. cit.* 5th ed. III, 5.

[3] *Ibid.* 8.

ignored constitutional restraints.[1] The period as a whole was one in which constitutional progress had outrun administrative order.[2]

These views of Stubbs, that the Lancastrian period witnessed a conscious constitutional experiment, that this experiment was not maintained under the Yorkists, together with the implication that the spirit of the constitution in the earlier part, at least, of the century was distinctly modern in character, represent, in brief, the essence of the accounts of the matter that have long been purveyed in numerous textbooks and countless lecture-rooms, until a recent date.

In the hands of less subtle and cautious writers than Stubbs, his implicit conclusions have been magnified into explicit and forthright pronouncements. Stubbs himself never actually said that the Lancastrian constitution was modern; but even so well known a scholar as G. B. Adams had no hesitation, as late as 1920, in asserting that the Lancastrian period 'was one of unbroken constitutional government'. It was, he says, startlingly and prematurely modern; and 'though the machinery of constitutional government had as yet been worked out in few details, it was in spirit modern'.[3]

The 'uneasy feeling' mentioned by Mr Plucknett in 1924 has arisen about views of this sort. It is not, perhaps, too much to say that the large amount of original work that has been done in constitutional history—especially in the history of parliament and of the administrative system—since Stubbs's day, has made such extreme views highly improbable, if not impossible. The detection of any notable constitutional experiment under the Lancastrians becomes more and more difficult, and consequently any theory of backsliding on the part of the Yorkists becomes more and more meaningless.

The present writer does not, in these studies, touch specifically upon this matter; but he has not, in the course of his reading

[1] *Ibid.* 281. [2] *Ibid.* 276.
[3] *Constitutional History of England*, 218. The same statements appear in the revised edition of the work (1935).

of the sources, discerned any such traces, in contemporary ideas, of a conscious constitutional experiment as might have been expected if the older views were justified. It is quite certain that whatever constitutional progress took place during the fifteenth century was not of a sensational character, but was sufficiently quiet and below the surface to escape the comments of contemporaries.

It may, indeed, be taken for granted that no historian to-day would profess to observe any very close resemblance between the constitution of the early fifteenth century and that of the nineteenth, except in a few forms and phrases. But what of the spirit behind those forms? Was that really modern—startlingly and prematurely modern? On this specific question little or no original work has been done in recent years, and there is no bibliography of it to mention. The importance, however, of coming to some conclusions as to the nature of the fifteenth-century constitution has been clearly demonstrated by Mr Kenneth Pickthorn's notable work, *Early Tudor Government* (1934). In this book, which is a contribution to constitutional history from a new angle, Mr Pickthorn found it necessary to analyse the 'constitution' as it was at the accession of Henry VII, and his allusions to it show how far opinion on the matter has travelled since Stubbs's day. Mr Pickthorn, it seems, represents an extreme reaction against the old views of the fifteenth-century constitution. In fact he goes so far as to doubt whether the fifteenth century had anything that can very usefully be called a constitution at all;[1] and if there was one, he thinks it amounted to no more than the mediaeval idea of the supremacy of law.[2] In face of such assertions as these, it is evidently desirable that fifteenth-century people themselves should be consulted as to what they thought about the matter, if anything.

[1] *Op. cit.* I, 101: '...another occasion to remark how far the fifteenth century was from anything which can very usefully be called a constitution.'

[2] *Ibid.* 55: '...the mediaeval idea of the supremacy of the law, an idea of which it is hardly too much to say that before the sixteenth century it was all there was in England in the way of a constitution.'

Now obviously, in all discussions of this nature, much depends upon the definitions of the terms 'constitution' and 'constitutional' adopted. Often—far too often—they are used simply to mean 'parliamentary limited monarchy as understood from the nineteenth century'. Certainly this is Stubbs's usage—unhistorical though it be—and must surely be also Mr Pickthorn's. For it is impossible to conceive of any established government without *some* sort of constitution, however primitive, crude, or unparliamentary. Since Mr Pickthorn analyses the government as established in 1485, at considerable length, we must needs believe that *some* sort of constitution existed even in that deficient century.

Whatever definition of a constitution be adopted, it is most important, in order to avoid endless confusion and question-begging, to adopt one that is not unhistorical. The modern constitutional lawyer and the constitutional historian cannot adopt the same definition, for the simple reason that though the child may be father to the man, 'child' is not a synonym for 'man'. The present writer understands a constitution to be that body of governmental rights and duties[1] which exist in a state at any given time in virtue of their recognition or implication by law, custom, convention, practice, or opinion. By this definition, even the most extreme despotism is a constitution, wherein all governmental rights centre in one person; by it also, Mr Pickthorn's assertion *is* impossible, and Stubbs's, if not meaningless, is quite non-committal; since by it, the expression 'constitutional principles' gives no indication of the *sort* of government meant: by it, the word can justly be applied to any century and any place, and the assumption that only one sort of constitution, namely, the modern, is worth mentioning, is avoided.

[1] These words are to be preferred, for purposes of English history at least, to the term 'rules', which appears in many definitions; because whatever constitutional rules may exist, they are never more than statements about somebody or other's rights or duties. Rules may formalise rights, but they are not elemental. Mr Pickthorn himself notes this fact, following Dicey, in *Some Historical Principles of the Constitution*, 120: '... the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence, of the rights of individuals.'

The purpose, then, of these studies is to examine and as far as may be to interpret what has been called 'the spirit of the constitution', as it was in the fifteenth century. The four Chapters attempt to analyse the information that has been gleaned on the several subjects relevant to this purpose; and the Conclusion aims at giving an account of the constitution in the form in which an observer at the end of the fifteenth century *could* have given it *if* he had tried. The phrase 'spirit of the constitution' is not, perhaps, altogether satisfactory; but it serves, and by it is meant 'opinions, ideas, and assumptions as to the nature and distribution of governmental rights'. As such, it is a theme necessarily fundamental to the constitutional history of England, whose constitution remains mostly unwritten because at any given time it actually is, in large part, what opinion makes it.

The present writer is not interested in answering specifically the question of the modernity of the constitution in the fifteenth or any other century—a question which he feels is essentially futile. On the contrary, his endeavour is merely to examine the constitution as it actually was, leaving shibboleths and anachronisms aside. In so doing, he is well content to take his stand with the late Professor Tout when he repudiated the aim of seeking in the middle ages what seems important to ourselves, not what was important to them.[1]

[1] *Chapters*, 1, 2. Cf. *ibid.* 7: 'We investigate the past not to deduce practical lessons, but to find out what really happened.'