THE CONSTITUTIONAL HISTORY OF ENGLAND

A COURSE OF LECTURES
DELIVERED BY

F. W. MAITLAND

First Edition 1908

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 No." The lectures written in six months, which Professor Maitland told the Cambridge Law Club would not be published, were delivered during the Michaelmas term of 1887 and the Lent term of 1888, and were specially designed for the needs of undergraduates of the University of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

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.

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[1]

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**

(ii) 1066—1154. What law had the Normans? Survival of English law; confirmations by William I and Henry I. Law books: *Leges Edwardi, Willelmi, Henrici Primi*; fusion of English and Norman (Frankish) law. Genuine laws of William I; charters of Henry I and Stephen; Domesday Book . . . **6—10**

(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.

(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

(v) 1272—1307. 'The English Justinian.' The great statutes, 1275 Westminster I, 1278 Gloucester, 1284 Wales, 1285 Westminster II and Winchester, 1290 Westminster III, 1297 *Confirmatio Cartarum*; their character and permanent importance. Edward as an administrator. Law books: Britton, Fleta. The first Year Book, 1292. Check on growth of unenacted law. Roman law ceases to be studied. Growth of class of lawyers. 'Common law,' contrasted with statute, local custom, ecclesiastical law; not yet with 'equity' 18—23

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 (*vicecomes*). The county

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, *baillivi*, *praepositi*; (*d*) collection of royal dues, the *firma burgi*; (*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:—

(1) 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

(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 *Parliamenta*: 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 movables. 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

E. *Administration of Justice.*

The courts are (1) communal, (2) feudal, (3) royal, central and permanent, (4) royal, local and temporary (visitatorial), (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—111

(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 . . . . . 111—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; *peine 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

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 *feodum*; 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

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.

(ii) Lords:—the dukes, marquises, viscounts. Peerage by patent and peerage by writ. Barony by tenure. Number of peers. Idea of 'peerage'; right to trial by peers admitted, but within narrow limits. Court of the High Steward. The peerage not a caste. Preponderance in the House of Lords of lords spiritual.

(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

3. *Business of Parliament.*

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

(i) Taxation:—here the need of Parliaments is established. Direct taxation without consent of Parliament becomes impossible. History of indirect taxation. Benevolences. Parliamentary taxation; taxation of clerical estate. Money grants to be initiated by the Commons: form of grants. Tonnage and poundage. Wealth of Henry VII. Change in the king's financial position. Purveyance and preemption. Audit of accounts and appropriation of supplies 179—184

(ii) Legislation. Changes in the legislative formula. Original equality of commons and clergy. Declaration of 1322. Gradual coordination of lords and commons. *Magna concilia*. Legislation by the king's Council; ordaining and dispensing powers. Forms of bill and statute. Royal dissent. Growing bulk of statute law: character of the statutes . . . . . 184—190

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**

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.*

1. *Constitution of 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**

2. *Privileges of Parliament.*

'Privilege' now an important topic.

(*a*) Freedom of debate; Haxey'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**

3. *Jurisdiction of Parliament.*

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**

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.

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**

D[1]. *Local Government.*

E[1]. *General Characteristics of Law, especially Criminal Law.*

F[1]. *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**

B. *Constitution of Parliament.*

(i) House of Lords. Expulsion and restoration of the bishops. Number of the lords. Abolition of the House in 1649.

[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.