

INTRODUCTION

TO THE STUDY OF THE

LAW OF THE CONSTITUTION



MACMILLAN AND CO., LIMITED
LONDON · BOMBAY · CALCUTTA · MADRAS
MELBOURNE

THE MACMILLAN COMPANY
NEW YORK · BOSTON · CHICAGO
DALLAS · SAN FRANCISCO

THE MACMILLAN CO. OF CANADA, LTD.
TORONTO

BY

A. V. DICEY, K.C., HON. D.C.L.

OF THE INNER TEMPLE; FORMERLY VINERIAN PROFESSOR OF ENGLISH LAW
FELLOW OF ALL SOULS COLLEGE, OXFORD
HON. LL.D. CAMBRIDGE, GLASGOW, AND EDINBURGH
AUTHOR OF 'LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION
IN ENGLAND DURING THE NINETEENTH CENTURY'

EIGHTH EDITION

MACMILLAN AND CO., LIMITED
ST. MARTIN'S STREET LONDON

1915

PREFACE TO THE FIRST EDITION

THIS book is (as its title imports) an introduction to the study of the law of the constitution; it does not pretend to be even a summary, much less a complete account of constitutional law. It deals only with two or three guiding principles which pervade the modern constitution of England. My object in publishing the work is to provide students with a manual which may impress these leading principles on their minds, and thus may enable them to study with benefit in Blackstone's *Commentaries* and other treatises of the like nature those legal topics which, taken together, make up the constitutional law of England. In furtherance of this design I have not only emphasised the doctrines (such, for example, as the sovereignty of Parliament) which are the foundation of the existing constitution, but have also constantly illustrated English constitutionalism by comparisons between it and the constitutionalism on the one hand of the United States, and on the other of the French Republic. Whether I have in any

COPYRIGHT

| | |
|--------------------------------|-------------------------------|
| <i>First Edition</i> , 1885. | <i>Second Edition</i> , 1886. |
| <i>Third Edition</i> , 1889. | <i>Fourth Edition</i> , 1893. |
| <i>Fifth Edition</i> , 1897. | <i>Sixth Edition</i> , 1902. |
| <i>Seventh Edition</i> , 1908. | <i>Eighth Edition</i> , 1915. |

measure attained my object must be left to the judgment of my readers. It may perhaps be allowable to remind them that a book consisting of actually delivered lectures must, even though revised for publication, exhibit the characteristics inseparable from oral exposition, and that a treatise on the principles of the law of the constitution differs in its scope and purpose, as well from a constitutional history of England as from works like Bagehot's incomparable *English Constitution*, which analyse the practical working of our complicated system of modern Parliamentary government.

If, however, I insist on the fact that my book has a special aim of its own, nothing is further from my intention than to underrate the debt which I owe to the labours of the lawyers and historians who have composed works on the English constitution. Not a page of my lectures could have been written without constant reference to writers such as Blackstone, Hallam, Hearn, Gardiner, or Freeman, whose books are in the hands of every student. To three of these authors in particular I am so deeply indebted that it is a duty no less than a pleasure to make special acknowledgment of the extent of my obligations. Professor Hearn's *Government of England* has taught me more than any other single work of the way in which the labours of lawyers established in early times the elementary principles which form the basis

of the constitution. Mr. Gardiner's *History of England* has suggested to me the conclusion on which, confirmed as I found it to be by all the information I could collect about French administrative law, stress is frequently laid in the course of the following pages, that the views of the prerogative maintained by Crown lawyers under the Tudors and the Stuarts bear a marked resemblance to the legal and administrative ideas which at the present day under the Third Republic still support the *droit administratif* of France. To my friend and colleague Mr. Freeman I owe a debt of a somewhat different nature. His *Growth of the English Constitution* has been to me a model (far easier to admire than to imitate) of the mode in which dry and even abstruse topics may be made the subject of effective and popular exposition. The clear statement which that work contains of the difference between our so-called "written law" and "our conventional constitution," originally led me to seek for an answer to the inquiry, what may be the true source whence constitutional understandings, which are not laws, derive their binding power, whilst the equally vigorous statements contained in the same book of the aspect in which the growth of the constitution presents itself to an historian forced upon my attention the essential difference between the historical and the legal way of regarding our institutions, and compelled me to consider whether

the habit of looking too exclusively at the steps by which the constitution has been developed does not prevent students from paying sufficient attention to the law of the constitution as it now actually exists. The possible weakness at any rate of the historical method as applied to the growth of institutions, is that it may induce men to think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has become.

A. V. DICEY.

ALL SOULS COLLEGE,
OXFORD, 1885.

PREFACE TO THE EIGHTH EDITION

THE body of this work is the eighth edition, or rather a reprint of the seventh edition, of the *Law of the Constitution* first published in 1885. It is, however, accompanied by a new Introduction. This Introduction is written with two objects. The first object is to trace and comment upon the way in which the main principles of our constitution as expounded by me may have been affected either by changes of law or by changes of the working of the constitution which have occurred during the last thirty years (1884–1914). The second object of this Introduction is to state and analyse the main constitutional ideas which may fairly be called new, either because they have come into existence during the last thirty years, or because (what is much more frequently the case) they have in England during that period begun to exert a new and noticeable influence.

It has been my good fortune to receive in the composition of this Introduction, as in the writing of every book which I have published, untold aid from suggestions made to me by a large number both of English and of foreign friends. To all these helpers I return my most sincere thanks. It is at once a duty and a pleasure to mention my special obligation to two friends, who can both be numbered as high authorities among writers, who have investigated the constitution of England from different points of view. To the friendship of the late Sir William Anson I owe a debt the amount of which it is impossible to exaggerate. He was better acquainted, as

his books show, with the details and the working of the whole constitution of England than any contemporary authority. Since I first endeavoured to lay down the few general principles which in my judgment lie at the basis of our constitution, I have, whilst engaged in that attempt, always enjoyed his sympathy and encouragement, and, especially in the later editions of my work, I have received from him corrections and suggestions given by one who had explored not only the principles but also all the minute rules of our constitutional law and practice. To my friend Professor A. Berriedale Keith I am under obligations of a somewhat different kind. He has become already, by the publication of his *Responsible Government in the Dominions*, an acknowledged authority on all matters connected with the relation between England and her Colonies. I have enjoyed the great advantage of his having read over the parts of my Introduction which refer to our Colonial Empire. His knowledge of and experience in Colonial affairs has certainly saved me from many errors into which I might otherwise have fallen.

It is fair to all the friends who have aided me that I should state explicitly that for any opinions expressed in this Introduction no one is responsible except myself. The care with which many persons have given me sound information was the more valued by me because I have known that with some of the inferences drawn by me from the facts on which I commented my informants probably did not agree.

A. V. DICEY.

OXFORD, 1914.

CONTENTS

| | PAGE |
|--|------|
| INTRODUCTION TO EIGHTH EDITION | xvii |

OUTLINE OF SUBJECT

| | |
|---|---|
| THE TRUE NATURE OF CONSTITUTIONAL LAW | 1 |
|---|---|

PART I

THE SOVEREIGNTY OF PARLIAMENT

CHAPTER I

| | |
|---|----|
| THE NATURE OF PARLIAMENTARY SOVEREIGNTY | 37 |
|---|----|

CHAPTER II

| | |
|--|----|
| PARLIAMENT AND NON-SOVEREIGN LAW-MAKING BODIES | 83 |
|--|----|

CHAPTER III

| | |
|--|-----|
| PARLIAMENTARY SOVEREIGNTY AND FEDERALISM | 134 |
|--|-----|

PART II

THE RULE OF LAW

CHAPTER IV

| | |
|--|-----|
| THE RULE OF LAW: ITS NATURE AND GENERAL APPLICATIONS | 179 |
|--|-----|

| | PAGE |
|---|------|
| CHAPTER V | |
| THE RIGHT TO PERSONAL FREEDOM | 202 |
| CHAPTER VI | |
| THE RIGHT TO FREEDOM OF DISCUSSION | 234 |
| CHAPTER VII | |
| THE RIGHT OF PUBLIC MEETING | 266 |
| CHAPTER VIII | |
| MARTIAL LAW | 280 |
| CHAPTER IX | |
| THE ARMY | 291 |
| CHAPTER X | |
| THE REVENUE | 308 |
| CHAPTER XI | |
| THE RESPONSIBILITY OF MINISTERS | 321 |
| CHAPTER XII | |
| RULE OF LAW COMPARED WITH <i>DROIT ADMINISTRATIF</i> | 324 |
| CHAPTER XIII | |
| RELATION BETWEEN PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW | 402 |

| | |
|---|-------------|
| PART III | |
| THE CONNECTION BETWEEN THE LAW OF THE CONSTITUTION AND THE CONVENTIONS OF THE CONSTITUTION | |
| CHAPTER XIV | |
| NATURE OF CONVENTIONS OF CONSTITUTION | PAGE 413 |
| CHAPTER XV | |
| THE SANCTION BY WHICH THE CONVENTIONS OF THE CON- STITUTION ARE ENFORCED | 435 |
| APPENDIX | |
| NOTE I.—RIGIDITY OF FRENCH CONSTITUTIONS | 469 |
| „ II.—DIVISION OF POWERS IN FEDERAL STATES | 476 |
| „ III.—DISTINCTION BETWEEN A PARLIAMENTARY EXECU- TIVE AND A NON-PARLIAMENTARY EXECUTIVE | 480 |
| „ IV.—THE RIGHT OF SELF-DEFENCE | 489 |
| „ V.—QUESTIONS CONNECTED WITH THE RIGHT OF PUBLIC MEETING | 497 |
| „ VI.—DUTY OF SOLDIERS CALLED UPON TO DISPERSE AN UNLAWFUL ASSEMBLY | 512 |
| „ VII.—THE MEANING OF AN “UNCONSTITUTIONAL” LAW | 516 |
| „ VIII.—SWISS FEDERALISM | 517 |
| „ IX.—AUSTRALIAN FEDERALISM | 529 |

| | PAGE |
|--|------|
| NOTE X.—MARTIAL LAW IN ENGLAND DURING TIME OF WAR OR INSURRECTION | 538 |
| „ XI.—CONSTITUTION OF THE <i>TRIBUNAL DES CONFLITS</i> | 555 |
| „ XII.—PROCEEDINGS AGAINST THE CROWN | 556 |
| „ XIII.—PARLIAMENT ACT, 1911 | 557 |
| INDEX | 561 |

ANALYSIS OF INTRODUCTION

| | PAGE |
|---|---------|
| Aim | xvii |
| (A) THE SOVEREIGNTY OF PARLIAMENT | xviii |
| Possible changes | xix |
| I. Possible change in constitution of parliamentary sovereign (Parliament Act, 1911) | xix |
| State of things before passing of Act | xx |
| Direct effects of Parliament Act | xxi |
| (1) Money Bill—House of Lords no veto | xxi |
| (2) Other public Bills—House of Lords has only suspensive veto | xxi |
| (3) House of Commons has unlimited legislative power | xxiii |
| II. Practical change in area of parliamentary sovereignty (Relation of the Imperial Parliament to Dominions) | xxiv |
| First question—What is the difference between such relation in 1884 and 1914 ? | xxv |
| Second question—What changes of opinion caused the change of relation ? | xxxii |
| (B) THE RULE OF LAW | xxxvii |
| I. Decline in reverence for rule of law | xxxviii |
| II. Comparison between present official law of England and present <i>droit administratif</i> of France | xliii |
| (C) CONVENTIONS OF THE CONSTITUTION | xlvi |
| First question—What changes ? | xlvi |
| Second question—What is the tendency of new con- ventions ? | lv |
| Third question—Does experience of last thirty years con- firm principles laid down as to connection between con- ventions and rule of law ? | lvii |
| (D) DEVELOPMENT DURING THE LAST THIRTY YEARS OF NEW CONSTITUTIONAL IDEAS | lviii |
| Two general observations on new constitutional ideas | lviii |
| First observation—Slow growth of political or constitu- tional inventiveness | lix |
| Second observation—These new ideas take no account of one of the ends which good legislation ought to attain | lix |

| | PAGE |
|--|----------|
| <i>Criticism of the Four New Constitutional Ideas</i> | lxii |
| I. Woman Suffrage | lxii |
| The causes of demand | lxiii |
| The two main lines of argument and answers | lxiv |
| First argument—Every citizen entitled to vote. | lxiv |
| Second argument—Difference of sex no ground for difference of political rights | lxv |
| II. Proportional representation | lxvi |
| The three propositions on which argument in favour of proportional representation is based | lxvi |
| The truth of two first propositions admitted | lxvi |
| Objections to third proposition | lxix |
| First objection—Complication of system increases power of wire-pullers | lxix |
| Second objection—House of Commons is not mere House for Debate. | lxix |
| Third objection—Proportional representation increases number and evil of parliamentary groups | lxx |
| III. Federalism | lxiii |
| Leading characteristics of federal government | lxxv |
| Characteristics of federal government in relation to Imperial Federalism | lxxx |
| First objection—Attempt to form federal constitution for Empire full of difficulty and peril | lxxxii |
| Second objection—No real necessity for formation of any new federal constitution for Empire | lxxxv |
| Characteristics of federal government in relation to Home Rule all round (<i>i.e.</i> federalisation of United Kingdom) | lxxxvii |
| Vagueness of the ideas which support the policy of federalisation of United Kingdom (Home Rule all round) | lxxxvii |
| Specific objections to Home Rule all round | lxxxviii |
| First objection—No desire for Federalism in any part of United Kingdom | lxxxviii |
| Second objection—Federalisation of United Kingdom does not promote Imperial Federalism | xc |
| Third objection—Such federalisation opposed to whole history of English constitutionalism | xc |
| IV. The Referendum | xci |
| Meaning of referendum | xci |
| Causes for demand for referendum | xcii |
| The main argument against the referendum | xciv |
| The main argument in favour of the referendum | xcvii |
| CONCLUSIONS | e |

INTRODUCTION

AIM OF INTRODUCTION

THE *Law of the Constitution* was first published in 1885. The book was based on lectures delivered by me as Vinerian Professor of English Law. The lectures were given and the book written with the sole object of explaining and illustrating three leading characteristics in the existing constitution of England; they are now generally designated as the Sovereignty of Parliament, the Rule of Law, and the Conventions of the Constitution. The book, therefore, dealt with the main features of our constitution as it stood in 1884–85, that is thirty years ago. The work has already gone through seven editions; each successive edition, including the seventh, has been brought up to date, as the expression goes, by amending it so as to embody any change in or affecting the constitution which may have occurred since the last preceding edition. On publishing the eighth and final edition of this treatise I have thought it expedient to pursue a different course. The constant amendment of a book republished in successive editions during thirty years is apt to take from it any such literary merits as it may originally have possessed. Recurring alterations destroy the original tone and spirit of any treatise which has the least claim to belong to the literature of England. The present edition, therefore, of the *Law of the Constitution* is in substance a reprint of the seventh edition; it is however accompanied by this new Introduction whereof the aim is to compare our constitution as it stood and worked in 1884 with the constitution as it now stands in 1914. It is thus possible to take a general view of the development of the constitution during a period filled with many changes

both of law and of opinion.¹ My readers are thus enabled to see how far either legislation or constitutional conventions have during the last thirty years extended or (it may be) limited the application of the principles which in 1884 lay at the foundation of our whole constitutional system. This Introduction therefore is in the main a work of historical retrospection. It is impossible, however (nor perhaps would it be desirable were it possible), to prevent a writer's survey of the past from exhibiting or betraying his anticipations of the future.

The topics here dealt with may be thus summed up:—The Sovereignty of Parliament,² the Rule of Law,³ the Law and the Conventions of the Constitution,⁴ New Constitutional Ideas,⁵ General Conclusions.⁶

(A) SOVEREIGNTY OF PARLIAMENT ⁷

The sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions. And my readers will remember that Parliament consists of the King, the House of Lords, and the House of Commons acting together. The principle, therefore, of parliamentary sovereignty means neither more nor less than this, namely that "Parliament" has "the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament,"⁸ and further that this

¹ Compare the Introduction to the second edition of *Law and Public Opinion in England during the Nineteenth Century*.

² See Part I. Chaps. I.-III., *post*.

³ See Part II. Chaps. IV.-XIII., *post*.

⁴ See Part III. Chaps. XIV., XV., *post*.

⁵ See p. lviii, *post*.

⁶ A student who wishes to understand the statements in the Introduction should read with care that part of the book on which they are a comment; thus the portions of the Introduction referring to the Sovereignty of Parliament ought to be read in connection with Part I. Chapters I.-III., *post*.

⁷ See Chaps. I.-III., *post*.

⁸ See Chap. I. p. 38, *post*. Parliament may itself by Act of Parliament either expressly or impliedly give to some subordinate legislature or other body the power to modify or add to a given Act of Parliament. Thus under the Commonwealth Act, 63 & 64 Vict. c. 12, the Imperial Parliament has given to the Parliament of the Australian Commonwealth power to modify many

right or power of Parliament extends to every part of the King's dominions.¹ These doctrines appear in the first edition of this work, published in 1885; they have been repeated in each successive edition published up to the present day. Their truth has never been denied. We must now, however, consider whether they are an accurate description of parliamentary sovereignty as it now exists in 1914. And here it should be remarked that parliamentary sovereignty may possibly at least have been modified in two different directions, which ought to be distinguished. It is possible, in the first place, that the constitution or nature of the sovereign power may have undergone a change. If, for example, the King and the Houses of Parliament had passed a law abolishing the House of Lords and leaving supreme legislative power in the hands of the King and of the House of Commons, any one would feel that the sovereign to which parliamentary sovereignty had been transferred was an essentially different sovereign from the King and the two Houses which in 1884 possessed supreme power. It is possible, in the second place, that since 1884 the Imperial Parliament may, if not in theory yet in fact, have ceased as a rule to exercise supreme legislative power in certain countries subject to the authority of the King. Let us consider carefully each of these two possibilities.

I. *Possible change in constitution or character of the parliamentary sovereign (Effect of the Parliament Act, 1911).*—The matter under consideration is in substance whether the Parliament Act,² has transferred legislative authority from the King³ and the two Houses of Parliament to the King and the House of Commons?

provisions of the Commonwealth Act, and the Imperial Parliament, under the National Insurance Act, 1911, has given power to the Insurance Commissioners and to the Board of Trade to modify some provisions of the Insurance Act.

¹ See pp. 98-116, *post*.

² See especially the Parliament Act, 1911, ss. 1-3, and Appendix, Note XIII., the Parliament Act.

³ The Parliament Act in no way diminishes the prerogatives of the King as they existed immediately before the passing of that Act, and it is enacted (Parliament Act. s. 6) that "nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons."

The best mode of giving an answer to this question is first to state broadly what were the legislative powers of the House of Lords immediately before the passing of the Parliament Act, 18th August 1911, and next to state the main direct and indubitable effects of that Act on the legislative power of the House of Lords and of the House of Commons respectively.

The state of things immediately before the passing of the Parliament Act.—No Act of Parliament of any kind could be passed without the consent thereto both of the House of Lords and of the House of Commons. No doubt the House of Lords did very rarely either alter or reject any Money Bill, and though the Lords have always claimed the right to alter or reject such a Bill, they have only on very special occasions exercised this power. No doubt again their lordships have, at any rate since 1832, acknowledged that they ought to pass any Bill deliberately desired by the nation, and also have admitted the existence of a more or less strong presumption that the House of Commons in general represents the will of the nation, and that the Lords ought, therefore, in general to consent to a Bill passed by the House of Commons, even though their lordships did not approve of the measure. But this presumption may, they have always maintained, be rebutted if any strong ground can be shown for holding that the electors did not really wish such a Bill to become an Act of Parliament. Hence Bill after Bill has been passed by their lordships of which the House of Lords did not in reality approve. It was however absolutely indubitable up to the passing of the Parliament Act that no Act could be passed by Parliament without obtaining the consent of the House of Lords. Nor could any one dispute the legal right or power of the House, by refusing such assent, to veto the passing of any Act of which the House might disapprove. Two considerations, however, must be taken into account. This veto, in the first place, has, at any rate since 1832, been as a rule used by the Lords as a merely suspensive veto. The passing of the Great Reform Act itself was delayed by their lordships for somewhat less than two years, and it may well be doubted whether they have, since 1832, ever by their legislative veto, delayed legislation

really desired by the electors for as much as two years. It must again be remembered that the Lords, of recent years at least, have at times rejected Bills supported by the majority of the House of Commons which, as has been proved by the event, had not received the support of the electors. Hence it cannot be denied that the action of the House of Lords has sometimes protected the authority of the nation.

*The direct effects of the Parliament Act.*¹—Such effects can be summed up in popular and intelligible language, rather than with technical precision, as follows :

(1) In respect of any Money Bill the Act takes away all legislative power from the House of Lords. The House may discuss such a Bill for a calendar month, but cannot otherwise prevent, beyond a month, the Bill becoming an Act of Parliament.²

(2) In respect of any public Bill (which is not a Money Bill),³ the Act takes away from the House of Lords any *final* veto, but leaves or gives to the House a *suspensive* veto.⁴

This suspensive veto is secured to the House of Lords because under the Parliament Act, s. 2, no such Bill can be passed without the consent of the House which has not fulfilled the following four conditions :

(i.) That the Bill shall, before it is presented to the King for his assent, be passed by the House of Commons and be rejected by the House of Lords in each of *three successive* sessions.⁵

(ii.) That the Bill shall be sent up to the House of Lords at least one calendar month before the end of each of these sessions.⁶

(iii.) That in respect of such Bill at least two years shall have elapsed between the date of the second reading of the Bill in the House of Commons during the first of those sessions

¹ See as to "indirect effects," p. li, *post*.

² See Parliament Act, ss. 1 and 3.

³ Except a Bill for extending the maximum duration of Parliament beyond five years. See Parliament Act, s. 2, sub-s. 1.

⁴ See s. 2.

⁵ See s. 2 (1).

⁶ *Ibid.*

and the date on which it passes the House of Commons in the third of such sessions.¹

(iv.) That the Bill presented to the King for his assent shall be in every material respect identical with the Bill sent up to the House of Lords in the first of the three successive sessions except in so far as it may have been amended by or with the consent of the House of Lords.

The history of the Government of Ireland Act, 1914, popularly, and throughout this Introduction generally, called the Home Rule Bill or Act, affords good illustrations of the peculiar procedure instituted by the Parliament Act. The Home Rule Bill was introduced into the House of Commons during the first of the three successive sessions on April 11, 1912: it passed its second reading in the House of Commons during that session on May 9, 1912; it was rejected by the House of Lords either actually or constructively² in each of the three successive sessions. It could not then possibly have been presented to the King for his assent till June 9, 1914; it was not so presented to the King till September 18, 1914. On that day, just before the actual prorogation of Parliament in the third session, it received the royal assent without the consent of the House of Lords; it thereby became the Government of Ireland Act, 1914. The Act as assented to by the King was in substance identical with the Bill sent up to the House of Lords in the first of the three sessions on January 16, 1913. But here we come across the difficulty of amending a Bill under the Parliament Act after it had once been sent up in the third session to the House of Lords. By June 1914 it was felt to be desirable to amend the Home Rule Bill in respect of the position of Ulster. On June 23 the Government brought into the House of Lords a Bill which should amend

¹ S. 2 (1) Proviso. Under this enactment the House of Lords may insist upon a delay of at least two years and one calendar month, and a powerful opposition in the House of Commons may lengthen this delay.

² Constructive rejection arises under the Parliament Act, s. 2, sub-s. 3, which runs as follows: "A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses." The Home Rule Bill was actually rejected by the vote of the House of Lords in its first and second session. It was constructively rejected in the third session by the House of Lords simply by the House not passing the Bill during such session.

the Home Rule Act which was still a Bill, and it is difficult to find a precedent for thus passing an Act for amending a Bill not yet on the statute-book. The attempt to carry out the Government's proposal came to nothing. On September 18, 1914, the Home Rule Bill became the Home Rule Act (or technically the Government of Ireland Act, 1914) unamended, but on the very day on which the Home Rule Act was finally passed it was in effect amended by a Suspensory Act under which the Government of Ireland Act, 1914, cannot come into force until at any rate twelve months from September 18, and possibly will not come into force until the present war has ended. The Suspensory Act evades or avoids the effect of the Parliament Act, but such escape from the effect of a recently passed statute suggests the necessity for some amendment in the procedure created by the Parliament Act.

(3) The House of Commons can without the consent of the House of Lords present to the King for his assent any Bill whatever which has complied with the provisions of the Parliament Act, section 2, or rather which is certified by the Speaker of the House of Commons in the way provided by the Act to have complied with the conditions of the Parliament Act, section 2.

The simple truth is that the Parliament Act has given to the House of Commons, or, in plain language, to the majority thereof, the power of passing any Bill whatever, provided always that the conditions of the Parliament Act, section 2, are complied with. But these provisions do leave to the House of Lords a suspensive veto which may prevent a Bill from becoming an Act of Parliament for a period of certainly more, and possibly a good deal more, than two years.¹

¹ The Parliament Act leaves the existing rights and privileges of the House of Commons untouched (*ibid.* sect. 6). No reference whatever is therein made to the so-called "veto" of the King. Its existence is undoubted, but the veto has not been exercised for at least two centuries. The well-known words of Burke, however, should always be borne in mind: "The king's negative to bills," he says, "is one of the most indisputed of the royal prerogatives; and it extends to all cases whatsoever. I am far from certain, that if several laws which I know had fallen under the stroke of that sceptre, the public would have had a very heavy loss. But it is not the propriety of the exercise which is in question. The exercise itself is wisely forborne. Its repose may be the preservation of its existence; and its existence may be the means of saving the constitution

In these circumstances it is arguable that the Parliament Act has transformed the sovereignty of Parliament into the sovereignty of the King and the House of Commons. But the better opinion on the whole is that sovereignty still resides in the King and the two Houses of Parliament. The grounds for this opinion are, firstly, that the King and the two Houses acting together can most certainly enact or repeal any law whatever without in any way contravening the Parliament Act; and, secondly, that the House of Lords, while it cannot prevent the House of Commons from, in effect, passing under the Parliament Act any change of the constitution, provided always that the requirements of the Parliament Act are complied with, nevertheless can, as long as that Act remains in force, prohibit the passing of any Act the effectiveness of which depends upon its being passed without delay.

Hence, on the whole, the correct legal statement of the actual condition of things is that sovereignty still resides in Parliament, *i.e.* in the King and the two Houses acting together, but that the Parliament Act has greatly increased the share of sovereignty possessed by the House of Commons and has greatly diminished the share thereof belonging to the House of Lords.

II. *Practical change in the area of parliamentary sovereignty. (Relation of the Imperial Parliament to the Dominions.)*¹—

“itself, on an occasion worthy of bringing it forth.”—Burke, *Letter to the Sheriffs of Bristol*, vol. iii., ed. 1808, pp. 180, 181; ed. 1872, vol. ii. p. 28. Experience has confirmed the soundness of Burke's doctrine. The existence of this “negative” has greatly facilitated the development of the present happy relation between England and her self-governing colonies. It has enabled English and colonial statesmanship to create that combination of Imperial unity with something coming near to colonial independence which may ultimately turn out to be the salvation of the British Empire.

¹ For this use of the term Dominions see British Nationality & Status of Aliens Act, 1914, 4 & 5 Geo. V. c. 17, 1st Schedule. Compare especially as to British colonies with representative and responsible government pp. 98 to 116, *post*.

The Dominions for the most part consist either of a country which was a self-governing colony, or of countries which were self-governing colonies in 1884. But this statement does not apply with perfect accuracy to every one of the Dominions. Western Australia, for instance, which is now one of the states of the Commonwealth of Australia, did not obtain responsible government till 1890, and Natal, now a state of the Union of South Africa, did not obtain such government till 1893. The Union of South Africa itself

The term “Dominions” means and includes the Dominion of Canada, Newfoundland, the Commonwealth of Australia, New Zealand, and the Union of South Africa. Each of the Dominions is a self-governing colony, *i.e.* a colony possessed both of a colonial Parliament, or representative legislature, and a responsible government, or in other words, of a government responsible to such legislature.

Our subject raises two questions:

First question.—What is the difference between the relation of the Imperial Parliament to a self-governing colony, such, *e.g.*, as New Zealand, in 1884, and the relation of the same Parliament to the Dominion, *e.g.* of New Zealand, in 1914?

Before attempting a direct answer to this inquiry it is well to point out that in two respects of considerable importance the relation of the Imperial Parliament¹ to the self-governing colonies, whether called Dominions or not, has in no respect changed since 1884.

In the first place, the Imperial Parliament still claims in 1914, as it claimed in 1884, the possession of absolute sovereignty throughout every part of the British Empire; and this claim, which certainly extends to every Dominion, would be admitted as sound legal doctrine by any court throughout the Empire which purported to act under the authority

consists to a great extent of states which in 1884, though subject to the suzerainty of the King, were (under the government of the Boers) all but independent countries.

Throughout this Introduction, unless the contrary is expressly stated, or appears from the context, no reference is made to the position either of (i.) the Crown colonies, or (ii.) the three colonies, *viz.* the Bahamas, Barbadoes, and Bermuda, which possess representative but not responsible government, or (iii.) British India. This Introduction, in short, in so far as it deals with the relation of the Imperial Parliament to the colonies, refers exclusively, or all but exclusively, to the relation between the Imperial Parliament and the five Dominions.

¹ This term means what an English writer on our constitution would generally call simply “Parliament,” that is the Parliament of the United Kingdom. The term “Imperial Parliament” is, however, a convenient one when we have to deal, as in this Introduction, with the relation between the Parliament of the United Kingdom and the Dominions, every one of which has representative legislatures of their own which are always popularly, and sometimes in Acts of Parliament, termed Parliaments. The term “Imperial Parliament” is used in colonial statutes, *e.g.*, in the Interpretation Act of the Commonwealth of Australia, No. 2 of 1901.

of the King. The constitution indeed of a Dominion in general originates in and depends upon an Act, or Acts, of the Imperial Parliament; and these constitutional statutes are assuredly liable to be changed by the Imperial Parliament.

Parliament, in the second place, had long before 1884 practically admitted the truth of the doctrine in vain pressed upon his contemporaries by Burke,¹ when insisting upon the folly of the attempt made by the Parliament of England to exert as much absolute power in Massachusetts as in Middlesex, that a real limit to the exercise of sovereignty is imposed not by the laws of man but by the nature of things, and that it was vain for a parliamentary or any other sovereign to try to exert equal power throughout the whole of an immense Empire. The completeness of this admission is shown by one noteworthy fact: the Imperial Parliament in 1884, and long before 1884, had ceased to impose of its own authority and for the benefit of England any tax upon any British colony.² The omnipotence, in short, of Parliament,

¹ "Who are you," to quote his words, "that should fret and rage, and bite the chains of nature? Nothing worse happens to you, than does to all nations who have extensive empire; and it happens in all the forms into which empire can be thrown. In large bodies, the circulation of power must be less vigorous at the extremities. Nature has said it. The Turk cannot govern Egypt, and Arabia, and Curdistan, as he governs Thrace; nor has he the same dominion in the Crimea and in Algiers which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The Sultan gets such obedience as he can. He governs with a loose rein, that he may govern at all; and the whole of the force and vigour of his authority in the centre is derived from a prudent relaxation in all his borders. Spain, in her provinces, is, perhaps, not so well obeyed as you are in yours. She complies too; she submits; she watches times. This is the immutable condition, the eternal law, of extensive and detached empire."—Burke, *Conciliation with America*, vol. iii. (ed. 1808), pp. 56, 57.

² This renunciation by the Imperial Parliament of the right to impose taxes upon a colony, whether a self-governing colony or not, has passed through two stages. Since 1783 taxation imposed by an Imperial Act has always been, even in the case of a Crown colony, imposed for the benefit of the colony, and the proceeds thereof have been paid to the colony. But until the repeal of the Navigation Laws in 1849 Parliament, in support of our whole navigation system, retained the practice of imposing duties on goods imported into the colonies, though the proceeds thereof were paid to the colonies so taxed. Since 1849 no Imperial Act has been passed for the taxation of any colony, and no colony is compelled by the Imperial Parliament to contribute anything in the way of taxation towards the cost of the

though theoretically admitted, has been applied in its full effect only to the United Kingdom.

A student may ask what is the good of insisting upon the absolute sovereignty of Parliament in relation to the Dominions when it is admitted that Parliament never gives, outside the United Kingdom, and probably never will give, full effect to this asserted and more or less fictitious omnipotence. The answer to this suggestion is that students who do not bear in mind the claim of Parliament to absolute sovereignty throughout the whole of the British Empire, will never understand the extent to which this sovereign power is on some occasions actually exerted outside the limits of the United Kingdom, nor, though this statement sounds paradoxical, will they understand the limits which, with the full assent, no less of English than of colonial statesmen, are in fact, as regards at any rate the Dominions, imposed upon the actual exercise of the theoretically limitless authority of Parliament. It will be found further that even to the Dominions themselves there is at times some advantage in the admitted authority of the Imperial Parliament to legislate for the whole Empire. In the eyes, at any rate, of thinkers who share the moral convictions prevalent in most civilised states, it must seem a gain that the Imperial Parliament should have been able in 1834 to prohibit the existence of slavery in any country subject to the British Crown, and should be able to-day to forbid throughout the whole Empire the revival of the Slave Trade, or of judicial torture.

Let us now turn to the points wherein the relation of the Imperial Parliament to the self-governing colonies in 1884 differed from the existing relation of the Imperial Parliament to the Dominions in 1914.

The relation of the Imperial Parliament in 1884 to a self-governing colony, *e.g.* New Zealand.

The Imperial Parliament, under the guidance of English statesmen, certainly admitted in practice thirty years ago that a self-governing colony, such as New Zealand, ought to

government of the United Kingdom or towards the defence of the British Empire.

The Imperial Parliament does still impose customs duties upon the Isle of Man. See 3 & 4 Geo. V. c. 18.

be allowed in local matters to legislate for itself. Parliament did, however, occasionally legislate for New Zealand or any other self-governing colony. Thus the existing English Bankruptcy Act, 1883, as a matter of fact transferred, as it still transfers, to the trustee in bankruptcy the bankrupt's property, and even his immovable property situate in any part of the British Empire,¹ and a discharge under the English Bankruptcy Act, 1883, was, and still is, a discharge as regards the debts of the bankrupt contracted in any part of the British Empire,² e.g. in New Zealand or in the Commonwealth of Australia. So again the veto of the Crown was, in one form or another³ in 1884, and even later, used occasionally to prevent colonial legislation which, though approved of by the people of the colony and by the legislature thereof, might be opposed to the moral feeling or convictions of Englishmen. Thus colonial Bills for legalising the marriages between a man and his deceased wife's sister, or between a woman and her deceased husband's brother, were sometimes vetoed by the Crown, or in effect on the advice of ministers supported by the Imperial Parliament. No doubt as time went on the unwillingness of English statesmen to interfere, by means of the royal veto or otherwise, with colonial legislation which affected only the internal government of a self-governing colony, increased. But such interference was not unknown. There was further, in 1884, an appeal in every colony from the judgments of the Supreme Court thereof to the English Privy Council. And a British Government would in 1884 have felt itself at liberty to interfere with the executive action of a colonial Cabinet when such action was inconsistent with English ideas of justice. It was also in 1884 a clear principle of English administration that English colonists should neither directly nor indirectly take part in negotiating treaties with foreign powers. Nor had either England or the self-governing colonies, thirty years ago, realised the general advantage of those conferences now becoming a regular part

¹ See Dicey, *Conflict of Laws* (2nd ed.), pp. 329-333.

² *Ibid.*, p. 441, and *Ellis v. M'Henry* (1871), L. R. 6, C. P. 228, 234-236; but contrast *New Zealand Loan, etc. Co. v. Morrison* [1898], A. C. 349, cited *Conflict of Laws*, p. 342.

³ See pp. 111-116, *post*.

of English public life, at which English ministers and colonial ministers could confer upon questions of colonial policy, and could thus practically acknowledge the interest of the colonies in everything which concerned the welfare of the whole Empire. Neither certainly did English statesmen in 1884 contemplate the possibility of a colony standing neutral during a war between England and a foreign power.

The relation of the Imperial Parliament in 1914 to a Dominion.¹

This relation may now, it is submitted, be roughly summed up in the following rules:

Rule 1.—In regard to any matter which directly affects Imperial interests the Imperial Parliament will (though with constantly increasing caution) pass laws which apply to a Dominion and otherwise exercise sovereign power in such a Dominion.

But this rule applies almost exclusively to matters which directly and indubitably affect Imperial interests.²

Rule 2.—Parliament does not concede to any Dominion or to the legislature thereof the right—

(a) to repeal [except by virtue of an Act of the Imperial Parliament] any Act of the Imperial Parliament applying to a Dominion;

(b) to make of its own authority a treaty with any foreign power;

(c) to stand neutral in the event of a war between the King and any foreign power, or, in general, to receive any benefit from a foreign power which is not offered by such power to the whole of the British Empire.³

It must be noted that under these two rules the Imperial Parliament does retain, and sometimes exerts the right to legislate in regard to matters which may greatly concern the prosperity of a Dominion, and also does in some respects seriously curtail both the legislative power of a Dominion Parliament and the executive power of a Dominion Cabinet. As long, in short, as the present state of things continues,

¹ See as to meaning of Dominion, p. xxiv, note 1, *ante*.

² See Keith, *Responsible Government in the Dominions*, p. 1316.

³ *Ibid.* pp. 1119-1122.

the Imperial Parliament, to the extent I have laid down, still treats any Dominion as on matters of Imperial concern subordinate to the sovereignty of the Imperial Parliament.

Rule 3.—The Imperial Parliament now admits and acts upon the admission, that any one of the Dominions has acquired a moral right to as much independence, at any rate in regard to matters occurring within the territory of such Dominion, as can from the nature of things be conceded to any country which still forms part of the British Empire.

Take the following illustration of the extent of such internal independence :

Parliament does not (except at the wish of a Dominion) legislate with respect to matters which merely concern the internal interests of such Dominion, *e.g.* New Zealand.¹

The legislature of any Dominion has within the territorial limits of such Dominion power to legislate in regard to any matter which solely concerns the internal interests of such Dominion.

The power of the Crown, *i.e.* of the British ministry, to veto or disallow in any way ² any Bill passed by the legislature of a Dominion, *e.g.* New Zealand, is now most sparingly exercised, and will hardly be used unless the Bill directly interferes with Imperial interests or is as regards the colonial legislature *ultra vires*. Thus the Crown, or in other words a British ministry, will now not veto or disallow any Bill passed by the legislature of a Dominion on the ground that such Bill is indirectly opposed to the interests of the United Kingdom, or contradicts legal principles generally upheld in England, *e.g.* the principle of free trade.

The British Government will not interfere with the executive action of the Government (*e.g.* of New Zealand) in the giving or the withholding of pardon for crime, in regard to transactions taking place wholly within the territory of New Zealand.³

Any Dominion has now a full and admitted right to raise military or naval forces for its own defence. And the policy of England is in the main to withdraw the English Army from

¹ See Keith, *Responsible Government in the Dominions*, pp. 1316-1328.

² See p. 111, *post*.

³ See Keith, *Responsible Government in the Dominions*, p. 1583.

the Dominions and to encourage any Dominion to provide for its own defence and to raise for itself a Navy, and thereby contribute to the defensive power of the British Empire.

The Imperial Government is now ready at the wish of a Dominion to exclude from its constitution, either partially or wholly, the right of appeal from the decision of the Supreme Court of such Dominion to the Privy Council.¹

The Imperial Government also is now ready at the wish of a Dominion to grant to such Dominion the power to amend by law the constitution thereof though created under an Act of the Imperial Parliament.²

Rule 4.—The habit has now grown up that conferences should be held from time to time in England, at which shall be present the Premier of England and the Premier of each Dominion, for consultation and discussion on all matters concerning the interest and the policy of the Empire, and that such conferences should be from time to time held may now, it is submitted, be considered a moral right of each Dominion.

These conferences, which were quite unthought of thirty years ago, and which did not receive their present form until the year 1907, mark in a very striking manner a gradual and therefore the more important change in the relations between England and the self-governing colonies.

The answer then to the question before us ³ as to the difference between the relation of England (or in strictness of the Imperial Parliament) to the self-governing colonies ⁴ in 1884 and her relation to the Dominions in 1914 can thus be summed up: At the former period England conceded to the self-governing colonies as much of independence as was necessary to give to such colonies the real management in their internal or local affairs. But English statesmen at that date did intend to retain for the Imperial Parliament, and the Imperial Government as representing such

¹ See Commonwealth of Australia Constitution, s. 74; South Africa Act, 1909, s. 106.

² See especially South Africa Act, 1909, s. 106.

³ See first question, p. xxv, *ante*.

⁴ The difference between the expression "self-governing colonies" and "Dominions" is worth noticing. The first is appropriate to 1884, the second is appropriate to 1914.

Parliament, a real and effective control over the action of the ministry and the legislature of each self-governing colony in so far as that control was not palpably inconsistent with independence as regards the management of strictly local affairs. In 1914 the colonial policy of England is to grant to every Dominion absolute, unfettered, complete, local autonomy,¹ in so far as such perfect self-government by a Dominion does not clearly interfere with loyalty of the Dominion to the Empire. The two relations of England to the self-governing colonies—now called Dominions—are, it may be objected, simply one and the same relation described in somewhat different language. The objection is plausible, but not sound. My effort has been to describe two different ways of looking at one and the same relation, and the results of this difference of view are of practical consequence. In 1884 it was admitted, as it is to-day, that the self-governing colonies must have rights of self-government. But in 1884 the exercise of self-government on the part of any colony was regarded as subordinate to real control by the English Parliament and Crown of colonial legislation which might be opposed to English interests or to English ideals of political prudence. In 1914 the self-government, *e.g.*, of New Zealand means absolute, unfettered, complete autonomy, without consulting English ideas of expediency or even of moral duty. The one limit to this complete independence in regard to local government is that it is confined to really local matters and does not trench upon loyalty to the Empire. The independence of the Dominion, in short, means nowadays as much of independence as is compatible with each Dominion remaining part of the Empire.

Second question.—What are the changes of opinion which have led up to the altered relation between England and the Dominions? ²

“In the early Victorian era [and even in the mid-Victorian era] there were two rough-and-ready solutions for what was regarded, with some impatience, by the British states-

¹ See Minutes of Proceedings of Imperial Conference, 1911 [Cd. 5745], p. 22.

² See *Law and Opinion*, pp. 450-457.

“men of that day as the ‘Colonial problem.’ The one was centralisation—the government, that is, except in relatively trivial matters, of all the outlying parts of the Empire from an office in Downing Street. The other was disintegration—the acquiescence in, perhaps the encouragement of, a process of successive ‘hivings off’ by which, without the hazards or embitterments of coercion, each community, as it grew to political manhood, would follow the example of the American Colonies, and start an independent and sovereign existence of its own. After 70 years’ experience of Imperial evolution, it may be said with confidence that neither of these theories commands the faintest support to-day, either at home or in any part of our self-governing Empire. We were saved from their adoption—some people would say by the favour of Providence—or (to adopt a more flattering hypothesis) by the political instinct of our race. And just in proportion as centralisation was seen to be increasingly absurd, so has disintegration been felt to be increasingly impossible. Whether in the United Kingdom, or in any one of the great communities which you represent, we each of us are, and we each of us intend to remain, master in our own household. This is, here at home and throughout the Dominions, the life-blood of our polity. It is the *articulus stantis aut cadentis Imperii*.” ¹

These words are a true statement of patent facts, but it will on examination be found that the change during recent years in English opinion, and also in colonial opinion, with regard to the relation between England and the Dominions presents rather more complexity than at first sight may be apparent² to a casual reader of Mr. Asquith’s address. Up to the last quarter of the nineteenth century, and even as late as 1884, many Englishmen, including a considerable number of our older statesmen, held that the solution of the colonial problem was to be found wholly in the willingness of England to permit and even to promote the separation from the Empire

¹ Minutes of Proceedings of the Imperial Conference, 1911 [Cd. 5745]. Opening address of the President (Mr. Asquith), p. 22. Compare “Message of King to Governments and Peoples of the Self-governing Dominions,” *Times*, Sept. 10, 1914.

² Compare Dicey, *Law and Opinion*, pp. 450-457.

of any self-governing colony which desired independence, provided that this separation should take place without engendering any bad feeling between England and her so-called dependencies. No doubt there existed, at any rate till the middle of the nineteenth century, a limited body of experienced officials who held that our colonial system, as long as it was maintained, implied the active control by England of colonial affairs. But such men in many cases doubted whether the maintenance of the Colonial Empire was of real benefit to England, and thought that on the whole, with respect at any rate to any self-governing colony, the course of prudence was to leave things alone until it should have become manifest to every one that the hour for friendly separation had struck. The self-governing colonies, on the other hand, up at any rate till 1884, just because they were more and more left alone and free to manage their own affairs, though they occasionally resented the interference of the English Government with colonial legislation, were on the whole contented with things as they stood. They certainly did not display any marked desire to secede from the Empire. Still less, however, did they show any active wish to take part in controlling the policy of the Empire, or to share the cost of Imperial defence. Honest belief in the principle of *laissez faire* produced its natural and, as far as it went, beneficial result. It removed causes of discontent; it prevented the rise of ill-will between England and her self-governing colonies. But it did not of itself produce any kind of Imperial patriotism. The change which a student has to note is an alteration of feeling, which did not become very obvious till near the close of the nineteenth century. This was the growth (to use a current expression) of Imperialism. But this term, like all popular phrases, is from its very vagueness certain to mislead those who use it, unless its meaning be defined with some care. In regard to the British Empire it ought to be used as a term neither of praise nor of blame, but as the name for an idea which, in so far as it is true, is of considerable importance. This idea is that the British Empire is an institution well worth maintaining, and this not on mere grounds of sentiment but for definite and assign-

able reasons. Upon England and upon every country subject to the King of England the British Empire confers at least two benefits: It secures permanent peace among the inhabitants of the largest of existing states; it again secures, or ought to secure, to the whole of this vast community absolute protection against foreign attack. The resources of the Empire are, it is felt, practically inexhaustible; the creation of a fleet supported by revenues and also by armies drawn from every country subject to the King of England should, provided England herself stands properly armed, render invasion of the British Empire by any of the great military powers of Europe an impossibility. But then the hugeness of the Empire and the strength of the Empire, if it remains united, are enough to show that the different countries which are parts of the Imperial system would, if they each stood alone, be easily assailable by any state or combination of states which had the command of large military and naval armaments. Neither England, in short, nor any of her self-governing Dominions can fail to see that the dissolution of the Empire might take from both the mother country and the most powerful of the Dominions the means necessary for maintaining liberty and independence. Loyalty to the Empire, typified by loyalty to the King, is in short a sentiment developed by the whole course of recent history. It is a feeling or conviction which places the relation of England and the Dominions in a new light. It amply accounts for the extraordinary difference between the colonial policy accepted both by England and by the self-governing colonies in 1850, and even (to a great extent) in 1884, and the colonial policy acceptable both to England and to her all but independent Dominions in 1914. English statesmen on the one hand now proffer to, and almost force upon, each Dominion every liberty compatible with the maintenance of the Empire; but then English statesmen no longer regard with philosophic calm the dawn of the day when any one of the Dominions may desire to secede from the Empire. The Dominions, on the other hand, have no longer any reason to fear and do not desire any interference with colonial affairs either by the legislation of the Imperial Parliament or by the administrative action of officials at Downing Street who are the servants of the

Imperial Parliament. But then statesmen of the Dominions show a willingness to share the cost of the defence of the Empire, and at the same time express at each of the great Conferences, with more and more plainness, the desire that the Dominions should take a more active part in the determination of Imperial policy. It is not my object, at any rate at this part of this Introduction, to consider how far it may be possible to give satisfaction to the desires of rational Imperialists, and still less ought any man of sense to express any confident opinion as to how far the sentiment of Imperialism may in the course of time increase in force or suffer diminution. My immediate aim is to show that this new Imperialism is the natural result of historical circumstances. It is well, however, to bear in mind several considerations which Englishmen of to-day are apt to overlook. The friendly Imperialism which finds expression in the Imperial Conferences is itself the admirable fruit of the old policy of *laissez faire*. The system of leaving the self-governing colonies alone first appeased discontent, and next allowed the growth of friendliness which has made it possible for the English inhabitants, and even in some cases the foreign inhabitants, of the Dominions to recognise the benefits which the Empire confers upon the Dominions, and for Englishmen at home to see that the Dominions may contribute to the safety of England and to the prosperity of the whole Empire.¹ But we must at the same time recognise that the policy of friendly indifference to secession from the Empire, which nominally, at any rate, was favoured by many English statesmen during the nineteenth century, has come to an end. The war in South Africa was in reality a war waged not only by England but also by the Dominions to prevent secession; the concession further to the South African Union of the full rights of a Dominion is no more inconsistent with resistance to secession than was the restoration to the Southern States of the American Commonwealth of their full right to existence as States of the United States. It must, lastly, be noted, that while the inhabitants of England and of the Dominions express at each Conference their honest pleasure in Imperial unity, the growth

¹ As they now [1914] are contributing.

of Imperialism already causes to many patriotic men one disappointment. Events suggest that it may turn out difficult, or even impossible, to establish throughout the Empire that equal citizenship of all British subjects which exists in the United Kingdom and which Englishmen in the middle of the nineteenth century hoped to see established throughout the length and breadth of the Empire.¹

(B) THE RULE OF LAW ²

The rule of law, as described in this treatise, remains to this day a distinctive characteristic of the English constitution. In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded.

The principles laid down in this treatise with regard to the rule of law and to the nature of *droit administratif* need little change. My object in this Introduction is first to note a

¹ The kind of equality among British subjects which Englishmen, whether wisely or not, hoped to establish throughout the whole Empire is best seen by considering the sort of equality which actually exists and has for many years existed in England. Speaking broadly, every British subject has in England at the present day the same political rights as every natural-born Englishman, e.g. an Englishman born in England and the son of English parents settled in England. Thus a British subject, whatever be the place of his birth, or the race to which he belongs, or I may now add the religion which he professes, has, with the rarest possible exceptions, the same right to settle or to trade in England which is possessed by a natural-born Englishman. He has further exactly the same political rights. He can, if he satisfies the requirements of the English electoral law, vote for a member of Parliament; he can, if he commends himself to an English constituency, take his seat as a member of Parliament. There is no law which forbids any British subject, wherever he be born, or to whatever race he belongs, to become a member of the English Cabinet or a Prime Minister. Of course it will be said that it is extremely improbable that the offices I have mentioned will, in fact, be filled by men who are not in reality Englishmen by race. This remark to a certain extent is true, though it is not wholly true. But the possession of theoretically equal political rights does certainly give in England, or rather to be strictly accurate in the United Kingdom, to every British subject an equality which some British subjects do not possess in some of the Dominions.

² See Part II., and especially Chap. IV., *post*.

the United Kingdom, but in the University of Melbourne. From both these writers we expect to learn, and do learn much, but, as in the case of Mr. Freeman, though we learn much from our teacher which is of value, we do not learn precisely what as lawyers we are in search of. The truth is that both Bagehot and Professor Hearn deal and mean to deal mainly with political understandings or conventions and not with rules of law. What is the precise moral influence which might be exerted by a wise constitutional monarch; what are the circumstances under which a Minister is entitled to dissolve Parliament; whether the simultaneous creation of a large number of Peers for a special purpose is constitutionally justifiable; what is the principle on which a Cabinet may allow of open questions;—these and the like are the kind of inquiries raised and solved by writers whom, as being occupied with the conventional understandings of the constitution, we may term conventionalists. These inquiries are, many of them, great and weighty; but they are not inquiries which will ever be debated in the law courts. If the Premier should advise the creation of five hundred Peers, the Chancery Division would not, we may be sure, grant an injunction to restrain their creation. If he should on a vote of censure decline to resign office, the King's Bench Division would certainly not issue a *quo warranto* calling upon him to show cause why he continues to be Prime Minister. As a lawyer, I find these matters too high for me. Their practical solution must be left to the profound wisdom of Members of Parliament; their speculative solution belongs to the province of political theorists.

One suggestion a mere legist may be allowed to make, namely, that the authors who insist upon and explain the conventional character of the understandings which make up a great part of the constitution, leave unexplained the one matter which needs explanation. They give no satisfactory answer to the inquiry how it happens that the understandings of politics are sometimes at least obeyed as rigorously as the commands of law.¹ To refer to public opinion and to considerations of expediency is to offer but a very inadequate solution of a really curious problem. Public opinion approves and public expediency requires the observance of contracts, yet contracts are not always observed, and would (presumably) be broken more often than they are did not the law punish their breach, or compel their performance. Meanwhile it is certain that understandings are not laws, and that no system of conventionalism will explain the whole nature of constitutional law, if indeed "constitutional law" be in strictness law at all.

For at this point a doubt occurs to one's mind which must more than once have haunted students of the constitution. Is it possible that so-called "constitutional law" is in reality a cross between history and custom which does not properly deserve the name of law at all, and certainly does not belong to the province of a professor called upon to learn or to teach nothing but the true indubitable law of England? Can it be that a dark saying of Tocqueville's, "the English constitution has no real existence" (*elle n'existe point*²), contains the truth of

And conventional view does not explain how conventions enforced.

Is constitutional law really "law" at all?

¹ See further on this point, Part III. *post*.

² Tocqueville, *Œuvres Complètes*, i. 166, 167.

Part I.

The cumbersomeness and prolixity of English statute law is due in no small measure to futile endeavours of Parliament to work out the details of large legislative changes. This evil has become so apparent that in modern times Acts of Parliament constantly contain provisions empowering the Privy Council, the judges, or some other body, to make rules under the Act for the determination of details which cannot be settled by Parliament. But this is only an awkward mitigation¹ of an acknowledged evil, and the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the legislature.² In this, as in some other instances, restrictions wisely placed by our forefathers on the growth of royal power, are at the present day the cause of unnecessary restraints on the action of the executive government. For the repeal of 31 Henry VIII., c. 8, rendered

¹ A critic has objected to the words "awkward mitigation of an acknowledged evil" on the ground that they condemn in England a system which as it exists abroad is referred to as being not without great practical utility. The expression objected to is, however, justifiable. Under the English system elaborate and detailed statutes are passed, and the power to make rules under the statute, e.g. by order in council or otherwise, is introduced only in cases where it is obvious that to embody the rules in the statute is either highly inexpedient or practically impossible. Under the foreign, and especially the French system, the form of laws, or in other words, of statutes, is permanently affected by the knowledge of legislators and draftsmen that any law will be supplemented by decrees. English statutes attempt, and with very little success, to provide for the detailed execution of the laws enacted therein. Foreign laws are, what every law ought to be, statements of general principles.

² See Duguit, *Manuel de Droit Public Français—Droit Constitutionnel*, ss. 140, 141.

governmental legislation, with all its defects and merits, impossible, and left to proclamations only such weight as they might possess at common law. The exact extent of this authority was indeed for some time doubtful. In 1610, however, a solemn opinion or protest of the judges¹ established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament. In 1766 Lord Chatham attempted to prohibit by force of proclamation the exportation of wheat, and the Act of Indemnity (7 George III., c. 7), passed in consequence of this attempt, may be considered the final legislative disposal of any claim on the part of the Crown to make law by force of proclamation.

The main instances² where, in modern times, pro-

¹ See Coke, 12 *Rep.* p. 74; and Gardiner, *History of England*, ii. pp. 104, 105.

² In rare instances, which are survivals from the time when the King of England was the true "sovereign" in the technical sense of that term, the Crown exercises legislative functions in virtue of the prerogative. Thus the Crown can legislate, by proclamations or orders in council, for a newly conquered country (*Campbell v. Hall*, Cowp. 204), and has claimed the right, though the validity thereof is doubtful, to legislate for the Channel Islands by orders in council. *In the Matter of the States of Jersey*, 9 Moore P. C., n. s. 184, 262. See Stephen, *Commentaries* (8th ed.), i. pp. 100-102. "The Channel Islands indeed claim to have conquered England, and are the sole fragments of the dukedom of Normandy which still continue attached to the British Crown. For this reason, in these islands alone of all British possessions does any doubt arise as to whether an Act of the imperial Parliament is of its own force binding law. In practice, when an Act is intended to apply to them, a section is inserted authorising the King in Council to issue an Order for the application of the Act to these islands, and requiring the registration of that Order in the islands, and the Order in Council is made by the King and registered by the States accordingly." Sir H. Jenkyns, *British Rule and Jurisdiction beyond the*

CHAPTER VII

THE RIGHT OF PUBLIC MEETING¹

Part II. THE law of Belgium² with regard to public meetings is contained in the nineteenth article of the constitution, which is probably intended in the main to reproduce the law of England, and runs as follows:—

Right of public meeting.

Rules of Belgian constitution.

“*Art. 19. Les Belges ont le droit de s’assembler paisiblement et sans armes, en se conformant aux lois, qui peuvent régler l’exercice de ce droit, sans néanmoins le soumettre à une autorisation préalable.*”

“*Cette disposition ne s’applique point aux rassemblements en plein air, qui restent entièrement soumis aux lois de police.*”³

Principles of English law as to right of public meeting.

The restrictions on the practice of public meeting appear to be more stringent in Belgium than in England, for the police have with us no special authority to control open-air assemblies. Yet just as it cannot with strict accuracy be asserted that

¹ See generally as to the right of public meeting, Stephen, *Commentaries*, iv. (14th ed.), pp. 174-178, and Kenny, *Outlines of Criminal Law* (3rd ed.), pp. 280-286. See Appendix, Note V., Questions connected with the Right of Public Meeting.

² See *Law Quarterly Review*, iv. p. 159. See also as to right of public meeting in Italy, *ibid.* p. 78; in France, *ibid.* p. 165; in Switzerland, *ibid.* p. 169; in United States, *ibid.* p. 257. See as to history of law of public meeting in France, Duguit, *Manuel de Droit Constitutionnel*, pp. 554-559.

³ *Constitution de la Belgique*, art. 19.

English law recognises the liberty of the press, so it can hardly be said that our constitution knows of such a thing as any specific right of public meeting. No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing *A*, *B*, and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass, and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E*, and *F*, and so on *ad infinitum*, lead to the consequence that *A*, *B*, *C*, *D*, and a thousand or ten thousand other persons, may (as a general rule)¹ meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner. *A* has a right to walk down the High Street or to go on to a common. *B* has the same right. *C*, *D*, and all their friends have the same right to go there also. In other words, *A*, *B*, *C*, and *D*, and ten thousand such, have a right to hold a public meeting; and as *A* may say to *B* that he thinks an Act ought to be passed abolishing the House of Lords, or that the House of Lords are bound to reject any bill modifying the constitution

¹ It is not intended here to express any opinion on the point whether an agreement on the part of *A*, *B*, and *C* to meet together may not under exceptional circumstances be a conspiracy.

