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 No." The lectures written in six months, which Professor Maitland told the Cambridge Law Club would not be published, were delivered during the Michaelmas term of 1887 and the Lent term of 1888, and were specially designed for the needs of undergraduates of the University of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

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[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:—

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

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

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

(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.

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[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.

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

C. *Frequency and Duration of Parliaments.*

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

D. *The Question of Sovereignty.*

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

E. *Legislation.*

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

F. *Taxation and Control over Finance.*

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

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

G. *Administration of Justice.*

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

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

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

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

Jurisdiction of the Council in admiralty and colonial cases **311—320**

H. *Privilege of Parliament.*

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

I. *Military Affairs.*

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

PERIOD V.

SKETCH OF PUBLIC LAW AT THE PRESENT DAY (1887–8).

Preliminary.

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

Incorporation of Wales in England. Union with Scotland; 'personal union' in 1603; legislative union in 1707; scheme of the union; the 'fundamental conditions.' Relation of Ireland to England in Middle Ages; Poynings' law; questions as to authority of English statutes and judicial power of English House of Lords; Act of 1719; Act of 1783 freeing Irish Parliament from subjection; union of 1801; articles of the union. No federation of three kingdoms, but a complete merger in the United Kingdom of Great Britain and Ireland.

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

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

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

A. *The Sovereign Body.*

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

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

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

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

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

C. *Classification of the Powers of the Crown.*

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G. *The Police System.*

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Organs of local government:—

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PERIOD I.

ENGLISH PUBLIC LAW AT THE DEATH OF EDWARD THE FIRST.

A. *General characteristics of English law and review of legislation.*

i. *Before* 1066.

The oldest English laws that have come down to us are those of Ethelbert, king of Kent, and we have good reason for believing that they were the first English laws that were ever put into writing. Ethelbert became king in 560 and died in 616. The laws that we have must have been published after he had received the Christian faith; we may attribute them to the year 600 or thereabouts. Thus the history of English law may be said to begin just about the time when the history of Roman law—we will not say comes to an end, for in a certain sense it has never come to an end—but comes to a well marked period:—the reign of Ethelbert overlaps the reign of Justinian. Not only are Ethelbert's the earliest English laws, but they seem to be the earliest laws ever written in any Teutonic tongue. It is true that on the continent the German nations which overwhelmed the Roman Empire had already felt the impulse to put their laws in writing; the *Lex Salica*, for example, the law of the Salian Franks, is considerably older than anything that we Englishmen have to show, but it is written in Latin, and for centuries Latin continued to be the legal language of the new kingdoms. But our earliest laws are written in English, or Anglo-Saxon, and until the Norman Conquest all laws were written in English, though

Latin was commonly used for many legal documents, conveyances of land and the like. Seemingly it was the contact with Roman civilization in the form of Christianity which raised the desire for written laws. Beda, who died in 735, says that Ethelbert put his laws in writing 'juxta exempla Romanorum.' It is possible that some collection of ecclesiastical canons served as a model. We do well to remember that the oldest laws that we have, however barbarous they may seem, are none the less Christian laws. 'God's property and the church's 12-fold. A bishop's property 11-fold. A priest's property 9-fold. A deacon's property 6-fold. A clerk's property 3-fold':—this is the first utterance of English law. This it is well to remember, for it should prevent any glib talk about primitive institutions: Teutonic law (for what is true of England is true also of the continent) when it is first set in writing has already ceased to be primitive; it is already Christian, and so close is the connection between law and religion, that we may well believe that it has already undergone a great change.

We have two more sets of Kentish laws, a set from Hlothar and Eadric, who seem to have been joint kings of the Kentings, which we may date in 680 or thereabouts, and a set from Wihtræd, which comes from 700 or thereabouts. Wessex takes up the tale; in 690 or thereabouts king Ine, with the counsel and consent of the wise, published a set of laws. Then we have a gap of two centuries, the greatest gap in our legal history. The laws of Alfred, which come next in order, may be attributed to 890 or thereabouts. They show us that during the two last centuries there had been no great change in the character of law or the legal structure of society. Alfred disclaims all pretension of being an innovator, he will but set down the best principles that he has been able to find in the laws of Ethelbert, of Ine and of the Mercian king, Offa. The laws of Offa of Mercia, who died in 796, have not come down to us.

Beginning with Alfred's we now have a continuous series of laws covering the whole of the tenth century and extending into the eleventh, laws from Edward the Elder, Æthelstan, Edmund, Edgar, and Ethelred; the series is brought to an end by a long and comprehensive set of laws coming from our great Danish king, Canute. We have no one law that can be ascribed to Edward the Confessor, who, however, in after days acquired the fame of having been a great legislator.

These Anglo-Saxon laws or dooms—as they call themselves—after having lain hid in MS. for several centuries, were dug up in the sixteenth century as antiquarian curiosities. Lambard published some of them in 1568 under the title Archaionomia. In 1840 they were published for the Record Commissioners with a modern English translation under the title *Ancient Laws and Institutes of England*; they were again published in 1865 with a German translation by Dr Reinhold Schmid[1]. These editions contain, besides the dooms, a few brief statements of customary law, forms of oaths and the like. The whole material can be printed in about 160 octavo pages. We have nothing from this period that can be called a treatise on law, and we have but very few accounts of litigation. On the other hand we have a large number of private legal documents, conveyances of lands, or land books as they were called, leases, wills and so forth; these were collected and printed by J. M. Kemble in his *Codex Diplomaticus Ævi Saxonici.*

I have spoken of 'sets of laws' and have refrained from using the word code. Once or twice it would seem as if an attempt had been made to state the existing law; but in general these laws seem to be new laws, additions to the law that is already in force; we may compare them to our modern statutes and like our statutes they pre-suppose a body of existing law. I will not say that they pre-suppose 'common law,' because I think that the phrase implies law common to the whole kingdom, and how much law there was common to the whole kingdom in the days before the Norman Conquest is a very difficult question. In the twelfth century, some time after the Conquest, it was the established theory that England was or had been divided between three laws, the West-Saxon, the Mercian and the Danish. The old laws themselves notice this distinction in a casual way; but we have little means of telling how deep it went. It is highly probable, however, that a great variety of local customs was growing up in England, when the Norman Conquest checked the growth. Originally there may have been considerable differences between the laws of the various tribes of Angles, Saxons and Jutes that invaded Britain, and the Danes must have brought with them a new supply of new customs. But this would not be all; the courts of justice, as we shall presently see, were local courts, courts of shires and of hundreds; resort to any central tribunal, to the king and his wise men seems to have been rare, and this localization of justice must have engendered a variety of local laws. Law was transmitted by oral tradition and the men of one shire would know nothing and care nothing for the tradition of another shire.

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[1] The best edition is now that of F. Liebermann, *Die Gesetze der Angelsachsen*, 2 vols., Halle, 1903 and 1906.

The written laws issued by the king and the wise cover but a small part of the whole field of law. They deal chiefly with matters of national importance, in particular with the preservation of the peace. To keep the peace is the legislator's first object, and is not easy. The family bond is strong; an act of violence will too often lead to a blood feud, a private war. To force the injured man or the slain man's kinsfolk to accept a money composition instead of resorting to reprisals is a main aim for the law giver. Hence these dooms often take the form of tariffs—so much is to be paid for slaying an eorl, so much for a ceorl, so much for a broken finger, so much for a broken leg. Another aim is to make men mindful of their police duties, to organize them for the pursuit of robbers and murderers, to fine them if they neglect such duties. But of what we may call private law we hear little or nothing—of property, contract or the like. It is easy to ask very simple questions about inheritance and so forth to which no certain answer can be given, and like enough there were many different local customs. There was as yet no body of professional lawyers, law was not yet a subject for speculation; it was the right and duty of the free man to attend the court of his hundred and his shire, and to give his judgment there. This must not, however, lead us to believe that law was a simple affair, that it consisted of just the great primary rules of what we think natural justice. In all probability it was very complicated and very formal; exactly the right words must be used, the due solemnities must be punctually performed. An ancient popular court with a traditional law was no court of equity; forms and ceremonies and solemn poetical phrases are the things which stick in the popular memory and can be handed down from father to son.

A great deal has been done by modern scholars and a great deal more may yet be done towards reconstructing the Anglo-Saxon legal system. Besides the primary sources of information that I have mentioned, the evidence of Caesar and Tacitus, the kindred laws of other German tribes and books written in England after the Conquest may be cautiously employed for the purpose: but for reasons already given I do not think that this matter can be profitably studied by beginners; we must work backwards from the known to the unknown, from the certain to the uncertain, and when we see very confident assertions about the details of Anglo-Saxon law we shall do well to be sceptical. One point however of considerable importance seems pretty clear, namely, that the influence of Roman jurisprudence was hardly felt. There is no one passage in the dooms which betrays any knowledge of the Roman law books. German scholars are in the habit of appealing to these Anglo-Saxon dooms as to the purest monuments of pure Germanic law; they can find nothing so pure upon the continent. But we must not exaggerate this truth. Roman jurisprudence did not survive in Britain, but the traditions of Roman civilization were of great importance. The main force which made for the improvement of law was the church, and the church if it was Catholic was also Roman. Thus, for example, at a quite early time we find the Anglo-Saxons making wills. This practice we may safely say is due to the church:—the church is the great recipient of testamentary gifts. We may further say that the will is a Roman institution; that these Anglo-Saxons would not be making wills, if there had been no Rome, no world-wide Roman Empire; but of any knowledge of the Roman law of wills, even of so much of it as is contained in the Institutes we may safely acquit them. Suppose a party of English missionaries to go preaching to the heathen, they would inevitably carry with them a great deal of English law although they might be utterly unable to answer the simplest examination paper about it; for instance they would know that written wills can be made, and they would think that written wills should take effect, though they might well not know how many witnesses our law requires, or whether a will is revoked by marriage. In some such way the church, Catholic and Roman, carried with it wherever it went the tradition of the older civilization, carried with it Roman institutions, such as the will, but in a popularized and vulgarized form.

I have spoken of the Anglo-Saxon dooms as the dooms of this king and of that, but we ought to observe, even in passing, and though this matter must come before us again, that no English king takes on himself to legislate without the counsel and consent of his wise men. Legislative formulae are of great importance to us, for we have to trace the growth of that form of words in which our Queen and Parliament legislate for us to-day. Here is the preface of the laws of Wihtræd: 'In the reign of the most clement king of the Kentish men, Wihtræd, there was assembled a deliberative convention of the great men: there was Birhtwald, Archbishop of Britain, and the fore-named king, and the Bishop of Rochester, Gybmund by name; and every degree of the church of that province spoke in unison with the obedient people. There the great men decreed these dooms with the suffrages of all, and added them to the customary laws of the Kentish men';—and so on until the end of the period, until the laws of Canute: "This is the ordinance that king Canute, king of all England, and king of the Danes and Norwegians, decreed, with the counsel of his 'witan' to the honour and behoof of himself."

ii. 1066–1154.

The Norman Conquest is an event of the utmost importance in the history of English law; still we must not suppose that English law was swept away or superseded by Norman law. We must not suppose that the Normans had any compact body of laws to bring with them. They can have had but

very little if any written law of their own; in this respect they were far behind the English.

Since 912 these Norsemen had held a corner of what had once formed a part of the great Frank kingdom; but their dukes had been practically independent, owing little more than a nominal allegiance to the kings of the French. They had adopted the religion and language of the conquered, and we must believe that what settled law there was in Normandy was rather Frankish than Norse. They were an aristocracy of Scandinavian conquerors ruling over a body of Romance-speaking Kelts. No one of their dukes had been a great legislator. Such written law as there was must have already been of great antiquity, the Lex Salica and the capitularies of the Frankish kings, and how far these were really in force, we cannot say. The hold of the dukes upon their vassals had been precarious; but probably some traditions of strong and settled government survived from the times of the Carlovings. For instance, that practice of summoning a body of neighbours to swear to royal and other rights which is the germ of trial by jury, appears in England so soon as the Normans have conquered the country, and it can be clearly traced to the courts of the Frankish kings.

There is no Norman law book that can be traced beyond the very last years of the twelfth century; there is none so old as our own Glanvill. Really we know very little of Norman law as it was in the middle of the tenth century. It cannot have been very unlike the contemporary English law—the Frankish capitularies are very like our English dooms, and the East of England was full of men of Norse descent. We must not therefore think of William as bringing with him a novel system of jurisprudence.

The proofs of the survival of English law can be briefly summarised. In the first place one of the very few legislative acts of William the Conqueror of which we can be certain, is that he confirmed the English laws. 'This I will and order that all shall have and hold the law of king Edward as to lands and all other things with these additions which I have established for the good of the English people.' Then again, after the misrule of Rufus, Henry I on his accession (1100) confirmed the English law: 'I give you back king Edward's law with those improvements whereby my father improved it by the counsel of his barons.' Secondly, these confirmations of Edward's law seem to have set several different persons on an attempt to restate what Edward's law had been. We have three collections of laws known respectively as the *Leges Edwardi Confessoris*, *Leges Willelmi Primi*, *Leges Henrici Primi*. These are apparently the work of private persons; we cannot fix the date of any of them with any great certainty. The most valuable is the *Leges Henrici Primi*, which has been ascribed to as late a date as the reign of Henry II, but which the most recent investigations assign to that of Henry I. It is a book of some size, very obscure and disorderly. The author has borrowed freely from foreign sources, from the *Lex Salica*, the capitularies of the Frankish kings, and from collections of ecclesiastical canons—one little passage has been traced to the Theodosian Code; but the main part of the book consists of passages from the Anglo-Saxon dooms translated into Latin, and the author evidently thinks that these are, or ought to be, still regarded as the law of the land. The picture given us by this book is that of an ancient system which has undergone a very severe shock. So the compiler of the *Leges Edwardi Confessoris* has borrowed largely from the old dooms. His book did much to popularize the notion that the Confessor was a great legislator. In after times he became the hero of many legal myths; but as already said there is no one law that can be attributed to him. The demand for Edward's law which was conceded by William and by Henry I was not a demand for laws made by Edward; it was merely a demand for the good old law, the law which prevailed here before England fell under the domination of the Conqueror[1]. Thirdly, Domesday book, the record of the great survey made in the years 1085-6—the greatest legal monument of the Conqueror's reign—shows us that the Norman landowners were conceived as stepping into the exact place of the English owners whose forfeited lands had come to their hands; the Norman represents an English antecessor whose rights and duties have fallen upon him. The same conclusion is put before us by the charters of the Norman kings, the documents whereby they grant lands to their followers. It is in English words that they convey jurisdictions and privileges: the Norman lord is to have *sac* and *soc*, *thol* and *theam*, *infangthief* and *outfangthief*,—rights which have been enjoyed by Englishmen, rights which can only be described in the English language.

At the same time it must be admitted that there has been a large infusion of Norman ideas. Occasionally, though but rarely, we can place our finger on a rule or an institution and say 'This is not English.' Such is the case with trial by battle, such is the case with the sworn inquest of neighbours which comes to be trial by jury. More often we can say that a new idea, a new theory, has been introduced from abroad, this as we shall hereafter see is the case with what we call feudalism. But still more often we can only say that a new meaning, a new importance, has been given to an old institution. The valuable thing that the Norman Conquest gives us is a strong kingship which makes for national unity.

No one of the Norman kings, among whom we will include Stephen, was a great legislator. The genuine laws of William the Conqueror are few; of most of them we shall speak by and by. The two most important are that by which he severs the ecclesiastical jurisdiction from the temporal, and that by which he insists that every man, no matter of whom he holds his land, is the king's man and owes allegiance to the king. From the lawless Rufus we have no law. Henry the First on his accession (1100) purchases the support of the people by an important charter—important in itself, for it is a landmark in constitutional history, important also as the model for Magna Carta. Stephen also has to issue a charter, but it is of less value, for it is more general in its terms. It is as administrators rather than as legislators that William the First and Henry the First are active. The making of Domesday, the great rate book of the kingdom, is a magnificent exploit, an exploit which has no parallel in the history of Europe, an exploit only possible in a conquered country. Under Henry the First national finance becomes an orderly system, a system of which an orderly written record is kept. The sheriff's accounts for 1132 are still extant on what is called the Pipe Roll of 31 Hen. I; this is one of our most valuable sources of information. It has been casually preserved; it is not until the beginning of Henry II's reign that we get a regular series of such records. To illustrate the Norman reigns we have also a few unofficial records of litigation. These have been printed by Mr Bigelow in his *Placita Anglo-Normannica.* The genuine laws of William I and the Charter of Henry I will be found in Stubbs' *Select Charters.* The so-called *Leges Edwardi Confessoris, Willelmi Conquestoris,* and *Henrici Primi* are among the Ancient Laws published by the Record Commissioners[1].

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[1] For a fuller account of the law-books of the Norman period see Pollock and Maitland, *History of English Law*, 2nd edn. vol. I, pp. 97—110. Stubbs, *Lectures on Early English History*, 37—133.

iii. *Henry II* (1154–89), *Richard* (1189–99), *John* (1199–1216).

The reign of Henry II is of great importance in legal history; he was a great legislator and a great administrator. Some of his laws and ordinances we have, they have been casually preserved by chroniclers; others we have lost. The time had not yet come when all laws would be carefully and officially recorded. At his coronation or soon afterwards he issued a charter, confirming in general terms the liberties granted by his grandfather, Henry I. The next monument that we have of his legislation consists of the Constitutions of Clarendon issued in 1164. Henry's quarrel with Becket was the occasion of them. They deal with the border land between the temporal and the ecclesiastical jurisdictions, defining the province of the spiritual courts. During the anarchy of Stephen's reign the civil, as contrasted with the ecclesiastical, organization of society had been well-nigh dissolved—the church had gained in power as the state became feeble. Henry endeavoured to restore what he held to be the ancient boundary, to maintain the old barriers against the pretensions of the clergy. These Constitutions are the result. To some extent Henry failed: the murder of the Archbishop shocked the world, and shocked him, and he was obliged to surrender several of the points for which he had contended. Nevertheless in the main he was successful; by the action of the royal court which now becomes steady and vigorous a line was drawn between the temporal and the spiritual spheres, though it was not exactly the line which Henry tried to define, and though for a century and more after his death there was still a debateable border land. The Canon law was just taking shape, a law for ecclesiastical matters common to all Europe. One great stage in its development is marked by the *Decretum Gratiani,* the work of a Bolognese monk, composed, it is believed, between 1139 and 1142, i.e. in our King Stephen's reign. The decrees of ecclesiastical councils, ancient and modern, genuine and spurious, were being elaborated into a great system of jurisprudence. The classical Roman law, which for some time past had become the subject of serious study, was a model for this new system. We have to remember that throughout the subsequent ages Canon law administered by ecclesiastical courts regulated for all Englishmen some of the most important affairs of life. It did not merely define the discipline of the clergy—all matters relating to marriages and to testaments fell to its share. A great deal of the ordinary private law even of our own day can only be understood if we remember this. The fundamental distinction that we draw between real and personal property, to take one example, is the abiding outcome of the division of the field of law into two departments, the secular and the spiritual. Why do we still couple 'probate' with 'divorce'? Merely because both matrimonial and testamentary causes belonged to the church courts.

We have just mentioned the revived study of Roman law. In Southern Europe Roman law had never perished: it had survived the dark ages in a barbarized and vulgarized form. Then in the eleventh century men began to turn once more to the classical texts. The new study spread rapidly. In 1143 Archbishop Theobald brought hither in his train one Vacarius, a Lombard lawyer. He lectured in England on Roman law; it seems that Stephen silenced him; Stephen had quarrelled with the clergy. But he did not labour in vain; the influence of Roman law is apparent in some of Henry's reforms, and it has even been conjectured that Henry as a youth had sat at the feet of Vacarius[1]. To the early part of his reign we owe certain measures of the utmost importance. The text of the ordinances or assizes whereby they were accomplished we have lost. An assize (*assisa*) seems to mean in the first instance a sitting, a session for example of the king and his barons; then the name is transferred to an ordinance made at such a session—we have the Assize of Clarendon, the Assize of Northampton, and, to look abroad, the Assizes of Jerusalem; then again it is transferred to any institution which is created by such an ordinance. Henry by some ordinance that we have lost took under his royal protection the possession, or seisin as it was called, of all freeholders. The vast importance of this step we shall better understand hereafter. He provided in his own court remedies for all who were disturbed in their possession. These remedies were the possessory assizes of novel disseisin and mort d'ancestor; there was a third assize of darein presentment which dealt with the right of presenting to churches. Doubtless these possessory actions were suggested by, though they were not copied from, the Roman *interdicta*. The distinction between a possessory and a proprietary action was firmly grasped; proprietary actions still went to the feudal courts while the king himself now undertook to protect possession. All this will become more intelligible hereafter. But if the thought of protecting possession or something different from property was of Roman origin, the machinery employed for this purpose was of a kind unknown to the Romans, it was, we may say, a trial by jury. This new procedure gradually spreads from these possessory actions to all other actions. Henry himself extended it to proprietary actions for land—in the form of the grand assize. The person sued might refuse trial by battle and have the question 'Who has the best right to this land?' submitted to a body of his neighbours sworn to tell the truth. More of this by and by

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[1] The *Leges Edwardi Confessoris* and the *Leges Henrici Primi* may now be read in Liebermann's *Gesetze der Angelsachsen.* For a full and valuable commentary on the latter document see Stubbs, *Lectures on Early English History,* 143—65. For the *Leges Willelmi* see Stubbs, *Select Charters,* p. 84.

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[1] For a fuller account see Pollock and Maitland, *History of English Law*, vol. I, pp. 118—9.

when we come to the history of trial by jury; our present point is that by providing new remedies in his own court Henry centralized English justice. From his time onwards the importance of the local tribunals began to wane; the king's own court became ever more and more a court of first instance for all men and all causes. The consequence of this was a rapid development of law common to the whole land; local variations are gradually suppressed; we come to have a common law. This common law is enforced throughout the land by itinerant justices, professional administrators of the law, all trained in one school. During the latter part of Henry's reign the counties are habitually visited by such justices.

By the Assize of Clarendon in 1166 reissued with amendments at Northampton in 1176 Henry began a great reform of criminal procedure. Practically, we may say, he introduced the germs of trial by jury: the old modes of trial, the ordeals and the judicial combat, begin to yield before the oath of a body of witnesses. From 1181 we have the Assize of Arms which reorganizes the ancient military force and thus establishes a counterpoise to feudalism. From 1184 we have the Assize of Woodstock, which for the first time defines the king's rights in his forests. The establishment of an orderly method of taxation and the decline of feudalism as a political force are marked by the first collection of a scutage in 1159—personal service in the army may be commuted for a money payment—and by the first taxation of personal property, the Saladin tithe of 1188.

Two great books illustrate the legal activity of the reign. The *Dialogus de Scaccario* describes minutely the proceedings of the Royal Exchequer. It was written by Richard Fitz Neal, Bishop of London and Treasurer of the Exchequer. The other book is a Treatise on the Laws of England, commonly attributed to Ranulf Glanvill, who became chief justiciar (prime minister and chief justice we may say) in 1180. This book, known to lawyers as 'Glanvill,' was written in the very last years of the reign, 1187–9. It is the first of our classical text books. It gives us an accurate picture of the working of the royal court. The law contained in it is mostly land law: as yet it is with land that the royal court is chiefly concerned. We can see that Roman law has been exercising a subtle influence; the writer knows something of the Institutes and occasionally copies their words; but in the main the king's court has been working out a law for itself. It is only with the king's court that the writer deals. The customs which prevail in the local courts are, he says, so many, so various, so confused, that to put them in writing would be impossible. However by the action of the royal court a certain province has been reclaimed from local custom for common law; that province is 'land-holding' about which there are already many uniform rules. The book thus marks an important stage in the development of common law[1].

Henry's reign finished, we look onwards to Magna Carta. Under Richard the tradition of orderly administration, of the concentration of justice in the king's court was maintained. Richard himself was an absentee king; he never was in this country save on two occasions and then but for a few months; the country was governed by justiciars, by men trained in the school of Henry II. Our materials for legal history now begin to accumulate rapidly. Not that there is much that can be called legislation; but it now becomes the practice to keep an official record of the business done in the king's court. Our earliest judicial records come from the year 1194; thenceforward we have the means of knowing accurately what cases come before the king's justices and how they are decided. During the first half of John's reign the country was decently governed, though the legislative and reforming activity of his father's day has ceased. But then John casts off all restraints, becomes involved in a great quarrel with the church, in another with the baronage, unites the whole nation against him, and at length in 1215 is forced to grant the great charter.

iv. *Henry III* (1216–72).

The great charter, from whatever point of view we regard it, is of course a document of the utmost importance[2]. The

first thing that strikes one on looking at it is that it is a very long document—and a good deal of its importance consists in this, that it is minute and detailed. It is intensely practical; it is no declaration in mere general terms of the rights of Englishmen, still less of the rights of men; it goes through the grievances of the time one by one and promises redress. It is a definite statement of law upon a great number of miscellaneous points. In many cases, so far as we can now judge, the law that it states is not new law; it represents the practice of Henry II's reign. The cry has been not that the law should be altered, but that it should be observed, in particular, that it should be observed by the king. Henceforward matters are not to be left to vague promises; the king's rights and their limits are to be set down in black and white. Apart from the actual contents of the charter, which we must notice from time to time hereafter, we ought to notice that the issue of so long, so detailed, so practical a document, means that there is to be a reign of law.

Now Magna Carta came to be reckoned as the beginning of English statute law; it was printed as the first of the statutes of the realm. But to explain this we have first to remark that of Magna Carta there are several editions. We have four versions of the charter, that of 1215, that of 1216, that of 1217 and that of 1225, and between them there are important differences. Several clauses which were contained in the charter of 1215 were omitted in that of 1216 and were never again inserted. It seems to have been thought unadvisable to bind the young king to some of the more stringent conditions to which John had been subjected. The charter of 1217 again differs from that of 1216. Substantially it is in 1217 that the charter takes its final form; still it is the charter of 1225 which is the Magna Carta of all future times. That there were four versions is a fact to be carefully remembered; it is never enough to refer to Magna Carta without saying which edition of it you mean. As we shall hereafter see, the whole history of parliament might have been very different, had not a certain clause been omitted from the charter of 1216 and all subsequent versions—a clause defining the common council of the realm.

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[1] Pollock and Maitland, *History of English Law*, vol. 1, pp. 161—7.

[2] An admirable commentary on Magna Carta was published by W. S. McKechnie in 1905.

Now the charter of 1225 came to be reckoned as the beginning of our statute law. This in part is due to accidents. The lawyers of the later middle ages had no occasion to go behind that instrument; the earlier ordinances so far as they had not become obsolete had worked themselves into the common law; but every word of the charter was still of great importance. So when the time for printing came Magna Carta, i.e. the charter of 1225, took its place at the beginning of the statute book. It was constantly confirmed; Henry confirmed it in 1237; Edward confirmed it in 1297—thenceforward down to the days of Henry IV it was repeatedly confirmed; Coke reckons thirty-two confirmations. It was one thing to obtain the charter, another to get it observed. It was a fetter on the king, a fetter from which a king would free himself whenever he could; and the nation has to pay money over and over again to procure a confirmation of the charter:—that the king is bound by his ancestors' concessions is a principle that is but slowly established.

Magna Carta then, however ill it may be observed, constitutes what for the time is a considerable body of definitely enacted law. From the long reign of Henry III we have not much other legislation; legislation is as yet by no means a common event. The interest of the reign is to be found not so much in the laws that are made but in the struggle for a parliament. Gradually, as we shall see hereafter, the idea of what the national assembly should be is undergoing a change; it is ceasing to be that of a feudal assembly of barons, it is becoming that of an assembly of the three estates of the realm—clergy, lords and commons; the summoning of knights of the shire in 1254, and of representative burgesses in 1264 are the great landmarks. Still there are two important legislative acts. The first of these is known as the Statute of Merton made in 1236. It contains provisions which are in force at the present moment. Among its other noticeable clauses, we come across the famous declaration of the barons that they will not change the laws of England. They have been asked by the clergy to consent that children born before the marriage of their parents should be deemed legitimate:—their reply is '*Nolumus leges Angliae mutare.*' Between this

and the next great act, there occurs the great crisis which we know as the Barons' War. The discontent of the nation with Henry's faithlessness and extravagance comes to a head in 1258. After stormy years of quarrelling, a leader is found in De Montfort; the insurgents are victorious at Lewes (14 May, 1264), and then defeated at Evesham (4 Aug. 1265). But a great deal of what they wanted is gained. The statute made at Marlborough in 1267, commonly called the Statute of Marlbridge, chiefly consists of a re-enactment of certain concessions which had been obtained from the king during the revolutionary period, concessions which we know as the Provisions of Westminster of 1259[1]. The grievances redressed in this instance are for the most part the grievances of the smaller landowners.

But it is not only or even chiefly by means of legislation that English law has been growing. The reign of Henry III is the time when a great part of the common law takes definite shape—in particular the land law. The king's court has been steadily at work evolving common law; that law is carried through the length and breadth of the kingdom by the itinerant justices. As yet the judges have a free hand—they can invent new remedies to meet new cases. Towards the end of the reign indeed complaints of this grow loud. It is more and more seen that to invent new remedies is in effect to make new laws; that the judges while professing to declare the law are in reality making law;—and it is more and more felt that for new laws the consent of the estates of the realm, at all events of the baronage, is necessary. But law, judge-made law if we like to call it so, has been growing apace. The justices have been learned men, mostly ecclesiastics, men not ignorant of Canon Law and Roman Law. A great law book is the outcome[2]. Henry of Bratton, or Bracton as he is commonly called, died in 1268; for twenty years he had been a judge. Sometime between 1250 and 1260 he wrote his treatise on the Laws of England. He owed a great deal to the work of an Italian lawyer, Azo of Bologna, and we can plainly see that the study of Roman law has had a powerful influence on the growth of English law:—it has set men to think seriously and rationally of English law as a whole, to try to set it in order and represent it as an organized body of connected principles[1]. But the substance of Bracton's work is English. He cites no less than 500 decisions of the king's judges. English law, we see, is already becoming what we now call 'case law'—a decided case is an 'authority' which ought to be followed when a similar case arises. We see also that the growth of English law, especially land law, has been very rapid. Glanvill's book looks very small and meagre when placed beside Bracton's full and comprehensive treatise. We may indeed regard the reign of Henry III as a golden age of judge-made law: the king's court is rapidly becoming the regular court for all causes of any great importance, except those which belong to the ecclesiastical courts, and as yet the judges are not hampered by many statutes or by the jealousy of a parliament which will neither amend the law nor suffer others to amend it. Also we now hear very little of local customs deviating from the common law; as the old local courts give way before the rising power of the king's court, so local customs give way to common law. The king's court gains in power and influence because its procedure is more summary, more rational, more modern than the procedure of the local courts. Their procedure is never improved, it remains archaic; meanwhile the royal court is introducing trial by jury; all the older modes of trial are giving way before this new mode. In 1215 the Lateran Council forbad the clergy any longer to take part in the ordeal. In England the ordeal was at once abolished, and the whole province of criminal law was thus thrown open to trial by jury.

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[1] Printed in Stubbs' *Select Charters*, pp. 400—5.

[2] Pollock and Maitland, *History of English Law*, vol. I, pp. 206—10.

v. *Edward the First* (1272–1307).

Edward I has been called 'the English Justinian.' The suggested comparison is not very happy; it is something like a comparison between childhood and second childhood. Justinian, we may say, did his best to give final immutable form to a system which had already seen its best days, which had

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[1] *Select Passages from the Works of Bracton and Azo*, ed. F. W. Maitland (Selden Society), 1895—with a brilliant introduction.

already become too elaborate for those who lived under it. Edward, taking the whole nation into his counsels, legislated for a nation which was only just beginning to have a great legal system of its own. Still it is very natural that we should seek some form of words which will mark the fact that Edward's reign is an unique period in the history of our law. Sir M. Hale, writing late in the seventeenth century, says that more was done in the first thirteen years of that reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together. We can hardly say so much as this; still we may say that the legislative activity of those thirteen years remains unique until the reign of William IV; for anything with which we may compare Edward's statutes we must look forward from his day to the days of the Reform Bill. Now Hale, I think, hits the mark when he says that more was done *to settle and establish the distributive justice of the kingdom* in Edward's reign than in subsequent ages[1]. The main characteristic of Edward's statutes is that they interfere at countless points with the ordinary course of law between subject and subject. They do more than this—many clauses of the greatest importance deal with what we should call public law—but the characteristic which makes them unique is that they enter the domain of private law and make vast changes in it. For ages after Edward's day king and parliament left private law and civil procedure, criminal law and criminal procedure, pretty much to themselves. Piles of statutes are heaped up—parliament attempts to regulate all trades and all professions, to settle what dresses men may wear, what food they may eat—ordains that they must be buried in wool—but we may turn page after page of the statute book of any century from the fourteenth to the eighteenth, both inclusive, without finding any change of note made in the law of property, or the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished. Consequently in Hale's day and in Blackstone's day, a lawyer whose business lay with the common affairs of daily life had to keep the statutes of Edward I constantly in his mind; a few statutes of Henry VIII, of Elizabeth, of Charles II he had to remember, but there were large tracts of past history which had not supplied one single law which was of any importance to him in the ordinary course of his business. To a certain extent this is true even now, even after the vigorous legislation of the last sixty years. There are at least two statutes of Edward I which you will have to know well—the *De donis conditionalibus* and the *Quia emptores terrarum*—these still are pillars of our land law; to pull them away without providing some substitute would be to bring the whole fabric to confusion. It is well to remember the dates of the great statutes.

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[1] *The History of the Common Law of England*, 4th edn., 1779, p. 152.

1275.	Stat. Westminster, I.
1278.	Stat. Gloucester.
1284.	Stat. of Wales.
1285.	Stat. Westminster, II. Stat. Winchester.
1290.	Stat. Westminster, III.
1297.	Confirmatio Cartarum, with new articles.

But Edward was not merely a great legislator, he was a great administrator also, a great organizer. Take any institution that exists at the end of the Middle Ages, any that exists in 1800—be it parliament, or privy council, or any of the courts of law—we can trace it back through a series of definite changes as far as Edward's reign, but if we go back further the object that we have had in view begins to disappear, its outlines begin to be blurred, we pass as it were from sunlight to moonlight, we cannot be certain whether that which we see is really that for which we have been looking. Shall we call this court that is sitting, the King's Bench, or the Council, or the Parliament? it seems to be all and yet to be none of these. In Edward's day all becomes definite—there is the Parliament of the three estates, there is the King's Council, there are the well known courts of law. Words have become appropriated—the king in parliament can make statutes; the king in council can make ordinances; a statute is one thing, an ordinance is another. It is for this reason that any one who would study the constitution of older times, should first make certain that he knows the constitution as it is under Edward I.

The vigorous legislation of the time has an important consequence in checking the growth of unenacted law. Henceforward the common law grows much more slowly than under Henry III. Its growth is hampered at every turn by statute—the judges are checked by the now admitted principle that changes in the law are not to be made without the consent of parliament. Law continues to grow, but it can grow but slowly; the judges are forced to have recourse to fictions and evasions because the highroad of judge-made law has been barred. Two law books come to us from Edward's reign, Britton and Fleta, both written in 1290 or thereabouts; Britton in French, Fleta in Latin; both are little better than poor epitomes of Bracton's work, epitomes which take notice of the changes introduced by the great statutes. We learn from them an important fact:—it is plain that English lawyers are no longer studying Roman law. There can be no doubt that under Henry III Roman law was slowly gaining ground in England. To any further Romanization of English law, a stop was put by Edward's legislation. The whole field of law was now so much covered by statute, that the study of Roman law had become useless. About the same time, we no longer find ecclesiastics sitting in the royal courts; Bracton was an ecclesiastic, an archdeacon, and the great judges whose decisions he cites were ecclesiastics—Martin Pateshull became Dean of St Paul's, William Raleigh became Bishop of Winchester. But the opinion steadily grew among the clergy that ecclesiastics should not sit in lay tribunals. The consequence is that from the beginning of Edward's reign, English law becomes always more insular, and English lawyers become more and more utterly ignorant of any law but their own. Thus English law was saved from Romanism; by this we lost much—but we gained much also. The loss, we may say, was juristic; if our lawyers had known more of Roman law, our law—in particular our land law—would never have become the unprincipled labyrinth that it became;—the gain, we