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LECTURES
INTRODUCTORY TO THE STUDY OF
THE LAW OF THE CONSTITUTION

A. V. DICEY



LECTURES

INTRODUCTORY TO THE STUDY OF

THE LAW OF THE CONSTITUTION

BY

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PREFACE.

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 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 enquiry 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 SECOND EDITION.

THE demand for a second edition of this book within six months of its original publication encourages the hope that my attempt to survey the English Constitution from its legal side interests a class larger than the body of law students for whom my lectures were originally prepared.

Though the substance of the book is practically unchanged, care has been taken in preparing this edition for the press to correct every error of detail which has been brought to my notice by friendly critics. To no one among this class do I owe more than to M. Boutmy. His observations have enabled me to set right several oversights (pardonable I trust in an Englishman) with regard to special points in the French administrative system, and have given me ground to suppose that my general estimate of the nature of *droit administratif* does not disapprove itself to the judgment of a Frenchman whose *Études de droit Constitutionnel* prove him to be as capable as any living author of comparing and appreciating the distinguishing characteristics of English and French institutions.

ALL SOULS COLLEGE, OXFORD,

March, 1886.



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LECTURE I.

THE TRUE NATURE OF CONSTITUTIONAL LAW.

“GREAT critics,” writes Burke in 1791, “have **Lecture**
“taught us one essential rule It is this, that **I.**
“if ever we should find ourselves disposed not to Optimistic
“admire those writers or artists, Livy and Virgil for view of
“instance, Raphael or Michael Angelo, whom all the English
“learned had admired, not to follow our own fancies, constitu-
“but to study them until we know how and what tion.
“we ought to admire; and if we cannot arrive at
“this combination of admiration with knowledge,
“rather to believe that we are dull, than that the
“rest of the world has been imposed on. It is as
“good a rule, at least, with regard to this admired
“constitution (of England). We ought to under-
“stand it according to our measure; and to venerate
“where we are not able presently to comprehend¹.”

“No unbiassed observer,” writes Hallam in 1818,
“who derives pleasure from the welfare of his species,
“can fail to consider the long and uninterruptedly
“increasing prosperity of England as the most
“beautiful phænomenon in the history of mankind.

¹ Burke, *Works*, iii. p. 114.

Lecture
I.

“Climates more propitious may impart more largely
 “the mere enjoyments of existence; but in no other
 “region have the benefits that political institutions
 “can confer, been diffused over so extended a popu-
 “lation; nor have any people so well reconciled the
 “discordant elements of wealth, order, and liberty.
 “These advantages are surely not owing to the
 “soil of this island, nor to the latitude in which it
 “is placed; but to the spirit of its laws, from which,
 “through various means, the characteristic inde-
 “pendence and industriousness of our nation have
 “been derived. The constitution, therefore, of Eng-
 “land must be to inquisitive men of all countries,
 “far more to ourselves, an object of superior interest;
 “distinguished, especially, as it is from all free
 “governments of powerful nations, which history
 “has recorded, by its manifesting, after the lapse
 “of several centuries, not merely no symptom
 “of irretrievable decay, but a more expansive
 “energy¹.”

These two quotations from authors of equal though of utterly different celebrity, recall with singular fidelity the spirit with which our grandfathers and our fathers looked upon the institutions of their country. The constitution was to them in the quaint language of George the Third “the most perfect of human formations²,” it was to them not a mere polity to be compared with the government of any other state, but so to speak a sacred mystery

¹ Hallam, *Middle Ages*, 12th ed., ii. p. 267.

² See Stanhope, *Life of Pitt*, i. App. p. 10.

of statesmanship; it "had (as we have all heard Lecture from our youth up) not been made but had grown;" I.
 it was the fruit not of abstract theory but of that instinct which (it is supposed) has enabled Englishmen, and especially uncivilized Englishmen, to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtly wrought than any work of conscious art. The constitution was marked by more than one transcendent quality which in the eyes of our fathers raised it far above the imitations, counterfeits, or parodies, which have been set up during the last hundred years throughout the civilized world; no precise date could be named as the day of its birth; no definite body of persons could claim to be its creators, no one could point to the document which contained its clauses; it was in short a thing by itself, which Englishmen and foreigners alike should "venerate, where they are not able presently to comprehend."

The present generation must of necessity look on the constitution in a spirit different from the sentiment either of 1791 or of 1818. We cannot share the religious enthusiasm of Burke, raised as it was to the temper of fanatical adoration by just hatred of those "doctors of the modern school," who when he wrote, were renewing the rule of barbarism in the form of the reign of terror; we cannot exactly echo the fervent self-complacency of Hallam, natural as it was to an Englishman who saw the institutions of

Modern
view of
constitu-
tion.

Lecture
I.

England standing and flourishing, at a time when the attempts of foreign reformers to combine freedom with order had ended in ruin. At the present day students of the constitution wish neither to criticise, nor to venerate, but to understand, and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of a eulogist, but simply of an expounder; his duty is neither to attack nor to defend the constitution but simply to explain its laws. He must also feel that however attractive be the mysteries of the constitution, he has good reason to envy professors who belong to countries such as France, Belgium, or the United States, blessed with constitutions of which the terms are to be found in printed documents, known to all citizens and accessible to every man who is able to read. Whatever may be the advantages of a so-called "unwritten" constitution, its existence imposes special difficulties on teachers bound to expound its provisions. Anyone will see that this is so who compares for a moment the position of writers such as Kent or Story, who commented on the constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England.

Special
difficulty
of com-
menting on
English
constitu-
tion.

When these distinguished jurists delivered in the form of lectures commentaries upon the Constitution of the United States, they knew precisely what was the subject of their teaching and what was the proper mode of dealing with it. The theme of their teaching

was a definite assignable part of the law of their country; it was recorded in a given document to which all the world had access, namely "the Constitution of the United States established and ordained by the People of the United States." The articles of this constitution fall indeed far short of perfect logical arrangement; and they lack absolute lucidity of expression, but they contain in a clear and intelligible form, the fundamental law of the Union. This law (be it noted) is made and can only be altered or repealed in a way different from the method by which other enactments are made or altered; it stands forth, therefore, as a separate subject for study; it deals with the legislature, the executive, and the judiciary, and by its provisions for its own amendment, indirectly defines the body in which resides the legislative sovereignty of the United States. Story and Kent therefore knew with precision the nature and limits of the department of law on which they intended to comment, they knew also what was the method required for the treatment of their topic. Their task as commentators on the constitution was in kind exactly similar to the task of commenting on any other branch of American jurisprudence. The American lawyer has to ascertain the meaning of the Articles of the Constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and by the conclusions to be deduced from

Lecture a careful study of judicial decisions. The task, in
I. short, which lay before the great American commen-
tators, was the explanation of a definite legal docu-
ment in accordance with the received canons of legal
interpretation. Their work, difficult as it might prove,
was work of the kind to which lawyers are accus-
tomed, and was to be achieved by the use of ordinary
legal methods. Story and Kent indeed were men of
extraordinary capacity, so however were our own
Blackstone, and at least one of Blackstone's edi-
tors. If (as is undoubtedly the case) the American
jurists have produced commentaries on the constitu-
tion of the United States utterly unlike, and (one
must in truth add) vastly superior to any commen-
taries on the constitutional law of England, their
success is partly due to the possession of advantages
denied to the English commentator or lecturer. His
position is entirely different from that of his
American rivals. He may search the statute-book
from beginning to end, but he will find no enactment
which purports to contain the articles of the consti-
tution; he will not find any test by which to dis-
criminate laws which are constitutional or funda-
mental from ordinary enactments; he will discover
that the very term "constitutional law," which is
not (unless my memory deceives me) ever employed
by Blackstone, is of comparatively modern origin;
and in short, that before commenting on the law of
the constitution he must make up his mind what
is the nature and the extent of English constitu-
tional law.

His natural, his inevitable resource is to recur to writers of authority on the law, the history, or the practice of the constitution. He will find (it must be admitted) no lack of distinguished guides; he may avail himself of the works of lawyers such as Blackstone, of the investigations of historians such as Hallam or Freeman, and of the speculations of philosophical theorists such as Bagehot or Hearn. From each class he may learn much, but for reasons which I am about to lay before you for consideration, he is liable to be led by each class of authors somewhat astray in his attempt to ascertain the field of his labours and the mode of working it; he will find, unless he can obtain some clue to guide his steps, that the whole province of so-called "constitutional law" is a sort of maze in which the wanderer is perplexed by unreality (by what, if I might venture to do so, I would call "shams"), by antiquarianism and by conventionalism.

Lecture
I.
Commentator seeks help from constitutional lawyers, constitutional historians and constitutional theorists.

Let us turn first to the lawyers and as in duty bound to Blackstone.

I. Lawyer's view of constitution. Its unreality. Blackstone.

Of constitutional law as such there is not a word to be found in his *Commentaries*. The matters which appear to belong to it are dealt with by him in the main under the head Rights of Persons. The Book which is thus entitled treats (*inter alia*) of the Parliament, of the King and his title, of master and servant, of husband and wife, of parent and child. The arrangement is curious and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The Book

Lecture contains much real learning about our system of
I. government. Its true defect is the hopeless confusion both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit—common to all the lawyers of his time—of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional King, the whole and perhaps more than the whole of the powers actually possessed and exercised by William the Conqueror.

“We are next,” writes Blackstone, “to consider “those branches of the royal prerogative, which “invest thus our sovereign lord, thus all-perfect and “immortal in his kingly capacity, with a number “of authorities and powers; in the exertion whereof “consists the executive part of government. This “is wisely placed in a single hand by the British “constitution, for the sake of unanimity, strength, “and dispatch. Were it placed in many hands, it “would be subject to many wills: many wills, if “disunited and drawing different ways, create weak- “ness in a government; and to unite those several “wills, and reduce them to one, is a work of more “time and delay than the exigencies of state will “afford. The King of England is, therefore, not “only the chief, but properly the sole, magistrate of “the nation; all others acting by commission from, “and in due subordination to him; in like manner “as, upon the great revolution of the Roman state, “all the powers of the ancient magistracy of the “commonwealth were concentrated in the new

“Emperor: so that, as Gravina expresses it, *in ejus* Lecture
 “*unius persona veteris reipublicae vis atque majestas* I.
 “*per cumulatas magistratum potestates exprimeba-*
 “*tur*”¹.”

The language of this passage is impressive; it stands curtailed but in substance unaltered in the last edition of Stephen's *Commentaries*. It has but one fault; the statements it contains are the direct opposite of the truth. The executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the Queen but the chairman of the committee, known as the Prime Minister. Nor can it be urged that Blackstone's description of the royal authority was a true account of the powers of the King at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have cited painted his true position. The terms used by the commentator were, when he used them, unreal and known to be so. They have become only a little more unreal during the century and more which has since elapsed. “The King,” he writes again, “is considered in domestic affairs
 “. as the fountain of justice, and general con-
 “servator of the peace of the kingdom He
 “therefore has alone the right of erecting courts of
 “judicature: for, though the constitution of the

¹ Blackstone, *Commentaries*, i. p. 249.

Lecture

I.

“kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected to assist him in executing this power; and equally necessary, that if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the king’s name, they pass under his seal, and are executed by his officers¹.”

Here we are in the midst of unrealities or of fictions. Neither the Queen nor the executive has anything to do with erecting courts of justice. We should rightly conclude that the whole Cabinet had gone mad if to-morrow’s Gazette contained an order in council not authorised by statute erecting a new Court of Appeal. It is worth while here to note what is the true injury to the study of law produced by the tendency of Blackstone, and other less famous constitutionalists, to adhere to unreal expressions. The evil is not merely or mainly that these expressions exaggerate the power of the Crown. For such conventional exaggeration a reader could make allowance, as easily as we do for ceremonious terms of respect or of social courtesy. The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the Queen and of the Government. No one, indeed, but a child, fancies

¹ Blackstone, *Commentaries*, i. p. 266.

that the Queen sits crowned on her throne at Westminster, and in her own person administers justice to her subjects. But the idea entertained by many educated men that an English King or Queen reigns without taking any part in the government of the country, is not less far from the truth than the notion that Queen Victoria ever exercises judicial powers in what are called her Courts. The oddity of the thing is that to most Englishmen the extent of the authority actually exercised by the Crown, and the same remark applies (in a great measure) to the authority exercised by the Prime Minister, and other high officials, is a matter of conjecture. We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the facts of constitutional government, and the more or less artificial phraseology, under which they are concealed. Thus to say that the Queen appoints the Ministry is untrue; it is also, of course, untrue to say that she creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the Government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the government are concealed under the fictitious ascription to the sovereign of political omnipotence, and the reader of, say the first

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I.

Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression.

II. Historian's view of constitution. Its antiquarianism.

Let us turn from the formalism of lawyers to the truthfulness of our constitutional historians.

Here a student or professor troubled about the nature of constitutional law finds himself surrounded by a crowd of eminent instructors. He may avail himself of the impartiality of Hallam: he may dive into the exhaustless erudition of the Bishop of Chester: he will discover infinite parliamentary experience in the pages of Sir Thomas May, and vigorous common sense, combined with polemical research, in Mr. Freeman's *Growth of the English Constitution*. Let us take this book as an excellent type of historical constitutionalism. The *Growth of the English Constitution* is known to everyone. Of its recognised merits, of its clearness, of its accuracy, of its force, it were useless and impertinent to say much to an audience who know, or ought to know, every line of the book from beginning to end. One point, however, deserves especial notice. Mr. Freeman's highest merit is his unrivalled faculty for bringing every matter under discussion to a clear issue. He challenges his readers to assent or deny. If you deny you must show good cause for your denial, and hence may learn fully as much from rational disagreement from our author as from unhesitating assent to his views. Take, then, the *Growth of the English Constitution* as a first-rate specimen of the mode in which an historian looks at

the constitution. What is it that a lawyer, whose object is to acquire the knowledge of law, will learn from its pages? A few citations from the ample and excellent head notes to the first two chapters of the work answer the enquiry.

They run thus:—

The Landesgemeinden of Uri and Appenzell; their bearing on English Constitutional History; political elements common to the whole Teutonic race; monarchic, aristocratic, and democratic elements to be found from the beginning; the three classes of men, the noble, the common freeman, and the slave; universal prevalence of slavery; the Teutonic institutions common to the whole Aryan family; witness of Homer; description of the German Assemblies by Tacitus; continuity of English institutions; English nationality assumed; Teutonic institutions brought into Britain by the English conquerors; effects of the settlement on the conquerors; probable increase of slavery; Earls and Churls; growth of the kingly power; nature of kingship; special sanctity of the King; immemorial distinction between Kings and Ealdormen Gradual growth of the English constitution; new laws seldom called for; importance of precedent; return to early principles in modern legislation; shrinking up of the ancient national Assemblies; constitution of the Witenagemót; the Witenagemót continued in the House of Lords; Gemóts after the Norman Conquest; the King's right of summons; Life Peerages; origin of the House of Commons; comparison of English and French national Assem-

Lecture
I.
—
blies; of English and French history generally; course of events influenced by particular men; Simon of Montfort . . . Edward the First; the constitution finally completed under him; nature of later changes; difference between English and continental legislatures.

All this is interesting, erudite, full of historical importance, and thoroughly in its place in a book concerned solely with the "growth" of the constitution; but as regards English law, as regards the law of the constitution, the *Landesgemeinden* of Uri, the witness of Homer, the ealdormen, the constitution of the Witenagemót, this and a lot more of fascinating matter are mere antiquarianism. Let no one suppose that to say this is to deny the relation between history and law. It were far better, as things now stand, to be charged with heresy, or even to be found guilty of petty larceny, than to fall under the suspicion of lacking historical-mindedness, or of questioning the universal validity of the historical method. What one may assert without incurring the risk of such crushing imputations is, that the kind of constitutional history which consists in researches into the antiquities of English institutions, has no direct bearing on the rules of constitutional law in the sense in which these rules can become the subject of legal comment. Let us eagerly learn all that is known, and still more all that is not known, about the Witenagemót. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law was yesterday, still less what it was centuries

ago, or what it ought to be to-morrow, but to state and explain what are the principles of law actually existing in England during the present year of grace 1886, 49 & 50 Victoria. For this purpose it boots nothing to know the nature of the Landsgemeinden of Uri, or to understand, if it be understandable, the constitution of the Witenagemót. All this is for a lawyer's purposes simple antiquarianism. It throws as much light on the constitution of the United States as upon the constitution of England, that is, it throws from a legal point of view no light upon either one or the other.

Lecture
I.

The name of the United States serves well to remind us of the true relation between constitutional historians and legal constitutionalists. They are each concerned with the constitution, but from a different aspect. An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with the question of "origins." He is only indirectly concerned in ascertaining what are the rules of the constitution in the year 1886. To a lawyer, on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence. This is absolutely clear if we compare the position of an American historian with the position of an American jurist. The historian of the American Union would not commence his researches at the year 1789; he would have a good deal to say about Colonial history and about the institutions of

Contrast
between
legal and
historical
view of con-
stitution.

Lecture
I.

England ; he might, for aught I know, find himself impelled to go back to the Witenagemót ; he would, one may suspect, pause in his researches considerably short of Uri. A lawyer lecturing on the constitution of the United States would, on the other hand, necessarily start from the constitution itself. But he would soon see that the articles of the constitution required a knowledge of the Articles of Confederation, that the opinions of Washington, of Hamilton, and generally of the "Fathers," as one sometimes hears them called in America, threw light on the meaning of various constitutional articles, and further, that the meaning of the constitution could not be adequately understood by anyone who did not take into account the situation of the colonies before the separation from England and the rules of common law, as well as the general conceptions of law and justice inherited by English colonists from their English forefathers. As it is with the American lawyer compared with the American historian so it is with the English lawyer, as compared with the English historian. Hence, even where lawyers are concerned, as they frequently must be, with the development of our institutions, arises a further difference between the historical and the legal view of the constitution. Historians in their devotion to the earliest phases of ascertainable history are infected with a love which, in the eyes of a lawyer, appears inordinate, for the germs of our institutions, and seem to care little about their later developments. Mr. Freeman gives but one third of

his book to anything as modern as the days of the Stuarts. The period of nearly two centuries which has elapsed since what used to be called the "Glorious Revolution," filled as it is with change and with growth, seems hardly to attract the attention of a writer whom lack, not of knowledge, but of will alone prevents from sketching out the annals of our modern constitution. A lawyer must look at the matter differently. It is from the later annals of England he derives most help in the study of existing law. What we might have got from Dr. Stubbs, had he not surrendered to Chester gifts which we hoped were dedicated to Oxford alone, is now left to conjecture. But things being as they are, the historian who most nearly meets the wants of lawyers is Mr. Gardiner. The struggles of the seventeenth century, the conflict between James and Coke, Bacon's theory of the prerogative, Charles' effort to substitute the personal will of Charles Stuart for the legal will of the King of England, are all matters which touch not remotely upon the problems of actual law. A knowledge of these things guards us, at any rate, from the illusion, for illusion it must be termed, that modern constitutional freedom has been established by an astounding method of retrogressive progress; that every step towards civilization has been a step backwards towards the simple wisdom of our uncultured ancestors. The assumption which underlies this view, namely, that there existed among our Saxon forefathers a more or less perfect polity, conceals the truth both of law and of history. To ask how a

Lecture

I.

mass of legal subtleties “would have looked
 “in the eyes of a man who had borne his part
 “in the elections of Eadward and of Harold, and
 “who had raised his voice and clashed his arms in
 “the great Assembly which restored Godwine to
 “his lands¹” is to put an enquiry which involves
 an untenable assumption; it is like asking what
 a Cherokee Indian would have thought of the
 claim of George the Third to separate taxation from
 representation. In each case the question implies
 that the simplicity of a savage enables him to solve
 with fairness a problem of which he cannot under-
 stand the terms. Civilization may rise above, but
 barbarism sinks below the level of legal fictions, and
 our respectable Saxon ancestors were, as compared,
 not with ourselves only, but with men so like our-
 selves as Coke and Hale, respectable barbarians.
 The supposition, moreover, that the cunning of
 lawyers has by a mass of legal fictions corrupted the
 fair simplicity of our original constitution, underrates
 the statesmanship of lawyers as much as it overrates
 the merits of early society. The fictions of the Courts
 have in the hands of lawyers such as Coke served
 the cause both of justice and of freedom, and served
 it when it could have been defended by no other
 weapons. For there are social conditions under which
 legal fictions or subtleties afford the sole means of
 establishing that rule of equal and settled law which
 is the true basis of English civilization. Nothing
 can be more pedantic, nothing more artificial, nothing

¹ See Freeman, *Growth of the English Constitution*, pp. 130, 131.

more unhistorical, than the reasoning by which Coke induced or compelled James to forego the attempt to withdraw cases from the Courts for his Majesty's personal determination¹. But no achievement of sound argument, no stroke of enlightened statesmanship, ever established a rule more essential to the very existence of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief Justice. Oddly enough the notion of an ideal constitution corrupted by the technicalities of lawyers is at bottom a delusion of legal imagination. The idea of retrogressive progress is merely one form of the appeal to precedent. This appeal has made its appearance at every crisis in the history of England, and indeed no one has stated so forcibly as my friend Mr. Freeman himself the peculiarity of all English efforts to extend the liberties of the country, namely, that these attempts at innovation have always assumed the form of an appeal to pre-existing rights. But the appeal to precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation; and a fiction is none the less a fiction because it has emerged from the Courts into the field of politics or of history. Here, then, the astuteness of lawyers has imposed upon the simplicity of historians. Formalism and antiquarianism have, so to speak, joined hands; they have united to mislead students in search for the law of the constitution.

¹ See 12 Rep. 64; Hearn, *Government of England*, pp. 70-74.

Lecture Let us turn now to the political theorists.

I.

III. View
of political
theorists.
Its defect
that it
deals solely
with con-
ventions of
constitu-
tion.

No better types of such thinkers can be taken than Bagehot and Professor Hearn. No author of modern times (it may be confidently asserted) has done so much to elucidate the intricate workings of English government as Bagehot. His *English Constitution* is so full of brightness, originality, and wit, that few students notice how full it is also of knowledge, of wisdom, and of insight. The slight touches, for example, by which Bagehot paints the reality of Cabinet government, are so amusing as to make a reader forget that Bagehot was the first author who explained in accordance with actual fact the true nature of the Cabinet and its real relation to Crown and to Parliament. He is, in short, one of those rare teachers who have explained intricate matters with such complete clearness, as to make the public forget that what is now so clear ever needed explanation. Professor Hearn may perhaps be counted an anticipator of Bagehot. In any case he too has approached English institutions from a new point of view, and has looked at them in a fresh light; he would be universally recognised among us as one of the most distinguished and ingenious exponents now living of the mysteries of the English constitution, had it not been for the fact that he made his fame as a professor, not in any of the seats of learning in 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 enquiries raised and solved by writers whom, as being occupied with the conventional understandings of the constitution, we may term conventionalists. These enquiries are, many of them, great and weighty; but they are not enquiries 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 Queen'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.

Lecture
I.

And conventional view does not explain how conventions enforced.

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 greatly needs explanation. They give no satisfactory answer to the enquiry how it happens that the understandings of politics are sometimes at least obeyed as rigorously as the commands of law¹. To refer to public opinion, and to considerations of expediency is to give 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 law, and that no system of conventionalism will explain the whole nature of constitutional law, if indeed "constitutional law" be in strictness law at all.

Is constitutional law really "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 De

¹ See further on this point, Lecture VIII.

Tocqueville's, "the English constitution has no real existence" (*elle n'existe point*¹), contains the truth of the whole matter? In this case lawyers would gladly surrender a domain to which they can establish no valid title. The one-half of it should, as belonging to history, go over to our historical professors; on this transfer of territory being carried out, I might perhaps suggest to my friends the professors of history, the advisability of conferring together and carefully reconsidering the doctrine that the constitution was "finally completed" in the reign of Edward the First; it is at least worth argument whether, when the foundations of a house are just laid, the house can or cannot be said to be finally completed. The other half should, as belonging to conventions which illustrate the growth of law, be transferred either to my friend the Professor of Jurisprudence, because it is his vocation to deal with the oddities or the outlying portions of legal science, or to my friend the Professor of International Law, because he being a teacher of law which is not law, and being accustomed to expound those rules of public ethics, which are miscalled international law, will find himself at home in expounding political ethics which, on the hypothesis under consideration, are miscalled constitutional law.

Before, however, admitting the truth of the supposition that "constitutional law" is in no sense law at all, it will be well to examine a little further into the precise meaning which we attach to the term con-

¹ De Tocqueville, *Œuvres Complètes*, i. 166, 167.

Lecture stitutional law, and then consider how far it is a fit
I. subject for legal exposition.

It consists
of two
different
kinds of
rules.

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state¹. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election. These rules also deal with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the state extends and settle who are to be deemed subjects or citizens. Observe that I have throughout used the word "rules," not "laws." This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

(i.) Rules
which are
true laws
—law of
the con-
stitution.

The one set of rules are in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims

¹ Compare Holland, *Jurisprudence*, pp. 277, 278.

known as the Common Law) are enforced by the Courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively, "the law of the constitution."

The other set of rules consist of conventions, understandings, habits, or practices which they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.

Lecture
I.

(ii.) Rules which are not laws—conventions of the constitution.

To put the same thing in a somewhat different shape, "constitutional law," as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, which I have called the "law of the constitution," is a body of undoubted law; the other element, which I have called the "conventions of the constitution," consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the constitution, are not in strictness laws at all. The contrast between the law of the constitution and the conventions of the constitution may be most easily seen from examples.

To the law of the constitution belong the following rules.

Examples of rules belonging to law of constitution.

"The King can do no wrong." This maxim, as

Lecture

I.

now interpreted by the Courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him; if (to give an absurd example) the Queen were herself to shoot Mr. Gladstone through the head, no Court in England could take cognizance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law; this principle in both its applications is (be it noted) a law and a law of the constitution, but it is not a written law. "There is no power in the Crown to dispense with the obligation to obey a law;" this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the constitution and a written law. "Some person is legally responsible for every act done by the Crown." This responsibility of Ministers appears in foreign countries as a formal part of the constitution; in England it results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong; secondly, the refusal of the Courts to recognise any act as done by the Crown, which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister or the counter-signature or something equivalent to the counter-signature of a Minister; thirdly, the principle that the Minister who affixes a particular seal, or countersigns his signature, is responsible for the act which he, so to speak,

endorses¹; this again is part of the constitution and a law, but it is not a written law. So again the right to personal liberty, the right of public meeting, and many other rights, are part of the law of the constitution, though most of these rights are consequences of the more general law or principle that no man can be punished except for direct breaches of law (i.e. crimes) proved in the way provided by law (i.e. before the Courts of the realm).

To the conventions of the constitution belong the following maxims.

“The King must assent to, or (as it is inaccurately expressed) cannot ‘veto’ any bill passed by the two Houses of Parliament;”—“the House of Lords does not originate any money bill;”—“when the House of Lords acts as a Court of Appeal, no peer who is not a law lord takes part in the decisions of the House;”—“Ministers resign office when they have ceased to command the confidence of the House of Commons;”—“a bill must be read a certain number of times before passing through the House of Commons.” These maxims are distinguished from each other by many differences; under a new or written constitution some of them probably would and some of them would not take the form of actual laws. Under the English constitution they have one point in common, they are none of them “laws” in the true sense of that word, for if any or all of them were broken, no court would take notice of their violation.

It is to be regretted that these maxims must be

¹ Compare Hearn, *Government of England*, pp. 90-112.

Lecture I. called "conventional," for the word suggests a notion of insignificance or unreality. This, however, is the last idea which any teacher would wish to convey to his hearers. Of constitutional conventions or practices some are as important as any laws, though some may be trivial, as may also be the case with a genuine law. My object, however, is to contrast, not shams with realities, but the legal element with the conventional element of so-called "constitutional law."

Distinction between laws and conventions not the same as difference between written and unwritten law. This distinction differs essentially, it should be noted, from the distinction between "written law" (or statute law) and "unwritten law" (or common law). There are laws of the constitution, as the Bill of Rights, the Act of Settlement, the Habeas Corpus Acts, which are "written law," found in the statute-book, in other words, statutory enactments. There are other most important laws of the constitution (several of which have already been mentioned) which are "unwritten" laws, that is, not statutory enactments. Some further of the laws of the constitution, such, for example, as the law regulating the descent of the Crown, which were at one time unwritten or common law, have now become written or statute law. The conventions of the constitution, on the other hand, cannot be recorded in the statute-book, though they may be formally reduced to writing. Thus the whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules. The distinction, in short, between written and un-

written law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and the conventions of the constitution. This latter is the distinction on which we should fix our whole attention, for it is of vital importance, and elucidates the whole subject of constitutional law. It is further a difference which may exist in countries which have a written or statutory constitution. In the United States the legal powers of the President, the Senate, the mode of electing the President, and the like, are, as far as the law is concerned, regulated wholly by the law of the constitution. But side by side with the law have grown up certain stringent conventional rules, which, though they would not be noticed by any Court, have in practice nearly the force of law. No President has ever been re-elected more than once: the popular approval of this conventional limit (of which the constitution knows nothing) on a President's re-eligibility proved a fatal bar to General Grant's third candidature. Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President; the chief officer, in short, of the Republic was, according to the law, to be appointed under a system of double election. This intention has failed; the "electors" have become a mere means of voting for a particular candidate; they are no more than so many ballots cast for the Republican or the Democratic nominee.

Lecture

I.

The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians. Public difficulties, not to say dangers, might have been averted if, in the contest between Mr. Hayes and Mr. Tilden, a few Republican electors had felt themselves at liberty to vote for the Democratic candidate. Not a single man among them changed his side. The power of an elector to elect is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses by the same force in England. Under a written, therefore, as under an unwritten constitution, we find in full existence the distinction between the law and the conventions of the constitution.

Constitutional law as subject of legal study means solely law of constitution.

Upon this difference I have insisted at possibly needless length, because it lies at the very root of the matter under discussion. Once grasp the ambiguity latent in the expression "constitutional law," and everything connected with the subject falls so completely into its right place that a lawyer, called upon to teach or to study constitutional law as a branch of the law of England, can hardly fail to see clearly the character and scope of his subject. With conventions or understandings he has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may

more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced off against the dicta or practice of Beaconsfield and Gladstone. The subject, however, is one not of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all he is so only in so far as he may be called upon to show what is the connection (if any there be) between the conventions of the constitution and the law of the constitution. This the true constitutional law is his only real concern. His proper function is to show what are the legal rules (i.e. rules recognised by the Courts) which are to be found in the several parts of the constitution. Of such rules or laws he will easily discover more than enough. The rules determining the legal position of the Crown, the legal rights of the Crown's ministers, the constitution of the House of Lords, the constitution of the House of Commons, the laws which govern the established Church, the laws which determine the position of the non-established Churches, the laws which regulate the army,—these and a hundred other laws form part of the law of the constitution, and are as truly part of the law

Lecture of the land, as the articles of the Constitution of the
 I. United States form part of the law of the Union.

Law of
 constitu-
 tion can be
 expounded
 like any
 other
 branch of
 English
 law.

The duty, in short, of an English Professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection. He ought to expound the unwritten or partly unwritten constitution of England, in the same manner in which Story and Kent have expounded the written law of the American constitution. The task has I admit its special perplexities, but the difficulties which beset the topic are the same in kind, though not in degree, as those which are to be found in every branch of the law of England. You have to deal partly with statute law, partly with judge-made law; you have to rely on Parliamentary enactments and also on judicial decisions, on authoritative dicta, and in many cases on mere inferences drawn from judicial doctrines; it is difficult to discriminate between prevalent custom and acknowledged law. This is true of the endeavour to expound the law of the Constitution; all this is true also in a measure of any attempt to explain our law of contract, our law of torts, or our law of real property.

Moreover, teachers of law enjoy at this moment the aid of one invaluable though unrecognised coadjutor. Mr. Charles Bradlaugh is doing more for the law outside the House of Commons, than he could by any possibility do for it when (if ever) he is admitted to a quiet seat in the House. He has rediscovered the law of maintenance; he has eluci-

dated the law of blasphemy; he has explained the character of a penal action; he has enabled us to define with precision the relation between the House of Commons and the Courts of the land; he has gone far to make intelligible the legal character and solemnity of an oath. Should he live and flourish, or perhaps one should rather say, should he live and not flourish, there is no saying what secrets of the constitution he may not unveil to the public gaze. His failure or success are from this point of view at least equally advantageous to the nation, and will, one may reflect with satisfaction, equally ensure to him his appropriate reward. He will obtain, or rather he has obtained, legal immortality. While *Calvin's Case*, while *Bates' Case*, while the *Case of Ship-money*, while the *Bankers' Case* are held in remembrance, Mr. Bradlaugh will survive in *Bradlaugh v. Gosset* side by side with *Stockdale v. Hansard*. His struggles may, however, indirectly propagate one serious error. Unintelligent students may fancy that the law of the constitution is to be gathered only from notorious judgments which embalm the results of grand constitutional or political conflicts. This is not so. Scores of unnoticed cases, such as the *Parlement Belge*¹, or the *Thomas v. Queen*², touch upon or decide principles of constitutional law. Indeed every action against a constable or collector of revenue, enforces the greatest of all such principles, namely that obedience to administrative orders is no defence to an

¹ 4 P. D. 129; 5 P. D. 197.² L. R., 10 Q. B. 31.

Lecture
I. action or prosecution for acts done in excess of legal authority. The true law of the constitution is in short to be gathered from the same sources whence we collect the law of England in respect to any other topic, and forms as interesting and as distinct, though not as well explored a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike therefore suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been reduced to order. This inconvenience has one great compensation. We are compelled to search for the guidance of first principles, and as we look for a clue through the mazes of a perplexed topic, three such guiding principles gradually become apparent: They are, *first*, the legislative sovereignty of Parliament¹; *secondly*, the universal rule or supremacy throughout the constitution of ordinary law², and *thirdly* (though here I admit we tread on more doubtful and speculative ground), the dependence in the last resort of the conventions upon the law of the constitution³. To examine, to elucidate, to test these three principles forms, at any rate, (whatever be the result of the investigation) a suitable introduction to the study of the law of the constitution.

¹ See Lectures II. to IV.

² See Lectures V. to VII.

³ See Lecture VIII.

LECTURE II.

THE SOVEREIGNTY OF PARLIAMENT.

THE sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions. Lecture
II.

My aim in this lecture is, in the first place to explain the nature of Parliamentary sovereignty and to show that its existence is a legal fact, fully recognised by the law of England; in the next place to prove that none of the alleged legal limitations on the sovereignty of Parliament have any existence; and, lastly, to state and meet certain speculative difficulties which hinder the ready admission of the doctrine that Parliament is, under the British constitution, an absolutely sovereign legislature. Aim of
lecture.

A. *Nature of Parliamentary Sovereignty.*—Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the “King in Parliament,” and constitute Parliament¹. Nature
of Parlia-
mentary
Sove-
reignty.

¹ Conf. Blackstone, *Commentaries*, i. p. 153.

Lecture
II.

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, 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. A law may, for our present purpose, be defined as "any rule which will be enforced by the Courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described; any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated; there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament. Some apparent exceptions to this rule no doubt suggest themselves. But these apparent exceptions, as where, for example, the Judges of the High Court of Justice make rules of court repealing Parliamentary enactments, are resolvable into cases in which Parliament either directly or indirectly sanctions subordinate legislation. This is not the place for entering into any details as to the nature of judicial legislation¹; the matter is mentioned here only in order to

¹ The reader who wishes for fuller information on the nature of

remove an obvious difficulty which might present itself to some students. It will be necessary in the course of these lectures to say a good deal more about Parliamentary sovereignty, but for the present the above rough description of its nature may suffice. The important thing is to make clear that the doctrine of Parliamentary sovereignty is both on its positive and on its negative side fully recognised by the law of England.

Lecture
II.

I. *Unlimited legislative authority of Parliament.*—The classical passage on this subject is the following extract from Blackstone's Commentaries:—

Unlimited
legislative
authority
of Par-
liament.

“The power and jurisdiction of Parliament, says Sir Edward Coke¹, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, ‘*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*’ It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.

judge-made law will find what he wants in Prof. Pollock's *Essays on Jurisprudence and Ethics*, p. 237.

¹ 4 Inst. 36.

Lecture
II.

“ All mischiefs and grievances, operations and reme-
 “ dies, that transcend the ordinary course of the laws,
 “ are within the reach of this extraordinary tribunal.
 “ It can regulate or new-model the succession to the
 “ crown ; as was done in the reign of Henry VIII. and
 “ William III. It can alter the established religion
 “ of the land ; as was done in a variety of instances,
 “ in the reigns of king Henry VIII. and his three
 “ children. It can change and create afresh even
 “ the constitution of the kingdom and of parliaments
 “ themselves ; as was done by the act of union, and
 “ the several statutes for triennial and septennial
 “ elections. It can, in short, do everything that is
 “ not naturally impossible ; and therefore some have
 “ not scrupled to call it's power, by a figure rather
 “ too bold, the omnipotence of Parliament. True it
 “ is, that what the Parliament doth, no authority
 “ upon earth can undo. So that it is a matter most
 “ essential to the liberties of this kingdom, that such
 “ members be delegated to this important trust, as
 “ are most eminent for their probity, their fortitude,
 “ and their knowledge ; for it was a known apoph-
 “ thegm of the great lord treasurer Burleigh, ‘ that
 “ England could never be ruined but by a Parlia-
 “ ment : ’ and, as Sir Matthew Hale observes, this
 “ being the highest and greatest court, over which
 “ none other can have jurisdiction in the kingdom, if
 “ by any means a misgovernment should any way
 “ fall upon it, the subjects of this kingdom are left
 “ without all manner of remedy. To the same
 “ purpose the president Montesquieu, though I

“trust too hastily, presages; that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will perish whenever the legislative power shall become more corrupt than the executive¹.”

Lecture
II.

De Lolme has summed up the matter in a grotesque expression which has become almost proverbial. “It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.”

This supreme legislative authority of Parliament is shown historically in a large number of instances.

Historical
examples of
Parliamentary
sovereignty.
Act of Set-
tlement.

The descent of the Crown was varied and finally fixed under the Act of Settlement, 12 & 13 Will. III. c. 2; the Queen occupies the throne under a Parliamentary title; her claim to reign depends upon and is the result of a statute. This is a proposition which, at the present day, no one is inclined either to maintain or to dispute; but a glance at the Statute book shows that not two hundred years ago Parliament had to insist strenuously upon the principle of its own lawful supremacy. The first section of 6 Anne c. 7, enacts (*inter alia*), “That if any person or persons shall maliciously, advisedly, and directly by writing or printing maintain and affirm that our sovereign lady the Queen that now is, is not the lawful and rightful Queen of these realms, or that the pretended Prince of Wales, who now styles himself King of Great Britain, or King of England, by

¹ Blackstone, *Commentaries*, i. pp. 160, 161.

Lecture
II.

“ the name of James the Third, or King of Scotland,
 “ by the name of James the Eighth, hath any right or
 “ title to the Crown of these realms, or that any other
 “ person or persons hath or have any right or title to
 “ the same, otherwise than according to an Act of
 “ Parliament made in England in the first year of the
 “ reign of their late Majesties King William and Queen
 “ Mary, of ever blessed and glorious memory, intituled,
 “ An Act declaring the rights and liberties of the sub-
 “ ject, and settling the succession of the Crown; and
 “ one other Act made in England in the twelfth year
 “ of the reign of his said late Majesty King William
 “ the Third, intituled, An Act for the further limita-
 “ tion of the Crown, and better securing the rights
 “ and liberties of the subject; and the Acts lately
 “ made in England and Scotland mutually for the
 “ union of the two kingdoms; or that the Kings or
 “ Queens of this realm, with and by the authority of
 “ Parliament, are not able to make laws and statutes
 “ of sufficient force and validity to limit and bind the
 “ Crown, and the descent, limitation, inheritance, and
 “ government thereof; every such person or persons
 “ shall be guilty of high treason, and being thereof
 “ lawfully convicted, shall be adjudged traitors, and
 “ shall suffer pains of death, and all losses and for-
 “ feitures as in cases of high treason¹.”

Acts of
Union.

The Acts of Union (to one of which Blackstone calls attention) afford a remarkable example of the exertion of Parliamentary authority. But there is no single statute which is more significant either

¹ 6 Anne, c. 7, sec. 1.

as to the theory or as to the practical working of the constitution than the Septennial Act¹. The Lecture
II. circumstances of its enactment and the nature of the Act itself merit therefore special attention.

In 1716 the duration of Parliament was under an Septennial
Act. Act of 1694 limited to three years, and a general election could not be deferred beyond 1717. The King and the Ministry were convinced (and with reason) that an appeal to the electors, many of whom were Jacobites, might be perilous not only to the Ministry but to the tranquillity of the state. The Parliament then sitting therefore, was induced by the Ministry to pass the Septennial Act by which the legal duration of Parliament was extended from three to seven years, and the powers of the then existing House of Commons were in effect prolonged for four years beyond the time for which the House was elected. This was a much stronger thing than passing say an Act which enabled future Parliaments to continue in existence without the necessity for a general election during seven instead of during three years. The statute was justified by considerations of statesmanship and expediency. This justification of the Septennial Act must seem to every sensible man so ample that it is with some surprise that one reads in writers so fair and judicious as Hallam or Lord Stanhope attempts to minimise the importance of this supreme display of legislative authority. "Nothing," writes Hallam, "can be more extravagant than what is sometimes confidently pretended by

¹ 1 George I, st. 2, c. 38.

Lecture
II.

“ the ignorant, that the legislature exceeded its rights
 “ by this enactment; or, if that cannot legally be
 “ advanced, that it at least violated the trust of the
 “ people, and broke in upon the ancient constitution; ”
 and this remark he bases on the ground that “ the
 “ law for triennial Parliaments was of little more than
 “ twenty years’ continuance. It was an experiment
 “ which, as was argued, had proved unsuccessful; it
 “ was subject, like every other law, to be repealed
 “ entirely, or to be modified at discretion¹.”

“ We may,” says Lord Stanhope, “. . . cast aside
 “ the foolish idea that the Parliament overstepped its
 “ legitimate authority in prolonging its existence; an
 “ idea which was indeed urged by party-spirit at the
 “ time, and which may still sometimes pass current in
 “ harangues to heated multitudes, but which has
 “ been treated with utter contempt by the best con-
 “ stitutional writers².”

Constitu-
 tional im-
 portance of
 Septennial
 Act.

These remarks miss the real point of the attack on
 the Septennial Act and also conceal the constitutional
 importance of the statute. The thirty-one Peers
 who protested against the Bill because (among other
 grounds) “ it is agreed, that the House of Commons
 “ must be chosen by the people, and when so chosen,
 “ they are truly the representatives of the people,
 “ which they cannot be so properly said to be, when
 “ continued for a longer time than that for which they
 “ were chosen; for after that time they are chosen by
 “ the Parliament, and not the people, who are thereby

¹ Hallam, *Constitutional History of England*, iii. pp. 233, 234.

² Lord Mahon, *History of England*, i. p. 302.

“deprived of the only remedy which they have against those, who either do not understand, or through corruption, do wilfully betray the trust reposed in them; which remedy is, to choose better men in their places¹,” hit exactly the theoretical objection to it. The peculiarity of the Act was not that it changed the legal duration of Parliament or repealed the Triennial Act²; the mere passing of a Septennial Act in 1716 was not and would never have been thought to be anything more startling or open to graver censure than the passing of a Triennial Act in 1694. What was startling was that an existing Parliament of its own authority prolonged its own legal existence. Nor can the argument used by Priestley³ and in effect by the protesting Peers “that Septennial Parliaments were at first a direct usurpation of the rights of the people; for by the same authority that one Parliament prolonged their own power to seven years, they might have continued it to twice seven or like the Parliament of 1641 have made it perpetual,” be treated as a blunder grounded simply on the “ignorant assumption” that the Septennial Act prolonged the original duration of Parliament⁴. The contention of Priestley and others was in substance that members elected to serve for three years were constitutionally so far at least the delegates or agents of their constituents that they could not with-

¹ Thorold Rogers, *Protests of the Lords*, vol. i. p. 228.

² 6 Wm. & M. c. 2.

³ See *Priestley on Government* (1771), p. 20.

⁴ Hallam, *Constitutional History*, iii. p. 233.

Lecture
II.

out an inroad on the constitution extend their own authority beyond the period for which it was conferred upon them by their principals, i.e., the electors. There are countries and notably the United States, where an Act like the Septennial Act would be held legally invalid; no modern English Parliament would for the sake of keeping a government or party in office venture to pass say a Decennial Act and thus prolong its own duration; the contention therefore that Walpole and his followers in passing the Septennial Act violated (though it may be on valid grounds of statesmanship) the understandings of the constitution has on the face of it nothing absurd. Parliament made a legal though unprecedented use of its powers. To underrate this exertion of authority is to deprive the Septennial Act of its true constitutional importance. That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the State, and the Septennial Act is at once the result and the standing proof of such Parliamentary Sovereignty.

Interference of Parliament with private rights.

Hitherto we have looked at Parliament as legally omnipotent in regard to public rights. Let us now consider the position of Parliament in regard to those private rights which are in civilized states justly held specially secure or sacred. Coke (it should be noted) particularly chooses interference with private rights as specimens of Parliamentary authority.

“Yet some examples are desired. Daughters and Lecture
II.
 “heirs apparent of a man or woman, may by Act of
 “Parliament inherit during the life of the ancestor.

“It may adjudge an infant, or minor of full age.

“To attain a man of treason after his death.

“To naturalize a mere alien, and make him a
 “subject born. It may bastard a child that by law
 “is legitimate, viz., begotten by an adulterer, the
 “husband being within the four seas.

“To legitimate one that is illegitimate, and born
 “before marriage absolutely. And to legitimate *se-*
 “*cundum quid*, but not *simpliciter* ¹.”

Coke is judicious in his choice of instances. Interference with public rights is at bottom a less striking exhibition of absolute power than is the interference with the far more important rights of individuals; a ruler who might think nothing of overthrowing the constitution of his country, would in all probability hesitate a long time before he touched the property or interfered with the contracts of private persons. Parliament however habitually interferes for the public advantage with private rights. Indeed such interference has now (greatly to the benefit of the community) become so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the supremacy of Parliament. The statute-book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons. This is of course the case with

¹ Coke, *Fourth Institute*, p. 36.

Lecture every railway Act, but no one will realise the full
II. action, generally the very beneficial action of Parli-
 amentary sovereignty who does not look through a
 volume or two of what are called *Local and Private*
Acts. These Acts are just as much Acts of Parlia-
 ment as any statute of the realm. They deal with
 every kind of topic as with railways, harbours, docks,
 the settlement of private estates and the like. To
 these you should add Acts such as those which
 declare valid marriages which owing to some mistake
 of form or otherwise, have not been properly cele-
 brated, and Acts common enough at one time but
 now rarely passed for the divorce of married persons.

One further class of statutes deserve in this con-
 nection more notice than they have received, these
 are Acts of Indemnity.

Acts of In-
 demnity.

An Act of Indemnity is a statute, the object of
 which is to make legal transactions which when they
 took place were illegal, or to free individuals to whom
 the statute applies from liability for having broken
 the law; enactments of this kind were annually passed
 with almost unbroken regularity for more than a
 century (1727-1828) to free Dissenters from penalties,
 for having accepted municipal offices without duly
 qualifying themselves by taking the sacrament accord-
 ing to the rites of the Church of England. To the
 subject of Acts of Indemnity however I shall return
 in a later lecture¹. The point to be now noted is
 that such enactments being as it were the legalisation

¹ See Lecture VI, *post*.

of illegality are the highest exertion and crowning proof of sovereign power. Lecture
II.

So far of the sovereignty of Parliament from its positive side; let us now look at the same doctrine from its negative aspect.

II. *The absence of any competing legislative power.* No other
competing
legislative
authority.
—The King, each House of Parliament, the Constitutions, and the Law Courts, either have at one time claimed, or might appear to claim, independent legislative power. It will be found however on examination that the claim can in none of these cases be made good.

(i.) *The King.*—Legislative authority originally resided in the King in Council¹, and even after the commencement of Parliamentary legislation there existed side by side with it a system of royal legislation under the form of Ordinances², and (at a later period) of Proclamations. The
King.

These had much the force of law, and in the year 1539 the Act 31 Henry VIII. c. 8, formally empowered the Crown to legislate by means of proclamations. This statute is so short and so noteworthy that I quote it *in extenso*. “The King” it runs “for the time being, with the advice of his Council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as Statute of
Proclama-
tions.

¹ See Stubbs, *Constitutional History*, i. pp. 126–128, and ii. pp. 245–247.

² Stubbs, *Constitutional History*, ii. pp. 240–264.

Lecture
II.

“ though they were made by Act of Parliament ; but
 “ this shall not be prejudicial to any person’s in-
 “ heritance, offices, liberties, goods, chattels or life ;
 “ and whosoever shall willingly offend any article
 “ contained in the said proclamations, shall pay such
 “ forfeitures, or be so long imprisoned, as shall be
 “ expressed in the said proclamations ; and if any
 “ offending will depart the realm, to the intent he
 “ will not answer his said offence, he shall be adjudged
 “ a traitor ¹.”

This enactment marks the highest point of legal authority ever reached by the Crown, and probably because of its inconsistency with the whole tenor of English law was repealed in the reign of Edward the Sixth. It is curious to notice how revolutionary would have been the results of the statute had it remained in force. It must have been followed by two consequences. An English King would have become nearly as despotic as a French monarch. The statute would further have established a distinction between “ laws ” properly so-called as being made by the legislature and “ ordinances ” having the force of law, though not in strictness laws as being rather decrees of the executive power than Acts of the legislature. This distinction exists in one form or another in most continental states, and is not without great practical utility. In foreign countries the legislature generally confines itself to laying down general principles of legislation, and leaves them with great advantage to the public to be supplemented by

¹ 31 Henry VIII, cap. 8.

decrees or regulations which are the work of the executive. 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 mitigation 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 legislature¹. 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 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 au-

¹ Recent events, as for example the issue by the French Government of the decree secularising the Pantheon, have called attention to the considerable though subordinate legislative authority possessed by the President of the French Republic. See on the subject of these legislative powers, M. F. Bœuf, *Droit Administratif* (4^{me} ed.), p. 111.

Lecture
 II.

thority 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 only instances where, in modern times, proclamations or orders in council are of any effect are cases either where, at common law, a proclamation is the regular mode, not of legislation, but of announcing the executive will of the King, as when parliament is summoned by proclamation, or else where orders in council have authority given to them by Act of Parliament.

Houses of
 Parlia-
 ment.

(ii.) *Resolutions of either House of Parliament.*—The House of Commons at any rate, has from time to time appeared to claim for resolutions of the House, something like legal authority. That this pretension cannot be supported is certain, but there exists some difficulty in defining with precision the exact effect which the Courts concede to a resolution of either House.

Two points are, however, clearly established.

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

First. The resolution of neither House is a law. Lecture

II.

This is the substantial result of the case of *Stockdale v. Hansard*¹. The gist of the decision in that case is that a libellous document did not cease to be a libel because it was published by the order of the House of Commons, or because the House subsequently resolved that the power of publishing the report which contained it, was an essential incident to the constitutional functions of Parliament.

Resolutions of either House.

Secondly. Each House of Parliament has complete control over its own proceedings, and also has the right to protect itself by committing for contempt any person who commits any injury against, or offers any affront to the House, and no Court of law will enquire into the mode in which either House exercises the powers which it by law possesses².

The practical difficulty lies in the reconciliation of the first with the second proposition, and is best met by following out the analogy suggested by Mr. Justice Stephen, between a resolution of the House of Commons, and the decision of a Court from which there is no appeal.

“I do not say,” runs his judgment, “that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal con-

¹ 9 Ad. & E. 1.

² See *Stockdale v. Hansard*, 9 A. & E. 1; *Case of Sheriff of Middlesex*, 11 A. & E. 273; *Burdett v. Abbott*, 14 East, 111, 131; *Bradlaugh v. Gossett*, 12 Q. B. D. 272.

Lecture
II.

cerns, practically invests it with a judicial character
 when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly, and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy, does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand, 'Where there is no legal remedy, there is no legal wrong¹.'

Law as to
 effect of
 resolutions
 of either
 House.

The law therefore stands thus. Either House of

¹ *Brallaugh v. Gossett*, 12 Q. B. D. 271. 285.

Parliament has the fullest power over its own proceedings, and can, like a Court, commit for contempt any person who, in the judgment of the House, is guilty of insult or affront to the House. The *Case of the Sheriff of Middlesex*¹ carries this right to the very furthest point. The Sheriff was imprisoned for contempt under a warrant issued by the Speaker. Everyone knew that the alleged contempt was nothing else than obedience by the Sheriff to the judgment of the Court of Queen's Bench in the case of *Stockdale v. Hansard*, and that the Sheriff was imprisoned by the House because under such judgment he took the goods of the defendant Hansard in execution. Yet when the Sheriff was brought by *Habeas Corpus* before the Queen's Bench the Judges held that they could not enquire what were the contempts for which the Sheriff was committed by the House. The Courts, in other words, do not claim any right to protect their own officials from being imprisoned by the House of Commons for alleged contempt of the House, even though the so-called contempt is nothing else than an act of obedience to the Courts. A declaration or resolution of either House, on the other hand, is not in any sense a law. Suppose that X were by order of the House of Commons to assault A out of the House, irrespective of any act done in the House, and not under a warrant committing A for contempt; or suppose that X were to commit some offence by which he incurred a fine under some Act of Parlia-

¹ 11 A. & E. 273.

Lecture
II.

ment, and that such fine were recoverable by *A* as a common informer. No resolution of the House of Commons ordering or approving of *X*'s act could be pleaded by *X* as a legal defence to proceedings, either civil or criminal, against him¹. If proof of this were wanted it would be afforded by the Act 3 & 4 Vict. c. 9. The object of this Act, passed in consequence of the controversy connected with the case of *Stockdale v. Hansard*, is to give summary protection to persons employed in the publication of Parliamentary papers, which are, it should be noted, papers published by the order of one or other of the Houses of Parliament. The necessity for such an Act is the clearest proof that an order of the House is not of itself a legal defence for the publication of matters which would otherwise be libellous. The House of Commons "by invoking "the authority of the whole Legislature to give "validity to the plea they had vainly set up in the "action [of *Stockdale v. Hansard*] and by not appealing against the judgment of the Court of "Queen's Bench, had, in effect, admitted the correctness of that judgment and affirmed the great "principle on which it was founded, viz., that no "single branch of the Legislature can, by any assertion of its alleged privileges, alter, suspend, or supersede any known law of the land, or bar the resort "of any Englishman to any remedy, or his exercise "and enjoyment of any right, by that law established²."

¹ Conf. *Attorney-General v. Bradlaugh*, 14 Q. B. D. (C. A.) 667.

² Arnould, *Memoir of Lord Denman*, ii. p. 70.

(iii.) *The Vote of the Parliamentary Electors.*— **Lecture****II.**

Expressions are constantly used in the course of political discussions which imply that the body of persons entitled to choose members of Parliament possess under the English constitution some kind of legislative authority. Such language is, as we shall see, not without a real meaning¹; it points to the important consideration that the wishes of the constituencies influence the action of Parliament. But any expressions which attribute to Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law of the position of an elector. The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament. No Court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone. This is not a necessary incident of representative government. In Switzerland no change can be introduced in the constitution² which has not been submitted for approval or disapproval to all male citizens who have attained their majority; and even an ordinary law which does not involve a change in the constitution may, after it has been passed by the Federal Assembly, be sub-

¹ See p. 64, *post*.

² See *Constitution Fédérale de la Confédération Suisse*, Arts.

Lecture mitted on the demand of a certain number of citizens
II. to a popular vote, and is annulled if a vote is not
 obtained in its favour¹.

The
 Courts.

(iv.) *The Law Courts.*—A large proportion of English law is in reality made by the judges, and whoever wishes to understand the nature and the extent of judicial legislation in England, should read Professor Pollock's admirable essay on the *Science of Case Law*². The topic is too wide a one to be considered at any length in these lectures. All that we need note is that the adhesion by our judges to precedent, that is their habit of deciding one case in accordance with the principle, or supposed principle, which governed a former case, leads inevitably to the gradual formation by the Courts of fixed rules for decision, which are in effect laws. This judicial legislation might appear, at first sight, inconsistent with the supremacy of Parliament. But this is not so. English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament.

Alleged li-
 mitations.

B. *Alleged legal limitations on the legislative sovereignty of Parliament.*—All that can be urged as to the speculative difficulties of placing any limits whatever

¹ See *Constitution Fédérale de la Confédération Suisse*, Art. 89.

² See Pollock, *Essays in Jurisprudence and Ethics*, p. 237.

on sovereignty has been admirably stated by Austin, and by Professor Holland¹. With these difficulties we have, at this moment, no concern. Nor is it necessary to examine whether it be or be not true, that there must necessarily be found in every state some person, or combination of persons, which, according to the constitution, whatever be its form, can legally change every law, and therefore constitutes the legally supreme power in the state. Our whole business is now to carry a step further the proof that, under the English constitution, Parliament does constitute such a supreme legislative authority or sovereign power as, according to Austin and other jurists, must exist in every civilized state, and for that purpose to examine into the validity of the various suggestions, which have from time to time been made, as to the possible limitations on Parliamentary authority, and to show that none of them are countenanced by English law.

Lecture
II.

The suggested limitations are three in number²:

First. Acts of Parliament, it has been asserted, Moral law.

¹ See Austin, *Jurisprudence*, i. pp. 270-274, and Holland, *Jurisprudence*, pp. 41-43, 276-279. The nature of sovereignty is also stated with brevity and clearness in Lewis, *Use and Abuse of Political Terms*, pp. 37-53.

² Another limitation has been suggested more or less distinctly by judges such as Coke (12 Rep. 76; and Hearn, *Government of England*, pp. 37-40, 48); an Act of Parliament cannot (it has been intimated) overrule the principles of the common law. This doctrine once had a real meaning (see Maine, *Early History of Institutions*, pp. 381-382), but it has never received systematic judicial sanction and is now obsolete: see Colonial Laws Act, 1865, 28 & 29 Vict. cap. 63.

Lecture
 II.

are invalid if they are opposed to the principles of morality or to the doctrines of international law. Parliament, it is in effect asserted, cannot make a law opposed to the dictates of private or public morality. Thus Blackstone lays down in so many words that the "law of nature being co-eval with mankind, and "dictated by God himself, is of course superior in "obligation to any other. It is binding over all "the globe, in all countries and at all times: no "human laws are of any validity if contrary to this, "and such of them as are valid derive all their "force and all their authority, mediately or immediately, from this original¹;" and expressions are sometimes used by modern judges which imply that the Courts might refuse to enforce statutes going beyond the proper limits (internationally speaking) of Parliamentary authority². But to words such as those of Blackstone, and to the *obiter dicta* of the Bench we must give a very qualified interpretation. There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rules of morality,

¹ Blackstone, *Commentaries*, i. p. 41; and see Hearn, *Government of England*, pp. 48, 49.

² See *Ex parte Blain*, 12 Ch. D. (C. A.) 522, 531, judgment of Cotton, L. J.

or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality. A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority. The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the Courts.

Lecture
II.

Secondly. Doctrines have at times¹ been maintained which went very near to denying the right of Parliament to touch the Prerogative.

Pre-
rogative.

In the time of the Stuarts² the doctrine was maintained, not only by the King, but by lawyers and statesmen who, like Bacon, favoured the increase of royal authority, that the Crown possessed under the name of the "prerogative" a reserve, so to speak, of wide and indefinite rights and powers, and that this prerogative or residue of sovereign power was superior to the ordinary law of the land. This doctrine combined with the deduction from it that the Crown could suspend the operation of statutes, or at any rate grant dispensation from obedience to them, certainly suggested the notion that the high powers of

¹ See Stubbs, *Constitutional History*, ii. pp. 239, 486, 513-515.

² Gardiner, *History*, iii. pp. 1-5; Hearn, *Government in England*, pp. 41-47: compare, as to Bacon's view of the prerogative, *Francis Bacon*, by Edwin A. Abbott, pp. 140, 260, 279.

Lecture
II.

the prerogative were to a certain extent beyond the reach of Parliamentary enactment. We need not, however, now enter into the political controversies of another age. All that need be noticed is that though certain powers—as, for example, the right of making treaties—are now left by law in the hands of the Crown, and are exercised in fact by the executive government, no modern lawyer would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of Parliament, or, what is the same thing, that the judges might legally treat as invalid a statute, say, regulating the mode in which treaties are to be made, or making the assent of the Houses of Parliament necessary to the validity of a treaty¹.

Preced-
ing Acts
of Parlia-
ment.

Thirdly. Language has occasionally been used in Acts of Parliament which implies that one Parliament can make laws which cannot be touched by any subsequent Parliament, and that therefore the legislative authority of an existing Parliament may be limited by the enactments of its predecessors.

The Acts
of Union.

That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Of statutes intended to arrest the possible course of future legislation, the most noteworthy are the Acts which embody the

¹ Compare the parliamentary practice in accordance with which the consent or commendation of the Crown is required to the introduction of bills touching the prerogative or the interests of the Crown. May, *Parliamentary Practice*, (8th ed.) 467-471.

treaties of Union with Ireland and Scotland. The legislators who passed these Acts assuredly intended to give to certain portions of them more than the ordinary effect of statutes. Yet the history of legislation in respect of these very Acts, affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body. Thus the Act of Union with Scotland enacts in effect that every professor of a Scotch University shall acknowledge and profess and subscribe the Confession of Faith as his profession of faith, and in substance enacts that this provision shall be a fundamental and essential condition of the treaty or union in all time coming¹. But this very provision has been in its main part repealed by 16 & 17 Vict. c. 89, s. 1, which relieves most professors in the Scotch universities from the necessity of subscribing the Confession of Faith. Nor is this by any means the only inroad made upon the terms of the Act of Union; from one point of view at any rate the Act 10 Anne, c. 12², restoring the exercise of lay patronage, was a direct infringement upon the Treaty of Union. The intended unchangeableness, and the real liability of these Acts or treaties to be changed by Parliament, comes out even more strikingly in the history of the Act of Union with Ireland. The fifth Article of that Act (39 & 40 Geo. III. c. 67) runs as follows:—"That it be the fifth Article of Union, that the Churches

¹ See 6 Anne, c. 11, art. 25.

² Compare Innes, *Law of Creeds in Scotland*, pp. 118-121.

Lecture “of England and Ireland as now by law established,
II. “be united into one Protestant episcopal Church, to
 “be called the United Church of England and Ire-
 “land; and that the doctrine, worship, discipline
 “and government of the said United Church shall be
 “and shall remain in full force for ever, as the same
 “are now by law established for the Church of
 “England; and that the continuance and preser-
 “vation of the said United Church, as the estab-
 “lished Church of England and Ireland, shall be
 “deemed and be taken to be an essential and
 “fundamental part of the Union.”

That the statesmen who drew and passed this Article meant to bind the action of future Parliaments is apparent from its language. That the attempt has failed of success is apparent to every one who knows the contents of the Irish Church Act, 1869.

Act limit-
 ing right
 of Parlia-
 ment to
 tax colo-
 nies.

One Act, indeed, of the British Parliament might, looked at in the light of history, claim a peculiar sanctity. It is certainly an enactment of which the terms, we may safely predict, will never be repealed and the spirit will never be violated. This Act is 18 Geo. III. c. 12, passed in 1778. It provides that Parliament “will not impose any duty, tax or
 “assessment whatever, payable in any of his Majesty’s
 “colonies, provinces and plantations in North America
 “or the West Indies; except only such duties as it
 “may be expedient to impose for the regulation of
 “commerce; the net produce of such duties to be
 “always paid and applied to and for the use of the

“colony, province or plantation, in which the same
 “shall be respectively levied, in such manner as other
 “duties collected by the authority of the respective
 “general courts, or general assemblies, of such colonies,
 “provinces, or plantations, are ordinarily paid and
 “applied¹.”

This language becomes the more impressive when contrasted with 6 Geo. III. c. 12, which, being passed in 1766 to repeal the Acts imposing the Stamp Duties, carefully avoids any surrender of Parliament's right to tax the colonies. There is no need to dwell on the course of events of which these two Acts are a statutory record. The point calling for attention is that though policy and prudence condemn the repeal of 18 Geo. III. c. 12, or the enactment of any law inconsistent with its spirit, there is under our constitution no legal difficulty in the way of repealing or overriding this Act. If Parliament were tomorrow to impose a tax, say on Victoria or on the Canadian Dominion, the statute imposing it would be a legally valid enactment, as stated in short by a very judicious writer, “it is certain that a Parliament
 “cannot so bind its successors by the terms of any
 “statute, as to limit the discretion of a future Par-
 “liament, and thereby disable the Legislature from
 “entire freedom of action at any future time
 “when it might be needful to invoke the interpo-
 “sition of Parliament to legislate for the public wel-
 “fare².”

¹ 18 George III, cap. 12, s. 1.

² Todd, *Parliamentary Government in the British Colonies*, p. 192.

Lecture
II.

Parliamentary sovereignty is therefore an undoubted legal fact.

It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation¹. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament².

No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts³.

This doctrine of the legislative supremacy of Parliament is the very key-stone of the law of the constitution. But it is, we must admit, a dogma which does not always find ready acceptance, and it is well worth while to note and examine the difficulties which impede the admission of its truth.

Difficulties
as to Parliamentary
sovereignty.

C. *Difficulties as to the doctrine of Parliamentary Sovereignty.*—The reasons why many persons find it hard to accept the doctrine of Parliamentary sovereignty are twofold.

Difficulty
from
Austin's
theory.

The dogma sounds like a mere application to the British constitution of Austin's theory of sovereignty, and yet intelligent students of Austin must have noticed that Austin's own conclusion as to the persons invested with sovereign power under

¹ See pp. 37-47, *ante*.

² See pp. 47-56, *ante*.

³ See pp. 56-63, *ante*.

the British constitution does not agree with the view put forward, on the authority of English lawyers, in these lectures. For while lawyers maintain that sovereignty resides in "Parliament," i. e. in the body constituted by the King, the House of Lords, and the House of Commons, Austin holds¹ that the sovereign power is vested in the King, the House of Lords, and the Commons or the electors.

Everyone, again, knows as a matter of common-sense that whatever lawyers may say the sovereign power of Parliament is not unlimited, and that King, Lords, and Commons united do not possess anything like that "restricted omnipotence"—if you will excuse the term—which is the utmost authority ascribable to any human institution. There are many enactments, and these laws not in themselves, obviously unwise or tyrannical, which Parliament never would and (to speak plainly) never could pass. If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament the dogma is no better than a legal fiction, and certainly is not worth the stress here laid upon it.

Both these difficulties are real and reasonable difficulties. They are, it will be found, to a certain extent connected together and well repay careful consideration.

As to Austin's theory of sovereignty in relation to the British constitution.—Sovereignty, like many

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Difficulty
from actual
limitation
on power
of Parlia-
ment.

Criti-
cism on
Austin's
theory.

¹ See Austin, *Jurisprudence*, i. pp. 251-255. Compare Austin's language as to the sovereign body under the constitution of the United States. Austin, *Jurisprudence*, i. p. 268.

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of Austin's conceptions, is a generalisation drawn in the main from English law, just as the ideas of the economists of Austin's generation are (to a great extent) generalisations suggested by the circumstances of English commerce. In England we are accustomed to the existence of a supreme legislative body, i.e. a body which can make or unmake every law; and which, therefore, cannot be bound by any law. This is, from a legal point of view, the true conception of a sovereign, and the ease with which the theory of absolute sovereignty has been accepted by English jurists is due to the peculiar history of English constitutional law. So far, therefore, from its being true that the sovereignty of Parliament is a deduction from abstract theories of jurisprudence, a critic would come nearer the truth who asserted that Austin's theory of sovereignty is suggested by the position of the English Parliament just as Austin's analysis of the term "law" is at bottom an analysis of a typical law, namely, an English criminal statute.

It should, however, be carefully noted that the term "sovereignty," as long as it is accurately employed in the sense in which Austin sometimes¹ uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. If the term "sovereignty" be thus used, the sovereign power under the English constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign

¹ Compare Austin, *Jurisprudence*, i. p. 268.

or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate and certainly of the electorate in combination with the Lords and the Crown is sure ultimately to prevail on all subjects to be determined by the British government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the Courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some parts of his work Austin has apparently confused the one sense with the other.

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“Adopting the language,” he writes, “of most of
 “the writers who have treated of the British con-
 “stitution, I commonly suppose that the present
 “parliament, or the parliament for the time being, is
 “possessed of the sovereignty: or I commonly suppose
 “that the King and the Lords, with the members of
 “the Commons’ house, form a tripartite body which is
 “sovereign or supreme. But, speaking accurately,
 “the members of the Commons’ house are merely
 “trustees for the body by which they are elected
 “and appointed: and, consequently, the sovereignty
 “always resides in the King and the Peers, with the
 “electoral body of the Commons. That a trust is
 “imposed by the party delegating, and that the party
 “representing engages to discharge the trust, seems to
 “be imported by the correlative expressions *delegation*
 “and *representation*. It were absurd to suppose that
 “the delegating empowers the representative party to
 “defeat or abandon any of the purposes for which the
 “latter is appointed: to suppose, for example, that
 “the Commons empower their representatives in par-
 “liament to relinquish their share in the sovereignty
 “to the King and the Lords ¹.”

Austin admits that the doctrine here laid down by him is inconsistent with the language used by writers who have treated of the British constitution. It is further absolutely inconsistent with the validity of the Septennial Act. Nothing is more certain than that no English judge ever conceded, or under the present constitution can concede, that Parliament is

¹ Austin, *Jurisprudence*, i. p. 253.

in any legal sense a "trustee"¹ for the electors. Of such a feigned "trust" the Courts know nothing. The plain truth is that as a matter of law Parliament is the sovereign power in the state, and that the "supposition" treated by Austin as inaccurate is the correct statement of a legal fact which forms the basis of our whole legislative and judicial system. It is however equally true that in a political sense the electors are the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience. The language therefore of Austin is as correct in regard to "political" sovereignty, as it is erroneous in regard to what we may term "legal" sovereignty. The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament.

It may be conjectured that the error of which (from a lawyer's point of view) Austin has been guilty arises from his feeling, as every person must feel who is not the slave to mere words, that Parliament is (as already pointed out²) nothing like an omnipotent body, but that its powers are practically limited in more ways than one. And this limitation

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¹ Austin admits this, but the admission seems almost fatal to the contention that Parliament is not in strictness a sovereign. See Austin, *Jurisprudence*, i. 252, 253.

² See p. 65, *ante*.

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Austin expresses, not very happily, by saying that the members of the House of Commons are subject to a trust imposed upon them by the electors. This, however, leads us to our second difficulty, namely, the co-existence of parliamentary sovereignty with the fact of actual limitations on the power of Parliament.

Existence
of actual
limitations
to power
not in-
consistent
with sove-
reignty.

As to the actual limitations on the sovereign power of Parliament.—The actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations. Of these the one is an external, the other is an internal limitation.

External
limit.

The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects or a large number of them will disobey or resist his laws.

This limitation exists even under the most despotic monarchies. A Roman Emperor, or a French King during the middle of the eighteenth century, was (as is the Russian Czar at the present day) in strictness a "sovereign" in the legal sense of that term. He had absolute legislative authority. Any law made by him was binding, and there was no power in the empire or kingdom which could annul such law. It may also be true,—though here we are passing from the legal to the political sense of sovereignty,—that the will of an absolute monarch is in general obeyed by the bulk of his subjects. But it would be an error to suppose that the most absolute ruler who ever existed could in reality make or change every

law at his pleasure. That this must be so results from considerations which were long ago pointed out by Hume. Force, he teaches, is in one sense always on the side of the governed, and government therefore in a sense always depends upon opinion. "Nothing," he writes, "appears more surprising to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular. The Soldan of Egypt, or the Emperor of Rome, might drive his harmless subjects, like brute beasts, against their sentiments and inclination: But he must, at least, have led his *mamalukes*, or *prætorian bands*, like men, by their opinion¹."

The authority that is to say, even of a despot, depends upon the readiness of his subjects or of some portion of his subjects to obey his behests; and this readiness to obey must always be in reality limited. This is shown by the most notorious facts of history. None of the early Cæsars could at their pleasure

Illustrations of external limit on exercise of sovereign power.

¹ Hume, *Essays*, i. pp. 109, 110.

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have subverted the worship or fundamental institutions of the Roman world, and when Constantine carried through a religious revolution his success was due to the sympathy of a large part of his subjects. The Sultan could not abolish Mahomedanism. Louis the Fourteenth at the height of his power could revoke the Edict of Nantes, but he would have found it impossible to establish the supremacy of Protestantism, and for the same reason which prevented James the Second from establishing the supremacy of Roman Catholicism. The one king was in the strict sense despotic; the other was as powerful as any English monarch. But the might of each was limited by the certainty of popular disobedience or opposition. The unwillingness of subjects to obey may have reference not only to great changes, but even to small matters. The French National Assembly of 1871 was emphatically the sovereign power in France. The majority of its members were (it is said) prepared for a monarchical restoration, but they were not prepared to restore the white flag: the army which would have acquiesced in the return of the Bourbons, would not (it was anticipated) tolerate the sight of an anti-revolutionary symbol; "the *chassepots* would go off of themselves." Here we see the precise limit to the exercise of legal sovereignty; and what is true of the power of a despot or of the authority of a constituent assembly is specially true of the sovereignty of Parliament; it is limited on every side by the possibility of popular resistance. Parliament might

legally establish an Episcopal Church in Scotland; Parliament might legally tax the Colonies; Parliament might without any breach of law change the succession to the throne or abolish the monarchy; but every one knows that in the present state of the world the British Parliament will do none of these things. In each case widespread resistance would result from legislation which, though legally valid, is in fact beyond the stretch of Parliamentary power. Nay more than this, there are things which Parliament has done in other times and done successfully which a modern Parliament would not venture to repeat. Parliament would not at the present day prolong by law the duration of an existing House of Commons. Parliament would not without great hesitation deprive of their votes large classes of Parliamentary electors; and, speaking generally, Parliament would not embark on a course of reactionary legislation; persons who honestly blame Catholic Emancipation and lament the disestablishment of the Irish Church do not dream that Parliament could repeal the statutes of 1829 or of 1869. These examples from among a score are enough to show the extent to which the theoretically boundless sovereignty of Parliament is curtailed by the external limit to its exercise.

The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under

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that head the moral feelings of the time and the society to which he belongs. The Sultan could not if he would change the religion of the Mahommedan world, but if he could do so it is in the very highest degree improbable that the head of Mahommedanism should wish to overthrow the religion of Mahomet; the internal check on the exercise of the Sultan's power is at least as strong as the external limitation. People sometimes ask the idle question why the Pope does not introduce this or that reform? The true answer is that a revolutionist is not the kind of man who becomes a Pope, and that the man who is a Pope has not any wish to be a revolutionist. Louis the Fourteenth could not in all probability have established Protestantism as the national religion of France; but to imagine Louis the Fourteenth as wishing to carry out a Protestant reformation is nothing short of imagining him to have been a being quite unlike the *Grand Monarque*. Here again the internal check works together with the external check, and the influence of the internal limitation is as great in the case of a Parliamentary sovereign as of any other; perhaps it is greater. Parliament could not prudently tax the Colonies; but it is hardly conceivable that a modern Parliament, with the history of the last century before its eyes, should wish to tax the colonies. The combined influence both of the external and of the internal limitation on legislative sovereignty is admirably stated in Mr. Leslie Stephen's *Science of Ethics*, whose chapter on *Law and Custom* con-

tains one of the best statements to be met with of the limits placed by the nature of things on the theoretical omnipotence of sovereign legislatures. Lecture
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“Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it¹.”

Though sovereign power is bounded by an external and an internal limit, neither boundary is very definitely marked, nor need the two precisely coincide. A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts specially to be noted that the exact point at which the external

Limits
may not
coincide.

¹ Leslie Stephen, *Science of Ethics*, p. 143.

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limitation begins to operate, that is the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision. It would be rash of the Imperial Parliament to abolish the Scotch law Courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious. Before the War of Secession the sovereign power of the United States could not have abolished slavery without provoking a civil war; after the War of Secession the sovereign power abolished slavery and conferred the electoral franchise upon the Blacks without exciting actual resistance.

Representative government produces coincidence between external and internal limit.

In reference to the relation between the external and the internal limit to sovereignty, representative government presents a noteworthy peculiarity. It is this. The aim and effect of such government is to produce a coincidence, or at any rate diminish the divergence between the external and the internal limitations on the exercise of sovereign power. Frederick the Great may have wished to introduce, and may in fact have introduced, changes or reforms opposed to the wishes of his subjects. Louis Napoleon certainly began a policy of free trade which would not be tolerated by an assembly which truly represented French opinion. In these instances neither monarch reached the external limit to his sovereign power, but it might very well have happened that he might have reached it, and have thereby provoked serious resistance on the part of his subjects. There

might, in short, have arisen a divergence between the internal and the external check. The existence of such a divergence, or (in other words) of a difference between the permanent wishes of the sovereign, or rather of the King who then constituted a predominant part of the sovereign power and the permanent wishes of the nation, is traceable in England throughout the whole period beginning with the accession of James the First and ending with the Revolution of 1688. The remedy for this divergence was found in a transference of power from the Crown to the Houses of Parliament; and in placing on the throne rulers who from their position were induced to make their wishes coincide with the will of the nation expressed through the House of Commons; the difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government. Where a Parliament really represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises must soon disappear. Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors. That which the majority of the House of Commons command the majority of the English people usually desire. To prevent the divergence between the wishes of the sovereign and the wishes of subjects is in short the effect, and the only certain effect, of bonâ fide representative government. For

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our present purpose there is no need to determine whether this result be good or bad. An enlightened sovereign has more than once carried out reforms in advance of the wishes of his subjects. This is true both of sovereign kings and, though more rarely, of sovereign Parliaments. But the sovereign who has done this, whether King or Parliament, does not in reality represent his subjects. All that it is here necessary to insist upon is that the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects; to make, in short, the two limitations on the exercise of sovereignty absolutely coincident. This, which is true in its measure of all real representative government, applies with special truth to the English House of Commons.

“The House of Commons,” writes Burke, “was supposed originally to be *no part of the standing government of this country*. It was considered as a control, issuing *immediately* from the people, and speedily to be resolved into the mass from whence it arose. In this respect it was in the higher part of government what juries are in the lower. The capacity of a magistrate being transitory, and that of a citizen permanent, the latter capacity it was hoped would of course preponderate in all discussions, not only between the people and the standing authority of the Crown, but between the people and the fleeting authority of the House of Commons itself. It was hoped that, being of a middle nature between subject and government, they would feel with a

“more tender and a nearer interest everything that
“concerned the people, than the other remoter and
“more permanent parts of legislature. Lecture
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“Whatever alterations time and the necessary
“accommodation of business may have introduced,
“this character can never be sustained, unless the
“House of Commons shall be made to bear some
“stamp of the actual disposition of the people at
“large. It would (among public misfortunes) be an
“evil more natural and tolerable, that the House of
“Commons should be infected with every epidemical
“phrensy of the people, as this would indicate some
“consanguinity, some sympathy of nature with their
“constituents, than that they should in all cases be
“wholly untouched by the opinions and feelings of
“the people out of doors. By this want of sympathy
“they would cease to be a House of Commons¹.”

¹ Burke, *Works*, i. pp. 347, 348.

LECTURE III.

COMPARISON BETWEEN PARLIAMENT AND NON-SOVEREIGN LAW-MAKING BODIES.

Lecture III. IN my last lecture I dwelt upon the nature of Parliamentary sovereignty; my object in this lecture is to illustrate the characteristics of such sovereignty by comparing the essential features of a sovereign Parliament like that of England with the traits which mark non-sovereign law-making bodies.

Aim of lecture.

Parliamentary sovereignty.

A. *Characteristics of Sovereign Parliament.*—The characteristics of Parliamentary sovereignty may be deduced from the term itself. But they are apt to escape the attention of persons who, like ourselves, have been so accustomed to live under the rule of a supreme legislature, that we almost, without knowing it, assume that all legislative bodies are supreme, and hardly therefore keep clear before our minds the properties of a supreme as contrasted with a non-sovereign law-making body. In this matter foreign observers are, as is natural, clearer sighted than Englishmen. De Lolme, Gneist, and De Tocqueville seize at once upon the sovereignty of Parliament as a salient feature of the English constitution, and recognise the far-reaching effects of this marked peculiarity in our institutions.

“In England,” writes De Tocqueville, “the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly¹.”

His expressions are wanting in accuracy, and might provoke some criticism, but the description of the English Parliament as at once “a legislative and a constituent assembly” supplies a convenient formula for summing up the fact that Parliament can change any law whatever. Being a “legislative” assembly it can make ordinary laws, being a “constituent” assembly it can make laws which shift the basis of the constitution. The results which ensue from this fact may be brought under three heads.

First. There is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.

No law
Parliament
cannot
change.

A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration not to be in orders, are each equally within the competence of Parliament, they each may

¹ De Tocqueville, i. (translation), p. 96, *Œuvres Complètes*, i. pp. 166, 167.

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be passed in substantially the same manner, they none of them when passed will be, legally speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament, which can be repealed as it has been passed by Parliament, and cannot be annulled by any other power.

No distinction between constitutional and ordinary laws.

Secondly. There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional. The very language therefore, expressing the difference between a "legislative" assembly which can change ordinary laws and a "constituent" assembly which can change not only ordinary but also constitutional and fundamental laws, has to be borrowed from the political phraseology of foreign countries.

Relation between Parliamentary sovereignty and an unwritten constitution.

This absence of any distinction between constitutional and ordinary laws has a close connection with the non-existence in England of any written or enacted constitutional statute or charter. De Tocqueville indeed, in common with other writers, apparently holds the unwritten character of the British constitution to be of its essence: "L'Angleterre n'ayant "point de constitution écrite, qui peut dire qu'on "change sa constitution¹?" But here De Tocqueville falls into an error, characteristic both of his nation and of the weaker side of his own rare genius. He has treated the form of the constitution as the cause of its substantial qualities, and has inverted the

¹ De Tocqueville, *Œuvres Complètes*, i. p. 312.

relation of cause and effect. The constitution, he seems to have thought, was mutable because it was not reduced to a written or statutory form. It is far nearer the truth to assert that the constitution has never been reduced to a written or statutory form because each and every part of it is changeable at the will of Parliament. When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing, or, to use English phraseology, is enacted as a statute. Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution. One main reason then why constitutional laws have not in England been recognised under that name, and in many cases have not been reduced to the form of a statutory enactment, is that one law, whatever its importance, can be passed and changed by exactly the same method as every other law. But it is a mistake to think that the whole law of the English constitution might not be reduced to writing and be enacted in the form of a constitutional code. The Belgian constitution indeed comes very near to a written reproduction of the English constitution, and the constitution of England might easily be turned into an Act

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of Parliament without suffering any material transformation of character, provided only that the English Parliament retained what the Belgian Parliament, by the way, does not possess—the unrestricted power of repealing or amending the constitutional code.

No person
entitled to
pronounce
Act of Par-
liament
void.

Thirdly. There does not exist in any part of the British Empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except of course its being repealed by Parliament.

These then are the three traits of Parliament sovereignty as it exists in England: first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.

Flexibility
of the con-
stitution.

These traits are all exemplifications of the quality which my friend Mr. Bryce has happily denominated, in an unpublished lecture, the “flexibility” of the British constitution. Every part of it can be expanded, curtailed, amended or abolished, with equal ease. It is the most flexible polity in existence, and is therefore utterly different in character from the “rigid” constitutions (to use another expression of Mr. Bryce’s) the whole or some part of which can be changed only by some extraordinary method of legislation.

B. *Characteristics of non-sovereign law-making bodies.*—From the attributes of a sovereign legislature it is possible to infer negatively what are the characteristics all (or some) of which are the marks of a non-sovereign law-making body, and which therefore may be called the marks or notes of legislative subordination.

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III.
Characteristics of non-sovereign law-making bodies.

These signs by which you may recognise the subordination of a law-making body are, first, the existence of laws affecting its constitution which such body must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary laws and fundamental laws; and, lastly, the existence of some person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body.

Wherever any of these marks of subordination exist with regard to a given law-making body, they prove that it is not a sovereign legislature.

Observe the use of the words "law-making body."

This term is here employed as an expression which may include under one head both municipal bodies, such as railway companies, school boards, town councils, and the like, which possess a limited power of making laws, but are not ordinarily called legislatures, and bodies such as the Parliaments of the British Colonies, of Belgium, or of France, which are ordinarily called "legislatures," but are not in reality sovereign bodies.

Meaning of term "law-making body."

The reason for grouping together under one name

Lecture such very different kinds of "law-making" bodies is,
III. that by far the best way of clearing up our ideas as
 to the nature of assemblies which, to use the foreign
 formula¹, are "legislative" without being "consti-
 tuent," and which therefore are not sovereign legis-
 latures, is to analyse the characteristics of societies,
 such as English railway companies, which possess a
 certain legislative authority, though the authority is
 clearly delegated and subject to the obvious control
 of a superior legislature.

It will conduce to clearness of thought if we divide
 non-sovereign law-making bodies into the two great
 classes of obviously subordinate bodies such as cor-
 porations, the Council of India, &c., and such legis-
 latures of independent countries as are legislative
 without being constituent, i.e. are non-sovereign
 legislative bodies.

The consideration of the position of the non-
 sovereign legislatures which exist under the com-
 plicated form of constitution known as a federal
 government is best reserved for a separate lecture².

I. *Subordinate Law-making Bodies.*

Subor-
 dinate
 bodies.
 Corpora-
 tions.

(i) *Corporations.*—An English railway company is
 as good an example as can be found of a subordinate
 law-making body. Such a company is in the strictest
 sense a law-making society, for it can under the
 powers of its Act make laws (called bye-laws) for
 the regulation (*inter alia*) of travelling upon the rail-

¹ See p. 81, *ante*.

² See Lecture IV.

way¹, and can impose a penalty for the breach of such laws, which can be enforced by proceedings in the Courts. The rules therefore or bye-laws made by a company within the powers of its Act are "laws" in the strictest sense of the term, as any person will discover to his own cost who, when he travels by rail from Oxford to Paddington, deliberately violates a bye-law duly made by the Great Western Railway Company.

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But though an English railway company is clearly a law-making body, it is clearly a non-sovereign law-making body. Its legislative power bears all the marks of subordination.

First. The company is bound to obey laws and (amongst others) the Act of Parliament creating the company, which it cannot change. This is obvious, and need not be insisted upon.

Secondly. There is the most marked distinction between the Act constituting the company, not a line of which can be changed by the company, and the bye-laws which, within the powers of its Act, the company can both make and change. Here we have on a very small scale the exact difference between constitutional or fundamental laws which cannot, and ordinary laws which can, be changed by the company. The company, if we may apply to it the terms of constitutional law, is not a constituent, but is within

¹ See especially the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, secs. 103, 108-111. This Act is always embodied in the special Act constituting the company. Its enactments therefore form part of the constitution of a railway company.

Lecture certain limits a legislative assembly ; and these limits
III. are fixed by the constitution of the company.

Thirdly. The Courts have the right to pronounce, and indeed are bound to pronounce, on the validity of the company's bye-laws, that is upon the validity, or to use political terms, on the constitutionality of the laws made by the company as a law-making body. Note particularly that it is not the function of any Court or judge to declare void or directly annul a bye-law made by a railway company. The function of the Court is simply, upon any particular case coming before it which depends upon a bye-law made by a railway company, to decide for the purposes of that particular case whether the bye-law is or is not within the powers conferred by Act of Parliament upon the company, that is to say, whether the bye-law is or is not valid, and to give judgment in the particular case according to the Court's view of the validity of the bye-law. It is worth while to examine with some care the mode in which English judges deal with the enquiry whether a particular bye-law is or is not within the powers given to the company by Act of Parliament, for to understand this point goes a good way towards understanding the exact way in which English or American Courts determine the constitutionality of Acts passed by a non-sovereign legislature.

The London and North-Western Railway Company made a bye-law by which "any person travelling "without the special permission of some duly authorised servant of the company in a carriage or by a

“train of a superior class to that for which his ticket
“was issued is hereby subject to a penalty not ex-
“ceeding forty shillings, and shall, in addition, be
“liable to pay his fare according to the class of
“carriage in which he is travelling from the station
“where the train originally started, unless he shows
“that he had no intention to defraud.” X, with the
intention of defrauding the company, travelled in
a first-class carriage instead of a second-class carriage
for which his ticket was issued, and having been
charged under the bye-law was convicted in the
penalty of ten shillings, and costs. On appeal by
X, the Court determined that the bye-law was
illegal and void as being repugnant to 8 Vict. c. 20,
s. 103, or in effect to the terms of the Act incor-
porating the company¹.

Lecture
III.

A bye-law of the South-Eastern Railway Company required that a passenger should deliver up his ticket to a servant of the company when required to do so, and that any person travelling without a ticket or failing or refusing to deliver up his ticket should be required to pay the fare from the station whence the train originally started to the end of his journey. X had a railway ticket enabling him to travel on the South-Eastern Railway. Having to change trains and pass out of the company's station he was asked to show his ticket, and refused to do so, but without any fraudulent intention. He was summoned for breach of the bye-law, and convicted in the amount of the fare from the station whence the train started.

¹ *Dyson v. L. & N. W. Ry. Co.*, 7 Q.B.D. 32.

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III.

The Queen's Bench Division held the conviction wrong on the ground that the bye-law was for several reasons invalid as not being authorised by the Act under which it purported to be made¹.

Now in these instances, and in other cases where the Courts pronounce upon the validity of a bye-law made by a body (e.g. a railway company or a School-board) having powers to make bye-laws enforceable by penalties, it is natural to say that the Courts pronounce the bye-laws valid or invalid. But this is not strictly the case. What the judges determine is not that a particular bye-law is invalid, for it is not the function of the Courts to repeal or annul the bye-laws made by railway companies, but that in a proceeding to recover a penalty from *X* for the breach of a bye-law judgment must be given on the basis of the particular bye-law being beyond the powers of the company, and therefore invalid. It may indeed be thought that the distinction between annulling a bye-law and determining a case upon the assumption of such bye-law being void is a distinction without a difference. But this is not so. The distinction is not without importance even when dealing with the question whether *X*, who is alleged to have broken a bye-law made by a railway company, is liable to pay a fine; it is of first-rate importance when the question before the Courts is one involving consider-

¹ *Saunders v. S. E. Ry. Co.*, 5 Q.B.D. 456. Compare *Bentham v. Hoyle*, 3 Q. B. D. 289, and *L. B. & S. C. Ry. Co. v. Watson*, 3 C. P. D. 429; 4 C. P. D. (C. A.) 118.

ations of constitutional law, as for example when the Privy Council is called upon, as constantly happens, to determine cases which involve the validity or constitutionality of laws made by the Dominion Parliament or by one of the provincial Parliaments of Canada. The significance however of the distinction will become more apparent as we proceed with our subject; the matter of consequence now is to notice the nature of the distinction, and to realise that when a Court in deciding a given case considers whether a bye-law is or is not valid, the Court does a different thing from affirming or annulling the bye-law itself.

(ii.) *Legislative Council of British India.*—British India is governed by a Legislative Council having very wide powers of legislation. This Council, or as it is technically expressed the “Governor General in Council,” can pass laws as important as any Acts passed by the British Parliament. But the authority of the Council in the way of law-making is as completely subordinate to and as much dependent upon Acts of Parliament as is the power of the L. & N. W. Railway Co. to make bye-laws.

The legislative powers of the Governor General and his Council arise from definite Parliamentary enactments¹. These Acts constitute what may be termed as regards the Legislative Council the constitution of India. Now observe, that under these Acts the Indian Council is in the strictest sense a

¹ 3 & 4 Will. IV. c. 85, ss. 45-48, 51, 52; 24 & 25 Vict. c. 67, ss. 16-25; 28 & 29 Vict. c. 17.

Lecture
III.

non-sovereign legislative body, and this independently of the fact that the laws or regulations made by the Governor General in Council can be annulled or disallowed by the Crown ; and note that the position of the Council exhibits all the marks or notes of legislative subordination.

First. The Council is bound by a large number of rules which cannot be changed by the Indian legislative itself, and which can be changed by the superior power of the Imperial Parliament.

Secondly. The Acts themselves from which the Council derives its authority cannot be changed by the Council, and hence in regard to the Indian legislative body form a set of constitutional or fundamental laws which, since they cannot be changed by the Council, stand in marked contrast with the laws or regulations which the Council is empowered to make. These fundamental rules contain, it must be added, a number of specific restrictions on the subjects with regard to which the Council may legislate. Thus the Governor General in Council has no power of making laws which may affect the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of India¹.

Thirdly. The Courts in India (or in any other part of the British Empire) may, when the occasion arises,

¹ See 24 & 25 Vict. c. 67, s. 22.

pronounce upon the validity or constitutionality of laws made by the Indian Council. Lecture
III.

The Courts treat Acts passed by the Indian Council precisely in the same way in which the Queen's Bench Division treats the bye-laws of a railway company. No judge in India or elsewhere ever issues a decree which declares invalid, annuls, or makes void a law or regulation made by the Governor General in Council. But when any particular case comes before the Courts, whether civil or criminal, in which the rights or liabilities of any party are affected by the legislation of the Indian Council, the Court may have to consider and determine with a view to the particular case whether such legislation was or was not within the legal powers of the Council, which is of course the same thing as adjudicating as regards the particular case in hand upon the validity or constitutionality of the legislation in question. Thus suppose that X is prosecuted for the breach of a law or regulation passed by the Council, and suppose the fact to be established past a doubt that X has broken this law. The Court before which the proceedings take place, which must obviously in the ordinary course of things be an Indian Court, may be called upon to consider whether the regulation which X has broken is within the powers given to the Indian Council by the Acts of Parliament making up the Indian constitution. If the law is within such powers, or in other words is constitutional, the Court will by giving judgment against X give full effect to the law, just as effect is given to the bye-law of a railway company

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III.

by the tribunal before whom an offender is sued pronouncing judgment against him for the penalty. If, on the other hand, the Indian Court deem that the regulation is *ultra vires* or unconstitutional, they will refuse to give effect to it, and treat it as void by giving judgment for the defendant on the basis of the regulation being invalid or having no legal existence. On this point the *Empress v. Burah*¹ is most instructive. The details of the case are immaterial; the noticeable thing is that the High Court held a particular legislative enactment of the Governor General in Council to be in excess of the authority given to him by the Imperial Parliament and therefore invalid, and on this ground entertained an appeal from two prisoners which, if the enactment had been valid, the Court would admittedly have been incompetent to entertain. The Privy Council, it is true, held on appeal² that the particular enactment was within the legal powers of the Council and therefore valid, but the duty of the High Court of Calcutta to consider whether the legislation of the Governor General was or was not constitutional, was not questioned by the Privy Council. To look at the same thing from another point of view, the Courts in India treat the legislation of the Governor General in Council in a way utterly different from that in which any English Court can treat the Acts of the Imperial Parliament. An Indian tribunal may be called upon to say that an Act passed by

¹ 3 Ind. L. R. (Calcutta Series), p. 63.

² *Reg. v. Burah*, 3 App. Cas. 889.

the Governor General need not be obeyed because it is unconstitutional or void. No British Court can give judgment, or ever does give judgment, that an Act of Parliament need not be obeyed because it is unconstitutional. Here, in short, we have the essential difference between subordinate and sovereign legislative power¹.

Lecture
III.

(iii.) *English Colonies with Representative Governments*.—Many English colonies, and notably Victoria (to which country our attention had best for the sake of clearness be confined), possess representative assemblies which occupy a somewhat peculiar position.

English
colonies.

The Victorian Parliament exercises throughout the colony all the ordinary powers of a sovereign assembly such as the Parliament of Great Britain. It makes and repeals laws, it puts Ministries in power and dismisses them from office, it controls the general policy of the Government, and generally makes its will felt in the transaction of affairs after the manner of the Parliament at Westminster. An ordinary observer would, if he looked merely at the everyday proceedings of the legislature which meets at Melbourne, have no reason to pronounce it a whit less powerful within its sphere than the Parliament of Great Britain. No doubt the assent of the Governor is needed in order to turn colonial Bills into laws: and further investigation would show our enquirer that for the validity of any colonial Act

Powers
exercised
by colonial
Parliaments.

¹ See especially *Empress v. Burah & Book Singh*, 3 Ind. L. R. (Calcutta Series, 1878), 63, 86-89, for the judgment of Markby J.

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III.

there is required, in addition to the assent of the Governor, the sanction, either express or implied, of the Crown. But these assents are constantly given almost as a matter of course, and may be compared (though not with absolute correctness) to the Crown's so-called "veto" or right of refusing assent to Bills which have passed through the Houses of Parliament.

Limit to
 powers.

Yet for all this, when the matter is further looked into, the Victorian Parliament (together with other colonial legislatures) will be found to be a non-sovereign legislative body, and bears decisive marks of legislative subordination. The action of the Victorian Parliament is restrained by laws which it cannot change, and are changeable only by the Imperial Parliament; and further, Victorian Acts, even when assented to by the Crown, are liable to be treated by the Courts in Victoria and elsewhere throughout the British dominions as void or unconstitutional, on the ground of their coming into conflict with laws of the Imperial Parliament, which the Victorian legislature has no authority to touch.

That this is so becomes apparent the moment we realise the exact relation between colonial and Imperial laws. The matter is worth some little examination, both for its own sake and for the sake of the light it throws on the sovereignty of Parliament.

The charter of colonial legislative independence is "an Act to remove doubts as to the validity of colonial laws," known as the "Colonial Laws Act 1865."

This statute seems (oddly enough) to have passed through Parliament without discussion; but it permanently defines and greatly extends the authority of colonial legislatures, and its main provisions are of such importance as to deserve verbal citation:—

Lecture
III.
Colonial
Laws Act
1865.

“Sec. 2. Any colonial law which is or shall be in
“any respect repugnant to the provisions of any Act
“of Parliament extending to the colony to which
“such law may relate, or repugnant to any order or
“regulation made under authority of such Act of
“Parliament, or having in the colony the force and
“effect of such Act, shall be read subject to such
“Act, order, or regulation, and shall, to the extent
“of such repugnancy, but not otherwise, be and
“remain absolutely void and inoperative.

“3. No colonial law shall be or be deemed to have
“been void or inoperative on the ground of repug-
“nancy to the law of England, unless the same
“shall be repugnant to the provisions of some such
“Act of Parliament, order, or regulation as afore-
“said.

“4. No colonial law, passed with the concurrence
“of or assented to by the Governor of any colony, or
“to be hereafter so passed or assented to, shall be
“or be deemed to have been void or inoperative, by
“reason only of any instructions with reference to
“such law or the subject thereof which may have
“been given to such Governor by or on behalf of
“Her Majesty, by any instrument other than the
“letters patent or instrument authorising such
“Governor to concur in passing or to assent to laws

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III.

“for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

“5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony¹.”

From these sections one may fix with something like precision the legal limits to the legislative authority possessed by a colonial legislature.

The Victorian Parliament may make laws opposed to the English common law, and such laws (on receiving the required assents) are perfectly valid.

Thus a Victorian Act which changed the common law rules as to the descent of property, which gave the Governor authority to forbid public meetings, or which abolished trial by jury, might be inexpedient or unjust, but would be a perfectly valid law, and

¹ 28 & 29 Vict. c. 63, ss. 2-5.

would be recognised as such by every tribunal throughout the British Empire¹. Lecture
III.

The Victorian Parliament, on the other hand, cannot make any laws inconsistent with any Act of Parliament or with any part of an Act of Parliament intended by the Imperial Parliament to apply to Victoria.

Suppose, for example, that the British Parliament were to pass an Act providing a special mode of trial in Victoria for particular classes of offences committed there, no enactment of the colonial Parliament which provided that such offences should be tried otherwise than as directed by the imperial statute would be of any legal effect. So again, no Victorian Act would be valid which legalised the slave trade in the face of 5 Geo. IV. c. 113, which prohibits slave trading throughout the British dominions; nor would Acts passed by the Victorian Parliament be valid which repealed or invalidated several provisions of the Merchant Shipping Acts meant to apply to the colonies, or which deprived a discharge under the English Bankruptcy Act of the effect which in virtue of the imperial statute it has as a release from debts contracted in any part whatever of the British dominions. No colonial legislature, in short, can override imperial legislation which is intended to apply to the colonies. Whether the intention be expressed in so many words, or be apparent only from the general scope and nature of the enactment,

¹ Assuming of course that such Acts are not inconsistent with any imperial statute applying to Victoria.

Lecture is immaterial. Once establish that an imperial law
III. is intended to apply to Victoria, and the consequence follows that any Victorian enactment which contravenes that law is invalid and unconstitutional¹.

Acts of
 colonial
 legislature
 may be pro-
 nounced
 void by
 Courts.

Hence the Courts in Victoria, as also in the rest of the British dominions, may be called upon to adjudicate upon the validity or constitutionality of any Act of the Victorian Parliament. For if a Victorian law really contradicts the provisions of an Act of Parliament extending to Victoria, no Court throughout the British dominions could legally, it is clear, give effect to the Victorian enactment. This is an inevitable result of the legislative sovereignty exercised by the Imperial Parliament. In the supposed case the Victorian Parliament commands the judges to act in a particular manner, and the Imperial Parliament commands them to act in another manner. Of these two commands the order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty. Whenever, therefore, it is alleged that any enactment of the Victorian Parliament is repugnant to the provisions of any Act of Parliament extending to the colony, the tribunal before which the objection is raised must pronounce upon the validity or constitutionality of the colonial law.

¹ See Tarring, *Law Relating to the Colonies*, pp. 79-86, for a list of imperial statutes which relate to the colonies in general, and which therefore no colonial legislation can contravene.

The constitution of Victoria is created by and depends upon the Act of Parliament 18 & 19 Vict. c. 55. One might therefore expect that the Victorian Parliament would exhibit that "mark of subordination" which consists in the inability of a legislative body to change fundamental or constitutional laws, or (what is the same thing) in the clearly drawn distinction between ordinary laws which the legislature can change and laws of the constitution which it cannot change, at any rate when acting in its ordinary legislative character.

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III.

Colonial
Parlia-
ment may
be a "con-
stituent"
as well as
legislative
body.

But this anticipation is hardly borne out by an examination into the Acts creating the Victorian constitution. A comparison of the Colonial Laws Act, 1865, s. 5 with 18 & 19 Vict. c. 55, Sched. I, sect. 60, shows that the Parliament of Victoria can change the articles of the constitution. This power, derived as it is from an imperial statute, is of course in no way inconsistent with the legal sovereignty of the Imperial Parliament. Though, further, a Victorian law may alter the articles of the constitution, that law must in some cases be passed in a manner different from the mode in which other laws are passed. The Victorian constitution does contain a faint recognition of the difference between fundamental and other laws. Still the recognition is so very faint that one may fairly assert that the Victorian Parliament (in common with many other colonial legislative assemblies) is, though a subordinate, yet at once a legislative

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III.

and a constituent assembly¹. It is a "subordinate" assembly because its powers are limited by the legislation of the Imperial Parliament; it is a "constituent" assembly since it can change the articles of the Victorian constitution.

Reason of
this.

The authority of the Victorian Parliament to change the articles of the Victorian constitution is from several points of view worth notice.

We have here a decisive proof that there is no necessary connection between the written character and the immutability of a constitution. The Victorian constitution is to be found in a written document; it is a statutory enactment. Yet the articles of this constitutional statute can be changed by the Parliament which it creates, and changed in almost though not absolutely in the same manner as any other law. This may seem an obvious matter enough, but writers of eminence so often use language which implies or suggests that the character of a law is changed by its being expressed in the form of a statute as to make it worth while noting that a statutory constitution need not be in any sense an immutable constitution. The readiness again with which the English Parliament has conceded constituent powers to colonial legislatures shows how little hold is exercised over Englishmen by that distinction between fundamental and non-fundamental laws which runs through almost all the constitutions not only of the Continent but also of America. The explanation appears to be that in

¹ See p. 81, *ante*.

England we have long been accustomed to consider Parliament as capable of changing one kind of law with as much ease as another. Hence when English statesmen gave Parliamentary government to the colonies, they almost as a matter of course bestowed upon colonial legislatures authority to deal with every law, whether constitutional or not, which affected the colony, subject of course to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British Parliament. The colonial legislatures, in short, are within their own sphere copies of the Imperial Parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of Great Britain.

The question may naturally be asked how the large amount of colonial liberty conceded to countries like Victoria has been legally reconciled with Imperial sovereignty?

How conflicts between imperial and colonial legislation avoided.

The enquiry lies a little outside our subject, but is not really foreign to it, and well deserves an answer. Nor is the reply hard to find if we keep in mind the true nature of the difficulty which needs explanation.

The problem is not to determine what are the means by which the English government keeps the colonies in subjection, or maintains the political sovereignty of Great Britain. This is a matter of politics with which these lectures have no concern.

The question to be answered is how (assuming the law to be obeyed throughout the whole of the

Lecture
III.

British Empire) colonial legislative freedom is made compatible with the legislative sovereignty of Parliament? How are the British Parliament and the colonial legislatures prevented from encroaching on each other's spheres?

No one will think this enquiry needless who remarks that in confederations such as the United States or the Canadian Dominion the Courts are constantly occupied in determining the boundaries which divide the legislative authority of the Central Government from that of the State Legislatures.

Conflicts
averted by
(i.) supremacy of
British
Parliament;

The assertion may sound paradoxical, but is nevertheless strictly true, that the acknowledged legal supremacy of Parliament is one main cause of the wide power of legislation allowed to colonial assemblies. The constitutions of the colonies depend directly or indirectly upon imperial statutes. No lawyer questions that Parliament could legally abolish any colonial constitution, or that Parliament can at any moment legislate for the colonies and repeal or override any colonial law whatever. Parliament moreover constantly does pass Acts affecting the colonies, and the colonial¹ no less than the English Courts completely admit the principle that a statute of the Imperial Parliament binds any part of the British dominions to which the statute is meant to apply. But when once this is admitted, it becomes obvious that there is little necessity for defining or limiting the sphere of colonial legislation. If an Act of the Victorian Parliament contravenes an

¹ See Todd, *Parliamentary Government*, pp. 168-192.

imperial statute, it is for legal purposes void; and if an Act of the Victorian Parliament, though not infringing upon any statute, is so opposed to the interests of the Empire that it ought not to be passed, the British Parliament may render the Act of no effect by means of an imperial statute.

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III.

This course however is rarely, if ever, necessary; for Parliament exerts authority over colonial legislation by in effect regulating the use of the Crown's "veto" in regard to colonial Acts. This is a matter which itself needs a little explanation.

(ii.) right
of veto.

The Crown's right to refuse assent to bills which have passed through the Houses of Parliament is practically obsolete. The power of the Crown to negative or veto the bills of colonial legislatures stands on a different footing. It is virtually, though not in name, the right of the Imperial Parliament to limit colonial legislative independence, and is frequently exercised.

This check on colonial legislation is exerted in two different forms.

The Governor of a colony, say Victoria, may directly refuse his assent to a bill passed by both Houses of the Victorian Parliament. In this case the bill is finally lost, just as would be a bill which had been rejected by the colonial council, or as would be a bill passed by the English Houses of Parliament if the Crown were to exert the obsolete prerogative of refusing the royal assent. The Governor, again, may, without refusing his assent, reserve the bill for the consideration of the Crown. In such case the bill does

How right
of "veto"
exercised.

Lecture
III.

not come into force until it has either actually or constructively¹ received the royal assent, which is in effect the assent of the English Ministry, and therefore indirectly of the Imperial Parliament.

The Governor, on the other hand, may, as representing the Crown, give his assent to a Victorian bill. The bill thereupon comes into force throughout Victoria. But such a bill, though for a time a valid Act, is not finally made law even in Victoria, since the Crown may, after the Governor's assent has been given, disallow the colonial Act. The case is thus put by Mr. Todd:—"Although a governor "as representing the Crown is empowered to give "the royal assent to bills, this act is not final and "conclusive; the Crown itself having, in point of "fact, a second veto. All statutes assented to by "the governor of a colony go into force immediately, unless they contain a clause suspending "their operation until the issue of a proclamation "of approval by the queen in council, or some "other specific provision to the contrary; but the "governor is required to transmit a copy thereof "to the secretary of state for the colonies; and the "queen in council may, within two years after the "receipt of the same, disallow any such Act²."

¹ In some cases a bill reserved by the Governor of a colony for the Royal consideration comes into force within a given period after it has been passed by the Colonial Legislature, unless before the lapse of that period the Crown formally signifies its dissent. The absence of such signification may be called constructive assent.

² Todd, *Parliamentary Government in the British Colonies*, p. 137.

The result therefore of this state of things is, that colonial legislation is subject to a real veto on the part of the imperial Government, and no bill which the English Ministry think ought for the sake of imperial interests to be negatived can, though passed by the Victorian or other colonial legislature, come finally into force. The home government is certain to negative or disallow any colonial law which either in letter or in spirit is repugnant to Parliamentary legislation, and a large number of Acts can be given which on one ground or another have been either not assented to or disallowed by the Crown. In 1868 the Crown refused assent to a Canadian Act reducing the salary of the Governor General¹. In 1872 the Crown refused assent to a Canadian Copyright Act because certain parts of it conflicted with imperial legislation. In 1873 a Canadian Act was disallowed as being contrary to the express terms of the British North America Act, 1868; and on similar grounds in 1878 a Canadian Shipping Act was disallowed². So again the Crown has in effect passed a veto upon Australian Acts for checking Chinese immigration. And Acts passed by colonial legislatures allowing divorce on the ground of the husband's adultery and legalising marriage with a deceased wife's sister have (though not consistently with the general tenour of our colonial policy) been disallowed by the Crown, that is in effect by the home government.

The general answer therefore to the enquiry, how

¹ See Todd, p. 144.

² See Todd, pp. 147, 150.

Lecture
III.

colonial liberty of legislation is made legally reconcilable with imperial sovereignty, is that the complete recognition of the supremacy of Parliament obviates the necessity for carefully limiting the authority of colonial legislatures, and that the home government, who in effect represent Parliament, retain by the use of the Crown's veto the power of preventing the occurrence of conflicts between colonial and imperial laws. To this it must be added that imperial treaties legally bind the colonies, and that the "treaty-making power," to use an American expression, resides in the Crown, and is therefore exercised by the home Government in accordance with the wishes of the Houses of Parliament, or more strictly of the House of Commons, whilst the authority to make treaties is, except where expressly allowed by Act of Parliament, not possessed by any colonial government¹.

Policy of imperial government not to interfere with action of colonies.

Any one however who wishes justly to appreciate the nature and the extent of the control exerted by Great Britain over colonial legislation should keep two points carefully in mind. The tendency, in the first place, of the imperial government is as a matter of policy to interfere less and less with the action of the colonies, whether in the way of law-making or otherwise. Colonial Acts, in the second place, even when finally assented to by the Crown are, as already pointed out, invalid if repugnant to an Act of Parliament applying to the colony. The imperial policy therefore of non-intervention in the local affairs of

¹ See Todd, *Parliamentary Government in the British Colonies*, pp. 24, 196.

British dependencies combines with the supreme legislative authority of the Imperial Parliament to render encroachments by the British Parliament on the sphere of colonial legislation or by colonial Parliaments on the domain of imperial legislation of rare occurrence¹.

II. *Foreign Non-sovereign Legislatures.*

We perceive without difficulty that the Parliaments of even those colonies, such as the Dominion of Canada, which are most nearly independent states are not in reality sovereign legislatures. This is easily seen, because the sovereign Parliament of Great Britain, which legislates for the whole British Empire, is visible in the background, and because the colonies, however large their practical freedom of action, do not act as independent powers in relation to foreign states; the Parliament of a dependency cannot itself be a sovereign body. It is harder for Englishmen to realise that the legislative assembly of an independent nation may not be a sovereign

Non-sovereign legislatures of independent nations.

¹ Acts of a colonial legislature have no operation beyond the territorial limits of the colony. This, it should be noted, forms a material restriction on the authority of a colonial Parliament. Thus when two of the Australian colonies passed laws for the mutual surrender of criminals, the Courts decided that such legislation was *ultra vires*, and void. Most in fact of the imperial legislation for the colonies arises from the Acts of the colonial legislatures having no operation beyond the territorial limits of each colony. See e.g. Fugitive Offenders Act, 1881, 44 & 45 Vict. c. 69, and the Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 17, 18.

Lecture assembly. Our political habits of thought indeed are
III. so based upon the assumption of Parliamentary om-
 nipotence, that the position of a Parliament which
 represents an independent nation and yet is not
 itself a sovereign power is apt to appear to us ex-
 ceptional or anomalous. Yet whoever examines the
 constitutions of civilized countries will find that the
 legislative assemblies of great nations are or have
 been in many cases legislative without being con-
 stituent bodies. To determine in any given case
 whether a foreign legislature be a sovereign power
 or not we must examine the constitution of the
 state to which it belongs, and ascertain whether the
 legislature whose position is in question bears any
 of the marks of subordination. Such an investiga-
 tion will in many or in most instances show that an
 apparently sovereign assembly is in reality a non-
 sovereign law-making body.

France. France has within the last hundred years made
 trial of at least twelve constitutions¹.

These various forms of government have amidst all
 their differences possessed in general one common
 feature. They have most of them been based upon
 the recognition of an essential distinction between
 constitutional or "fundamental" laws intended to
 be either immutable or changeable only with great
 difficulty, and "ordinary" laws which could be
 changed by the ordinary legislature in the common
 course of legislation. Hence under the constitu-

¹ Demombynes, *Les Constitutions Européennes*, ii. (2nd edit.),
 pp. 1-5.

tions which France has from time to time adopted the common Parliament or legislative body has not been a sovereign legislature. Lecture
III.

The constitutional monarchy of Louis Philippe, in outward appearance at least, was modelled on the constitutional monarchy of England. In the Charter not a word could be found which expressly limits the legislative authority possessed by the Crown and the two Chambers, and to an Englishman it would seem certainly arguable that under the Orleans dynasty the Parliament was possessed of sovereignty. This however was not the view accepted among French lawyers. The "immutability of the Constitution of France," writes De Tocqueville in 1840, "is a necessary consequence of the laws of that country. As the King, the Peers, and the Deputies, all derive their authority from the Constitution, these three powers united cannot alter a law by virtue of which alone they govern. Out of the pale of the Constitution they are nothing: where, then, could they take their stand to effect a change in its provisions? The alternative is clear: either their efforts are powerless against the Charter, which continues to exist in spite of them, in which case they only reign in the name of the Charter; or they succeed in changing the Charter, and then the law by which they existed being annulled, they themselves cease to exist. By destroying the Charter, they destroy themselves. This is much more evident in the laws of 1830 than in those of 1814. In 1814 the royal prerogative

Constitutional
monarchy
of Louis
Philippe.

Lecture
III.

“took its stand above and beyond the Constitution ;
 “but in 1830 it was avowedly created by, and de-
 “pendent on, the Constitution. A part therefore of
 “the French Constitution is immutable, because
 “it is united to the destiny of a family; and the
 “body of the Constitution is equally immutable,
 “because there appear to be no legal means of
 “changing it. These remarks are not applicable to
 “England. That country having no written Con-
 “stitution, who can assert when its Constitution is
 “changed¹?”

De Tocqueville's reasoning may not carry conviction to an Englishman, but the weakness of his argument is of itself strong evidence of the hold on French opinion of the doctrine which it is intended to support, namely that Parliamentary sovereignty was not a recognised part of French constitutionalism. The dogma which is so naturally assented to by Englishmen contradicts that idea of the essential difference between constitutional and other laws which appears to have a firm hold on most foreign statesmen and legislators.

Republic
of 1848.

The Republic of 1848 expressly recognised this distinction; no single article of the constitution proclaimed on 4th November, 1848, could be changed in the same way as an ordinary law. The legislative assembly sat for three years. In the last year of its existence, and then only, it could by a majority of three-fourths, and not otherwise, convoke a constituent

¹ De Tocqueville, *Democracy in America*, ii. (translation), App. pp. 322, 323. *Œuvres Complètes*, i. p. 311.

body with authority to modify the constitution. This constituent and sovereign assembly differed in numbers, and otherwise, from the ordinary non-sovereign legislature. Lecture
III.

The National Assembly of the existing Republic exerts more direct authority than the English Houses of Parliament; for the French Chamber of Deputies exercises more immediate influence on the appointment of Ministers and assumes a larger share in the executive functions of government than does our House of Commons. The President, moreover, does not possess even a theoretical right of veto. For all this, however, the French Parliament is not a sovereign assembly, but is bound by the laws of the constitution in a way in which no law binds our Parliament. The articles of the constitution, or "fundamental laws," stand in a totally different position from the ordinary law of the land. Under article 8 of the constitution, no one of these fundamental enactments can be legally changed otherwise than subject to the following provisions:—

"8. *Les Chambres auront le droit, par délibérations séparées, prises dans chacune à la majorité absolue des voix, soit spontanément, soit sur la demande du Président de la République, de déclarer qu'il y a lieu de réviser les lois constitutionnelles.—Après que chacune des deux Chambres aura pris cette résolution, elles se réuniront en Assemblée nationale pour procéder à la révision.—Les délibérations portant révision des lois constitutionnelles en tout ou en partie, devront être prises à la majorité*

Lecture "absolue des membres composant l'Assemblée nationale¹."
 III.

Supreme legislative power is therefore under the Republic vested not in the ordinary Parliament of two Chambers, but in a "national assembly," or congress, composed of the Chamber of Deputies and the Senate sitting together.

Distinction between flexible and rigid constitutions.

The various constitutions, in short, of France, which are in this respect fair types of continental polities², exhibit, as compared with the expansiveness or "flexibility" of English institutions, that characteristic which may be conveniently described as "rigidity."

And here it is worth while, with a view to understanding the constitution of our own country, to make perfectly clear to ourselves the distinction already referred to between a "flexible" and a "rigid" constitution.

Flexible constitutions.

A "flexible" constitution is one under which every law of every description can legally be changed with

¹ Plouard, *Les Constitutions Françaises*, p. 280. See *La Constitution Française de 1875*, par MM. Alphonse Bard et Robiquet (2nd edit.), p. 374.

² No constitution better merits study in this as in other respects than the constitution of Belgium. Though formed after the English model, it rejects or omits the principle of Parliamentary sovereignty. The ordinary Parliament cannot change anything in the constitution; it is a legislative, not a constituent body; it can declare that there is reason for changing a particular constitutional provision, and having done so is *ipso facto* dissolved (*après cette déclaration les deux chambres sont dissoutes de plein droit*). The new Parliament thereupon elected has a right to change the constitutional article which has been declared subject to change. *Constitution de La Belgique*, arts. 131, 71.

the same ease and in the same manner by one and the same body. The "flexibility" of our constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. With us, laws therefore are called constitutional, because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws. And as a matter of fact, the meaning of the word "constitutional" is in England so vague that the term "a constitutional law or enactment" is rarely applied to any English statute as giving a definite description of its character. It should further be noted that the term "flexible" is used in these lectures without any meaning either of praise or of blame. The flexibility or expansiveness of the English constitution may be a merit or a demerit. Our whole concern is to understand what the attribute means and to note its existence.

A "rigid" constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The "rigidity" of the constitution, say of Belgium or of France, consists in the absence of any right on the part of the Belgian or French Parliament, when acting in its ordinary capacity, to modify or repeal certain definite laws termed consti-

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III.

Rigid con-
stitutions.

Lecture tutional or fundamental. Under a rigid constitution
III. the term "constitutional law" has a perfectly definite
 sense. It means that a particular enactment belongs to the articles of the constitution, and cannot be legally changed with the same ease and in the same manner as ordinary laws. The articles of the constitution will no doubt generally, though by no means invariably, be found to include all the most important and fundamental laws of the state. But it certainly cannot be asserted that where a constitution is rigid all its articles refer to matters of supreme importance. The rule that the French Parliament must meet at Versailles was at one time one of the constitutional laws of the French Republic. Such an enactment, however practically important, would never in virtue of its own character have been termed constitutional; it was constitutional simply because it was included in the articles of the constitution. The term "rigid" is, like the term flexible, used in these lectures without any sense either of praise or of blame; the rigidity of most continental constitutions may be either a merit or a demerit; our whole concern is simply to understand what the attribute means and to note its existence.

The contrast between the flexibility of the English and the rigidity of almost every foreign constitution suggests two interesting enquiries.

First. Does the rigidity of a constitution secure its permanence and invest the fundamental institutions of the state with practical immutability?

To this enquiry historical experience gives an indecisive answer.

Whether
 rigidity of
 constitu-
 tion se-
 cures per-
 manence?

In some instances the fact that certain laws or institutions of a state have been marked off as placed beyond the sphere of political controversy has apparently prevented that process of gradual innovation which in England has within not much more than sixty years transformed our polity. The constitution of Belgium has existed for more than half a century; the constitution of the United States will soon have endured for a hundred years; neither of them has during its existence undergone one tithe of the changes which have been experienced by the constitution of England since the death of George the Third. But if the inflexibility of constitutional laws has in certain instances checked the gradual and unconscious process of innovation by which the foundations of a commonwealth are undermined, the rigidity of constitutional forms has in other cases provoked revolution. The twelve unchangeable constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Philippe's monarchy was destroyed within seven years of the time when De Tocqueville pointed out that no power existed legally capable of altering the articles of the Charter. In one notorious instance at least—and other examples of the same phenomenon might be produced from the annals of revolutionary France—the immutability of the constitution was the ground or excuse for its violent subversion. The best plea for the *Coup d'état* of 1851 was, that while the French people wished for the re-

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election of the President, the article of the constitution requiring a majority of three-fourths of the legislative assembly in order to alter the law which made the President's re-election impossible thwarted the will of the sovereign people. Had the Republican Assembly been a sovereign Parliament, Louis Napoleon would have lacked the plea which seemed to justify as well as some of the motives which tempted him to commit the crime of the 2nd of December.

Nor ought the perils in which France was involved by the immutability with which the statesmen of 1848 invested the constitution to be looked upon as exceptional; they arose from a defect which is inherent in every rigid constitution. The endeavour to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power; it therefore tends to bring the letter of the law into conflict with the will of the really supreme power in the state. The majority of French electors were under the constitution the true sovereign of France; but the rule which prevented the legal re-election of the President in effect brought the law of the land into conflict with the will of the majority of the electors, and produced therefore, as a rigid constitution has a natural tendency to produce, an opposition between the letter of the law and the wishes of the sovereign. If the inflexibility of French constitutions has provoked revolution, the flexibility of English institutions has, once at least, saved them from violent overthrow. To a stu-

dent who at this distance of time calmly studies the history of the first Reform Bill, it is apparent that in 1832 the supreme legislative authority of Parliament enabled the nation to carry through a political revolution under the guise of a legal reform.

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The rigidity, in short, of a constitution tends to check gradual innovation; but just because it impedes change may, under unfavourable circumstances, occasion or provoke revolution.

Secondly. What are the safeguards which under a rigid constitution can be taken against unconstitutional legislation?

What are the safeguards against unconstitutional legislation?

The general answer to our enquiry (which of course can have no application to a country like England, ruled by a sovereign Parliament) is that two methods may be and have been adopted by the makers of constitutions with a view to rendering unconstitutional legislation either impossible or inoperative.

Reliance may be placed upon the force of public opinion and upon the ingenious balancing of political powers for restraining the legislature from passing unconstitutional enactments. This system opposes unconstitutional legislation by means of moral sanctions, which resolve themselves into the influence of public sentiment.

Authority, again, may be given to some person or body of persons, and preferably to the Courts, to adjudicate upon the constitutionality of legislative acts, and treat them as void if they are inconsistent

Lecture with the letter or the spirit of the constitution. This
III. system attempts not so much to prevent unconstitutional legislation as to render it harmless through the intervention of the tribunals, and rests at bottom on the authority of the judges.

This general account of the two methods by which it may be attempted to secure the rigidity of a constitution is hardly intelligible without further illustration. Its meaning may be best understood by a comparison between the different policies in regard to the legislature pursued by two different classes of constitutionalists.

Safeguards provided by continental constitutionalists.

French constitution-makers and their continental followers have as we have seen always attached vital importance to the distinction between fundamental and other laws, and therefore have constantly created legislative assemblies which possessed "legislative" without possessing "constituent" powers. French statesmen have therefore been forced to devise means for keeping the ordinary legislature within its appropriate sphere. Their mode of procedure has been marked by a certain uniformity; they have declared on the face of the constitution the exact limits imposed upon the authority of the legislature; they have laid down as articles of the constitution whole bodies of maxims intended to guide and control the course of legislation: they have provided for the creation, by special methods and under special conditions, of a constituent body which alone should be entitled to revise the constitution. They have, in short, directed their attention

to restraining the ordinary legislature from attempting any inroad upon the fundamental laws of the state; but they have in general trusted to public sentiment, or at any rate to political considerations, for inducing the legislature to respect the restraints imposed on its authority, and have usually omitted to provide machinery for annulling unconstitutional enactments, or for rendering them of no effect.

These traits of French constitutionalism are specially noticeable in the three earliest of French political experiments. The Monarchical constitution of 1791, the Democratic constitution of 1793, the Directorial constitution of 1795 exhibit, under all their diversities, two features in common¹. They each, on the one hand, confine the power of the legislature within very narrow limits indeed; under the Directory, for instance, the legislative body could not itself change any one of the 377 articles of the constitution, and the provisions for creating a constituent assembly were so framed that not the very least alteration in any of these articles could have been carried out within a period of less than six years. None of these constitutions, on the other hand, contain a hint as to the mode in which a law is to be treated which is alleged to violate the constitution. Their framers indeed hardly seem to have recognised the fact that enactments of the legislature might, without being in so many words opposed to the constitution, yet be of dubious constitutionality, and that some means would be needed for determining whether a given

French
Revolu-
tionary
constitu-
tions.

¹ See Plouard, *Les Constitutions Françaises*.

Lecture law was or was not in opposition to the principles
 III. of the constitution.

Existing
 Republican
 constitu-
 tion.

These characteristics of the revolutionary constitu-
 tions have been repeated in the works of later French
 constitutionalists. Under the present French Re-
 public there exist a certain number of laws (not it is
 true, a very large number), which the Parliament can-
 not change; and what is perhaps of more consequence,
 the so-called Congress¹ could at any time increase
 the number of fundamental laws, and thereby greatly
 decrease the authority of future Parliaments. The
 constitution however contains no article providing
 against the possibility of an ordinary Parliament
 carrying through legislation greatly in excess of its
 constitutional powers. Any one in fact who bears
 in mind the respect paid in France from the time of
 the Revolution onwards to the legislation of *de facto*
 governments and the traditions of the French judica-
 ture will assume with confidence that an enactment
 passed through the Chambers, promulgated by the
 President, and published in the *Bulletin des Lois*, will
 be held valid by every tribunal throughout the
 Republic.

Are the
 articles of
 continent-
 al consti-
 tutions
 "laws"?

This curious result therefore ensues. The restric-
 tions placed on the action of the legislature under the
 French constitution are not in reality laws, since
 they are not rules which in the last resort will be
 obeyed by the Courts. Their true character is that

¹ The term is used by French writers, but does not appear in the
Lois Constitutionnelles, and one would rather gather that the proper
 title for a so-called Congress is *L'Assemblée Nationale*.

of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas. The Belgian constitution, for example, restricts the action of the Parliament no less than does the Republican constitution of France. But it is at least doubtful whether Belgian constitutionalists have provided any means whatever for invalidating laws which diminish or do away with the rights (e.g. the right to freedom of speech), "guaranteed" to Belgian citizens. The jurists of Belgium maintain, in theory at least, that an Act of Parliament opposed to any article of the constitution ought to be treated by the Courts as void. But during the fifty-four years of Belgian independence, no tribunal it is said has ever pronounced judgment upon the constitutionality of an Act of Parliament. This shows, it may be said, that the Parliament has respected the constitution, and is certainly some evidence that, under favourable circumstances, formal declarations of rights may, from their influence on popular feeling, possess greater weight than is generally attributed to them in England, but it also suggests the notion that in Belgium, as in France, the restrictions on Parliamentary authority are supported mainly by moral or political sentiment, and are at bottom rather constitutional understandings than laws.

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To an English critic indeed, the attitude of continental and especially of revolutionary statesmen towards the ordinary legislature bears an air of paradox. They seem to be almost equally afraid of leaving the authority of the ordinary legislature unfettered, and of taking the steps by which the legislature may be prevented from breaking through the bonds imposed upon its power. The explanation of this apparent inconsistency is to be found in two sentiments which have influenced French constitution-makers from the very outbreak of the Revolution—an over-estimate of the effect to be produced by general declarations of rights, and a settled jealousy of any intervention by the judges in the sphere of politics¹. We shall see, in a later lecture, that the public law of France is radically influenced by the belief, almost universal among Frenchmen, that the Courts must not be allowed to interfere in any way whatever with matters of state, or indeed with anything affecting the machinery of government².

Safeguards
provided
by found-
ers of
United
States.

The authors of the American constitution (together with their Swiss imitators) have, for reasons that will appear in my next lecture, been even more anxious than French statesmen to limit the authority of every legislative body throughout the Republic. They have further shared the faith of continental politicians in the value possessed by general declarations of rights. But they have, unlike French constitution-makers, directed their attention, not so

¹ De Tocqueville, *Œuvres Complètes*, i. pp. 167, 168.

² See Lecture V.

much to preventing Congress and other legislatures from making laws in excess of their powers, as to the invention of means by which the effect of unconstitutional laws may be nullified, and this result they have achieved by making it the duty of every judge throughout the Union to treat as void any enactment which violates the constitution, and thus have given to the restrictions contained in the constitution on the legislative authority either of Congress or the State legislatures the character of real laws, that is, of rules enforced by the Courts. This system, which makes the judges the guardians of the constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.

Lecture
III.

LECTURE IV.

PARLIAMENTARY SOVEREIGNTY AND FEDERALISM.

Lecture
IV.

Aim of
lecture.

MY aim in this lecture is to illustrate the nature of Parliamentary sovereignty as it exists in England, by a comparison with the system of government known as Federalism as it exists in several parts of the civilized world, and especially in the United States of America.

Federal-
ism best
understood
by study-
ing consti-
tution of
United
States.

There are indeed to be found at the present time three other noteworthy examples of federal government—the Swiss Confederation, the Dominion of Canada, and the German Empire. But while from a study of the institutions of each of these states one may draw illustrations which throw light on our subject, it will be best to keep our attention throughout this lecture fixed mainly on the institutions of the great American Republic. And this for two reasons. The Union, in the first place, presents the most completely developed type of federalism. All the features which mark that scheme of government, and above all the control of the legislature by the Courts, are there exhibited in their most

salient and perfect form; the Swiss Confederation moreover, and the Dominion of Canada, are copied from the American model, whilst the constitution of the German Empire is too full of anomalies, springing both from historical and from temporary causes, to be taken as a fair representative of any known form of government. The Constitution of the United States, in the second place, holds a very peculiar relation towards the institutions of England. In the principle of the distribution of powers which determines its form, the Constitution of the United States is the exact opposite of the English constitution, the very essence of which is, as I hope I have now made clear, the unlimited authority of Parliament. But while the formal differences between the constitution of the American Republic and the constitution of the English monarchy are, looked at from one point of view, immense, the institutions of America are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England. The principle, in short, which gives its form to our system of government is (to use a foreign but convenient expression) "unitarism," or the habitual exercise of supreme legislative authority by one central power, which in the particular case is the British Parliament. The principle which, on the other hand, shapes every part of the American polity, is that distribution of limited, executive, legislative, and judicial authority among bodies each co-ordinate with and independent of the other which, we shall in a moment see, is essential to

Lecture IV. the federal form of government. The contrast therefore between the two politics is seen in its most salient form, and the results of this difference are made all the more visible because in every other respect the institutions of the English people on each side the Atlantic rest upon the same notions of law, of justice, and of the relation between the rights of individuals and the rights of the government, or the state.

We shall best understand the nature of federalism and the points in which a federal constitution stands in contrast with the Parliamentary constitution of England if we note, first, the conditions essential to the existence of a federal state and the aim with which such a state is formed, secondly, the essential features of a federal union, and lastly, certain characteristics of federalism which result from its very nature, and form points of comparison or contrast between a federal polity and a system of Parliamentary sovereignty.

Conditions and aim of federalism. A federal state requires for its formation two conditions¹.

There must exist, in the first place, a body of countries such as the Cantons of Switzerland, the

¹ For United States see Story, *Commentaries on the Constitution of the United States*: 4th edition.

For Canada see the British North America Act, 1867, 30 Vict. c. 3. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*.

For Switzerland see *Constitution Fédérale de la Confédération Suisse* du 29 Mai, 1874: Blumer, *Handbuch des Schweizerischen Bundesstaatsrechtes*. Dubs, *Das öffentliche Recht der Schweizerischen Eidgenossenschaft*.

Colonies of America, or the Provinces of Canada, so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality. Lecture
IV.
Countries
capable of
union.

It will, also, be generally found (if we appeal to experience) that lands which now form part of a federal state were at some stage of their existence bound together by close alliance or by subjection to a common sovereign. It were going further than facts warrant to assert that this earlier connection is essential to the formation of a federal state. But it is certain that where federalism flourishes it is in general the slowly-matured fruit of some earlier and looser connection.

A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite. Existence
of federal
sentiment. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism; the wild scheme entertained (it is said) under the Commonwealth of forming a union between the English Republic and the United Provinces was one of those dreams which may haunt the imagination of politicians but can never be transformed into fact. If, on the other hand, there be a desire for unity, the wish will naturally find its satisfaction, not under a federal, but under a unitarian constitution; the experience of England and Scotland in the eighteenth and of the states of Italy in the nineteenth century shows that common

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national feeling or the sense of common interests may be too strong to allow of that combination of union and separation which is the foundation of federalism. The phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the individual existence of each man's State or Canton. We may perhaps go a little further, and say, that a federal government will hardly be formed unless many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government. This was certainly the case in America towards the end of the last century, and in Switzerland at the middle of the present century. In 1787 a Virginian or a citizen of Massachusetts felt more attachment to Virginia or to Massachusetts than to the body of the confederated States. In 1848 the citizens of Lucerne felt far keener loyalty to their Canton than to the confederacy, and the same thing, no doubt, held true in a less degree of the men of Berne or of Zurich. The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent—the desire for national unity and the determination to maintain the independence of each man's separate State. The aim of federalism is to give effect as far as possible to both these sentiments.

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of "state rights." The end aimed at fixes the essential character of federalism. For the method by which federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate States. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States. The preamble to the Constitution of the United States recites that "We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." The tenth amendment enacts that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." These two statements, which are reproduced with slight alteration in the constitution of the Swiss Confedera-

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IV.
 The aim of
 federalism.

Lecture tion¹, point out the aim and lay down the funda-
IV. mental idea of federalism.

Essential
 character-
 istics of
 federalism.
 United
 States.

From the notion that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual States on the other, flow the three leading characteristics of federalism,—the supremacy of the constitution—the distribution among bodies with limited and co-ordinate authority of the different powers of government—the authority of the Courts to act as interpreters of the constitution.

Supremacy
 of consti-
 tution.

A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts, nor the Legislature or General Court of Massachusetts can legally exercise a single power which is inconsistent with the articles of the Constitution. This doctrine of the supremacy of the Constitution is familiar to every American, but in England even trained lawyers find a difficulty in following it out to its legitimate consequences. The difficulty arises from the fact that under the English constitution no principle is recognised which bears any real resemblance to the doctrine (essential to

¹ *Constitution Fédérale*, Preamble, and Art. 3.

federalism) that the Constitution constitutes the "supreme law of the land"¹. In England we have laws which may be called fundamental² or constitutional because they deal with important principles (as, for example, the descent of the Crown or the terms of union with Scotland) lying at the basis of our institutions, but with us there is no such thing as a supreme law, or law which tests the validity of other laws. There are indeed important statutes, such as the Act embodying the Treaty of Union with Scotland, with which it would be political madness to tamper gratuitously; there are utterly unimportant statutes, such for example as the Dentists' Act, 1878, which may be repealed or modified at the pleasure or caprice of Parliament; but neither the Act of Union with Scotland nor the Dentists' Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament; neither tests the validity of the other. Should the Dentists' Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentists' Act, 1878, was thereby rendered invalid or unconstitutional. The one fundamental dogma of English constitutional law is the absolute

¹ See Constitution of United States, art. 6, cl. 2.

² The expression "fundamental laws of England" became current during the controversy as to the payment of ship-money (1635). See Gardiner, *History of England*, viii. pp. 84, 85.

Lecture IV. legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution¹.

Consequences. In the supremacy of the constitution are involved three consequences:—

Written constitution. The constitution must be a “written” constitution.

The foundations of a federal state are a complicated contract. This compact contains a variety of terms which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. The constitution must be a written document, and, if possible, a written document of which the terms are open to no misapprehension. The founders of the American Union left at least one great question unsettled. This gap in the Constitution gave an opening to the dispute which was the plea, if not the justification, for the War of Secession.

Rigid constitution. The constitution must be what I have termed a “rigid²” or “inexpansive” constitution.

The law of the constitution must be either legally immutable, or else capable of being changed only by

¹ Compare especially Kent, *Commentaries*, i. 447-449.

² See Lecture III, pp. 114-116, *ante*.

some authority above and beyond the ordinary legis- **Lecture**
lative bodies, whether federal or state legislatures, **IV.**
existing under the constitution.

In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable¹ that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a federal union, since one main object of the States entering into the compact is to prevent further encroachments upon their several state rights; and in the fifth article of the United States Constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question, however, whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorised to amend or alter its terms is of merely speculative interest, for under existing federal governments the constitution will be found to provide the means for its own improvement. It is, however, certain that this supreme legislative power cannot in a confederacy be vested in any ordinary legislature

¹ Eminent American lawyers, whose opinion is entitled to the highest respect, maintain that under the Constitution there exists no person or body of persons possessed of legal sovereignty in the sense given by Austin to that term, and it is difficult to see that this opinion involves any absurdity. Compare Constitution of United States, article 5.

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acting under the constitution. For so to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several States. If Congress could change the Constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the Constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a federal state, and would become a unitarian republic. If, on the other hand, the legislature of South Carolina could of its own will amend the Constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the Constitution has been placed, so to speak, outside the Constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the majority of a body constituted by the joint action of three-fourths of the several States at any time belonging to the Union¹. Now from the necessity for placing ultimate legislative authority in some body outside the Constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a

¹ See Constitution of U. S., art. 5.

sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.

Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of bye-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.

Every legislature under federal constitution is a subordinate law-making body.

There is an apparent absurdity in comparing the legislature of the United States to an English railway company or a school-board, but the comparison is just. Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Great Eastern Railway Company can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the Constitution, is invalid; a law passed by the Great Eastern Railway Company in excess of the powers given by Act of

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Parliament, or, in other words, by the legal constitution of the company, is also invalid; a law passed by Congress is called an "Act" of Congress, and if *ultra vires* is described as "unconstitutional;" a law passed by the Great Eastern Railway Company is called a "bye-law," and if *ultra vires* is called, not "unconstitutional," but "invalid." Differences however of words must not conceal from us essential similarity in things. Acts of Congress, or of the Legislative Assembly of New York or of Massachusetts, are at bottom simply "bye-laws," depending for their validity upon their being within the powers given to Congress or to the state legislatures by the Constitution. The bye-laws of the Great Eastern Railway Company, imposing fines upon passengers who travel over their line without a ticket, are laws, but they are laws depending for their validity upon their being within the powers conferred upon the company by Act of Parliament, i.e. by the company's constitution. Congress and the Great Eastern Railway Company are in truth each of them nothing more than subordinate law-making bodies. Their power differs not in degree, but in kind, from the authority of the sovereign Parliament of the United Kingdom.

Distri-
bution of
powers.

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate

States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition. The Constitution, for instance, of the United States delegates special and closely-defined powers to the executive, to the legislature, and to the judiciary of the Union, or in effect to the Union itself, whilst it provides that the powers "not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people¹."

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This is all the amount of division which is essential to a federal constitution. But the principle of definition and limitation of powers harmonises so well with the federal spirit that it is generally carried much farther than is dictated by the mere logic of the constitution. Thus the authority assigned to the United States under the Constitution is not concentrated in any single official or body of officials. The President has definite rights, upon which neither

Division of
powers
carried in
fact beyond
necessary
limit.

¹ Constitution of U. S., Amendments, art. 10. Compare provisions of a similar character in the Swiss Constitution, *Constitution Fédérale*, art. 3, and in the Constitution of the Canadian Dominion, British North America Act, 1867, secs. 91, 92.

There exists, however, one marked distinction in principle between the Constitution of the United States and the Constitution of the Canadian Dominion. The Constitution of the United States in substance reserves to the separate States all powers not expressly conferred upon the national government. The Canadian Constitution in substance confers upon the Dominion government all powers not assigned exclusively to the Provinces. In this matter the Swiss Constitution follows that of the United States.

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Congress nor the judicial department can encroach. Congress has a limited (indeed a very limited) power of legislation, for it can make laws upon eighteen topics only; but within its own sphere it is independent both of the President and of the Federal Courts. So, lastly, the judiciary have their own powers. They stand on a level both with the President and with Congress, and their authority (being directly derived from the constitution) cannot, without a distinct violation of law, be trenched upon either by the executive or by the legislature. Where, further, States are federally united, certain principles of policy or of justice must be enforced upon the whole confederated body as well as upon the separate parts thereof, and the very inflexibility of the constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance. Hence spring additional restrictions on the power both of the federation and of the separate states. The United States Constitution prohibits both to Congress¹ and to the separate States² the passing of a bill of attainder or an *ex post facto* law, the granting of any title of nobility, or the laying of any tax on articles exported from any State³, enjoins that full faith shall be given to the public acts and judicial proceedings of every other State, hinders any State from passing any law

¹ Constitution of United States, article 1, sec. 9.

² *Ibid.*, article 1, sec. 10.

³ *Ibid.*, article 1, sec. 9.

impairing the obligation of contracts¹, and prevents every State from entering into any treaty, alliance, or confederation; thus it provides that the elementary principles of justice, freedom of trade, and the rights of individual property shall be absolutely respected throughout the length and breadth of the Union. It further ensures that the right of the people to keep and bear arms shall not be infringed, while it also provides that no member can be expelled from either House of Congress without the concurrence of two-thirds of the House. Other federal constitutions go far beyond that of the United States in inscribing among constitutional articles either principles or petty rules which are supposed to have a claim of legal sanctity; the Swiss Constitution teems with "guaranteed" rights.

Nothing, however, would appear to an English critic to afford so striking an example of the connection between federalism and the "limitation of powers" as the way in which the principles of the federal Constitution pervade in America the constitutions of the separate States. In no case does the legislature of any one State possess all the powers of "state sovereignty" left to the States by the Constitution of the Republic, and every state legislature is subordinated to the constitution of the State. The ordinary legislature of New York or Massachusetts can no more change the state constitution than it can alter the Constitution of the United States itself; and, though the topic cannot be worked out here in detail, it may

¹ Constitution of United States, article 1, sec. 10.

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safely be asserted that state government throughout the Union is formed upon the federal model, and (what is noteworthy) that state constitutions have carried much further than the Constitution of the Republic the tendency to clothe with constitutional immutability any rules which strike the people as important. Illinois has embodied, among fundamental laws, regulations as to elevators¹.

But here, as in other cases, there is great difficulty in distinguishing cause and effect. If a federal form of government has affected, as it probably has, the constitutions of the separate States, it can hardly be doubted that features originally existing in the state constitutions have been reproduced in the Constitution of the Union; and, as we shall see in a moment, the most characteristic institution of the United States, the Federal Court, appears to have been suggested at least to the founders of the Republic, by the relation which before 1789 already existed between the state tribunals and the state legislatures².

Division of powers distinguishes federal from unitarian system of government.

The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities is specially noticeable, because it forms the essential distinction between a federal system

¹ See *Munn v. Illinois*, 4 Otto, 113.

² European critics of American federalism have, as has been well remarked by an eminent French writer, paid in general too little attention to the working and effect of the state constitutions, and have overlooked the great importance of the action of the state legislatures. See Boutmy, *Etudes de Droit Constitutionnel*, pp. 105-113.

such as that of America or Switzerland, and a unitarian system of government such as that which exists in England or Russia. We talk indeed of the English constitution as resting on a balance of powers, and as maintaining a division between the executive, the legislative, and the judicial bodies. These expressions have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States. All the power of the English state is concentrated in the Imperial Parliament, and all departments of government are legally subject to Parliamentary despotism. Our judges are independent, in the sense of holding their office by a permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on a level with Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law. The Federal Judiciary, on the other hand, are co-ordinate with the President and with Congress, and cannot without a revolution be deprived of a single right by President or Congress. So, again, the executive and the legislature are with us distinct bodies, but they are not distinct in the sense in which the President is distinct from and independent of the Houses of Congress. The House of Commons interferes with administrative matters, and the Ministry are in truth placed and kept in office by the House. A modern Cabinet would not hold power for a week if censured by a newly elected

Lecture House of Commons. An American President may
IV. retain his post and exercise his very important functions even though his bitterest opponents command majorities both in the Senate and in the House of Representatives. Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.

Authority
of Courts.

Whenever there exists, as in Belgium or in France, an inflexible constitution the articles of which cannot be amended by the ordinary legislature, the difficulty has to be met of guarding against legislation inconsistent with the constitution. As Belgian and French statesmen have created no machinery for the attainment of this object, we may conclude that they considered respect for the constitution to be sufficiently secured by moral or political sanctions, and treated the limitations placed on the power of Parliament rather as maxims of policy than as true laws. During a period, at any rate of more than fifty years, no Belgian judge has (it is said) ever pronounced a Parliamentary enactment unconstitutional. No French tribunal, as has been already pointed out, would hold itself at liberty to disregard an enactment, however unconstitutional, passed by the National Assembly, inserted in the *Bulletin des Lois*, and supported by the force of the government; and French statesmen may well have thought, as De

Tocqueville certainly did think, that in France possible Parliamentary invasions of the constitution were a less evil than the participation of the judges in political conflicts. France, in short, and Belgium being governed under unitarian constitutions, the non-sovereign character of the legislature is in each case an accident, not an essential property of their polity. Under a federal system it is otherwise. The legal supremacy of the constitution is essential to the existence of the state; the glory of the founders of the United States is to have devised or adopted arrangements under which the Constitution became in reality as well as name the supreme law of the land. This end they attained by adherence to a very obvious principle, and by the invention of appropriate machinery for carrying this principle into effect.

The principle is clearly expressed in the Constitution of the United States. "The Constitution," runs article 6, "and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding¹." The import of these expressions is unmistakeable. "Every Act of Congress," writes Chancellor Kent, "and every Act of the legislatures of the State, and every part of the constitution of any State, which are repugnant to the Constitution of the United States, are necessarily void. This is a clear and

How
authority
of the
Courts is
exerted.

¹ Constitution of United States, art. 6.

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“settled principle of [our] constitutional jurisprudence¹.” The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the state legislatures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a bye-law made by the Great Eastern or any other Railway Company. The American judge must in giving judgment obey the terms of the Constitution, just as his English brother must in giving judgment obey every Act of Parliament bearing on the case.

Supremacy
of consti-
tution
secured
by creation
of Supreme
Court.

To have laid down the principle clearly is much, but the great problem was how to ensure that the principle should be obeyed; for there clearly existed a danger that judges depending on the federal government should wrest the Constitution in favour of the central power, and that judges created by the States should wrest it in favour of State rights or interests. This problem has been solved by the creation of the Supreme Court and of the Federal Judiciary.

Nature
and ac-
tion of
Supreme
Court.

Of the nature and position of the Supreme Court itself thus much alone need for our present purpose be noted. The Court derives its existence from the Constitution, and stands therefore on an equality with the President and with Congress; the members thereof (in common with every judge of the

¹ Kent, *Commentaries*, i. p. 314, and conf. *Ibid.*, p. 449.

federal judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office¹. The Supreme Court stands at the head of the whole federal judicial department, which extending by its subordinate Courts throughout the Union can execute its judgments through its own officers without requiring the aid of state officials. The Supreme Court, though it has a certain amount of original jurisdiction, derives its importance from its appellate character; it is on every matter which concerns the interpretation of the Constitution a supreme and final Court of Appeal from the decision of every Court (whether a federal Court or a state Court) throughout the Union. It is in fact the final interpreter of the Constitution, and therefore has authority to pronounce finally as a Court of Appeal whether a law passed either by Congress or by the legislature of a State, e.g. New York, is or is not constitutional. To understand the position of the Supreme Court we must bear in mind that there exist throughout the Union two classes of Courts in which proceedings can be commenced, namely the subordinate federal Courts deriving their authority from the Constitution, and the state Courts, e.g. of New York or Massachusetts, created by and existing under the state constitutions; and that the jurisdiction of the federal judiciary and the state judiciary is in many cases concurrent, for though the jurisdiction of the federal Courts is mainly confined to cases arising under the Constitution and laws of the

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¹ See Constitution of United States, art. 3, secs. 1, 2.

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United States, it is also occasionally dependent upon the character of the parties, and though there are cases with which no state Court can deal, such a Court may often entertain cases which might be brought in a federal Court, and constantly has to consider the effect of the Constitution on the validity either of a law passed by Congress or of state legislation. That the Supreme Court should be a Court of Appeal from the decision of the subordinate federal tribunals is a matter which excites no surprise. The point to be noted is that it is also a Court of Appeal from decisions of the Supreme Court of any State, e.g. New York, which turn upon or interpret the articles of the Constitution or Acts of Congress. The particular cases in which a party aggrieved by the decision of a state Court has a right of appeal to the Supreme Court of the United States are regulated by an Act of Congress of 24th September, 1789, the twenty-fifth section of which provides that "a final judgment or decree, in any suit in the highest court of law or equity of a State, may be brought up on error in point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under the United States, was drawn in question in the state court, and the decision was against that validity; or provided the validity of any state authority was drawn in question, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favour of its validity; or provided the construc-

“tion of any clause of the Constitution or of a
 “treaty, or statute of, or commission held under
 “the United States, was drawn in question, and
 “the decision was against the title, right, privilege,
 “or exemption, specially claimed under the au-
 “thority of the Union¹.” Strip this enactment of
 its technicalities and it comes to this. A party to a
 case in the highest Court, say of New York, who bases
 his claim or defence upon an article in the Constitu-
 tion or law made under it, stands in this position ; if
 judgment be in his favour there is no further appeal ;
 if judgment goes against him, he has a right of
 appeal to the Supreme Court of the United States.
 Any lawyer can see at a glance how well devised is
 the arrangement to encourage state Courts in the
 performance of their duty as guardians of the
 Constitution, and further that the Supreme Court
 thereby becomes the ultimate arbiter of all matters
 affecting the Constitution.

Let no one for a moment fancy that the right of
 every Court, and ultimately of the Supreme Court
 to pronounce on the constitutionality of legislation
 and on the rights possessed by different authorities
 under the Constitution is one rarely exercised, for it
 is in fact a right which is constantly exerted with-
 out exciting any more surprise on the part of the
 citizens of the Union than does in England a judg-
 ment of the Queen’s Bench Division treating as
 invalid the bye-law of a railway company. The
 American tribunals have dealt with matters of

¹ Kent, *Commentaries*, i. p. 300.

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supreme consequence; they have determined that Congress has the right to give priority to debts due to the United States¹, can lawfully incorporate a bank², has a general power to levy or collect taxes without any restraint, but subject to definite principles of uniformity prescribed by the Constitution; the tribunals have settled what is the power of Congress over the militia, who is the person who has a right to command it³, and that the power exercised by Congress during the War of Secession of issuing paper money was valid⁴. The Courts again have controlled the power of the separate States fully as vigorously as they have defined the authority of the United States. The judiciary have pronounced unconstitutional every *ex post facto* law, every law taxing even in the slightest degree articles exported from any State, and have again deprived of effect state laws impairing the obligation of contracts. To the judiciary in short is due the maintenance of justice, the existence of internal free trade, and the general respect for the rights of property; whilst a recent decision shows that the Courts are prepared to uphold as consistent with the Constitution any laws which prohibit modes of using private property, which seem to the judges inconsistent with public interest⁵. The power moreover of the Courts which

¹ Kent, *Commentaries*, i. pp. 244-248.

² *Ibid.*, pp. 248-254.

³ *Ibid.*, pp. 262-266.

⁴ Story, *Commentaries on the Constitution* (4th ed.) ii. secs. 1116, 1117. See *Hepburn v. Griswold*, 8 Wallace, 603, Dec. 1869, and *Knox v. Lee*, 12 Wallace, 457.

⁵ *Munn v. Illinois*, 4 Otto, Rep. 113.

maintains the articles of the Constitution as the law of the land, and thereby keeps each authority within its proper sphere, is exerted with an ease and regularity which has astounded and perplexed continental critics. The explanation is that the judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never pronounces any opinion whatever upon an Act of Congress. What the Court does do is simply to determine that in a given case *A* is or is not entitled to recover judgment against *X*; but in determining that case the Court may decide that an Act of Congress is not to be taken into account, since it is an Act beyond the constitutional powers of Congress¹.

If any one thinks this is a distinction without a difference he shows great ignorance of politics, and does not understand how much the authority of a Court is increased by confining its action to purely judicial business. But persons who, like De Tocqueville, have fully appreciated the wisdom of the statesmen who created the Union, have formed perhaps an exaggerated estimate of their originality. Their true merit was that they applied with extraordinary skill the notions which they had inherited from English law to the novel circumstances of the new republic. To any one imbued with the traditions

The true merit of the founders of the United States.

¹ See Lecture III, pp. 88-91, *ante*.

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IV. of English procedure it must have seemed impossible to let a Court decide upon anything but the case before it. To any one who had inhabited a colony governed under a charter the effect of which on the validity of a colonial law was certainly liable to be considered by the Privy Council, there was nothing startling in empowering the judiciary to pronounce in given cases upon the constitutionality of Acts passed by assemblies whose powers were limited by the Constitution, just as the authority of the colonial legislatures was limited by charter or by Act of Parliament. To a French jurist indeed filled with the traditions of the French Parliaments all this might well be incomprehensible, but an English lawyer can easily see that the fathers of the republic treated Acts of Congress as English Courts treat bye-laws, and in forming the Supreme Court may probably have had in mind the functions of the Privy Council. It is still more certain that they had before their eyes cases in which the tribunals of particular States had treated as unconstitutional, and therefore pronounced void, Acts of the state legislature which contravened the state constitution. The earliest case of declaring a law unconstitutional dates (it is said) from 1786, and took place in Rhode Island, which was then, and continued till 1842, to be governed under the charter of Charles II. An Act of the legislature was declared unconstitutional by the Courts of North Carolina in 1787¹ and by the Courts of Virginia in 1788², whilst the Constitution

¹ Martin, 421.

² 1 Va. Cas. 198.

of the United States was not adopted till 1789, and *Marbury v. Madison*, the first case in which the Supreme Court dealt with the question of constitutionality, was decided in 1803¹. Lecture
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But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be "the law of the land," and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal state.

Turn for a moment to the Canadian Dominion. The preamble to the British North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united into one Dominion "with a constitution similar in principle to that of the United *Kingdom*." If preambles were intended to express the truth, for the word "*Kingdom*" ought to have been substituted "*States*"; since it is clear that the Constitution of the Dominion is modelled on that of the Union. This is indeed denied, but in my judgment without adequate grounds, by competent Canadian critics. The differences between the institutions of the United States and of The Cana-
dian Do-
minion.

¹ 1 Cranch, 137. For the facts as to the early action of the State Courts in declaring legislative enactments unconstitutional I am indebted, as for much other useful criticism, to my friend Professor Thayer, of Harvard University.

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the Dominion are of course both considerable and noteworthy. But no one can study the provisions of the B. N. America Act, 1867, without seeing that its authors had the American Constitution constantly before their eyes, and that if Canada were an independent country it would be a Confederacy governed under a Constitution very similar to that of the United States. The Constitution is the law of the land; it cannot be changed (except within narrow limits allowed by the B. N. America Act, 1867) either by the Dominion Parliament¹ or by the Provincial Parliaments²; it can be altered only by the sovereign power of the British Parliament. Nor does this arise from the Canadian Dominion being a dependency. Victoria is, like Canada, a colony, but the Victorian Parliament can with the assent of the Crown do what the Canadian Parliament cannot do—change the colonial constitution. Throughout the Dominion, therefore, the Constitution is in the strictest sense the immutable law of the land. Under this law again, you have, as you would expect, the distribution of powers among bodies of co-ordinate authority³; though undoubtedly the powers bestowed on the

¹ See, however, B. N. America Act, 1867 (30 Vict. c. 3), s. 94, which gives the Dominion Parliament a limited power (when acting in conjunction with a Provincial legislature) of changing to a certain extent the provisions of the B. N. America Act, 1867.

² The legislatures of each Province have, nevertheless, authority to make laws “for the amendment from time to time notwithstanding anything” [in the B. N. America Act, 1867] “of the Constitution of the Province except as regards the office of Lieutenant Governor.” See B. N. America Act, 1875, s. 92.

³ See B. N. America Act, 1867, secs. 91, 92.

Dominion government and Parliament are greater when compared with the powers reserved to the Provinces than are the powers which the Constitution of the United States gives to the federal government. In nothing is this more noticeable than in the authority given to¹ the Dominion Government to disallow provincial acts which are illegal or unconstitutional². This right was possibly given with a view to obviate altogether the necessity for invoking the law Courts as interpreters of the Constitution; the founders of the Confederation appear in fact to have believed that "the care taken to define the "respective powers of the several legislative bodies "in the Dominion would prevent any troublesome "or dangerous conflict of authority arising between "the central and local governments³." The futility however of a hope grounded on a misconception of the nature of federalism is proved by the existence of two thick volumes of reports filled with cases on the constitutionality of legislative enactments, and by a long list of decisions as to the respective powers possessed by the Dominion and by the Provincial Parliaments—judgments given by the true Supreme Court of the Dominion, namely, the Judicial Committee of the Privy Council. In Canada, as in the United States, the Courts inevitably become the interpreters of the Constitution.

¹ See B. N. America Act, secs. 56, 90.

² See Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, p. 76.

³ See *Ibid.*, p. 694.

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The Swiss
Confederation.

Swiss federalism repeats, though with noteworthy variations, the essential traits of the federal polity as it exists across the Atlantic. The Constitution is the law of the land, and cannot be changed either by the federal or by the cantonal legislative bodies; the Constitution enforces a distribution of powers between the national government and the Cantons, and directly or indirectly defines and limits the power of every authority existing under it. The Common Government has in Switzerland, as in America, three organs—a federal Legislature, a federal Executive (*Bundesrath*), and a federal Court (*Bundesgericht*). Of the many interesting and instructive peculiarities which give to Swiss federalism an individual character, this is not the occasion to write in detail. It lies however within the scope of this lecture to note that the Constitution of the Confederation differs in two most important respects from that of the United States. It does not, in the first place, establish anything like the accurate division between the executive and the judicial departments of government which exists both in America and in Canada; the executive exercises, under the name of “administrative law,” many functions¹ of a judicial character, and thus, for example, deals with questions having reference to the rights of religious bodies. The federal Assembly is the final arbiter on all questions as to the respective jurisdiction of the executive and the federal Court. The judges of

¹ See *Constitution Fédérale*, art. 113, *Loi*, 27 June, 1874, art. 59, and Dubs, *Oeffentliche Recht*, ii. p. 90.

that Court are elected by the federal Assembly, they are occupied greatly with questions of public law (*Staatsrecht*), and so experienced a statesman as Dr. Dubs laments that the federal Court should possess jurisdiction in matters of private law¹. When to this is added that the judgments of the federal Court are executed by the government, it at once becomes clear that, according to any English standard, Swiss statesmanship has failed as distinctly as American statesmanship has succeeded in keeping the judicial apart from the executive department of government, and that this failure constitutes a serious flaw in the Swiss Constitution. That Constitution, in the second place, does not in reality place the federal Court on an absolute level with the federal Assembly. In many cases that tribunal cannot question the constitutionality of laws or decrees passed by the federal Parliament². From this fact one might suppose that the federal Assembly is (unlike Congress) a sovereign body, but this is not so. The reason why all Acts of the federal Parliament are treated as constitutional by the federal tribunal is that the Constitution itself almost precludes the possibility of encroachment upon its articles by the federal legislative body. No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the Cantons, and an ordinary law duly passed by the federal Assembly may be legally annulled by a popular veto.

¹ *Constitution Fédérale*, art. 113, and Dubs, ii. pp. 92-95.

² *Constitution Fédérale*, art. 113, and Dubs, *Oeffentliche Recht*, ii. 92.

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The authority of the Swiss Assembly nominally exceeds the authority of Congress, because in reality the Swiss legislative body is weaker than Congress. For while in each case there lies in the background a legislative sovereign capable of controlling the action of the ordinary legislature, the sovereign power is far more easily brought into play in Switzerland than in America. When the sovereign power can easily enforce its will, it may trust to its own action for maintaining its rights; when, as in America, the same power acts but rarely and with difficulty, the Courts naturally become the guardians of the sovereign's will expressed in the articles of the Constitution.

Comparison between system of federalism and of parliamentary sovereignty.

Our survey from a legal point of view of the characteristics common to all federal governments forcibly suggests conclusions of more than merely legal interest, as to the comparative merits of federal government, and the system of Parliamentary sovereignty.

Weakness of federalism.

Federal government means weak government¹.

¹ This weakness springs from two different causes: first, the division of powers between the central government and the States; secondly, the distribution of powers between the different members (e.g. the President and the Senate) of the national government. The first cause of weakness is inherent in the federal system; the second cause of weakness is not (logically at least) inherent in federalism. Under a federal constitution the whole authority of the national government might conceivably be lodged in one person or body, but we may feel almost certain that in practice the fears entertained by the separate States of encroachments by the central government on their State rights will prohibit such a concentration of authority. See for some remarks on the feebleness of the federal system, Boutmy, *Études de Droit Constitutionnel*, pp. 156-158.

The distribution of all the powers of the state among co-ordinate authorities necessarily leads to the result that no one authority can wield the same amount of power as under a unitarian constitution is possessed by the sovereign. A scheme again of checks and balances in which the strength of the common government is so to speak pitted against that of the state governments leads, on the face of it, to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian states of equal resources. Nor does the experience either of the United States or of the Swiss confederation invalidate this conclusion. The Union has no powerful neighbours and has no foreign policy whatever. Circumstances unconnected with constitutional arrangements make it possible for Switzerland to preserve her separate existence, though surrounded by powerful and at times hostile nations; and the mutual jealousies incident to federalism do no doubt in some respects visibly weaken the Swiss Republic. Thus, to take one example only, each member of the executive must belong to a different canton¹. But this rule may exclude from the government statesmen of high merit, and therefore diminish the resources of the state. A rule that each member of the Cabinet should be the native of a different county would appear to Englishmen palpably absurd. Yet this absurdity is forced upon Swiss politicians, and affords one among numerous instances in which the efficiency of the public service

¹ *Constitution Fédérale*, art. 96.

Lecture is sacrificed to the requirements of federal sentiment.
IV. Switzerland, moreover, is governed under a form of democratic federalism which tends towards unitarianism. Each revision increases the authority of the nation at the expense of cantonal independence. This is no doubt in part due to the desire to strengthen the nation against foreign attack. It is perhaps also due to another circumstance. Federalism, as it defines and therefore limits the powers of each department of the administration, is unfavourable to the interference or to the activity of government. Hence a federal government can hardly render services to the nation by undertaking for the national benefit functions which may be performed by individuals. This may be a merit of the federal system; it is, however, a merit which does not commend itself to modern democrats, and no more curious instance can be found of the inconsistent currents of popular opinion which may pervade a nation or a generation at the same time than the coincidence in England of a vague admiration for federalism alongside with a far more decided feeling against the doctrines of so-called *laissez faire*. A system meant to maintain the *status quo* in politics is incompatible with schemes for wide social innovation.

Conservatism of federalism.

Federalism tends to produce conservatism.

This tendency is due to several causes. The constitution of a federal society must, as we have seen, be not only a written but a rigid constitution, that is, a constitution which cannot be changed by

any ordinary process of legislation. Now this essential rigidity of federal institutions is almost certain to impress on the minds of citizens the idea that any provision included in the constitution is immutable and, so to speak, sacred. The least observation of American politics shows how deeply the notion that the Constitution is something placed beyond the reach of amendment has impressed popular imagination. The difficulty of altering the Constitution produces conservative sentiment, and national conservatism doubles the difficulty of altering the Constitution. The House of Lords has lasted for centuries; the American Senate has existed for about one hundred years, yet to abolish or alter the House of Lords would be a far easier matter than to modify the constitution of the Senate. To this one must add that a federal constitution always lays down general principles which, from being placed in the constitution, gradually come to command a superstitious reverence, and thus are in fact, though not in theory, protected from change or criticism. The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion. Of the conservative effect of such a maxim when forming an article of the constitution we may form some measure by the following reflection. If any principle of the like kind had been recognised in England as legally binding on the Courts, the Irish Land Act would have been unconstitutional and void; the Irish Church Act, 1869, would, in great part at least, have been from a legal point of

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view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the Universities. One maxim only among those embodied in the Constitution of the United States would, that is to say, have been sufficient if adopted in England to have arrested the most vigorous efforts of recent Parliamentary legislation.

Legal
spirit of
federalism.

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but bye-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also the master of the constitution. Nothing puts in a stronger light the inevitable connection between federalism and the prominent position of the judicial body than the history of modern Switzerland. The statesmen of 1848 desired to give the *Bundesgericht* a far less authoritative

position than is possessed by the American Supreme Court. They in effect made the federal Assembly for most what it still is for some purposes, a final Court of Appeal. But the necessities of the case were too strong for Swiss statesmanship; the revision of 1874 greatly increased the power of the federal tribunal.

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From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended on constituting an august and impressive national tribunal than in the United States. Moreover, as already pointed out, the guardianship of the Constitution is in America confided not only to the Supreme Court but to every judge throughout the land. Still it is manifest that even the Supreme Court can hardly support the duties imposed upon it. No one can doubt that the varying decisions given in the legal-tender cases, or in the line of recent judgments of which *Munn v. Illinois* is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feeling and by reasons of state. But the moment that this bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law. American critics indeed are to be found who allege that the Supreme Court not only is proving but always has proved too

Dangers
arising
from posi-
tion of ju-
diary.

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weak for the burden it is called upon to bear, and that it has from the first been powerless whenever it came into conflict with a State, or could not count upon the support of the federal executive. These allegations undoubtedly hit a weak spot in the constitution of the great tribunal. Its judgments are without force, at any rate as against a State if the President refuses the means of putting them into execution. "John Marshall," said Jefferson, "has delivered his judgment, let him now execute it, if he can;" and the judgment was never put into force. But the weight of criticisms repeated from the earliest days of the Union may be easily exaggerated¹. Laymen are apt to mistake the growth of judicial caution for a sign of judicial weakness. Foreign observers moreover should notice that in a federation the causes which bring a body such as the Supreme Court into existence, also supply it with a source of ultimate power. The Supreme Court and institutions like it are the protectors of the federal compact, and the validity of that compact is, in the long run, the guarantee for the rights of the separate States. It is the interest of every man who wishes the federal constitution to be observed, that the judgments of the federal tribunals should be respected. It is therefore no bold assumption that, as long as the

¹ See Davis, *American Constitutions; the Relations of the Three Departments as adjusted by a century*. Mr. Davis is distinctly of opinion that the power of the Courts both of the United States and of the separate States has increased steadily since the foundation of the Union.

people of the United States wish to keep up the balanced system of federalism, they will ultimately compel the central government to support the authority of the federal Court. Critics of the Court are almost driven to assert that the American people are indifferent to state rights. The assertion may or may not be true; it is a matter on which no English critic should speak with confidence. But censures on the working of a federal Court tell very little against such an institution, if they establish nothing more than the almost self-evident proposition that a federal tribunal will be ineffective and superfluous, when the United States shall have ceased to be in reality a federation. A federal Court has no proper place in a unitarian Republic.

Judges, further, must be appointed by some authority which is not judicial, and where decisions of a Court control the action of government there exists an irresistible temptation to appoint magistrates who agree (honestly it may be) with the views of the executive. A strong argument pressed against Mr. Blaine's election was, that he would have the opportunity as President of nominating four judges, and that a politician allied with railway companies was likely to pack the Supreme Court with men certain to wrest the law in favour of mercantile corporations. The accusation may have been baseless; the fact that it should have been made and that even "Republicans" should declare that the time had come when "Democrats" should no longer be excluded from the Bench of the United States tells

Lecture plainly enough of the special evils which must be
IV. weighed against the undoubted benefits of making
 the Courts rather than the legislature the arbiters of
 the constitution.

Federalism
 impossible
 where a le-
 gal spirit
 does not
 prevail.

That a federal system again can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation. Constitutional questions arising out of either the constitutions of the separate States or the articles of the federal Constitution are of daily occurrence and constantly occupy the Courts. Hence the citizens become a people of constitutionalists, and matters which excite the strongest popular feeling, as for instance the right of Chinese to settle in the country, are determined by the judicial Bench and the decision of the Bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law, i.e. of the "most legal system of law" (if the expression may be allowed), in the world. De Tocqueville long ago remarked that the Swiss fell far short of the Americans in respect for law and justice¹. The events of the

¹ See passage cited, Lecture V, pp. 170-173, *post*.

last thirty-five years suggest that he perhaps underrated Swiss submission to law. But the law to which Switzerland is accustomed recognises wide discretionary power on the part of the executive, and has never fully severed the functions of the judge from those of the government. Hence Swiss federalism fails, just where one would expect it to fail, in maintaining that complete authority of the Courts which is necessary to the perfect federal system. But the Swiss, though they may not equal the Americans in reverence for judicial decisions, are a law-respecting nation. One may well doubt whether there are many states to be found where the mass of the people would leave so much political influence to the Courts. Yet any nation who cannot acquiesce in the finality of possibly mistaken judgments is hardly fit to form part of a federal state¹.

¹ *The meaning of an "unconstitutional" law.*—The expression "unconstitutional" has, as applied to a law, at least three different meanings varying according to the nature of the constitution with reference to which it is used:—

(i.) The expression as applied to an English Act of Parliament, means simply that the Act in question, as for instance the Irish Church Act 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void.

(ii.) The expression as applied to a law passed by the French Parliament, means that the law e.g. extending the length of the President's tenure of office, is opposed to the articles of the constitution. The expression does not necessarily mean that the law in question is void, for it is by no means certain (see pp. 122–123, *ante*) that any French Court will refuse to enforce a law because it is unconstitutional. The word would probably, though not of necessity, be when employed by a Frenchman, a term of censure.

Lecture (iii.) The expression, as applied to an Act of Congress, means
IV. simply that the Act is one beyond the power of Congress, and is
therefore void. The word does not in this case necessarily import
any censure whatever. An American might, without any inconsistency, say that an Act of Congress was a good law, that is a law calculated in his opinion to benefit the country, but that unfortunately it was "unconstitutional," that is to say *ultra vires* and void.

LECTURE V.

THE RULE OF LAW: ITS NATURE.

Two features have at all times since the Norman Conquest characterised the political institutions of England. Lecture
V.

The Rule
of Law.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the Courts, *tout fuit in luy et vient de lui al commencement*¹, was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the three foregoing lectures.

The second of these features, which is very closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the Courts, "*La ley est le plus haute inheritance, que le roy ad ; car par la ley il même et*

¹ Year Books, xxiv. Edward III; cited Gneist, *Englische Verwaltungsverrecht*, i. p. 454.

Lecture "toutes ses sujets sont rûlés, et si la ley ne fuit, nul roi,
 V. "et nul inheritance sera¹."

This supremacy of the law, or the security given under the English constitution to the rights of individuals, forms the subject of this lecture and of the two next lectures.

The rule of law in England noticed by foreign observers.

Foreign observers of English manners, such for example as Voltaire, De Lolme, De Tocqueville, or Gneist, have been far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law; and admiration or astonishment at the legality of English habits and feeling is nowhere better expressed than in a curious passage from De Tocqueville's writings, which compares the Switzerland and the England of 1836 in respect of the spirit which pervades their laws and manners.

De Tocqueville on the want of respect for law in Switzerland and contrast with England.

"I am not about," he writes, "to compare Switzerland with the United States, but with Great Britain. "When you examine the two countries, or even if "you only pass through them, you perceive, in my "judgment, the most astonishing differences between "them. Take it all in all, England seems to be much "more republican than the Helvetic Republic. The "principal differences are found in the institutions "of the two countries, and especially in their "customs (*mœurs*).

"1. In almost all the Swiss Cantons liberty of "the press is a very recent thing.

¹ Year Books, xix. Henry VI, cited Gneist, *Englische Verwaltungsrecht*, i. p. 455.

“ 2. In almost all of them individual liberty is by
“ no means completely guaranteed, and a man may
“ be arrested administratively and detained in prison
“ without much formality. Lecture
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“ 3. The Courts have not, generally speaking, a
“ perfectly independent position.

“ 4. In all the Cantons trial by jury is unknown.

“ 5. In several Cantons the people were thirty-
“ eight years ago entirely without political rights.
“ Aargau, Thurgau, Tessin, Vaud, and parts of the
“ Cantons of Zurich and Berne were in this condition.

“ The preceding observations apply even more
“ strongly to customs than to institutions.

“ i. In many of the Swiss Cantons the majority of
“ the citizens are quite without taste or desire for
“ *self-government*, and have not acquired the habit of
“ it. In any crisis they interest themselves about
“ their affairs, but you never see in them the thirst
“ for political rights and the craving to take part
“ in public affairs which seem to torment Englishmen
“ throughout their lives.

“ ii. The Swiss abuse the liberty of the press on
“ account of its being a recent form of liberty, and
“ Swiss newspapers are much more *revolutionary* and
“ much less *practical* than English newspapers.

“ iii. The Swiss seem still to look upon associa-
“ tions from much the same point of view as the
“ French, that is to say, they consider them as a
“ means of revolution, and not as a slow and sure
“ method for obtaining redress of wrongs. The
“ art of associating and of making use of the

Lecture "right of association is but little understood in
V. " Switzerland.

" iv. The Swiss do not show the love of justice
 " which is such a strong characteristic of the English.
 " Their Courts have no place in the political arrange-
 " ments of the country, and exert no influence on
 " public opinion. The love of justice, the peaceful
 " and legal introduction of the judge into the
 " domain of politics, are perhaps the most standing
 " characteristics of a free people.

" v. Finally, and this really embraces all the rest,
 " the Swiss do not show at bottom that respect for
 " justice, that love of law, that dislike of using force,
 " without which no free nation can exist, which
 " strikes strangers so forcibly in England.

" I sum up these impressions in a few words.

" Whoever travels in the United States is involun-
 " tarily and instinctively so impressed with the fact
 " that the spirit of liberty and the taste for it have
 " pervaded all the habits of the American people,
 " that he cannot conceive of them under any but a
 " Republican government. In the same way it is
 " impossible to think of the English as living under
 " any but a free government. But if violence were
 " to destroy the Republican institutions in most of
 " the Swiss Cantons, it would be by no means certain
 " that after rather a short state of transition the
 " people would not grow accustomed to the loss of
 " liberty. In the United States and in England there
 " seems to be more liberty in the customs than in
 " the laws of the people. In Switzerland there seems

“to be more liberty in the laws than in the customs
“of the country¹.”

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De Tocqueville's language has a twofold bearing on the topic of this lecture. His words point in the clearest manner to the rule, predominance, or supremacy of law as the distinguishing characteristic of English institutions. They further direct attention to the extreme vagueness of a trait of national character which is as noticeable as it is hard to portray. De Tocqueville, we see, is clearly perplexed how to define a feature of English manners of which he at once recognises the existence; he mingles or confuses together the habit of self-government, the love of order, the respect for justice and a legal turn of mind. All these sentiments are intimately allied, but they cannot without confusion be identified with each other. If however a critic as acute as De Tocqueville found a difficulty in describing one of the most marked peculiarities of English life, we may safely conclude that we ourselves, whenever we talk of Englishmen as loving the government of law, or of the supremacy of law as being a characteristic of the English constitution, are using words which, though they possess a real significance, are nevertheless to most persons who employ them full of vagueness and ambiguity. If therefore we are ever to appreciate the full import of the idea denoted by the term “rule, supremacy, or predominance of law,” we must first determine

Bearing of
De Tocque-
ville's re-
marks on
meaning of
rule of law.

¹ See De Tocqueville, *Œuvres Complètes*, viii. pp. 455-457.

Lecture V. precisely what we mean by such expressions when we apply them to the British constitution.

Three meanings of rule of law. When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

Absence of arbitrary power on part of the government. We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

Contrast between England and the Continent at present day. Modern Englishmen may at first feel some surprise that the "rule of law" (in the sense in which we are now using the term) should be considered as in any way a peculiarity of English institutions, since at the present day it may seem to be not so much the property of any one nation as a trait common to every civilized and orderly state. Even, however, if we confine our observation to the existing condition of Europe, we shall soon be convinced that the "rule of law" even in this narrow sense is peculiar to England, or to those countries which, like the United States of America, have inherited English traditions. In every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from the territory, and the like, than is either legally claimed or in fact exerted by

the government in England; and recent events in Switzerland, which by the way strikingly confirm De Tocqueville's judgment of the national character, remind us that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government means insecurity for legal freedom on the part of subjects.

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If however we confined our observation to the Europe of the year 1886, we might well say that in most European countries the rule of law is now nearly as well established as in England, and that private individuals at any rate who do not meddle in politics have little to fear, as long as they keep the law, either from the Government or from any one else, and we might therefore feel some difficulty in understanding how it ever happened that to foreigners the absence of arbitrary power on the part of the Crown, of the executive, and of every other authority in England has always seemed a striking feature, we might almost say the essential characteristic of the English constitution. Our perplexity is entirely removed by carrying back our minds to the time when the English constitution began to be criticised and admired by foreign thinkers. During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. The singularity of England was not so much the goodness or the leniency as the

Contrast
between
England
and Conti-
nent dur-
ing last
century.

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legality of the English system of government. When Voltaire came to England—and Voltaire represented the feeling of his age—his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice¹. He had good reason to know the difference. In 1717 Voltaire was sent to the Bastille for a poem which he had not written, of which he did not know the author, and with the sentiment of which he did not agree. What adds to the oddity, in English eyes, of the whole transaction is that the Regent treated the affair as a sort of joke, and, so to speak, “chaffed” the supposed author of the satire “*I have seen*” on being about to pay a visit to a prison which he “had not seen².” In 1725 Voltaire, then the literary hero of his country, was lured off from the table of a Duke, was thrashed by lackeys in the presence of their noble master, was unable to obtain either legal or honourable redress; and because he complained of this outrage, paid a second visit to the Bastille. This indeed was the last time in which

¹ “Les circonstances qui contraignaient Voltaire à chercher un refuge chez nos voisins devaient lui inspirer une grande sympathie pour des institutions où il n’y avait nulle place à l’arbitraire. ‘La raison est libre ici et n’y connaît point de contrainte.’ On y respire un air plus généreux, l’on se sent au milieu de citoyens qui n’ont pas tort de porter le front haut, de marcher fièrement, sûrs qu’on n’eût pu toucher à un seul cheveu de leur tête, et n’ayant à redoubter ni lettres de cachet, ni captivité immotivée.” Desnoiresterres, *Voltaire*, i. p. 365.

² 1 Desnoiresterres, pp. 344–364.

he was lodged within the walls of a French gaol, but his whole life was a series of contests with arbitrary power, and nothing but his fame, his deftness, his infinite resource, and ultimately his wealth, saved him from penalties far more severe than temporary imprisonment. Moreover, the price at which Voltaire saved his property and his life was after all exile from France. If you want to see how exceptional a phenomenon was that supremacy of law which existed in England during the eighteenth century read such a book as Morley's *Life of Diderot*. The effort lasting for twenty-two years to get the *Encyclopédie* published was a struggle on the part of all the distinguished literary men in France to obtain utterance for their thoughts. One hardly knows whether the difficulties or the success of the contest bear the strongest witness to the wayward arbitrariness of the French Government.

Royal lawlessness was not peculiar to specially detestable monarchs such as Louis the Fifteenth: it was inherent in the French system of administration. An idea prevails that Louis the Sixteenth at least was not an arbitrary, as he assuredly was not a cruel ruler. But it is an error to suppose that up to 1789 anything like the supremacy of law existed under the French monarchy. The folly, the grievances, and the mystery of the Chevalier D'Eon made as much noise little more than a century ago as the imposture of the Claimant in our own day. The memory of these things is not in itself worth reviving. What does deserve to be kept in remembrance is that in 1778,

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in the days of Johnson, of Adam Smith, of Gibbon, of Cowper, of Burke and of Mansfield, during the continuance of the American war and within eleven years of the assembling of the States General, a brave officer and a distinguished diplomatist could for some offence still unknown, without trial and without conviction, be condemned to undergo a penance and disgrace which could hardly be rivalled by the fanciful caprice of the torments inflicted by Oriental despotism¹.

Nor let it be imagined that during the latter part of the eighteenth century the government of France was more arbitrary than that of other countries. To entertain such a supposition is to misconceive utterly the condition of the continent. In France, law and public opinion went for a great deal more than in Spain, the petty States of Italy, or the Principalities of Germany. All the evils of despotism which attracted the notice of the world in a great kingdom such as France existed under worse forms in countries where, just because the evil was so much greater, it attracted the less attention. The power of the French monarch was criticised more severely than the lawlessness of a score of other tyrants, not because the French King ruled more tyrannically than other

¹ It is worth notice that even after the meeting of the States General the King was apparently reluctant to give up altogether the powers exercised by *lettres de cachet*. See *Déclaration des intentions du Roi*, Art. 15, Plouard, *Les Constitutions Françaises*, p. 10.

crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism. This explains the thrill of enthusiasm with which all Europe greeted the fall of the Bastille. When the fortress was taken, there were not ten prisoners within its walls; at that very moment hundreds of debtors languished in English gaols. Yet all England hailed the triumph of the French populace with a fervour which to Englishmen of the nineteenth century is at first sight hardly comprehensible. Reflection makes clear enough the cause of a feeling which spread through the length and breadth of the civilized world. The Bastille was the outward and visible sign of lawless power. Its fall was felt, and felt truly, to herald in for the rest of Europe that rule of law which already existed in England¹.

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We mean in the second place², when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the

Every
man sub-
ject to
ordinary
law admin-
istered by
ordinary
tribunals.

¹ For English sentiment with reference to the servitude of the French, see Goldsmith, *Citizen of the World*, iii., Letter iv.; and see *ibid.*, Letter xxxvii., p. 143, for a contrast between the execution of Lord Ferrers and the impunity with which a French nobleman was allowed to commit murder because of his relationship to the Royal family; and for the general state of feeling throughout Europe, De Tocqueville, *Œuvres Complètes*, viii. pp. 57-72.

² For first meaning see p. 174, *ante*.

Lecture ordinary law of the realm and amenable to the juris-
V. diction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts and made in their personal capacity liable to punishment or to the payment of damages for acts done in their official character but in excess of their lawful authority. A colonial governor¹, a secretary of state², a military officer³, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. Officials, such for example as soldiers⁴ or clergymen of the Established Church are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow countrymen; officials, that is to say, are to a certain extent governed under what may

¹ *Mostyn v. Fabregas*, Cowp. 161; *Musgrave v. Pulido*, 5 App. Cas. 102; *Governor Wall's Case*, 28 St. Tr. 51.

² *Entick v. Carrington*, 19 St. Tr. 1030.

³ *Phillips v. Eyre*, L. R., 4 Q. B. 225.

⁴ As to the legal position of soldiers, see Lecture VII.

be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm ; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilized societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests, and others could defy the law. But it is even now far from universally true, that in continental countries all persons are subject to one and the same law, or that the Courts are supreme throughout the state. If we take France as the type of a continental state, we may assert with substantial accuracy that officials (under which word should be included all persons employed in the service of the state) are in their official capacity protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies. This is a topic which can be understood only after a survey (which for our present purpose must be a cursory one) of the nature and principles of what is called in France *droit administratif*.

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V.

Contrast in
this respect
between
England
and
France.

Lecture

V.

*Droit
adminis-
tratif.*

*Droit administratif*¹ is a term known under one form or another to the law of most continental states, but it is one for which English legal phraseology supplies no proper equivalent. The words "administrative law," which are the most natural rendering of *droit administratif*, are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.

This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are in truth unknown. This absence from the institutions of the Union of anything answering to *droit administratif* arrested the observation of De Tocqueville from the first moment when he began his investigations into the characteristics of American democracy. In 1831 he writes to an experienced French judge (*magistrat*), Monsieur De Blosseville, to ask both for an explanation of the contrast in this matter between French and American institutions, and also for an authoritative explanation of the general ideas (*notions générales*) governing the *droit administratif* of his country². He

¹ On this topic see Aucoc, *Conférences sur l'administration et le droit administratif* (3rd ed.); Vivien, *Études Administratives*; Bœuf, *Droit Administratif* (4th ed.).

² De Tocqueville's language is so remarkable and bears so closely on our topic that it deserves quotation: "*Ce qui m'empêche*

grounds his request for information on his own ignorance about this special branch of French jurisprudence, and clearly implies that this want of knowledge is not uncommon among French lawyers.

When we know that a legist of De Tocqueville's ability found it necessary to ask for instruction in the "general ideas" of administrative law, we may safely assume that the topic is one which even in the eyes of a French lawyer bears an exceptional character, and need not wonder that Englishmen find it difficult to appreciate the nature of rules which are admittedly foreign to the spirit and traditions of our institutions. It is however this very contrast between administrative law as it prevails in France, and the notions of equality before the law of the land which are firmly established in modern England, that makes it worth while to study, not of course the details, but what De Tocqueville calls the *notions générales* of French *droit administratif*. Our aim should be to seize the general nature of administrative law and the principles on which the whole system of *droit administratif* depends, to note the salient characteristics by

"le plus, je vous avoue, de savoir ce qui se fait sur ces différents points en Amérique, c'est d'ignorer, à peu près complètement, ce qui existe en France. Vous savez que, chez nous, le droit administratif et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis ni assez ennemis pour se bien connaître. J'ai toujours reçu dans l'un et suis fort ignorant de ce qui se passe dans l'autre. En même temps que j'ai senti le besoin d'acquérir les notions générales qui me manquent à cet égard, j'ai pensé que je ne pouvais mieux faire que de m'adresser à vous." De Tocqueville, *Œuvres Complètes*, vii. p. 66.

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which this system is marked, and lastly to make clear to ourselves how it is that the existence of a scheme of administrative law makes the legal situation of every government official in France totally different from the legal situation of servants of the state in England, and in fact establishes a condition of things fundamentally inconsistent with what Englishmen regard as the due supremacy of the ordinary law of the land.

Droit administratif—its nature.

Droit administratif, or “administrative law,” has been defined by French authorities in general terms as “the body of rules which regulate the relations of “the administration or of the administrative authority “towards private citizens¹,” and Aucoc in his work on *droit administratif* describes his topic in this very general language²: “Administrative law “determines (1) the constitution and the relations of “those organs of society which are charged with the “care of those social interests (*intérêts collectifs*) which “are the object of public administration, by which “term is meant the different representatives of society “among which the state is the most important, and “(2) the relation of the administrative authorities “towards the citizens of the state.”

¹ “*On le définit ordinairement l'ensemble des règles qui régissent “les rapports de l'administration ou de l'autorité administrative avec “les citoyens.*” Aucoc, *Droit Administratif*, i. s. 6.

² “*Nous préférierions dire, pour notre part: Le droit administratif “détermine: 1^o. la constitution et les rapports des organes de la “société chargés du soin des intérêts collectifs qui font l'objet de “l'administration publique, c'est-à-dire des différentes personnalités “de la société, dont l'État est la plus importante; 2^o. les rapports “des autorités administratives avec les citoyens.*” Ibid.

These definitions are obviously wanting in precision, and their vagueness is not without significance. As far, however, as an Englishman may venture to deduce the meaning of *droit administratif* from foreign treatises and Reports, it may (at any rate for our present purpose) be best described as that portion of French law which determines (i.) the position and liabilities of all state officials, and (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the state, and (iii.) the procedure by which these rights and liabilities are enforced. The effect of this description is most easily made intelligible to English students by giving examples of the sort of matters to which the rules of administrative law apply. If a Minister, a Prefect, a policeman, or any other official commits acts in excess of his legal authority (*excès de pouvoirs*), as, for example, if a police officer in pursuance of orders, say from the Minister of the Interior, wrongfully arrests a private person, the rights of the individual aggrieved and the mode in which these rights are to be determined is a question of administrative law. If, again, a contractor enters into a contract with any branch of the administration, e.g. for the supply of goods to the government or for the purchase of stores sold off by a public office, and a dispute arises as to whether the contract has been duly performed or as to the damages due to the contractor for a breach of it by the government, the rights of the contracting parties are to be determined in accordance with the rules of administrative law, and to be en-

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forced (if at all) by the methods of procedure which that law provides. All dealings, in short, in which the rights of an individual in reference to the state or officials representing the state come in question, fall within the scope of administrative law.

Droit administratif—its two leading principles.

Any one who considers with care the nature of the *droit administratif* of France, or the kind of topics to which it applies, will soon discover that it rests at bottom on two leading ideas alien to the conceptions of modern Englishmen.

Privileges of the state.

The first of these notions is that the government, and every servant of the government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the state does not, according to French ideas, stand on anything like the same footing on which he stands in dealings with his neighbour.

A, for example, being a private person, enters into a contract with *X*, also a private person. *X* breaks the contract. *A* has a right to recover from *X* damages equivalent to the gain which *A* would have made if *X* had kept to his bargain.

A enters into an exactly similar contract with *N*, an official acting on behalf of some department of the government. *N*, or in fact the department, breaks the contract. *A* has a right to claim from the

government, not, as in the case of the action against X, damages equivalent to the gain which he would have made if the contract had been kept, but only damages equivalent to the loss (if any) which A may have actually suffered by the breach of contract¹. In other words, the state when it breaks a contract ought, according to French ideas, to suffer less than would a private wrong-doer. In the example here given, which is merely one among a hundred, the essential character of *droit administratif* becomes apparent—it is a body of law intended to preserve the privileges of the state.

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The second of the general ideas on which rests the system of administrative law is the necessity of maintaining the so-called separation of powers (*séparation des pouvoirs*), or, in other words, of preventing the government, the legislature, and the Courts from encroaching upon one another's province.

Separation of
powers.

The expression "separation of powers," as applied by Frenchmen to the relations of the executive and the Courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different

¹ "Un particulier qui n'exécute pas un marché doit à l'entrepreneur une indemnité proportionnée au gain dont il le prive; le Code civil l'établit ainsi. L'administration qui rompt un tel marché ne doit d'indemnité qu'en raison de la perte éprouvée. C'est la règle de la jurisprudence administrative. A moins que le droit ne s'y oppose, elle tient que l'État, c'est-à-dire la collection de tous les citoyens, et le trésor public, c'est-à-dire l'ensemble de tous les contribuables, doivent passer avant le citoyen ou le contribuable isolés, défendant un intérêt individuel." Vivien, *Études Administratives*, i. pp. 140-142.

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from what we mean in England by the "independence of the judges," or the like expressions. It means as interpreted by French history, by French legislation, and by the decisions of French tribunals, neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts¹. It were curious to follow out the historical growth of the whole theory as to the "separation of powers." It rests apparently upon Montesquieu's *Esprit des Loix*, Book XI. c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English constitution, and his doctrine was in turn, if not misunderstood, exaggerated and misapplied by the French statesmen of the Revolution, whose judgment was biassed at once by knowledge of the inconveniences which had resulted from the interference of the Parliaments in matters of state and by the characteristic and traditional desire to increase the force of the central government. The investigation, however, into the varying fate of a dogma which has undergone a different development on each side the Atlantic would lead us too far from our immediate topic. All that we need note is the extraordinary influence exerted in France and in all countries which have followed French examples by

¹ See Aucoc, *Droit Administratif*, ss. 20, 24.

this part of Montesquieu's teaching, and the extent to which it underlies the political and legal institutions of the French Republic. Lecture
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To the combination of these two ideas may be traced the distinguishing characteristics of French administrative law. Characteristics.

The first of these characteristics is (as you must already have perceived) that the relations of the government and its officials towards private citizens are regulated by a whole body of special rules, which are in reality laws, but which differ from the laws which govern the relation of one private person towards another. Nor is it unimportant to remark that the maxims of administrative law are not reduced to a code, but are what we should call in England "case law;" and therefore possess that element of expansiveness which, whether it be counted a merit or a defect, is inherent in case law. Add to this that these maxims are "case law" made not by judges, but by government officials. Rights of state determined by special rules.

The second of these leading characteristics is that the ordinary tribunals have, speaking generally, no concern with any matter of administrative law. Questions of private right as between private citizens and all accusations of crime fall within the jurisdiction of the civil tribunals or (as we should say) of the common law Courts. But the ordinary judges are incompetent to pronounce judgment on any administrative act (*acte administratif*), that is, on any act done by any official, high or low, *bonâ fide* in his official character. The judges cannot pronounce upon the legality of Law Courts without jurisdiction in matters concerning the state.

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decrees issued by the President of the Republic, as for example the decrees with reference to the "unauthorised congregations," nor upon the way in which these decrees have been put into execution by the government¹; the judges cannot determine the meaning and legal effect, in case it be seriously disputed, of official documents, as for example of a letter addressed by a Minister of State to a subordinate or by a General to a person under his command²; the judges have, speaking generally, no jurisdiction as to questions arising on a contract made between a private person and a department of the government; the judges have no right to entertain an action brought by a private individual against an official for a wrong done in discharge of his official duties; thus if *X*, a cavalry officer, when under orders rides from one place to another at a review and negligently knocks down *A* a spectator, *A* cannot bring an action against *X* in the ordinary Courts³.

The assertion however that where an official in the discharge of his official duty injures a private individual the person wronged cannot claim redress from the ordinary judges, does not mean or imply that a person who is thus aggrieved, say who is wrongfully arrested by a policeman acting under orders, or libelled in an official notice issued by a mayor, is without a remedy. The incompetence of the civil tribunals means only that where any wrong

¹ Dalloz, *Jurisprudence Générale*, 1883, ii. 212.

² *Ibid.*, iii. 94.

³ *Ibid.*, 1884, i. 220. This recalls the sixteenth Satire of Juvenal.

has been done in the course of an official proceeding, redress must be sought from the proper official authorities, or, as they are called, the administrative tribunals (*tribunaux administratifs*). Lecture
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For the third salient feature of French *droit administratif* is that it is administered by administrative Courts; at the head of which stands the Council of State. These so-called "Courts" have of comparatively recent times acquired to a certain extent a quasi-judicial character, and have adopted a quasi-judicial procedure¹. We must take care however not to be deceived by names. The administrative authorities which decide all disputes in regard to matters of administrative law (*contentieux administratif*) may be called "tribunals," and may adopt forms moulded on the procedure of a Court, but they all of them, from the Council of the Prefect (*conseil de préfecture*) up to the Council of State, bear the more or less definite impress of an official or governmental character; they are composed of official persons, and, as is implied by the very pleas advanced in defence of withdrawing questions of administrative law from the civil Courts,

Questions concerning state determined by administrative bodies.

¹ This change in the constitution and procedure of the administrative Courts is an act of deference to the gradual spread of ideas like those which prevail in England. It is a change which is very far from universally approving itself to the judgment of Frenchmen. There has always existed a school of French publicists who have objected to referring administrative matters to bodies which had anything whatever of a judicial character and who have maintained that where the rights of the state are concerned the administration as representing the state should be the sole judge in its own cause. See Vivien, *Études Administratives*, i. p. 129.

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look upon the disputes brought before them from a governmental point of view, and decide them in a spirit different from the feeling which influences the ordinary judges¹. Since 1789 it has been once and again proposed that in France, as in England, rights against the government should, like rights against private persons, be determined by the judges. But French statesmen of all schools have invariably rejected such proposals, on the avowed ground that it is only from administrative tribunals that the interests of the state will receive due consideration. Official Courts are, in short, supported because they have an official bias. The separation between judicial and administrative powers, combined with the co-existence of "ordinary" Courts and "administrative" Courts, results of necessity in conflicts of jurisdiction. A policeman acting under the orders of his superiors breaks into a monastery, seizes the property of the inmates, and expels them from the house, he is thereupon charged by the parties aggrieved with offences which English lawyers would call trespass and assault. He pleads that he is acting under government orders in execution of the decree which dissolved certain religious societies. The plaintiffs bring him before a civil Court. The question at once arises whether redress ought not to have been sought before the administrative tribunals; the objection is raised that the civil Court has no jurisdiction. Here we have a "conflict." The natural idea of an Englishman is that

¹ Aucoc, *Droit Administratif*, ss. 269-272; Vivien, *Études Administratives*, i. p. 140.

this conflict must be determined by the ordinary judges; for that the judges of the land are the proper authorities to define the limits of their own jurisdiction. This view, which is so natural to an English lawyer, is radically opposed to the French conception of the due "separation of powers," since it must, if systematically carried out, enable the Courts to encroach on the province of the administration; it contradicts the principle laid down in the earlier stages of the Revolution and still recognised as valid by French law, that "administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power¹;" nor can an Englishman who recollects the cases on general warrants deny that the judges have often interfered with the action of the administration. The worth of Montesquieu's doctrine is open to question, but if his theory be sound it is clear that judicial bodies ought not to be allowed to pronounce a final judgment upon the limits of their own authority.

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Hence arises the fourth and for our purpose the most noticeable feature of administrative law.

There exists in France a *Tribunal des Conflits*, or Court for deciding conflicts of jurisdiction. The special function of this body is to determine finally whether a given case, say an action against a policeman for an assault, comes within the jurisdiction of the civil Courts, or of the administrative Courts. On this matter of jurisdiction judges and officials are certain to form different opinions; a glance moreover at

Con-
flicts of
jurisdic-
tion de-
termined
by *Tribu-
nal des
Conflits*.

¹ See Aucoc, *Droit Administratif*, s. 24.

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the head *Compétence administrative* in the *Recueil Périodique de Jurisprudence*, by Dalloz, shows at once the constant occurrence of cases which make it necessary to fix the limits which divide the spheres of the judicial and of the administrative authorities. The true nature therefore of administrative law depends in France upon the constitution of the *Tribunal des Conflits*. Is this "tribunal" a judicial body or an official body? An English critic will be slow to give a decisive answer to this question. He will remember how easily a Frenchman might misinterpret the working of English institutions, and might, for instance, suppose from the relation of the Chancellor to the Ministry that the Cabinet could influence the decision of an action entered in the Chancery Division of the High Court. But subject to the hesitation which becomes any one who comments upon the effect of institutions which are not those of his own country, an observer may assert with some confidence that the *Tribunal des Conflits* is at least as much of an official as of a judicial body. It follows therefore that the jurisdiction of the civil tribunals is in all matters which concern officials determined by persons who, if not actually part of the executive, are swayed by official sympathies, and who are inclined to consider the interest of the state or of the government more important than strict regard to the legal rights of individuals. That this view is correct may be inferred from several considerations. Till a recent date the Council of State, a certainly more or less official body, was the final authority on questions of

jurisdiction. So strong moreover was the bias of French law in favour of the administration, that up to 1870 all servants of the government possessed a kind of exemption from the jurisdiction of the Courts absolutely inconsistent with every English notion of equality before the law. Lecture
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De Tocqueville has given us an account of the protection extended over French functionaries in the following passage, which may be considered classical:— DeTocque-
ville's
account of
Art. 75 of
Constitu-
tion of
YearVIII.

“ In the Year VIII of the French Republic a constitution was drawn up in which the following clause was introduced: ‘ Art. 75. All the agents of the government below the rank of ministers can only be prosecuted for offences relating to their several functions by virtue of a decree of the Conseil d’État; in which case the prosecution takes place before the ordinary tribunals.’ This clause survived the ‘ Constitution de l’An VIII,’ and it is still maintained in spite of the just complaints of the nation. I have always found the utmost difficulty in explaining its meaning to Englishmen or Americans. They were at once led to conclude that the Conseil d’État in France was a great tribunal, established in the centre of the kingdom, which exercised a preliminary and somewhat tyrannical jurisdiction in all political causes. But when I told them that the Conseil d’État was not a judicial body, in the common sense of the term, but an administrative council composed of men dependent on the Crown, so that the King, after having ordered one of his servants, called a Prefect, to commit an injustice, has the

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 " power of commanding another of his servants, called
 " a Councillor of State, to prevent the former from
 " being punished; when I demonstrated to them that
 " the citizen who has been injured by the order of the
 " sovereign is obliged to solicit from the sovereign
 " permission to obtain redress, they refused to credit
 " so flagrant an abuse, and were tempted to accuse
 " me of falsehood or of ignorance. It frequently
 " happened before the Revolution that a Parliament
 " issued a warrant against a public officer who had
 " committed an offence, and sometimes the proceed-
 " ings were stopped by the authority of the Crown,
 " which enforced compliance with its absolute and
 " despotic will. It is painful to perceive how much
 " lower we are sunk than our forefathers, since we
 " allow things to pass under the colour of justice and
 " the sanction of the law which violence alone could
 " impose upon them¹."

Its sub-
 sequent
 history.

Our author's subsequent investigations make it doubtful whether Article 75 of the Constitution of the Year VIII (1799) does more than reproduce in a stringent shape a principle inherited from the *ancien régime*²; it at any rate represents the permanent

¹ De Tocqueville, *Democracy in America*, i. (Translation), p. 101; *Œuvres Complètes*, i. pp. 174, 175.

² "Ce qui apparaît . . . quand on étudie les paperasses administratives, c'est l'intervention continuelle du pouvoir administratif dans la sphère judiciaire. Les légistes administratifs nous disent sans cesse, que le plus grand vice du gouvernement intérieur de l'ancien régime était que les juges administraient. On pourrait se plaindre avec autant de raison de ce que les administrateurs jugeaient. La seule différence est que nous avons corrigé l'ancien régime sur le premier point, et l'avons imité sur le second. J'avais eu jusqu'à présent la sim-

sentiment of French governments with regard to the protection due to officials. This is what gives to a repealed article of a forgotten constitution a curious speculative importance. If any one wants a proof of the essential difference between French and English ideas as to the relation between individuals and the state, he will find it in the fact that under the monarchy of Louis Philippe, which was supposed to be a copy of the English constitution, every official in France was entitled to a kind of exemption from ordinary legal process which never has existed in England, and which could not be established here without a revolution in the feelings of the English people. The one thing which to an Englishman is more astonishing than the existence of Article 75 is the date and mode of its abolition. It survived the Consulate, the Napoleonic Empire, the Restoration, the Orleans Monarchy, the Republic of 1848, and the Second Empire; it was abolished on the 19th September, 1870, by a government which had come into power through an insurrection, and which laid no claim to existence except the absolute necessity of protecting the nation against invasion. It is

“plicité de croire que ce que nous appelons la justice administrative était une création de Napoléon. C’est du pur ancien régime conservé; et la principe que lors même qu’il s’agit de contrat, c’est-à-dire d’un engagement formel et régulièrement pris entre un particulier et l’État, c’est à l’État à juger la cause, cet axiome, inconnu chez la plupart des nations modernes, était tenu pour aussi sacré par un intendant de l’ancien régime, qu’il pourrait l’être de nos jours par le personnage qui ressemble le plus à celui-là, je veux dire un préfet.” De Tocqueville, *Œuvres Complètes*, vi. pp. 221, 222.

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certainly strange that a provisional government occupied with the defence of Paris should have repealed a fundamental principle of French law. It is equally curious that the repeal has been subsequently treated as valid. Of the motives which led men placed in temporary authority by the accidents of a revolution to carry through a legal innovation which, in appearance at least, alters the whole position of French officials, no foreign observer can form a certain opinion. It is however a plausible conjecture that the repeal of Article 75 was lightly enacted and easily tolerated, because it effected a change more important in appearance than in reality, and did not after all gravely touch the position of French functionaries or the course of French administration¹.

Effect of
droit ad-
ministratif
 on position
 of French
 officials.

We can now understand the way in which the existence of a *droit administratif* affects the whole legal position of French public servants and renders it quite different from that of English officials.

Persons in the employment of the government, who form, be it observed, a much larger and more important part of the community than do the whole body of the servants of the English Crown, occupy

¹ For some confirmation of this view see Aucoc, *Droit Administratif*, ss. 419-426.

The admission, however, involved in the repeal of Article 75 of the general principle that officials are at any rate *prima facie* liable for illegal acts, in the same way as private persons, marks, it is said by competent authorities, important change in the public opinion of France, and is one among other signs of a tendency to look with jealousy on the power of the state.

in France a position in some respects resembling that of soldiers in England. For the breach of official discipline they are, we may safely assume, readily punishable in one form or another. But if like English soldiers they are subject to official discipline, they have what even soldiers in England do not possess, a very large amount of protection against legal proceedings for wrongs done to private citizens. The party wronged by an official must certainly seek relief, not from the judges of the land, but from some official Court. Before such a body the question which will be mainly considered is likely to be, not whether the complainant has been injured, but whether the defendant, say a policeman, has acted in discharge of his duties and in *bonâ fide* obedience to the commands of his superiors. If the defendant has so acted he will, we may almost certainly assume, be sure of acquittal, even though his conduct may have involved a technical breach of law. On this assumption, and on this assumption alone, we can understand the constant and successful efforts of the French administration to withdraw from the cognizance of the civil Courts the long list of actions brought against officials by members of the "unauthorised congregations" which were dissolved under the celebrated decrees of 29th March, 1880¹. We may further draw the general conclusion that under

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¹ See Dalloz, *Jurisprudence Générale*, 1880, iii. 121; *ibid.* 1881, iii. 81, 91; *ibid.* 1881, ii. 32, 33; *ibid.* 1883, ii. 212; *ibid.* 1880, iv. 23.

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the French system no servant of the government who, without any malicious or corrupt motive, executes the orders of his superiors, can be made civilly responsible for his conduct. He is exempted from the jurisdiction of the civil Courts because he is engaged in an administrative act; he is safe from official condemnation because the act complained of is done in pursuance of his official duties. To this must be added a further consideration, to which for the sake of clearness no reference has hitherto been made. French law appears to recognise an indefinite class of "acts of state," acts, that is to say, which are done by the government as matters of police, of high policy, of public security and the like, and acts of this class do not fall within the control either of the administrative or of any other Courts. It would, for example, appear that in questions of extradition as regards persons who are not French citizens the government can act freely on its own discretion, and that a foreigner threatened with expulsion or expelled from French territory by orders of the government will not be able to obtain protection or redress in any French Court whatever; the executive possesses under the French constitution "prerogatives"—no other word so well expresses the idea—which are above and beyond rather than opposed to the law of the land.

Effect of
droit ad-
ministratif
on position
of judges.

What may be the precise limits which the system of administrative law taken together with the authority ascribed in France to the executive in matters of state imposes on the jurisdiction of the civil tribunals,

no foreigner can pronounce with certainty. These limitations are however, as we have seen, in many instances very strict, and are certainly sufficient to prevent the judges of the land from pronouncing judgment on wrongs not amounting to actual crimes done by officials to private citizens. These restrictions on the authority of the Courts, must, at any rate as an Englishman would think, diminish the moral influence of the whole judicial body, and deprive the French judicature of that dignity which the English Bench have derived from their undoubted power to intervene, indirectly indeed, but none the less efficiently, in matters of state. The condemnation of general warrants—a condemnation which, whatever be the French law of arrest, could not (it would seem) be at the present day pronounced by any Court in France—did as much in the last century to raise the reputation of the Bench as to protect the freedom of the subject. Our judges would with difficulty retain the reverence with which their traditions surround them if the decisions even of the House of Lords were, whenever they were alleged to interfere with the prerogative of the Crown or the discretionary powers of the Ministry, liable to be invalidated by some official body. The separation of powers, as the doctrine is interpreted in France, means, it would seem to an Englishman, the powerlessness of the Courts in any conflict with the executive. However this may be, it assuredly means the protection of official persons from the liabilities of ordinary citizens.

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Contrast
with posi-
tion of
servants of
Crown in
England.

Compare for a moment with the position of French officials under the system of *droit administratif* the situation of servants of the Crown in England.

Among modern Englishmen the political doctrines which have in France created the system of *droit administratif* are all but unknown. Our law bears very few traces indeed of the idea that when questions arise between the state or, as we should say, the Crown or its servants and private persons, the interests of the government should be in any sense preferred or the acts of its agents claim any special protection¹. Our laws, again, lend no countenance to the dogma of the "separation of powers" as that doctrine is understood by Frenchmen. The common law Courts have constantly hampered the action of the executive, and by issuing the writ of *habeas corpus* as well as by other means do in fact exert a strict supervision over the proceedings of the Crown and its servants.

Hence in modern England the civil servants of the Crown are not, even as regards their official duties, subject to any peculiar kind of law or amenable to special tribunals. They are persons employed and paid to do work for the government; they do not

¹ There are some faint traces of some such principle in the existence of proceedings by "petition of right" and in the statutory advantages of notice of action and the like, which under many Acts of Parliament are given to constables and others "acting in pursuance of" some statutory power. The extent to which even these very limited advantages often prevent actions against subordinate officials may give us some slight conception of the way in which civil proceedings must be restrained in France by the incompetence of the Courts to deal with any "administrative act."

constitute anything like what foreigners call an "official hierarchy." This absence of amenability to special tribunals is not wholly beneficial. Gross violations of duty by public servants are frequently not punishable. A copyist in a public office sells to the newspapers a secret diplomatic document of the highest importance. Imagination can hardly picture a more flagrant breach of duty. But there are apparently no means available for punishing the culprit. He may perhaps be put on trial for larceny on the ground of his having stolen the paper on which the communication of state is written; but a prisoner tried for a crime which he has in fact not committed, because the offence of which he is really guilty is not a crime, may count upon acquittal. But if a civil servant may with us escape legal punishment for breach of his duties to the state, the fact that he serves the Crown gives him in general no protection against actions for wrongs to private persons. *Bonâ fide* obedience to the orders of superiors is not a defence available to a subordinate who in the discharge of his functions as a government officer has invaded the legal rights of the humblest individual. Officials, like everybody else, are accountable for their conduct to a Court of Law, and to a Court, be it noted, where the verdict is given by a jury.

In this point of view few things are more instructive than an examination of the actions which have been brought against officers of the Board of Trade for detaining ships about to proceed to sea.

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Under the Merchant Shipping Act, 1876, the Board are bound to detain any ship which from its unsafe and unseaworthy condition cannot proceed to sea without serious danger to human life¹. Most persons would suppose that the officials of the Board, as long as they *bonâ fide* and without malice or corrupt motive endeavoured to carry out the provisions of the statute, would be safe from an action at the hands of a shipowner. This, however, is not so. The Board and its officers have more than once been sued with success². They have never been accused of either malice or negligence, but the mere fact that the Board act in an administrative capacity is not a protection to the Board, nor is mere obedience to the orders of the Board an answer to an action against its servants. Any deviation moreover from the exact terms of the Act—the omission of the most unmeaning formality—may make every person, high and low, concerned in the detention of the ship, a wrong-doer. The question on the answer to which the decision in each instance at bottom depends is whether there was reasonable cause for detaining the vessel, and this enquiry is determined by a jury who sympathise more with the losses of a shipowner whose ship may have been unjustly detained, than with the zeal of an inspector anxious to perform his duty and to prevent loss of life. The result has (it is said) been to render the provisions of the Merchant Shipping Acts, with regard to the detention

¹ Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 6.

² See *Thompson v. Farrer*, 9 Q. B. D. (C. A.) 372.

of unseaworthy ships, nugatory. Courts and juries are biassed against the government. A technical question is referred for decision from persons who know something about the subject and are impartial to persons who are both ignorant and prejudiced. The government moreover, which has no concern but the public interest, is placed in the false position of a litigant fighting for his own advantage. These things ought to be noticed, for they explain if they do not justify the tenacity with which statesmen as partial as De Tocqueville to English ideas of government have clung to the conviction that administrative questions ought to be referred to administrative Courts. With the practical results however of the different position assigned to officials under French and under English law and with the merits or demerits of either system we need not greatly concern ourselves; the one point which should be impressed upon every student is that the *droit administratif* of France rests upon political principles at variance with the ideas which are embodied in our existing constitution, and contradicts modern English convictions as to the rightful supremacy or rule of the law of the land.

You will observe that I have contrasted "modern" English notions with the ideas now prevalent in continental states. I have purposely drawn the opposition between the two in this form. My reason is that at a period which historically is not very remote the ideas as to the position of the Crown which were current if not predominant in England bore a very

Droit administratif opposed to modern English notions, but not to ideas current in sixteenth and seventeenth centuries.

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close analogy to the doctrines which have given rise to the *droit administratif* of France. Similar beliefs moreover necessarily produced similar results, and there was a time when it must have seemed possible that what we now call administrative law should become a permanent part of English institutions. For from the accession of the Tudors till the final expulsion of the Stuarts the Crown and its servants maintained and put into practice, with more or less success and with varying degrees of popular approval, views of government essentially similar to the theories which under different forms have been accepted by the French people. The personal failings of the Stuarts and the confusion caused by the combination of a religious with a political movement have tended to mask the true character of the legal and constitutional issues raised by the political contests of the seventeenth century. A lawyer who regards the matter from an exclusively legal point of view is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand, and Coke or Eliot on the other, was whether a strong administration of the continental type should or should not be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of a despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were

struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law. Hence for each feature of French *droit administratif* one may find some curious analogy either in the claims put forward or in the institutions favoured by the Crown lawyers of the seventeenth century. The doctrine propounded under various metaphors by Bacon that the prerogative was something beyond and above the ordinary law is like the foreign doctrine that in matters of high policy the administration has a discretionary authority which cannot be controlled by any Court. The celebrated dictum that the judges, though they be "lions," yet should be "lions under the throne," "being circumspect that they do not check or oppose "any points of sovereignty¹," is a curious anticipation of the maxim formulated by French revolutionary statesmanship that the judges are under no circumstances to disturb the action of the administration, and would, if logically worked out, have led to the exemption of every administrative act, or, to use English terms, of every act alleged to be done in virtue of the prerogative from judicial cognizance. The constantly increasing power of the Star Chamber and of the Council gave practical expression to prevalent theories as to the Royal prerogative, and it is

¹ Gardiner, *History of England*, iii. p. 2.

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hardly fanciful to compare these Courts, which were in reality portions of the executive government, with the *Conseil d'état* and other *Tribunaux administratifs* of France. Nor is a parallel wanting to the celebrated Article 75 of the Constitution of the Year VIII¹. This parallel is to be found in Bacon's attempt to prevent the judges by means of the writ *De non procedendo Rege inconsulto* from proceeding with any case in which the interests of the Crown were concerned. "The working of this writ," observes Mr. Gardiner, "if Bacon had obtained his object, would have been to some extent analogous to that provision which has been found in so many French constitutions, according to which no agent of the Government can be summoned before a tribunal, for acts done in the exercise of his office, without a preliminary authorisation of the Council of State. The effect of the English writ being confined to cases where the King himself was supposed to be injured, would have been of less universal application, but the principle on which it rested would have been equally bad²." The principle moreover admitted of unlimited extension, and this, we may add, was perceived by Bacon. "The writ," he writes to the King, "is a mean provided by the ancient law of England to bring any case that may concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England, by the ordinary and legal part of this power. And your

¹ See p. 195, *ante*.

² Gardiner, *History of England*, p. 7, n. (2).

“Majesty knoweth *your Chancellor is ever a principal* Lecture
counsellor and instrument of monarchy, of imme- V.
diately dependence on the king; and therefore like to
be a safe and tender guardian of the regal rights¹.”

Bacon's innovation would, if successful, have formally established the fundamental dogma of administrative law that administrative questions must be determined by administrative bodies.

The analogy between the administrative ideas which still prevail on the Continent² and the conception of the prerogative which was maintained by the English Crown in the seventeenth century has considerable speculative interest. That the administrative ideas supposed by many French writers to have been originated by the statesmanship of the great Revolution or of the first Empire are to a great extent developments of the traditions and habits of the French monarchy is almost past a doubt, and it is a curious enquiry how far the efforts made by the Tudors or Stuarts to establish a strong government were influenced by foreign examples. This, however, is a problem for historians. A lawyer may content himself with noting that French history throws light on the causes both of the partial success and of the ultimate failure of the attempt to establish in England a strong administrative system. The

¹ Abbott, *Francis Bacon*, p. 234.

² It is worth noting that the system of “administrative law,” though more fully developed in France than elsewhere, exists in one form or another in most of the Continental States. See Holland, *Jurisprudence* (3rd ed.), pp. 305-308.

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endeavour had a partial success, because circumstances similar to those which made French monarchs ultimately despotic tended in England during the sixteenth and part of the seventeenth century to increase the influence of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions.

General
 rules of
 constitu-
 tional law
 are result
 of ordinary
 law of the
 land.

There remains yet a third¹ and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting), are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts²; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

¹ For second meaning, see p. 179, *ante*.

² Compare *Calvin's Case*, 7 Coke, Rep. 1; *Campbell v. Hall*, Cowp. 204; *Wilkes v. Wood*, 19 St. Tr. 1153; *Mostyn v. Fabregas*, Cowp. 161. Parliamentary declarations of the law such as the Petition of Right and the Bill of Rights have a certain affinity to judicial decisions.

This is one portion at least of the fact vaguely hinted at in the current but misleading statement that "the constitution has not been made but has grown." This dictum, if taken literally, is absurd. "Political institutions (however the proposition may be at times ignored) are the work of men, owe their origin and their whole existence to human will. Men did not wake up on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, are 'aye growing' while men 'are sleeping.' In every stage of their existence they are made what they are by human voluntary agency¹."

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Yet though this is so the dogma that the form of a government is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will and energy, does, though in a loose and inaccurate manner, bring into view the fact that some polities, and among them the English constitution, have not been created at one stroke, and far from being the result of legislation in the ordinary sense of that term are the fruit of contests carried on in the Courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.

Contrast
between
the English
constitution and
foreign
constitu-
tions.

Hence flow noteworthy differences between the constitution of England and the constitutions of most foreign countries. There is in the English

¹ Mill, *Representative Government*, p. 4.

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constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles moreover, as you can discover, are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. To put what is really the same thing in a somewhat different shape, the relation of the rights of individuals to the principles of the constitution is not quite the same in countries like Belgium, where the constitution is the result of a legislative act, as it is in England, where the constitution itself is based upon legal decisions. In Belgium, which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from or are secured by the constitution¹. In England the right to individual liberty is part of the constitution, because it is secured by the decisions of the Courts, extended or confirmed as they are by the *Habeas Corpus* Acts. If it be allowable to apply the formulas of logic to questions of law, one may describe the difference in this matter between the constitution of Belgium and the English constitution by saying that in Belgium individual rights are deductions drawn from the principles of the constitu-

¹ See *Belgian Constitution*, Art. 7. See p. 221, *post*.

tion, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals. This is of course a merely formal difference. Liberty is probably as well secured in Belgium as in England, and as long as this is so it matters nothing whether we say that individuals are free from all risk of arbitrary arrest, because liberty of person is guaranteed by the constitution, or that the right to personal freedom, or in other words to protection from arbitrary arrest, forms part of the constitution because it is secured by the ordinary law of the land. But though this merely formal distinction is in itself of no moment, provided always that the rights of individuals are really secure, the question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the enquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured. Now most foreign constitution-makers have begun with declarations of rights¹. For this they have often been in nowise to blame. Their course of action has more often than not been forced upon them by the stress of circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of

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¹ Compare pp. 120-124, *ante*.

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legislators. But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. The Constitution of 1791 proclaimed liberty of conscience, liberty of the press, the right of public meeting, the responsibility of government officials¹. But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say so completely non-existent, as at the height of the French Revolution. And an observer may well doubt whether a good number of these liberties or rights are even now so well secured under the French Republic as under the English Monarchy. On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right, and the right to be enforced which is the strength of judicial legislation. The saw, *ubi jus ibi remedium*, becomes from this point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually built up the complicated set of laws and institutions which we call the constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side)

¹ See Plouard, *Les Constitutions Françaises*, pp. 14-16.

for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty. Nor let it be supposed that this connection between rights and remedies which depends upon the spirit of law pervading English institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declarations of rights. The Constitution of the United States and the constitutions of the separate States are embodied in written or printed documents. But the statesmen of America have shown unrivalled skill in providing means for giving legal security to the rights declared by American constitutions. The rule of law is as marked a feature of the United States as of England.

The fact, again, that in many foreign countries the rights of individuals, e.g. to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended. They are something extraneous to and independent of the ordinary course of the law. The declaration of the Belgian constitution that individual liberty is "guaranteed" betrays a way of looking at the rights of individuals very different to the way in which such rights are

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regarded by English lawyers. We can hardly say that one right is more guaranteed than another. Freedom from arbitrary arrest, the right to express one's opinion on all matters subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy one's own property, seem to Englishmen all to rest upon the same basis, namely, on the law of the land. To say that the "constitution guaranteed" one class of rights more than the other would be to an Englishman an unnatural or a senseless form of speech. In the Belgian constitution the words have a definite meaning. They imply that no law invading personal freedom can be passed without a modification of the constitution made in the special way in which alone the constitution can be legally changed or amended¹. This however is not the point to which our immediate attention should be directed. The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation. The so-called "suspension of the *Habeas Corpus* Act" bears, it is true, a certain similarity to what is called in foreign

¹ See pp. 109-125, *ante*.

countries "suspending the constitutional guarantees." Lecture
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 But, after all, a statute suspending the *Habeas Corpus* Act falls very far short of what its popular name seems to imply; and though a serious measure enough, is not in reality more than a suspension of one particular remedy for the protection of personal freedom. The *Habeas Corpus* Act may be suspended and yet Englishmen may enjoy almost all the rights of citizens. The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.

That "rule of law" then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. Summary
of mean-
ings of
Rule of
Law.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there

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can be with us nothing really corresponding to the “administrative law” (*droit administratif*) or the “administrative tribunals” (*tribunaux administratifs*) of France; the notion which lies at the bottom of the “administrative law” known to foreign countries, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies¹ (*tribunaux administratifs*), is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The “rule of law,” lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

¹ See pp. 191–193, *ante*.

LECTURE VI.

THE RULE OF LAW: ITS APPLICATIONS.

- I. *The Right to Personal Freedom.* II. *The Right to Freedom of Discussion.* III. *The Right of Public Meeting.*

IN my last lecture I have attempted to define the different meanings of that rule of law which is a marked characteristic of our constitution. General propositions however as to the nature of the rule of law carry us but a very little way. If we want to understand what that principle in all its different aspects and developments really means, we must try to trace its influence throughout some of the main provisions of the constitution. The best mode of doing this is to examine with some care into the manner in which the law of England deals with the following topics, namely, the right to personal freedom; the right to (so-called) freedom of discussion; the right of public meeting; the use of martial law; the rights and duties of the army; the collection and expenditure of the public revenue; and the responsibility of Ministers. In this and the next lecture I shall treat of each of these topics in their due order.

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My object, however, is not to give you minute information, e.g. as to the *Habeas Corpus* Acts, or other enactments protecting the liberty of the subject; but simply to show that these leading heads of constitutional law, these "articles," so to speak, of the constitution, are both governed by and afford illustrations of the supremacy throughout our institutions of the law of the land. If at some future day the law of the constitution should be codified, each of the topics I have mentioned would be dealt with by the sections of the code. Many of these subjects are actually dealt with in the written constitutions of foreign countries, and notably in the articles of the Belgian constitution, which, as I have before noticed, makes an admirable summary of the leading maxims of English constitutionalism. It will therefore often be a convenient method of illustrating our topic to take the article of the Belgian, or it may be of some other constitution, which bears on the matter in hand, as for example the right to personal freedom, and to consider how far the principle therein embodied is recognised by the law of England; and if it be so recognised, what are the means by which it is maintained or enforced by our Courts. One reason why the law of the constitution is imperfectly understood is, that we too rarely put it side by side with the constitutional provisions of other countries. Here, as elsewhere, comparison is essential to recognition.

Right to
personal
freedom.

I. *Right to personal freedom.* The seventh article of the constitution establishes in Belgium principles which have long prevailed in England, its terms so

curiously illustrate by way of contrast some marked features of English constitutional law as to be worth quotation.

“*Art. 7. La liberté individuelle est garantie.*

“*Nul ne peut être poursuivi que dans les cas prévus par la loi, et dans la forme qu'elle prescrit.*

“*Hors le cas de flagrant délit, nul ne peut être arrêté qu'en vertu de l'ordonnance motivée du juge, qui doit être signifiée au moment de l'arrestation, ou au plus tard dans les vingt-quatre heures*¹.”

The security which an Englishman enjoys for personal freedom does not really depend upon or originate in any general proposition contained in any written document. The nearest approach which our statute-book presents to the statement contained in the seventh article of the Belgian constitution is the celebrated thirty-ninth article² of the Magna Carta: “*Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae,*” which should be read in combination with the declarations of the Petition of Right. And these enactments (if such they can be called) are rather records of the existence of a right than statutes which confer it. The expression again, “guaranteed,” is, as I have already pointed out, extremely significant; it suggests the notion that personal liberty is a special privilege insured to

How secured in England.

¹ *Constitution de la Belgique*, Art. 7.

² See Stubbs, *Charters*, p. 301.

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Belgians by some power above the ordinary law of the land. This is an idea utterly alien to English modes of thought, since with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the Courts. Here, in short, we may observe the application to a particular case of the general principle that with us individual rights are the basis not the result of the law of the constitution.

The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.

The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England *primâ facie* illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Now personal

freedom in this sense of the term is secured in Eng- Lecture
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land by the strict maintenance of the principle that
no man can be arrested or imprisoned except in due
course of law, i.e. (speaking again in very general
terms indeed) under some legal warrant or authority¹,
and, what is of far more consequence, it is secured
by the provision of adequate legal means for the
enforcement of this principle. These methods are
two-fold; namely, redress for unlawful arrest or
imprisonment by means of a prosecution or an
action, and deliverance from unlawful imprisonment
by means of the writ of *habeas corpus*. Let us
examine the general character of each of these
remedies.

i. *Redress for Arrest*. If we use the term re- Proceed-
ings for
wrongful
arrest.
dress in a wide sense, we may say that a person
who has suffered a wrong obtains redress either when
he gets the wrongdoer punished or when he obtains
compensation for the damage inflicted upon him by
the wrong.

Each of these forms of redress is in England open
to every one whose personal freedom has been in any
way unlawfully interfered with. Suppose, for ex-
ample, that *X* without legal justification assaults *A*,
by knocking him down, or deprives *A* of his freedom—
as the technical expression goes, “imprisons” him—
whether it be for a length of time, or only for
five minutes; *A* has two courses open to him. He
can have *X* convicted of an assault and thus cause

¹ See as to arrests, Stephen, *Commentaries*, iv. (8th ed.), pp.
340-349.

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him to be punished for his crime, or he can bring an action of trespass against *X* and obtain from *X* such compensation for the damage which *A* has sustained from *X*'s conduct as a jury think that *A* deserves. Suppose that in 1725 Voltaire had at the instigation of an English lord been treated in London as he was treated in Paris. He would not have needed to depend for redress upon the goodwill of his friends or upon the favour of the Ministry. He could have pursued one of two courses. He could by taking the proper steps have caused all his assailants to be brought to trial as criminals. He could, if he had preferred it, have brought an action against each and all of them: he could have sued the nobleman who caused him to be thrashed, the footmen who thrashed him, the policemen who threw him into gaol, and the gaoler or lieutenant who kept him there. Notice particularly that the action for trespass, to which Voltaire would have had recourse, can be brought, or, as the technical expression goes, "lies" against every person throughout the realm. It can and has been brought against governors of colonies, against secretaries of state, against officers who have tried by Court-martial persons not subject to military law, against every kind of official high or low. Here then we come across another aspect of the "rule of law." No one of Voltaire's enemies would, if he had been injured in England, have been able to escape from responsibility on the plea of acting in an official character or in obedience to his official superiors. Nor would any one of them have been able to say

that because he was a government officer he must be tried by an official Court. Voltaire, to keep to our example, would have been able in England to have brought each and all of his assailants, including the officials who kept him in prison, before an ordinary Court, and therefore before judges and jurymen who were not at all likely to think that official zeal or the orders of official superiors were either a legal or a moral excuse for breaking the law.

Before quitting the subject of the redress afforded by the Courts for the damage caused by illegal interference with any one's personal freedom, we shall do well to notice the strict adherence of the judges in this as in other cases to two maxims or principles which underlie the whole law of the constitution, and the maintenance of which has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown. The first of these maxims or principles is that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part, and, what is really the same thing looked at from another point of view, cannot, if the act be unlawful, plead in his defence that he did it under the orders of a master or superior. Voltaire, had he been arrested in England, could have treated each and all of the persons engaged in the outrage as individually responsible for the wrong done to him. Now this doctrine of individual responsibility is the real foundation of the legal dogma that the orders of the King himself are no justification for the com-

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mission of a wrongful or illegal act. The ordinary rule, therefore, that every wrongdoer is individually liable for the wrong he has committed, is the foundation on which rests the great constitutional doctrine of Ministerial responsibility. The second of these noteworthy maxims is, that the Courts give a remedy for the infringement of a right whether the injury done be great or small. The assaults and imprisonment from which Voltaire suffered were serious wrongs; but it would be an error to fancy, as persons who have no experience in the practice of the Courts are apt to do, that proceedings for trespass or for false imprisonment can be taken only where personal liberty is seriously interfered with. Ninety-nine out of every hundred of actions for assault or false imprisonment have reference to injuries which in themselves are trifling. If one ruffian gives another a blow, if a policeman makes an arrest without lawful authority, if a schoolmaster keeps a scholar locked up at school for half an hour after he ought to have let the child go home¹, if in short X interferes unlawfully to however slight a degree with the personal liberty of A, the offender exposes himself to proceedings in a Court of Law, and the sufferer, if he can enlist the sympathies of a jury, may recover heavy damages for the injury which he has or is supposed to have suffered. The law of England protects the right to personal liberty, as also every other legal right, against every kind of infringement, and gives the same kind of redress (I do not mean, of course,

¹ *Hunter v. Johnson*, 13 Q. B. D. 225.

inflicts the same degree of punishment or penalty) for the pettiest as for the gravest invasions of personal freedom. This seems to us so much a matter of course as hardly to call for observation, but it may be suspected that few features in our legal system have done more to maintain the authority of the law than the fact that all offences great and small are dealt with on the same principles and by the same Courts. The law of England now knows nothing of exceptional offences punished by extraordinary tribunals¹.

The right of a person who has been wrongfully imprisoned on regaining his freedom to put his oppressor on trial as a criminal, or by means of an action to obtain pecuniary compensation for the wrong which he has endured, affords a most insufficient security for personal freedom. If *X* keeps *A* in confinement, it profits *A* little to know that if he could recover his freedom, which he cannot, he could punish and fine *X*. What *A* wants is to recover his liberty. Till this is done he cannot hope to punish the foe who has deprived him of it. It would have been little consolation for Voltaire to know that if he could have got out of the Bastille he could recover damages from his enemies. The possibility that he might when he got free have obtained redress for the wrong done him might, so far from being a benefit, have condemned him to life-long incarceration. Liberty is not secure unless the law, in addition to punishing every kind of

¹ Contrast with this the extraordinary remedies adopted under the old French monarchy for the punishment of powerful criminals.

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Writ of
habeas
corpus.

ii. *Writ of Habeas Corpus*¹.—It is not within the scope of these lectures to give a history of the writ of *habeas corpus* or to provide the details of the legislation with regard to it. For minute information both about the writ and about the *Habeas Corpus* Acts you should consult the ordinary legal text-books. My object is solely to explain generally the mode in which the law of England secures the right to personal freedom. I shall therefore call attention to the following points: first, the nature of the writ; secondly, the effect of the so-called *Habeas Corpus* Acts; thirdly, the precise effect of what is called (not quite accurately) the Suspension of the *Habeas Corpus* Act; and, lastly, the relation of any Act suspending the operation of the *Habeas Corpus* Act to an Act of Indemnity. Each of these matters has a close bearing on the law of the constitution.

Nature of
Writ.

Nature of Writ.—Legal documents constantly give the best explanation and illustration of legal principles. We shall do well therefore to examine with care the following copy of a writ of *habeas corpus*:—

“*Victoria, by the Grace of God, of the United*

¹ See Stephen, *Commentaries*, iii. 627–636; 16 Car. I, c. 10; 31 Car. II, c. 2; 56 George III, c. 100; Forsyth, *Opinions*, 436–452, 481.

“*Kingdom of Great Britain and Ireland, Queen, De-* Lecture
VI.
“*fender of the Faith,*

“*To J. K., Keeper of our Gaol of Jersey, in the*
“*Island of Jersey, and to J. C., Viscount of said*
“*Island, greeting. We command you that you have*
“*the body of C. C. W. detained in our prison under*
“*your custody, as it is said, together with the day and*
“*cause of his being taken and detained, by whatsoever*
“*name he may be called or known, in our Court before*
“*us, at Westminster, on the 18th day of January next,*
“*to undergo and receive all and singular such matters*
“*and things which our said Court shall then and there*
“*consider of him in this behalf; and have there*
“*then this Writ. Witness THOMAS Lord DENMAN, at*
“*Westminster, the 23rd day of December in the 8th*
“*year of our reign.*

“*By the Court,*

“*Robinson¹.*”

“*At the instance of C. C. W.*

“*R. M. R.*”

“*W. A. L., 7 Gray's Inn Square, London,*

“*Attorney for the said C. C. W.*”

The character of the document is patent on its face. It is an order issued, in the particular instance, by the Court of Queen's Bench calling upon a person by whom a prisoner is alleged to be kept in confinement to bring such prisoner—to “have his body,” whence

¹ *Carus Wilson's Case*, 7 Q. B. 984, 988. In this particular case the writ calls upon the gaoler of the prison to have the body of the prisoner before the Court by a given day. It more ordinarily calls upon him to have the prisoner before the Court “immediately after the receipt of this writ.”

Lecture VI. the name *habeas corpus*—before the Court to let the Court know on what ground the prisoner is confined, and thus to give the Court the opportunity of dealing with the prisoner as the law may require. The essence of the whole transaction is that the Court can by the writ of *habeas corpus* cause any person who is imprisoned to be actually brought before the Court and obtain knowledge of the reason why he is imprisoned; and then having him before the Court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, brought speedily to trial.

The writ can be issued on the application either of the prisoner himself or of any person on his behalf, or (supposing the prisoner cannot act) then on the application of any person who believes him to be unlawfully imprisoned. It is issued by the High Court or during vacation by any judge thereof, and the Court or a judge should and will always cause it to be issued on being satisfied by affidavit that there is reason to suppose a prisoner to be wrongfully deprived of his liberty. You cannot say with strictness that the writ is issued “as a matter of course,” for some ground must be shown for supposing that a case of illegal imprisonment exists. But the writ is granted “as a matter of right,” that is to say, the Court will always issue it if *primâ facie* ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ or order of the Court can be addressed to any person whatever, be he an official or a private

individual, who has or is supposed to have another in his custody. Any disobedience to the writ exposes the offender to summary punishment for contempt of Court¹, and also in many cases to heavy penalties recoverable by the party aggrieved². To put the matter therefore in the most general terms the case stands thus. The High Court of Justice possesses, as the tribunals which make up the High Court used to possess, the power by means of the writ of *habeas corpus* to cause any person who is alleged to be kept in unlawful confinement to be brought before the Court. The Court can then enquire into the reason why he is confined, and can, should it see fit, set him then and there at liberty. This power moreover is one which the Court always will exercise whenever ground is shown by any applicant whatever for the belief that any man in England is unlawfully deprived of his liberty.

The Habeas Corpus Acts.—The right to the writ of *habeas corpus* existed at common law long before the passing in 1679 of the celebrated *Habeas Corpus Act*³, 31 Car. II, cap. 2, and you may wonder how it has happened that this and the subsequent Act, 56 Geo. III, c. 100, are treated, and (for practical purposes) rightly treated, as the basis on which rests an Englishman's security for the enjoyment of his personal freedom. The explanation is, that prior to

¹ *Rex v. Winton*, 5 T. R. 89, and conf. 56 George III, c. 100, s. 2; see Corner, *Practice of the Crown Side of the Court of Queen's Bench*.

² 31 Car. II, c. 2, s. 4.

³ See also 16 Car. I, c. 10, s. 6.

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1679 the right to the writ was often under various pleas and excuses made of no effect. The aim of the *Habeas Corpus* Acts has been to meet all the devices by which the effect of the writ can be evaded, either on the part of the judges, who ought to issue the same and if necessary discharge the prisoner, or on the part of the gaoler or other person who has the prisoner in custody. The earlier Act of Charles the Second applies to persons imprisoned on a charge of crime; the later Act of George the Third applies to persons deprived of their liberty otherwise than on a criminal accusation.

Take these two classes of persons separately.

31 Car.
II, c. 2.

A person is imprisoned on a charge of crime. If he is imprisoned without any legal warrant for his imprisonment he has a right to be set at liberty. If on the other hand he is imprisoned under a legal warrant, the object of his detention is to ensure his being brought to trial. His position in this case differs according to the nature of the offence with which he is charged. In the case of the lighter offences known as misdemeanors he has, generally speaking¹, the right to his liberty on giving security with proper sureties that he will in due course surrender himself to custody and appear and take his trial on such indictment as may be found against him in respect of the matter with which he is charged, or (to use technical expressions) he has the right to be

¹ See Stephen, *Digest of the Law of Criminal Procedure*, art. 276, note 1, and also art. 136 and p. 89, note 1. Compare 11 & 12 Vict. c. 42, s. 23.

admitted to bail. In the case, on the other hand, of the more serious offences, such as felonies or treasons, a person who is once committed to prison is not entitled to be let out on bail. The right of the prisoner is in this case simply the right to a speedy trial. The effect of the writ of *habeas corpus* would be evaded either if the Court did not examine into the validity of the warrant on which the prisoner was detained, and if the warrant were not valid release him, or, if the Court on ascertaining that he was legally imprisoned, did not cause him according to circumstances either to go out on bail or to be speedily brought to trial.

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The Act provides against all these possible failures of justice. The law as to persons imprisoned under accusations of crime stands through the combined effect of the rules of the common law and of the statute in substance as follows. The gaoler who has such person in custody is bound when called upon to have the prisoner before the Court with the true cause of his commitment. If the cause is insufficient the prisoner must of course be discharged; if the cause is sufficient the prisoner in case he is charged with a misdemeanor, can in general insist upon being bailed till trial; in case on the other hand the charge is one of treason or felony he can insist upon being tried at the first sessions after his committal, or if he is not then tried, upon being bailed, unless the witnesses for the Crown cannot appear. If he is not tried at the second sessions after his commitment he can insist upon his release without

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bail. The net result, therefore, appears to be that while the *Habeas Corpus* Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else of being brought to a speedy trial.

56 Geo.
III, c. 100.

A person, again, who is detained in confinement but not on a charge of crime needs for his protection the means of readily obtaining a legal decision on the lawfulness of his confinement, and also of getting an immediate release if he has by law a right to his liberty. This is exactly what the writ of *habeas corpus* affords. Whenever any Englishman or foreigner is alleged to be wrongfully deprived of liberty, the Court will issue the writ, have the person aggrieved brought before the Court, and if he has a right to liberty set him free. Thus if a child is forcibly kept apart from his parents¹, if a man is wrongfully kept in confinement as a lunatic, if a nun is alleged to be prevented from leaving her convent, if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be deprived of liberty, the Court will always issue a writ of *habeas corpus* to any one who has the aggrieved person in his custody to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free. Till, however, the year 1816 (56 Geo. III) the machinery for obtaining the writ was less perfect in the case of persons not

¹ See *Queen v. Nash*, 10 Q. B. D. (C. A.) 454; and compare *Re Agar Ellis*, 24 Ch. D. (C. A.) 317.

accused of crime than in the case of those charged with criminal offences, and the effect of 56 Geo. III, c. 100 was in substance to apply to non-criminal cases the machinery of the great *Habeas Corpus* Act, 31 Car. II, c. 2.

At the present day, therefore, the securities for personal freedom are in England as complete as laws can make them. The right to its enjoyment is absolutely acknowledged. Any invasion of the right entails either imprisonment or fine upon the wrongdoer; and any person, whether charged with crime or not, who is even suspected to be wrongfully imprisoned, has, if there exists a single individual willing to exert himself on the victim's behalf, the certainty of having his case duly investigated, and, if he has been wronged, of recovering his freedom. Let us return for a moment to a former illustration, and suppose that Voltaire had been treated in London as he was treated in Paris. He most certainly would very rapidly have recovered his freedom. The procedure would not, it is true, have been in 1725 quite as easy as it is now under the Act of George the Third. Still, even then it would have been within the power of any one of his friends to put the law in motion. It would have been at least as easy to release Voltaire in 1725 as it was in 1773 to obtain by means of *habeas corpus* the freedom of the slave James Sommersett when actually confined in irons on board a ship lying in the Thames and bound for Jamaica¹.

The whole history of the writ of *habeas corpus*

¹ *Sommersett's Case*, 20 St. Tr. 1.

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illustrates the predominant attention paid under the English constitution to "remedies," that is, to modes of procedure by which to secure respect for a legal right, and by which to turn a merely nominal into an effective or real right. The *Habeas Corpus* Acts are essentially procedure Acts, and simply aim at improving the legal mechanism by means of which the acknowledged right to personal freedom may be enforced. They are intended, as is generally the case with legislation which proceeds under the influence of lawyers, simply to meet actual and experienced difficulties. Hence the *Habeas Corpus* Act of Charles the Second's reign was an imperfect or very restricted piece of legislative work, and Englishmen waited nearly a century and a half (1679-1816) before the procedure for securing the right to discharge from unlawful confinement was made complete. But this lawyer-like mode of dealing with a fundamental right had with all its defects the one great merit that legislation was directed to the right point. There is no difficulty, and there is often very little gain in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The *Habeas Corpus* Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights. One may even venture to say that these Acts are of really more importance not only than the general proclamations of the Rights of Man which have often been put forward in foreign countries, but even than

such very lawyer-like documents as the Petition of Right or the Bill of Rights, though these celebrated enactments show almost equally with the *Habeas Corpus* Act that the law of the English constitution is at bottom judge-made law. Lecture
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Every critic of the constitution has observed the effect of the *Habeas Corpus* Acts in securing the liberty of the subject; what has received less and deserves as much attention is the way in which the right to issue a writ of *habeas corpus*, strengthened as that right is by statute, determines the whole relation of the judicial body towards the executive. The authority to enforce obedience to the writ is nothing less than the power to release from imprisonment any person who in the opinion of the Court is unlawfully deprived of his liberty, and hence in effect to put an end to or to prevent any punishment which the Crown or its servants may attempt to inflict in opposition to the rules of law as interpreted by the judges. The judges therefore are in truth, though not in name, invested with the means of hampering or supervising the whole administrative action of the government, and of at once putting a veto upon any proceeding not authorised by the letter of the law. Nor is this power one which has fallen into disuse by want of exercise. It has often been put forth, and this too in matters of the greatest consequence; the knowledge moreover of its existence governs the conduct of the administration. An example or two will best show the mode in which the "judiciary" (to use a convenient Americanism) Effect of writ of *habeas corpus* on authority of judges.

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can and do by means of the writ of *habeas corpus* keep a hold on the acts of the executive. In 1839 Canadian rebels, found guilty of treason in Canada and condemned to transportation, arrived in official custody at Liverpool on their way to Van Diemen's Land. The friends of the convicts questioned the validity of the sentence under which they were transported: the prisoners were thereupon taken from prison and brought upon a writ of *habeas corpus* before the Court of Exchequer. Their whole position having been considered by the Court, it was ultimately held that the imprisonment was legal. But had the Court taken a different view, the Canadians would at once have been released from confinement¹. In 1859 an English officer serving in India was duly convicted of manslaughter and sentenced to four years' imprisonment: he was sent to England in military custody to complete there his term of punishment. The order under which he was brought to this country was technically irregular, and the convict having been brought on a writ of *habeas corpus* before the Queen's Bench, was on this purely technical ground set at liberty². So, to take a very notorious instance of judicial authority in matters most nearly concerning the executive, the Courts have again and again considered in the case of persons brought before them by the writ of *habeas corpus* questions as to the legality of impressment, and as to the limits within

¹ *The Case of the Canadian Prisoners*, 5 M. & W. 32.

² *In re Allen*, 30 L. J. (Q. B.) 38.

which the right of impressment may be exercised; and if, on the one hand, the judges have in this particular instance (which by the way is almost a singular one) supported the arbitrary powers of the prerogative, they have also strictly limited the exercise of this power within the bounds prescribed to it by custom or by statute¹. Moreover, as already pointed out, the authority of the civil tribunals even when not actually put into force regulates the action of the government. In 1854 a body of Russian sailors were found wandering about the streets of Guildford, without any visible means of subsistence; they were identified by a Russian naval officer as deserters from a Russian man-of-war which had put into an English port; they were thereupon, under his instructions and with the assistance of the superintendent of police, conveyed to Portsmouth for the purpose of their being carried back to the Russian ship. Doubts arose as to the legality of the whole proceeding. The law officers were consulted, who thereupon gave it as their opinion that "the delivering-up of the Russian "sailors to the Lieutenant and the assistance offered "by the police for the purpose of their being conveyed back to the Russian ship, was contrary to "law²." The sailors were presumably released; they no doubt would have been delivered by the Court had a writ of *habeas corpus* been applied for. Here then

¹ See *Case of Pressing Mariners*, 18 St. Tr. 1323; Stephen, *Commentaries*, ii. 595; Conf. Corner, *Forms of Writs on Crown Side of Court of Queen's Bench*, for form of *habeas corpus* for an impressed seaman.

² See Forsyth, *Opinions*, p. 468.

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we see the judges in effect restraining the action of the executive in a matter which in most countries will be considered one of administration or of policy lying beyond the range of judicial interference. The strongest examples however of interference by the judges with administrative proceedings are to be found in the decisions given under the Extradition Acts. Neither the Crown nor any servant of the Crown has any common law right to expel a foreign criminal from the country or to surrender him to his own government for trial. A French forger, robber, or murderer who escapes from France to England cannot, independently of statutory enactments, be sent back to his native land for trial or punishment. The absence of any power on the part of the Crown to surrender foreign criminals to the authorities of their own state has been found so inconvenient, that in recent times Extradition Acts have empowered the Crown to make treaties with foreign states for the mutual extradition of criminals or of persons charged with crime. The exercise of this authority is however hampered by restrictions which are imposed by the statute under which alone it exists. It therefore often happens that an offender arrested under the warrant of a Secretary of State and about to be handed over to the authorities of his own country conceives that, on some ground or other, his case does not fall within the precise terms of any Extradition Act. He applies for a writ of *habeas corpus*; he is brought up before the High Court; every technical plea he can raise obtains full consideration, and if on

any ground whatever it can be shown that the terms of the Extradition Act have not been complied with, or that they do not justify his arrest and surrender, he is as a matter of course at once set at liberty¹. It is easy to perceive that the authority of the judges, exercised as it invariably must be in support of the strict rules of law, cuts down the discretionary powers of the Crown. It often prevents the English government from meeting public danger by measures of precaution which would as a matter of course be taken by the executive of any continental country. Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or imprisonment they would at once be brought before the High Court on a writ of *habeas corpus*, and unless some specific legal ground for their detention could be shown they would be forthwith set at liberty. Of the political or, to use foreign expressions, of the "administrative" reasons which might make the arrest or expulsion of a foreign refugee highly expedient, the judges would hear nothing; that he was arrested by order of the Secretary of

¹ *In re Coppin*, L. R. 2 Ch. 47; *Queen v. Wilson*, 3 Q. B. D. 42.

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State, that his imprisonment was a simple administrative act, that the Prime Minister or the Home Secretary was prepared to make affidavit that the arrest was demanded by the most urgent considerations of public safety, or to assure the Court that the whole matter was one of high policy and concerned national interests, would be no answer whatever to the demand for freedom under a writ of *habeas corpus*. All that any judge could enquire into would be whether there was any rule of common or of statute law which would authorise interference with a foreigner's personal freedom. If none such could be found, the applicants would assuredly obtain their liberty. The plain truth is that the power possessed by the judges of controlling the administrative conduct of the executive has been of necessity so exercised as to prevent the development with us of any system corresponding to the "administrative law" of continental states. It strikes at the root of those theories as to the nature of "administrative acts," and as to the "separation of powers" on which, as I have already shown, the *droit administratif* of France depends, and it deprives the Crown, which now means the Ministry of the day, of all discretionary authority. The actual or possible intervention in short of the Courts, exercisable for the most part by means of the writ of *habeas corpus*, confines the action of the government within the strict letter of the law; with us the state can punish, but it can hardly prevent the commission of crimes.

We can now see why it was that the political conflicts of the seventeenth century often raged round the position of the judges, and why the battle might turn on a point so technical as the enquiry what might be a proper return to a writ of *habeas corpus*¹. Upon the degree of authority and independence to be conceded to the Bench depended the colour and working of our institutions. To supporters on the one hand of the prerogative who, like Bacon, were not unfrequently innovators or reformers, judicial independence appeared to mean the weakness of the executive and the predominance throughout the state of the conservative legalism which found a representative in Coke. The Parliamentary leaders, on the other hand, saw, more or less distinctly, that the independence of the Bench was the sole security for the maintenance of the common law, which was nothing else than the rule of established customs modified only by Acts of Parliament, and that Coke in battling for the power of the judges was asserting the rights of the nation; they possibly also saw, though this is uncertain, that the maintenance of rigid legality (inconvenient as it might sometimes prove) was the certain road to Parliamentary sovereignty².

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VI.Contests
of seven-
teenth
century
about
position of
judges.

Suspension of the Habeas Corpus Act. During periods of political excitement the power or duty of the Courts to issue a writ of *habeas corpus*, and thereby compel the speedy trial or release of persons

Suspension
of Habeas
Corpus
Act.

¹ *Darnel's Case*, 3 St. Tr. 1.

² See Gardiner, *History of England*, ii. chap. xxii, for an admirable statement of the different views entertained as to the position of the judges.

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charged with crime, has been found an inconvenient or dangerous limitation on the authority of the executive government. Hence has arisen the occasion for statutes which are popularly called *Habeas Corpus* Suspension Acts. I say "popularly called," because if you take (as you may) the Act 34 Geo. III. c. 54 as a type of such enactments, you will see that it hardly corresponds with its received name. The whole effect of the Act, which does not even mention the *Habeas Corpus* Act, is to make it impossible for any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason, or on suspicion of high treason, to insist upon being either discharged or put on trial. No doubt this is a great diminution in the securities for personal freedom provided by the *Habeas Corpus* Acts; but it falls very far short of anything like a general suspension of the right to the writ of *habeas corpus*; it in no way affects the privileges of any person not imprisoned on a charge of high treason; it does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed; it does not in anywise touch the claim to a writ of *habeas corpus* possessed by every one, man, woman, or child, who is held in confinement otherwise than on a charge of crime. The particular statute, 34 Geo. III. c. 54, is, and (I believe) every other *Habeas Corpus* Suspension Act affecting England has been, an annual Act, and must therefore, if it is to continue in force, be renewed year by year. The sole, immediate, and direct

result therefore of suspending the *Habeas Corpus* Act is this: the Ministry may for the period during which the Suspension Act continues in force constantly defer the trial of persons imprisoned on the charge of treasonable practices. This increase in the power of the executive is no trifle, but it falls far short of the process known in some foreign countries as "suspending the constitutional guarantees," or in France as the "proclamation of a state of siege¹;" it, indeed, extends the arbitrary powers of the government to a far less degree than many so-called Coercion Acts. That this is so may be seen by a mere enumeration of the chief of the extraordinary powers which were conferred by recent enactments on the Irish executive. Under the Act of 1881 (44 Vict. c. 4) the Irish executive obtained the absolute power of arbitrary and preventive arrest, and could without breach of law detain in prison any person arrested on suspicion for the whole period for which the Act continued in force. It is true that the Lord Lieutenant could arrest only persons suspected of treason or of the commission of some act tending to interfere with the maintenance of law and order. But as the warrant itself to be issued by the Lord Lieutenant was made under the Act conclusive evidence of all matters contained therein, and therefore (*inter alia*) of the truth of the assertion that the arrested person or "suspect" was reasonably suspected e.g. of treasonable practices, and therefore liable to arrest, the

¹ See p. 301, *post*.

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result clearly followed that neither the Lord Lieutenant nor any official acting under him could by any possibility be made liable to any legal penalty for any arrest, however groundless or malicious, made in due form within the words of the Act. The Irish government therefore could arrest any person whom the Lord Lieutenant thought fit to imprison, provided only that the warrant was in the form and contained the allegations required by the statute. Under the Prevention of Crime (Ireland) Act, 1882—45 & 46 Vict. c. 25—the Irish executive was armed with the following (among other) extraordinary powers. The government could abolish the right to trial by jury¹, could arrest strangers found out of doors at night under suspicious circumstances², could seize any newspaper which in the judgment of the Lord Lieutenant contained matter inciting to treason or violence³, and could prohibit any public meeting which the Lord Lieutenant believed to be dangerous to the public peace or safety. Add to this that the Prevention of Crime Act, 1882, re-enacted (incidentally as it were) the Alien Act of 1848, and thus empowered the British Ministry to expel from the United Kingdom any foreigner who had not before the passing of the Act been resident in the country for three years⁴. Not one of these extraordinary powers flows directly from a mere suspension of the *Habeas Corpus* Act, and, in truth, the best proof of the very limited legal effect of such so-called “suspension” is supplied by the fact that before a *Habeas*

¹ Sect. 1.² Sect. 12.³ Sect. 13.⁴ Sect. 15.

Corpus Suspension Act runs out its effect is almost invariably supplemented by legislation of a totally different character, namely, an Act of Indemnity. Lecture
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An Act of Indemnity. Reference has already been made to Acts of Indemnity as the supreme instance of Parliamentary sovereignty¹. They are retrospective statutes which free persons who have broken the law from responsibility for its breach, and thus make lawful acts which when they were committed were unlawful. It is easy enough to see the connection between a *Habeas Corpus* Suspension Act and an Act of Indemnity. The Suspension Act, as already pointed out, does not free any person from civil or criminal liability for a violation of the law. Suppose that a Secretary of State or his subordinates during the suspension of the *Habeas Corpus* Act should arrest and imprison a perfectly innocent man without any cause whatever except (it may be) the belief that it is conducive to the public safety that the particular person—say, an influential party leader such as Wilkes, Fox, or O'Connell—should be at a particular crisis kept in prison, and thereby deprived of influence. Suppose, again, that an arrest should be made by orders of the Ministry under circumstances which involve the unlawful breaking into a private dwelling-house, the destruction of private property, or the like. In each of these instances, and in many others which might easily be imagined, the Secretary of State who orders the arrest and the officials who carry out his commands have Act of In-
demnity.

¹ See pp. 46, 47, *ante*.

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broken the law. They may have acted under the *bonâ fide* belief that their conduct was justified by the necessity of providing for the maintenance of order. But this will not of itself, whether the *Habeas Corpus* Act be suspended or not, free the persons carrying out the arrests from criminal and civil liability for the wrong they have committed. The suspension indeed of the *Habeas Corpus* Act prevents the person arrested from taking at the moment any proceedings against a Secretary of State or the officers who have acted under his orders. For the sufferer is of course imprisoned on the charge of high treason or suspicion of treason, and therefore will not while the suspension lasts be able to get himself discharged from prison. The moment however that the Suspension Act expires he can of course apply for a writ of *habeas corpus*, and ensure that either by means of being put on his trial or otherwise his arbitrary imprisonment shall be brought to an end. In the cases we have supposed the prisoner has been guilty of no legal offence. The offenders are in reality the Secretary of State and his subordinates. The result is that on the expiration of the Suspension Act they are liable to actions or indictments for their illegal conduct, and can derive no defence whatever from the mere fact that at the time when the unlawful arrest took place the *Habeas Corpus* Act was, partially at any rate, not in force. It is however almost certain that when the suspension of the *Habeas Corpus* Act makes it possible for the government to keep suspected persons in prison for a length of time

without bringing them to trial, a smaller or greater number of unlawful acts will be committed, if not by the members of the Ministry themselves, at any rate by their agents. We may even go further than this, and say that the unavowed object of a *Habeas Corpus* Suspension Act is to enable the government to do acts which, though politically expedient, may not be strictly legal. The Parliament which destroys one of the main guarantees for individual freedom must hold (whether wisely or not) that a crisis has arisen when the rights of individuals must be postponed to considerations of state. A Suspension Act would in fact fail of its main object unless officials felt assured that, as long as they *bonâ fide* and uninfluenced by malice or by corrupt motives carried out the policy of which the Act was the visible sign, they would be protected from penalties for conduct which, though it might be technically a breach of law, was nothing more than the free exertion for the public good of that discretionary power which the suspension of the *Habeas Corpus* Act was intended to confer upon the executive. This assurance is derived from the expectation that before the Suspension Act ceases to be in force Parliament will pass an Act of Indemnity protecting all persons who have acted or have intended to act under the powers given to the government by the statute. This expectation has not been disappointed. An Act suspending the *Habeas Corpus* Act which has been continued for any length of time has constantly been followed by an Act of Indemnity. Thus the Act to

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which reference has already been made, 34 George III. c. 54, was continued in force by successive annual re-enactments for seven years, from 1794 to 1801. In the latter year an Act was passed, 41 George III. cap. 66, "indemnifying such persons as since the first "day of February, 1793, have acted in the apprehending, imprisoning, or detaining in custody in "Great Britain of persons suspected of high treason "or treasonable practices." It cannot be disputed that the so-called suspension of the *Habeas Corpus* Act, which every one knows will probably be followed by an Act of Indemnity, is in reality a far greater interference with personal freedom than would appear from the very limited effect in a merely legal point of view of suspending the right of persons accused of treason to demand a speedy trial. The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still there are one or two considerations which limit the practical importance which can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain. Any suspicion on the part of the public that officials had grossly abused their powers might make it difficult to obtain a Parliamentary indemnity for things done while the *Habeas Corpus* Act was suspended. As regards, again, the protection to be derived from the Act by men who have been guilty of irregular, illegal, oppressive or cruel conduct, everything depends on the terms of the Act of Indemnity. These may be either narrow or wide. The Indemnity Act, for

instance, of 1801, gives a very limited amount of protection to official wrongdoers. It provides indeed a defence against actions or prosecutions in respect of anything done, commanded, ordered, directed, or advised to be done in Great Britain for apprehending, imprisoning, or detaining in custody any person charged with high treason or treasonable practices. And no doubt such a defence would cover any irregularity or merely formal breach of the law, but there certainly could be imagined acts of spite or extortion done under cover of the Suspension Act which would expose the offender to actions or prosecutions, and could not be justified under the terms of the Indemnity Act. Reckless cruelty to a political prisoner, or still more certainly the arbitrary punishment or the execution of a political prisoner, between 1793 and 1801, would, in spite of the Indemnity Act, have left every man concerned in the crime liable to suffer punishment. Whoever wishes to appreciate the moderate character of an ordinary Act of Indemnity passed by the British Parliament should compare such an Act as 41 George III. cap. 66 with the enactment by which the Jamaica House of Assembly attempted to cover Governor Eyre from all liability for unlawful deeds done in suppressing rebellion during 1866. An Act of Indemnity again, though it is the legalisation of illegality, is also, it should be noted, itself a law. It is something in its essential character therefore very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the

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executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power, but where the legal sovereign is a Parliamentary assembly even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law¹.

Freedom of
discussion.

II. *The Right to Freedom of Discussion.* The Declaration of the Rights of Man² and the French Constitution of 1791 proclaim freedom of discussion and the liberty of the press in terms which are still cited in text-books³ as embodying maxims of French jurisprudence.

Principles
laid down
in foreign
constitu-
tions.

“*La libre communication des pensées et des opinions est un des droits les plus précieux de l’homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l’abus de cette liberté dans les cas déterminés par la loi*⁴.”

“*La constitution garantit, comme droit naturel et civil . . . la liberté à tout homme de parler, d’écrire, d’imprimer et publier ses pensées, sans que ses écrits puissent être soumis à aucune censure ou inspection avant leur publication*⁵.”

Belgian law, again, treats the liberty of the press as a fundamental article of the constitution.

¹ See Lecture VII.

² Plouard, *Les Constitutions Françaises*, p. 16.

³ Bourguignon, *Éléments Généraux de Législation Française*, p. 468.

⁴ *Déclar. des droits*, art. 11, Plouard, p. 16.

⁵ *Constitution de 1791, Tit. 1*; Plouard, *Constitutions Françaises*, p. 18.

“Art. 18. *La presse est libre ; la censure ne pourra* Lecture
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jamais être établie : il ne peut être exigé de cautionne-
ment des écrivains, éditeurs ou imprimeurs.

“*Lorsque l'auteur est connu et domicilié en Belgique,*
l'éditeur, l'imprimeur ou le distributeur ne peut être
*poursuivi*¹.”

Both the revolutionists of France and the constitutionalists of Belgium borrowed their ideas about freedom of opinion and the liberty of the press from England, and most persons form such loose notions as to English law that the idea prevails in England itself that the right to the free expression of opinion, and especially that form of it which is known as the “liberty of the press,” are fundamental doctrines of the law of England in the same sense in which they were part of the ephemeral constitution of 1791 and still are embodied in the articles of the existing Belgian constitution ; and, further, that our Courts recognise the right of every man to say and write what he pleases, especially on social, political, or religious topics, without fear of legal penalties. Yet this notion, justified though it be, to a certain extent, by the habits of modern English life, is essentially false, and conceals from students the real attitude of English law towards what is called “freedom of thought,” and is more accurately described as the “right to the free expression of opinion.” As every lawyer knows, the phrases “freedom of discussion” or “liberty of the press” are not to be found in any part of the statute-book nor among the maxims of the

¹ *Constitution de la Belgique*, Art. 18.

Lecture VI. common law. As terms of art they are indeed quite unknown to our Courts. At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech. The true state of things cannot be better described than in these words from an excellent treatise on the law of libel :—

English law only secures that no one shall be punished except for statements proved to be breach of law.

“Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment¹.”

Any man may therefore say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing, or in print) which he is not legally entitled to make. Nor is the law of England specially favourable to free speech or to free writing in the rules which it maintains in theory and often enforces in fact as to the kind of statements which a man has a legal right to make. Above all, it recognises no special privilege on behalf of the “press,” if by that term we mean, in conformity with ordinary language, periodical literature in general, and particularly the newspapers. In truth there

¹ Odgers, *Libel and Slander*, Introd. p. 12. See Story, ii. *Constitution of the U. S.*, secs. 1880, 1891, 1892.

is nothing or scarcely anything in the statute-book which can be called a "press law"¹. The law of the press as it exists here is merely part of the law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the "freedom of the press;" by which expression I mean a person's right to make any statement he likes in books or newspapers.

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There are many statements with regard to individuals which no man is entitled to publish in writing or print. It is a libel (speaking generally) to circulate any untrue statement about another which is calculated to injure his interests, character, or reputation. Every man who directly or indirectly makes known or, as the technical expression goes, "publishes" such a statement, gives currency to a libel and is liable to an action for damages. The person who makes a defamatory statement and authorises its publication in writing, the person who writes, the publisher who brings out for sale, the printer who prints, the vendor who distributes a libel, are each guilty of publication, and may each severally be sued. The gist of the offence being the making public, not the writing of the libel, the person who having read a libel sends it on to a friend, is a libeller; and it would seem that a man who reads aloud a libel, knowing it to be such, may be sued. This separate liability of each person concerned in a wrongful act is, as already pointed out, a very notice-

Libels on
individuals.

¹ For exceptions to this see e.g. 8 & 9 Vict. c. 75; 44 & 45 Vict. c. 60, s. 2.

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able characteristic of our law. Honest belief moreover, and good intentions on the part of a libeller, are no legal defence for his conduct. Nor will it avail him to show that he had good reason for thinking the false statement which he made to be true. Persons often must pay heavy damages for giving currency to statements which were not meant to be falsehoods and which were reasonably believed to be true. Thus it is libellous to publish of a man who has been convicted of felony but has worked out his sentence that he "is a convicted felon." It is a libel on the part of *X* if *X* publishes that *B* has told him that *A*'s bank has stopped payment, if though *B* in fact made the statement to *X* and *X* believed the report to be true it turns out to be false. Nor, again, are expressions of opinion when injurious to another at all certain not to expose the publisher of them to an action. A "fair" criticism, it is often said, is not libellous; but it would be a grave mistake to suppose that critics, either in the press or elsewhere, have a right to publish whatever criticisms they think true. Every one has a right to publish fair and candid criticism. But "a critic must confine himself to "criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair "attacks merely from the love of exercising his power "of denunciation¹." A writer in the press and an artist or actor whose performances are criticised are apt to draw the line between "candid criticism" and "personal censure" at very different points. And when

¹ See Odgers, *Libel and Slander*, p. 38.

on this matter there is a difference of opinion between a critic and his victim, the delicate question what is meant by fairness has to be determined by a jury, and may be so answered as greatly to curtail the free expression of critical judgments. Nor let it be supposed that the mere "truth" of a statement is of itself sufficient to protect the person who publishes it from liability to punishment. For though the fact that an assertion is true is an answer to an action for libel, a person may be criminally punished for publishing statements which, though perfectly true, damage an individual without being of any benefit to the public. To write for example and with truth of *A* that he many years ago committed acts of immorality may very well expose the writer *X* to criminal proceedings, and *X* if put on his trial will be bound to prove not only that *A* was in fact guilty of the faults imputed to him, but also that the public had an interest in the knowledge of *A*'s misconduct. If *X* cannot show this, he will find that no supposed right of free discussion or respect for liberty of the press will before an English judge save him from being found guilty of a misdemeanor and sent to prison.

So far in very general terms of the limits placed by the law of libel on freedom of discussion as regards the character of individuals. Let us now observe for a moment the way in which the law of libel restricts in theory at least the right to criticise the conduct of the government.

Every person commits a misdemeanor who publishes (verbally or otherwise) any words or any document

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with a seditious intention. Now a seditious intention means an intention to bring into hatred or contempt or to excite disaffection against the Queen or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to promote feelings of ill-will and hostility between different classes¹. And if the matter published is contained in a written or printed document the publisher is guilty of publishing a seditious libel. The law, it is true, permits the publication of statements meant only to show that the Crown has been misled, or that the government has committed errors, or to point out defects in the government or the constitution with a view to their legal remedy, or with a view to recommend alterations in Church or State by legal means, and, in short, sanctions criticism on public affairs which is *bonâ fide* intended to recommend the reform of existing institutions by legal methods. But any one will see at once that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with prevailing forms of political agitation.

Expression
of opinion
on religious
or moral
questions.

The case is pretty much the same as regards the free expression of opinion on religious or moral

¹ See Stephen, *Digest of the Criminal Law*, Arts. 91, 92, and note also Art. 95 as to spreading false news.

questions¹. Recent circumstances have recalled attention to the forgotten law of blasphemy. But it surprises most persons to learn that, on one view of the law, any one who publishes a denial of the truth of Christianity in general or of the existence of God, whether the terms of such publication are decent or otherwise, commits the misdemeanor of publishing a blasphemous libel and is liable to imprisonment, and that, according to another view of the law, any one is guilty of publishing a blasphemous libel who publishes matter relating to God, Jesus Christ, or the Book of Common Prayer intended to wound the feelings of mankind, or to excite contempt against the Church by law established, or to promote immorality, and that it is at least open to grave doubt how far the publications which thus wound the feelings of mankind are exempt from the character of blasphemy because they are intended in good faith to propagate opinions which the person who publishes them regards as true². Most persons, again, are astonished to find that the denial of the truth of Christianity or of the authority of the Scriptures by "writing, printing, teaching, or advised speaking" on the part of any person who has been educated in or made profession of Christianity in England is by statute a criminal offence entailing very severe penalties³.

¹ See Stephen, *Digest of the Criminal Law*, ss. 161-164.

² See especially Stephen, *Digest of the Criminal Law*, art. 161, for two different expositions of the nature of "blasphemy" as a legal offence.

³ See 9 & 10 Will. III. c. 35, as altered by 53 George III. c. 160,

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When once however the principles of the common law and the force of the enactments still contained in the statute-book are really appreciated, no one can maintain that the law of England recognises anything like that natural right to the free communication of thoughts and opinions which was proclaimed in France nearly a hundred years ago to be one of the most valuable Rights of Man. It is quite clear, further, that the effect of English law, whether as regards statements made about individuals, or the expression of opinion about public affairs, or speculative matters, depends wholly upon the answer to the question who are to determine whether a given publication is or is not a libel. The reply (as we all know) is, that in substance this matter is referred to the decision of a jury. Whether in any given case a particular individual is to be convicted of libel depends wholly upon their judgment, and they have to determine the questions of truth, fairness, intention and the like, which affect the legal character of a published statement ¹.

and Stephen's *Digest of the Criminal Law*, art. 163. Conf. *Attorney-General v. Bradlaugh*, 14 Q. B. D. (C. A.) 667, p. 719, Judgment of Lindley L. J.

¹ "The truth of the matter is very simple when stripped of all ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this; that a man may publish anything which twelve of his countrymen think is not blameable, but that he ought to be punished if he publishes that which is blameable [i.e. that which twelve of his countrymen think is blameable]. This in plain common sense is the substance of all that has been said on the matter." *Rex v. Cutbill*, 27 St. Tr. 642, 675.

Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written. Such "liberty" may vary at different times and seasons from unrestricted license to very severe restraint, and the experience of English history during the last two centuries shows that under the law of libel the amount of latitude conceded to the expression of opinion has in fact differed greatly according to the condition of popular sentiment. Until very recent times the law, moreover, has not recognised any privilege on the part of the press. A statement which is defamatory or blasphemous if made in a letter or upon a card has exactly the same character if made in a book or a newspaper. The protection given by the Belgian constitution to the editor, printer, or seller of a newspaper involves a recognition of special rights on the part of persons connected with the press which is quite inconsistent with the general theory of English law. It is hardly an exaggeration to say, from this point of view, that liberty of the press is not recognised in England.

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Why then has the liberty of the press been long reputed as a special feature of English institutions?

Why the liberty of the press has been thought peculiar to England.

The answer to this enquiry is, that for about two centuries the relation between the government and the press has in England been marked by all those characteristics which make up what we have termed the "rule" or "supremacy" of law, and that just

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because of this, and not because of any favour shown by the law of England towards freedom of discussion, the press, and especially the newspaper press, has practically enjoyed with us a freedom which till recent years was unknown in continental states. Any one will see that this is so who examines carefully the situation of the press in modern England, and then contrasts it either with the press law of France or with the legal condition of the press in England during the sixteenth and seventeenth centuries.

The present position of the English press is marked by two features.

The position of the press in modern England. No censorship.

First. "The liberty of the press," says Lord Mansfield, "consists in printing without any previous license, subject to the consequences of law¹." "The law of England," says Lord Ellenborough, "is a law of liberty, and consistently with this liberty we have not what is called an *imprimatur*. There is no such preliminary license necessary, but if a man publish a paper he is exposed to the penal consequences, as he is in every other act if it be illegal²."

These dicta show us at once that the so-called liberty of the press is a mere application of the general principle, that no man is punishable except for a distinct breach of the law³. This principle is

¹ *Rex v. Dean of St. Asaph*, 3 T. R. 431 (n.).

² *Rex v. Cobbett*, 29 St. Tr. 49; see Odgers, *Libel and Slander*, p. 10.

³ See p. 174, *ante*.

radically inconsistent with any scheme of license or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the Courts to restrain the circulation of a libel, until at any rate the publisher has been convicted of publishing it. It is also opposed in spirit to any regulation requiring from the publisher of an intended newspaper a preliminary deposit of a certain sum of money, for the sake either of ensuring that newspapers should be published only by solvent persons, or that if a newspaper should contain libels there shall be a certainty of obtaining damages from the proprietor. No sensible person will argue that to demand a deposit from the owner of a newspaper or to impose other limitations upon the right of publishing periodicals is of necessity inexpedient or unjust. All that is here insisted upon is, that such checks and preventive measures are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence. Hence with one exception¹, which is a quaint survival from a different system, no such thing is known with us as a license to print, or a censorship either of the press or of political newspapers. Neither the government nor any other authority has the right to seize or destroy the stock of a publisher

¹ i.e. the licensing of plays. See 6 & 7 Vict. c. 68; Stephen, *Commentaries*, iii. p. 202.

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because it consists of books, pamphlets, or papers which in the opinion of the government contain seditious or libellous matter. Indeed, it is questionable how far the Courts themselves will, even for the sake of protecting an individual from injury, prohibit the publication or republication of a libel, or restrain its sale until the matter has gone before a jury and it has been established by their verdict that the words complained of are libellous¹. Writers in the press are in short, like every other person, subject to the law of the realm, and nothing else. Neither the government nor the Courts have (speaking generally) any greater power to prevent or oversee the publication of a newspaper than the writing of a letter. Indeed, the simplest way of setting forth briefly the position of writers in the press is to say that they stand in substantially the same position as letter-writers. A man who scribbles blasphemy on a gate² and a man who prints blasphemy in a paper or in a book commit exactly the same offence, and are dealt with in England on exactly the same principles. Hence also writers in newspapers have, or had until very recently, no special privilege protecting them from liability. Look at the matter which way you will, the main feature of liberty of the press as understood in England is that the press (which means of course the writers in it) is subject only to the ordinary law of the land.

¹ *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. D. 339; Odgers, pp. 13-16.

² *Reg. v. Pooley*, cited Stephen, *Digest of Criminal Law*, art. 161.

Secondly. Press offences, in so far as the term can be used with reference to English law, are tried and punished only by the ordinary Courts of the country, that is by a judge and jury¹. Since the Restoration², offences committed through the newspapers, or, in other words, the publication therein of libels whether defamatory, seditious, or blasphemous, have never been tried by any special tribunal. Nothing to Englishmen seems more a matter of course than this. Yet nothing has in reality contributed so much to free the periodical press from any control. If the criterion whether a publication be libellous is the opinion of a jury, and a man may publish anything which twelve of his countrymen think is not blameable, it is impossible that the Crown or the Ministry should exert any stringent control over writings in the press, unless (as indeed may sometimes happen) the majority of ordinary citizens are entirely opposed to attacks on the government. The times when persons in power wish to check the excesses of public writers are times at which a large body of opinion or sentiment is hostile to the executive. But under these circumstances it must, from the nature of things, be at least an even chance that the jury called upon

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Press
offences
dealt with
by ordi-
nary
Courts.

¹ The existence however of process by criminal information, and the rule that truth was no justification, had the result that during the eighteenth century seditious libel rose almost to the rank of a press offence, to be dealt with, if not by separate tribunals, at any rate by special rules with a special procedure.

² See, as to the state of the press under the Commonwealth, Masson, *Life of Milton*, iii. pp. 265-297. Substantially the possibility of trying press offences by special tribunals was put an end to by the abolition of the Star Chamber in 1641, 16 Car. I, cap. 10.

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to find a publisher guilty of printing seditious libels sympathise with the language which the officers of the Crown deem worthy of punishment, and hence may hold censures which are prosecuted as libels to be fair and laudable criticism of official errors. Whether the control indirectly exercised over the expression of opinion by the verdict of twelve commonplace Englishmen is at the present day certain to be as great a protection to the free expression of opinion even in political matters as it proved a century ago, when the sentiment of the governing body was different from the prevalent feeling of the class from which jurymen were chosen, is an interesting speculation into which there is no need to enter. What is certain is, that the practical freedom of the English press arose in great measure from the trial with us of "press offences," like every other kind of libel, by a jury.

The liberty of the press then is in England simply one result of the universal predominance of the law of the land. The terms "liberty of the press," "press offences," "censorship of the press," and the like, are all unknown to English lawyers, simply because any offence which can be committed through the press is some form of libel, and is governed in substance by the ordinary law of defamation.

These things seem to us at the present day so natural as hardly to be noticeable; let us however glance as I have suggested at the press law of France, both before and since the Revolution; and also at the condition of the press in England, up to nearly

the end of the seventeenth century. Such a survey will prove to us that the treatment in modern England of offences committed through the newspapers affords an example, as singular as it is striking, of the legal spirit which now pervades every part of the English constitution. Lecture
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An Englishman who consults French authorities is struck with amazement at two facts: press law¹ has long constituted and still constitutes to a certain extent a special department of French legislation, and press offences have been, under every form of government which has existed in France, a more or less special class of crimes. The Acts which have been passed in England with regard to the press since the days of Queen Elizabeth do not in number equal one-tenth, or even one-twentieth, of the laws enacted during the same period on the same subject in France. The contrast becomes still more

Compari-
son with
the press
law of
France.

¹ The press is now governed in France wholly by the *Loi sur la liberté de la presse*, 29-30 Juill. 1881; D. P. 1881, iv. 65. This law repeals all earlier edicts, decrees, laws, ordinances, &c., on the subject. Immediately before this law was passed there were in force more than thirty enactments regulating the position of the French press and inflicting penalties on offences which could be committed by writers in the press; and the three hundred and odd closely printed pages of Dalloz treating of laws on the press showed that the enactments then in vigour under the Republic were as nothing compared to the whole mass of regulations, ordinances, decrees, and laws which since the earliest days of printing down to the year 1881 have been issued by French rulers with the object of controlling the literary expression of opinion and thought. See Dalloz, *Répertoire*, vol. xxxvi. "Presse," pp. 384-776, and especially Tit. I, chap. 1, Tit. II, chap. 4; Roger et Sorel, *Codes et Lois Usuelles*, "Presse," 637-651.

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marked if we compare the state of things in the two countries since the beginning of the eighteenth century, and (for the sake of avoiding exaggeration) put the laws passed since that date and which were till 1881 in force in France against every Act which, whether repealed or unrepealed, has been passed in England since the year 1700. It will be found that the French press code consisted till long after the establishment of the present Republic of over thirty enactments, whilst the English Acts about the press passed since the beginning of the last century do not exceed a dozen, and, moreover, have gone very little way towards touching the freedom of writers.

The ground of this difference lies in the opposite views taken in the two countries of the proper relation of the state to literature, or, more strictly, to the expression of opinion in print. In England the doctrine has since 1700 in substance prevailed that the government has nothing to do with the guidance of opinion, and that the sole duty of the state is to punish libels of all kinds, whether they are expressed in writing or in print. Hence the government has (speaking generally) exercised no special control over literature, and the law of the press, in so far as it can be said to have existed, has been nothing else than a branch or an application of the law of libel. In France, literature has for centuries been considered as the particular concern of the state. The prevailing doctrine, as may be gathered from the current of French legislation, has been, and still to a certain extent is, that it is the function of the administration

not only to punish defamation, slander, or blasphemy, but to guide the course of opinion, or, at any rate, to adopt preventive measures for guarding against the propagation in print of unsound or dangerous doctrines. Hence the huge amount and the special and repressive character of the press laws which have existed in France. Up to the time of the Revolution the whole literature of the country was avowedly controlled by the state. The right to print or sell books and printed publications of any kind was treated as a special privilege or monopoly of certain libraries; the regulations (*règlements*) of 1723 (some part of which was till quite recently in force¹) and of 1767 confined the right of sale and printing under the severest penalties to librarians who were duly licensed². The right to publish, again, was submitted to the strictest censorship, exercised partly by the University (an entirely ecclesiastical body), partly by the Parliaments, partly by the Crown. The penalties of death, of the galleys, of the pillory, were from time to time imposed upon the printing or sale of forbidden works. These punishments were often evaded; but they after all retained practical force till the very eve of the Revolution. The most celebrated literary works of France were published abroad. Montesquieu's *Esprit des Lois* appeared at Geneva. Voltaire's *Henriade* was printed in England; the most remarkable of his and of Rousseau's

¹ See Dalloz, *Répertoire*, vol. xxxvi. "Presse," Tit. I, chap. 1. Compare Roger et Sorel, *Codes et Lois*, "Presse," pp. 637-651.

² *Ibid.*

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writings, were published in London, in Geneva, or in Amsterdam. In 1775 a work entitled *Philosophie de la Nature* was destroyed by the order of the Parliament of Paris, the author was decreed guilty of treason against God and man, and would have been burnt if he could have been arrested. In 1781, eight years before the meeting of the States General, Raynal was pronounced by the Parliament guilty of blasphemy on account of his *Histoire des Indes*¹. The point however to remark is, not so much the severity of the punishments which under the *Ancien Régime* were intended to suppress the expression of heterodox or false beliefs, as the strict maintenance down to 1789 of the right and duty of the state to guide the literature of the country. It should further be noted that down to that date the government made no marked distinction between periodical and other literature. When the *Lettres Philosophiques* could be burnt by the hangman, when the publication of the *Henriade* and the *Encyclopédie* depended on the goodwill of the King, there was no need for establishing special restrictions on newspapers. The daily or weekly press, moreover, hardly existed in France till the opening of the States General. The Revolution (it may be fancied) put an end to restraints upon the press. The Declaration of the Rights of Man proclaimed the right of every citizen to publish and print his opinions, and the language has been cited² in which the Constitution of 1791 guaranteed

¹ Dalloz, *Répertoire*, vol. xxxvi. "Presse," Tit. I, chap. 1.

² See p. 252, *ante*.

to every man the natural right of speaking, printing, and publishing his thoughts without having his writings submitted to any censorship or inspection prior to publication. But the Declaration of Rights and this guarantee were practically worthless. They enounced a theory which for many years was utterly opposed to the practice of every French government. The Convention did not establish a censorship, but under the plea of preventing the circulation of seditious works it passed the law of 29 March, 1793, which silenced all free expression of opinion. The Directory imitated the Convention, and under the First Empire the newspaper press became the property of the government, and the sale, printing, and publication of books was wholly submitted to imperial control and censorship¹. The years which elapsed from 1789 to 1815 were, it may be suggested, a revolutionary era which provoked or excused exceptional measures of state interference. Any one however who wants to see how consonant to the ideas which have permanently governed French law and French habits is the notion that the administration should by some means keep its hand on the national literature of the country ought to note with care the course of legislation from the Restoration to the present day. The attempt indeed to control the publication of books has been by slow degrees given up; but one government after another has, with curious uniformity, proclaimed the freedom and ensured the subjection of the newspaper press. Be-

¹ Dalloz, *Rép.* xxxvi. "Presse," Tit. I, chap. 1.

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tween 1814 and 1830 the censorship was established (21 Oct. 1814), was partially abolished, was re-extended (1817), was re-abolished (1819), was re-established and extended (1820), and was re-abolished (1828). In 1830 the Charter made the abolition of the censorship part of the constitution, and since that date no system of censorship has been in name re-established. But as regards newspapers, the celebrated decree of 17 February, 1852, enacted restrictions more rigid than anything imposed under the name of *la censure* by any government since the fall of Napoleon I. The government took to itself under this law, in addition to other discretionary powers, the right to suppress any newspaper without the necessity of proving the commission of any crime or offence by the owner of the paper or by any writer in its columns¹. No one, further, could under this decree set up a paper without official authorisation. Nor have different forms of the censorship been the sole restrictions imposed in France on the liberty of the press. The combined operation of enactments passed during the existence of the Republic of 1848 and under the Empire was (among other things) to make the signature of newspaper articles by their authors compulsory², to require a large deposit from any person who wished to establish a paper³, to with-

¹ Décret, 17 Février, 1852, sec. 32, Roger et Sorel, *Codes et Lois*, p. 648.

² Roger et Sorel, *Codes et Lois*, p. 646. Lois, 16 Juillet, 1850.

³ *Ibid.*

draw all press offences whatever from the cognizance of a jury¹, to re-establish or reaffirm the provision contained in the *règlement* of 1723 by which no one could carry on the trade of a librarian or printer (*commerce de la librairie*) without a license. It may in fact be said with substantial truth that between 1852 and 1870 the newspapers of France were as much controlled by the government as was every kind of literature before 1789, and that the Second Empire exhibited a retrogression towards the despotic principles of the *Ancien Régime*. The Republic², it is true, has recently abolished the restraints on the liberty of the press which grew up both before and

¹ Lois, 31 Déc. 1851.

² One thing is perfectly clear and deserves notice. The legislation of the existing Republic was not till 1881, any more than that of the Restoration or the Empire, based on the view of the press which pervades the modern law of England. "Press law" still formed a special department of the law of France. "Press offences" were a particular class of crimes, and there were at least two provisions, and probably several more, to be found in French laws which conflicted with the doctrine of the liberty of the press as understood in England. A law passed under the Republic (6 July, 1871. Roger et Sorel, *Codes et Lois*, p. 651) reimposed on the proprietors of newspapers the necessity of making a large deposit, with the proper authorities, as a security for the payment of fines or damages incurred in the course of the management of the paper. A still later law (29 December, 1875, s. 5. Roger et Sorel, *Codes et Lois*, p. 651), while it submitted some press offences to the judgment of a jury, subjected others to the cognizance of Courts of which a jury formed no part. Recent French legislation exhibits no doubt a violent reaction against all attempts to check the freedom of the press, but in its very efforts to secure this freedom betrays the existence of the notion that offences committed through the press require in some sort exceptional treatment.

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under the Empire. But though for the last few years the ruling powers in France have favoured the liberty or license of the press nothing is more plain that until quite recently the idea that press offences were a peculiar class of offences to be dealt with in a special way and punished by special courts was accepted by every party in France. This is a matter of extreme theoretical importance. It shows how foreign to French notions is the idea that every breach of law ought to be dealt with by the ordinary law of the land. Even a cursory survey (and no other is possible in these lectures) of French legislation with regard to literature proves then that from the time when the press came into existence up to almost the present date the idea has held ground that the state as represented by the executive ought to direct or control the expression of opinion, and that this control has been exercised by an official censorship—by restrictions on the right to print or sell books—and by the subjection of press offences to special laws administered by special tribunals. The occasional relaxation of these restrictions is of importance. But their recurring revival is of far more significance than their temporary abolition.

Contrast with position of press in England during seventeenth century.

Let us now turn to the position of the English press during the sixteenth and seventeenth centuries.

The Crown originally held all presses in its own hands, allowed no one to print except under special license, and kept all presses subject to regulations put forward by the Star Chamber in virtue of the

royal prerogative: the exclusive privilege of printing was thus given to ninety-seven London stationers and their successors, who, as the Stationers' Company, constituted a guild with power to seize all publications issued by outsiders; the printing-presses ultimately conceded to the Universities existed only by a decree of the Star Chamber.

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Side by side with the restrictions on printing—which appear to have more or less broken down—there grew up a system of licensing which constituted a true censorship¹.

Press offences constituted a special class of crimes cognizable by a special tribunal—the Star Chamber—which sat without a jury and administered severe punishments². The Star Chamber indeed fell in 1641, never to be revived, but the censorship survived the Commonwealth, and was under the Restoration (1662) given a strictly legal foundation by the statute 13 & 14 Car. II, cap. 33, which by subsequent enactments was kept in force till 1695³.

There existed, in short, in England during the sixteenth and seventeenth centuries every method of curbing the press which was then practised in France, and which has prevailed there almost up to the present day. In England, as on the Continent, the book trade was a monopoly, the censorship was in

Original
likeness
and subse-
quent un-
likeness
between
press law
of England
and of
France.

¹ See for the control exercised over the press down to the Restoration, Odgers, *Libel and Slander*, pp. 10, 11.

² Gardiner, *History of England*, vii. pp. 51, 130; *Ibid.* viii. pp. 225, 234.

³ See Macaulay, *History of England*, iv. chaps. 19, 21.

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full vigour, the offences of authors and printers were treated as special crimes and severely punished by special tribunals. This similarity or identity of the principles with regard to the treatment of literature originally upheld by the government of England and by the government of France is striking. It is rendered still more startling by the contrast between the subsequent history of legislation in the two countries. In France (as we have already seen) the censorship, though frequently abolished, has almost as frequently been restored. In England the system of licensing, which was the censorship under another name, was terminated rather than abolished in 1695. The House of Commons, which refused to continue the Licensing Act, was certainly not imbued with any settled enthusiasm for liberty of thought. The English statesmen of 1695 neither avowed nor entertained the belief that the "free communication of thoughts and opinions was one of the most valuable of the rights of man¹." They refused to renew the Licensing Act, and thus established freedom of the press without any knowledge of the importance of what they were doing. This can be asserted with confidence, for the Commons delivered to the Lords a document which contains the reasons for their refusing to renew the Act.

"This paper completely vindicates the resolution to which the Commons had come. But it proves at the same time that they knew not what they were doing, what a revolution they were making, what a

¹ See *Declaration of the Rights of Man*, art. 11, p. 252, *ante*.

“power they were calling into existence. They
 “pointed out concisely, clearly, forcibly, and some- Lecture
 “times with a grave irony which is not unbecoming, VI.
 “the absurdities and iniquities of the statute which
 “was about to expire. But all their objections will
 “be found to relate to matters of detail. On the
 “great question of principle, on the question whether
 “the liberty of unlicensed printing be, on the whole,
 “a blessing or a curse to society, not a word is said.
 “The Licensing Act is condemned, not as a thing
 “essentially evil, but on account of the petty
 “grievances, the exactions, the jobs, the commercial
 “restrictions, the domiciliary visits which were inci-
 “dental to it. It is pronounced mischievous because
 “it enables the Company of Stationers to extort
 “money from publishers, because it empowers the
 “agents of the government to search houses under
 “the authority of general warrants, because it con-
 “fines the foreign book trade to the port of London ;
 “because it detains valuable packages of books at the
 “Custom House till the pages are mildewed. The
 “Commons complain that the amount of the fee
 “which the licenser may demand is not fixed. They
 “complain that it is made penal in an officer of the
 “Customs to open a box of books from abroad,
 “except in the presence of one of the censors of
 “the press. How, it is very sensibly asked, is the
 “officer to know that there are books in the box till
 “he has opened it? Such were the arguments which
 “did what Milton’s *Areopagitica* had failed to do¹.”

¹ Macaulay, *History of England*, iv. pp. 541, 542.

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How slight was the hold of the principle of the liberty of the press on the statesmen who abolished the censorship is proved by their entertaining, two years later, a bill (which however never passed) to prohibit the unlicensed publication of news¹. Yet while the solemn declaration by the National Assembly of 1789 of the right to the free expression of thought remained a dead letter, or at best a speculative maxim of French jurisprudence which, though not without influence, was constantly broken in upon by the actual law of France, the refusal of the English Parliament in 1695 to renew the Licensing Act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the Restoration in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of the press other than those contained in the law of libel have been so long unknown to Englishmen, that the rare survivals in our law of the notion that literature ought to be controlled by the state appear to most persons inexplicable anomalies, and are tolerated only because they produce so little inconvenience that their existence is forgotten.

Questions suggested by original similarity and final difference between press law of France and of England.

To a student who surveys the history of the liberty of the press in France and in England two questions suggest themselves. How does it happen that down to the end of the seventeenth century the principles upheld by the Crown in each country were in sub-

¹ Macaulay, *History of England*, iv. pp. 771, 772.

stance the same? What, again, is the explanation of the fact that from the beginning of the eighteenth century the principles governing the law of the press in the two countries have been, as they still continue to be, essentially different? The similarity and the difference each seems at first sight equally perplexing. Yet both one and the other admit of explanation, and the solution of an apparent paradox is worth giving because of its close bearing on the subject of this lecture, namely, the predominance of the spirit of legality which distinguishes the law of the constitution. Lecture
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The ground of the similarity between the press law of England and of France from the beginning of the sixteenth till the beginning of the eighteenth century, is that the governments, if not the people, of each country were during that period influenced by very similar administrative notions and by similar ideas as to the relation between the state and individuals¹. In England again, as in every European country, the belief prevailed that a King was responsible for the religious belief of his subjects. This responsibility involves the necessity for regulating the utterance and formation of opinion. But this direction or control cannot be exercised without governmental interference with that liberty of the press which is at bottom the right of every man to print any opinion which he chooses to propagate, subject only to risk of punishment if his expressions contravene some distinct legal maxim. During the sixteenth Reasons
for original
similarity.

¹ See pp. 205-209, *ante*.

Lecture and seventeenth centuries, in short, the Crown was
VI. in England, as in France, extending its administrative powers; the Crown was in England, as in France, entitled, or rather required by public opinion, to treat the control of literature as an affair of state. Similar circumstances produced similar results; in each country the same principles prevailed; in each country the treatment of the press assumed therefore a similar character.

Reasons
for later
dissimi-
larity.

The reason, again, why for nearly two centuries the press has been treated in France on principles utterly different from those which have been accepted in England lies deep in the difference of the spirit which has governed the customs and laws of the two countries.

In France the idea has always flourished that the government, whether Royal, Imperial, or Republican, possesses, as representing the state, rights and powers as against individuals superior to and independent of the ordinary law of the land. This is the real basis of that whole theory of a *droit administratif* which it is so hard for Englishmen fully to understand. The increase moreover in the authority of the central government has at most periods both before and since the Revolution been, or appeared to most Frenchmen to be, the means of removing evils which oppressed the mass of the people. The nation has in general looked upon the authority of the state with the same favour with which Englishmen during the sixteenth century regarded the prerogative of the Crown. The control exercised in different forms by

the executive over literature has therefore in the main fully harmonised with the other institutions of France. The existence moreover of an elaborate administrative system, the action of which has never been subject to the control of the ordinary tribunals, has always placed in the hands of whatever power was supreme in France the means of enforcing official surveillance of literature. Hence the censorship (to speak of no other modes of checking the liberty of the press) has been on the whole in keeping with the general action of French governments and with the average sentiment of the nation, whilst there has never been wanting appropriate machinery by which to carry the censorship into effect. No doubt there were heard throughout the eighteenth century and have been ever since vigorous protests against the censorship as against other forms of administrative arbitrariness, and at the beginning of the Great Revolution, as at other periods since, efforts were made in favour of free discussion. Hence flowed the abolition of the censorship, but this attempt to limit the powers of the government in one particular direction was quite out of harmony with the general reverence for the authority of the state. As long moreover as the whole scheme of French administration was left in force, the government, in whatever hands it was placed, always retained the means of resuming its control over the press whenever popular feeling should for a moment favour the repression of free speech. Hence arose the constantly recurring restoration of the abolished

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by the unpopular name of *la censure* were more stringent than has ever been any Licensing Act. Restrictions, in short, on what Englishmen understand by the liberty of the press have continued to exist in France and are hardly now abolished, because the exercise of preventive and discretionary authority on the part of the executive harmonises with the general spirit of French law, and because the administrative machinery which is the creation of that spirit has always placed (as it still places) in the hands of the executive the proper means for enforcing discretionary authority.

In England, on the other hand, the attempt made by the Crown during the sixteenth and seventeenth centuries to form a strong central administration, though it was for a time attended with success because it met some of the needs of the age, was at bottom repugnant to the manners and traditions of the country, and even at a time when the people wished the Crown to be strong, they hardly liked the means by which the Crown exerted its strength. Hundreds of Englishmen who hated toleration and cared little for freedom of speech, entertained a keen jealousy of arbitrary power, and a fixed determination to be ruled in accordance with the law of the land¹. These sentiments abolished the Star Chamber in 1641, and made the re-establishment of the hated Court impossible even for the frantic loyalty of 1660. But the destruction of the Star Chamber meant much

¹ See Selden's remarks on the illegality of the decrees of the Star Chamber, cited Gardiner, *History of England*, vii. p. 51.

more than the abolition of an unpopular tribunal; it meant the rooting up from its foundations of the whole of the administrative system which had been erected by the Tudors and extended by the Stuarts. This overthrow of a form of administration which contradicted the legal habits of Englishmen had no direct connection with any desire for the uncontrolled expression of opinion. The Parliament which would not restore the Star Chamber or the Court of High Commission passed the Licensing Act, and this statute, which in fact establishes the censorship, was as we have seen continued in force for some years after the Revolution. The passing however of the statute, though not a triumph of toleration, was a triumph of legality. The power of licensing depended henceforward, not on any idea of inherent executive authority, but on the statute law. The right of licensing was left in the hands of the government, but this power was regulated by the words of a statute; and what was of more consequence, breaches of the Act could be punished only by proceedings in the ordinary Courts. The fall of the Star Chamber deprived the executive of the means for exercising arbitrary power. Hence the refusal of the House of Commons in 1695 to continue the Licensing Act was something very different from the proclamation of freedom of thought contained in the French Declaration of Rights, or from any of the laws which have abolished the censorship in France. To abolish the right of the government to control the press was in England simply to do away with an exceptional

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Right of public meeting.

III. *The Right of Public Meeting.* The law of Belgium 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:—

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 Lecture
 “néanmoins le soumettre à une autorisation préalable. VI.

“Cette disposition ne s'applique point aux ras-
 “semblements en plein air, qui restent entièrement
 “soumis aux lois de police¹.”

The restrictions on the practice of public meeting Principles of English law as to right 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 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 with regard to *A*, and the existence of the same rights of *C*, *D*, *E* and *F*, and so on *ad infinitum*, leads to the consequence that *A*, *B*, *C*, *D*, and a thousand or ten-thousand other persons may (as a general rule) meet together in any place where otherwise they each have a right to be

¹ *Constitution de la Belgique*, art. 19.

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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 of their House, and as *B* may make the same remark to any of his friends, the result ensues that *A* and ten-thousand more may hold a public meeting either to support the government or to encourage the resistance of the Peers. Here then you have in substance that right of public meeting for political and other purposes which is constantly treated in foreign countries as a special privilege, to be exercised only subject to careful restrictions. The assertion however that *A*, *B*, *C*, and *D* and a hundred-thousand more persons, just because they may each go where they like and each say what they please, have a right to hold meetings for the discussion of political and other topics, does not of course mean that persons may not so exercise the right of meeting as to break the law. The object of a meeting may be unlawful, e.g. the aim of the meeting may be to conspire against the Crown, in which case the assembly itself becomes an unlawful meeting. The mode in which a meeting is held may threaten a breach of the peace on the part of those holding the meeting, and therefore inspire peace-

able citizens with reasonable fear; in which case, again, the meeting will be unlawful. In either instance the persons taking part in the meeting will be exposed to all the consequences in the way of having the meeting legally broken up, and of being themselves arrested, and prosecuted, which attend the doing of unlawful acts, or, in other words, the commission of crimes.

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The law of public meetings involves some practical consequences which, though logically deduced from it, are found by many persons, magistrates and others, somewhat startling, and are not of invariable benefit to the nation.

Conse-
quences.

A public meeting which from the conduct of those engaged in it, as for example from their marching together in arms, threatens a breach of the peace on the part of those holding the meeting and therefore fills peaceable citizens with reasonable fear, is an unlawful assembly. But no meeting which would not otherwise be illegal becomes unlawful because it will excite opposition which is itself unlawful, and thus will indirectly lead to a breach of the peace. Suppose, for example, that the members of the Salvation Army propose to hold a meeting at Oxford; suppose that a so-called Skeleton Army announce that they will attack the Salvationists and disperse them by force. Suppose that thereupon peaceable citizens, who do not like the quiet of the town to be disturbed, and who dread riots, urge the magistrates to stop the meeting of the Salvationists, or if there is any row to arrest the members of both armies. This

Meeting
not unlaw-
ful because
it will ex-
cite unlaw-
ful opposi-
tion.

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may seem at first sight a reasonable request, but the magistrates cannot legally take the course suggested to them. That under the present state of the law this must be so is on reflection clear. The right of *A* to walk down the High Street is not taken away by the threat of *X* to knock *A* down if *A* takes his proposed walk. It is true that *A*'s going into the High Street will lead to a breach of the peace, but *A* no more causes the breach of the peace than a man whose pocket is picked causes the theft by wearing a watch. *A* is the victim, not the author of a breach of the law. Now if the right of *A* to walk down the High Street is not affected by the threats of *X*, the right of *A*, *B*, *C*, and *D* to march down the High Street together is not diminished by the proclamation of *X*, *Y*, and *Z* that they will not suffer *A*, *B*, *C*, and *D* to take their walk. Nor does it make any difference that *A*, *B*, and *C* call themselves the Salvation Army, or that *X*, *Y*, and *Z* call themselves the Skeleton Army. The plain principle is that *A*'s right to do a lawful act, namely walk down the High Street, cannot be diminished by *X*'s threat to do an unlawful act, namely to knock *A* down. This is the principle established, or rather illustrated, by the recent case of *Beatty v. Gillbanks*¹. The Salvation Army met together at Weston-super-Mare with the knowledge that they would be opposed by the Skeleton Army. The magistrates had put out a notice intended to forbid the meeting. The Salvationists however assembled, were met by the police, and told

¹ 9 Q. B. D. 308.

to obey the notice. X, one of the members, declined to obey and was arrested. He was subsequently with others convicted by the magistrates of holding an unlawful assembly. It was an undoubted fact that the meeting of the Salvation Army was likely to lead to an attack by the Skeleton Army, and in this sense cause a breach of the peace. The conviction however of X by the magistrates, was quashed on appeal to the Queen's Bench Division.

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“What has happened here,” say the Court, “is that an unlawful organisation” [the Skeleton Army] “has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition¹.”

No public meeting, further, which would otherwise be illegal, becomes so (unless in virtue of some special Act of Parliament) in consequence of any proclamation or notice by a Secretary of State, by a magistrate, or by any other official. Suppose, for example, that the Salvationists advertise throughout the town that they intend holding a meeting in a field which they have hired near Oxford, that they intend to assemble in St. Giles's and march thence with banners flying and bands playing to their proposed place of worship. Suppose that the Home

Meeting
not made
unlawful
by official
proclama-
tion of its
illegality.

¹ *Beatty v. Gillbanks*, 9 Q. B. D. 308, p. 314, per Field J. See also *Beatty v. Glenister*, W. N. 1884, p. 93.

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Secretary thinks that, for one reason or another, it is undesirable that the meeting should take place, and serves formal notice upon every member of the army, or on the officers who are going to conduct the so-called "campaign" at Oxford, that the gathering must not take place. This notice is so much waste paper. Assume that the meeting would have been lawful if the notice had not been issued, and it certainly will not become unlawful because a Secretary of State has forbidden it to take place. The proclamation has as little legal effect as would have a proclamation from the Home Office forbidding me or any other person to walk down the High Street. It follows therefore that the government has little or no power of preventing meetings which to all appearance are lawful, even though they may in fact turn out when actually convened to be unlawful because of the mode in which they are conducted. This is certainly a singular instance of the way in which adherence to the principle that the proper function of the state is the punishment, not the prevention, of crimes, deprives the executive of discretionary authority¹.

Meeting
may be
lawful
though its
holding
contrary
to public
interest.

A meeting, lastly, may be perfectly lawful which nevertheless any wise or public-spirited person would hesitate to convene. For *A*, *B*, and *C* may have the right to hold a meeting, although their doing so will

¹ Recent events in Switzerland suggest that the officials of a democratic Republic claim, whether rightly or not, an authority in regard to the restraint of public meetings which is not conceded in England to the Crown or its servants. This curiously illustrates the remarks cited from De Tocqueville, pp. 170-173, *ante*, in reference to the non-existence in Switzerland of a spirit of legality.

as a matter of fact certainly excite others to deeds of violence, and may probably produce bloodshed. Suppose that a zealous Protestant were to convene a meeting for the purpose of denouncing the evils of the confessional; and were to choose as the scene of the gathering the midst of a large town filled with a population of Roman Catholic poor. The meeting would be lawful, but no one can doubt that it would provoke violence. Neither the government however, nor the magistrates, could prohibit it. Wise men might condemn, but the law would sanction an extreme exercise of the right of public meeting which would probably not be tolerated in any other European country¹. Of the policy or impolicy of denying to the highest authorities in the state the power to take precautionary measures against the evils which may flow from the injudicious exercise of legal rights it is unnecessary here to say anything. The matter which is worth notice is the way in which the rules as to the right of public meeting

¹ A good proof of the narrowness of the limits within which the ordinary law confines the power of the executive to interfere with the right of public meeting is to be found in the provisions of the Prevention of Crime (Ireland) Act, 1882, sect. 10. Under this section the Lord Lieutenant was given power to prohibit any meeting which he had reason to believe would be dangerous to the public peace or the public safety. The Act however has expired, and has not hitherto been renewed. Nothing but such a special enactment would have made it lawful for the Lord Lieutenant to prohibit a meeting which he knew to be dangerous to the public peace. The recurring necessity for Coercion Acts in Ireland shows how limited are the powers possessed by the government under the ordinary law of the land.

Lecture illustrate both the legal spirit of our institutions and
VI. the process by which the decisions of the Courts as
to the rights of individuals have in effect made the
right of public meeting a part of the law of the
constitution ¹.

¹ See generally as to the right of meeting, Stephen, *Commentaries*,
iv. 213-217, and Stephen, *History of Criminal Law*, i. 202-205.

LECTURE VII.

THE RULE OF LAW: ITS APPLICATIONS.

- IV. *Martial Law.* V. *The Army.* VI. *The Revenue.*
VII. *The Responsibility of Ministers.*

PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW.

THE rights already treated of in the foregoing Lecture lecture, as for example the right to personal freedom VII. or the right to free expression of opinion, do not, it No sharp line can be drawn between rules of private law or of criminal law and constitutional law. may be suggested, properly belong to the province of constitutional law at all, but form part either of private law strictly so called, or of the ordinary criminal law. Thus *A*'s right to personal freedom is, it may be said, only the right of *A* not to be assaulted or imprisoned by *X*, or (to look at the same thing from another point of view) is nothing else than the right of *A* if assaulted by *X* to bring an action against *X*, or to have *X* punished as a criminal for the assault. Now in this suggestion there lies an element of important truth, yet it is also undoubted that the right to personal freedom, the right to free discussion and the like, appear in the forefront of many written constitutions, and are in fact the chief advantages which citizens hope to gain by the change from a despotic to

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a constitutional form of government. The truth is that these rights may be looked upon from two points of view. They may be considered simply parts of private or it may be of criminal law; thus the right to personal freedom may, as already pointed out, be looked at as the right of *A* not to have the control of his body interfered with by *X*. But in so far as these rights hold good against the governing body in the state, or in other words in so far as these rights determine the relation of individual citizens towards the executive, they are part, and a most important part, of the law of the constitution. Now the noticeable point is that in England the rights of citizens as against each other are (speaking generally) the same as the rights of citizens against any servant of the Crown. This is the significance of the assertion that in this country the law of the constitution is part of the ordinary law of the land. The fact that a Secretary of State cannot at his discretion and for reasons of state arrest, imprison, or punish any man, except of course where special powers are conferred upon him by statute, as by an Alien Act or by an Extradition Act, is simply a result of the principle that a Secretary of State is governed in his official as in his private conduct by the ordinary law of the realm. Were Sir William Harcourt or Sir Richard Cross to assault Mr. Parnell in a fit of anger, or were he to arrest Mr. Parnell in England because he thought the Home Rule leader's freedom dangerous to the state, the Home Secretary would in either case be liable to an action, and all other penalties to which a person exposes himself by

committing an assault. The fact that Mr. Parnell's Lecture
VII. arrest was a strictly administrative act would afford no defence to the Minister, or to the constables who obeyed his orders.

The subjects of which we are now about to treat, as for example martial law, or the army, clearly belong to the field of constitutional law, and no one would think of objecting to the treatment of these subjects in this lecture that they were really part of private law. Yet if the matter be looked at carefully, it will be found that just as rules which at first sight seem to belong to the domain of private law are in reality the foundation of constitutional principles, so topics which appear to belong manifestly to the law of the constitution depend with us at bottom on the principles of private or of criminal law. Thus the position of a soldier is in England governed, as we shall see, by the principle, that though a soldier is subject to special liabilities in his military capacity, he remains while in the ranks as he was when out of them, subject to all the liabilities of an ordinary citizen. So, in a legal point of view, ministerial responsibility is simply one application of the doctrine which pervades English law¹, that no one can plead the command of a superior, were it the order of the Crown itself, in defence of conduct otherwise not justified by law.

Turn the matter which way you will, you come back to the all-important consideration on which we have

¹ See Mommsen, *Römische Staatsrecht*, p. 672, for the existence of what seems to have been a similar principle in early Roman law.

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already dwelt, that whereas under many foreign constitutions the rights of individuals flow, or appear to flow, from the articles of the constitution, in England the law of the constitution is the result not the source of the rights of individuals. It becomes, too, more and more apparent that the means by which the Courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of "equality before the law," which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary Courts, and secondly of "personal responsibility of wrongdoers," which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors; the legal dogma, as old at least as the time of Edward the Fourth, that if any man arrest another without lawful warrant even by the King's command he shall not be excused but shall be liable to an action for false imprisonment, is not a special limitation imposed upon the royal prerogative, but the application to acts done under royal orders of that principle of individual responsibility which runs through the whole law of torts¹.

Martial
Law.

IV. *Martial Law*².—"Martial law," in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of

¹ See Hearn, *Government of England*, pp. 99-112; and compare Gardiner, *History*, x. pp. 144-145.

² See Forsyth, *Opinions*, pp. 188-216, 481-563; Stephen, *History of Criminal Law*, i. 201-216; *Reg. v. Pinney*, 5 C. & P. 254; *Reg. v. Vincent*, 9 C. & P. 91; *Reg. v. Neale*, 9 C. & P. 431.

a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the "Declaration of the State of Siege¹," under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*), and this is an unmistakable proof of the permanent supremacy of the law under our constitution.

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The assertion however that no such thing as martial law exists under our system of government, though perfectly true, will mislead any one who does not attend carefully to the distinction between two utterly different senses in which the term "martial law" is used by English writers.

Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right or power is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England. It is a power which has in itself no special connection with the existence of an armed force. The Crown has the right to put down breaches of the peace. Every subject, whether a civilian or a soldier, whether what is called a "servant of the government" (such for example as a policeman) or a person in no way

In what
sense mar-
tial law
recognised
by English
law.

¹ See *Loi sur l'état de siège*, 9 Aout 1849, Roger et Sorel, *Codes et Lois*, p. 436. See p. 301, *post*.

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connected with the administration, not only has the right, but is, as a matter of legal duty, bound to assist in putting down breaches of the peace. No doubt policemen or soldiers are the persons who, as being specially employed in the maintenance of order, are most generally called upon to suppress a riot, but it is clear that all loyal subjects are bound to take their part in the suppression of riots. It is also clear¹ that a soldier has, as such, no exemption from liability to the law for his conduct in restoring order. Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position; they are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances; they are, each and all of them, authorised to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are none of them entitled to use more; they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force; they are each, it must be added—for this is often forgotten—liable, in theory at least, to be called to account before the Courts for non-performance of their duty as citizens in putting down riots, though of course the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, magistrate, soldier, or ordinary civilian. Whoever doubts these propositions should study the leading

¹ See further, pp. 310-314, *post.*

case of *Rex v. Pinney*¹, in which was fully considered the duty of the Mayor of Bristol in reference to the Reform Riots of 1831. So accustomed have people become to fancy that the maintenance of the peace is the duty solely of soldiers or policemen, that many students will probably feel surprise on discovering from the doctrine laid down in *Rex v. Pinney* how stringent are the obligations of a magistrate in time of tumult, and how unlimited is the amount of force which he is bound to employ in support of the law. A student, further, must be on his guard against being misled, as he well might be, by the language of the Riot Act². That statute provides in substance that if twelve rioters continue together for an hour after a magistrate has made a proclamation to them in the terms of the Act (which proclamation is absurdly enough called reading the Riot Act) ordering them to disperse, he may command the troops to fire upon the rioters or charge them sword in hand³. This of course is not the language, but it is the effect of the enactment. Now the error into which an uninstructed reader is likely to fall, and into which magistrates and officers have from time to time (and notably during the Gordon riots of 1780) in fact fallen, is to suppose that the effect of the Riot Act is negative as well as positive, and that therefore the military cannot be employed without the fulfilment of the conditions imposed by

¹ 5 C. & P. 254.

² 1 George I, stat. 2, c. 5.

³ See Stephen, *History of Criminal Law*, i. pp. 202-205.

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the statute. This notion is now known to be erroneous; the occasion on which force can be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case. If then by martial law be meant the power of the government or of legal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England. Even however as to this kind of martial law one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury, and that the estimate of what constitutes necessary force formed by a judge and jury sitting in quiet and safety after the suppression of a riot may differ considerably from the judgment formed by a general or magistrate who is surrounded by armed rioters and knows that at any moment a riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution.

In what sense martial law not recognised by English law.

Martial law is however more often used as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the Courts. The proclamation of martial law in this sense of the term is, as has been already pointed out, nearly equivalent to the state of things which in France and many other foreign countries is known as the declaration of a "state of siege," and is in effect the temporary and

recognised government of a country by military force. The legal aspect of this condition of affairs in states which recognise the existence of this kind of martial law can hardly be better given than by citing some of the provisions of the law which at the present day regulates the state of siege in France:—

“ 7. *Aussitôt l'état de siège déclaré, les pouvoirs dont l'autorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire.—L'autorité civile continue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.* French Law as to state of siege.

“ 8. *Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre et la paix publique, quelle que soit la qualité des auteurs principaux et des complices.*

“ 9. *L'autorité militaire a le droit,—1° De faire des perquisitions, de jour et de nuit, dans le domicile des citoyens;—2° D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux, soumis à l'état de siège;—3° D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement;—4° D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre¹.*”

We may reasonably however conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of

¹ Roger et Sorel, *Codes et Lois*, pp. 436, 437.

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France is declared in a state of siege, and, to use a significant expression known to some continental countries, "the constitutional guarantees are suspended." We shall hardly go far wrong if we assume that during this suspension of ordinary law any man whatever is liable to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war. However this may be, it is clear that in France, even under the present Republican government, the suspension of law involved in the proclamation of a state of siege is a thing fully recognised by the constitution, and (strange though the fact may appear) the authority of military Courts during a state of siege is greater under the Republic than it was under the monarchy of Louis Philippe¹. Now this kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace rebels may be lawfully killed just as enemies may be lawfully slaughtered in battle or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a Court-martial is illegal, and technically murder. Nothing better illustrates the noble energy with which judges have maintained

¹ See *Geoffroy's Case*, 24 *Journal du Palais*, p. 1218, cited by Forsyth, *Opinions*, p. 483.

the rule of regular law, even at periods of revolutionary violence, than *Wolfe Tone's Case*¹. In 1798, Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a Court-martial in Dublin. He was thereupon sentenced to be hanged. He held however no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place, application was made to the Irish King's Bench for a writ of *habeas corpus*. The ground taken was that Wolfe Tone not being a military person was not subject to punishment by a Court-martial, or in effect that the officers who tried him were attempting illegally to enforce martial law. The Court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the Court was filled with judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of law can be found than that then made by the Irish Bench.

V. *The Army*².—The English army consists of The Army. the Standing (or Regular) army, and of the Militia.

¹ 27 St. Tr. 614.

² See Stephen, *Commentaries*, ii. 584-594; Gneist, *Das Englische Verwaltungsrecht*, ii. 952-966.

As to Standing Army, 1 William & Mary, c. 5; see the Army Discipline and Regulation Act, 1879, 42 & 43 Vict. c. 33; the Army Act, 1881, 44 & 45 Vict. c. 58.

As to Militia, 13 Car. II, stat. 1, c. 6; 14 Car. II, c. 3; 15 Car.

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Each of these forces has been rendered subordinate to the law of the land. My object is not to give even an outline of the enactments affecting the army, but simply to explain the legal principles on which this supremacy of the law throughout the army has been secured.

It will be convenient in considering this matter to reverse the order pursued in the common text-books; these contain a great deal about the militia, and comparatively little about the regular forces, or what we now call the "army." The reason of this is that historically the militia is an older institution than the permanent army, and the existence of a standing army is historically and according to constitutional theories an anomaly. Hence the standing army is often treated by writers of authority as a sort of exceptional or subordinate topic, a kind of excrescence so to speak on the national and constitutional force known as the militia. As a matter of fact, of course, the standing army is now the real national force, and the militia is a body of comparatively small importance.

Standing
Army.
Its exist-
ence recon-
ciled with
Parlia-
mentary
govern-
ment by
annual
Mutiny
Acts.

As to the Standing Army.—A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government; and in truth the existence of

II, c. 4; 42 George III, c. 90; Militia Act, 1882, 45 & 46 Vict. c. 49; and Regulation of the Forces Act, 1881, 44 & 45 Vict. c. 57.

permanent paid forces has often in most countries and at times in England—notably under the Commonwealth—been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government¹. The belief indeed of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen therefore, at the end of the seventeenth and the beginning of the eighteenth century, found themselves placed in this dilemma. With a standing army the country could not (they thought) escape from despotism; without a standing army the country could not (they perceived) escape from invasion; the maintenance of national liberty appeared to involve the sacrifice of national independence. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem.

In this instance as in others of success achieved by what is called the practical good-sense, the political instinct, or the statesman-like tact of Englishmen, we ought to be on our guard against two errors. We ought not on the one hand to fancy that English statesmen acted with some profound

¹ See e.g. Macaulay, *History*, iii. pp. 42-47.

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sagacity or foresight peculiar to themselves, and not to be found among the politicians of other countries. Still less ought we on the other to imagine that luck or chance helps Englishmen out of difficulties with which the inhabitants of other countries cannot cope. Political common-sense, or political instinct means little more than habitual training in the conduct of affairs; this practical acquaintance with public business was enjoyed by educated Englishmen a century or two earlier than by educated Frenchmen or Germans, hence the early prevalence in England of sounder principles of government than have till recently prevailed in other lands. The statesmen of the Revolution succeeded in dealing with difficult problems, not because they struck out new and brilliant ideas, or because of luck, but because the notions of law and government which had grown up in England were in many points sound, and because the statesmen of 1689 applied to the difficulties of their time the notions which were habitual to the more thoughtful Englishmen of the day. The position of the army in fact was, you will find, determined by an adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.

The object and principles of the first Mutiny Act¹

¹ 1 William and Mary, c. 5.

of 1689 are exactly the same as the object and principles of the Army Act, 1881, under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land. Lecture
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The preamble to the first Mutiny Act has re-appeared with slight alterations in every subsequent Mutiny Act, and recites that "Whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm; yet, nevertheless, it" [is] "requisite for retaining such forces as are, or shall be raised during this exigence of affairs, in their duty an exact discipline. be observed; and that soldiers who shall mutiny or stir up sedition, or shall desert their majesties' service, be brought to a more exemplary and speedy punishment than the usual forms of law will allow¹."

This recital states the precise difficulty which perplexed the statesmen of 1689. Now observe the way in which it has been met.

A person who enlists as a soldier in a standing

¹ See Clode, *Military Forces of the Crown*, i. p. 499. Compare 47 Vict. c. 8. The variations in the modern Acts, though slight, are instructive.

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army, or (to use the wider expression of modern Acts) "a person subject to military law," stands in a twofold relation: the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English law governed by definite principles.

Soldier's
position as
citizen.

A soldier's position as a citizen.—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. "Nothing in this act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law¹." These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

The results of this principle are traceable throughout the Mutiny Acts.

Criminal
liability

A soldier is subject to the same criminal liability as

¹ 1 William & Mary, c. 5, s. 6; see Clode, *Military Forces of the Crown*, i. p. 500.

a civilian¹. He may when in the British dominions be put on trial before any competent "civil" (i.e. non-military) Court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal². Thus if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

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A soldier cannot escape from civil liabilities, as, for example, responsibility for debts; the only exemption which he can claim is that he cannot be forced to appear in Court, and could not, when arrest for debt was allowable, be arrested for any debt not exceeding £30³.

Civil
liability.

No one who has entered into the spirit of continental legislation can believe that (say in France or Prussia) the rights of a private individual would thus have been allowed to override the claims of the public service.

In all conflicts of jurisdiction between a military and a civil Court the authority of the civil Court

¹ Compare Army Act, 1881 (44 & 45 Vict. c. 58), secs. 41, 144, 162.

² Compare however the Jurisdiction in Homicide Act, 1862, 25 & 26 Vict. c. 65, and Clode, *Military Forces of the Crown*, i. pp. 206, 207.

³ See Army Act, 1881 (44 & 45 Vict. c. 58), s. 144. Compare Clode, *Military Forces of the Crown*, i. pp. 207, 208, and *Thurston v. Mills*, 16 East, 254.

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prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil Court, he cannot be tried for the same offence by a Court-martial¹; but an acquittal or conviction by a Court-martial, say for manslaughter or robbery, is no plea to an indictment for the same offence at the Assizes².

Order of
superiors
no defence
to charge
of crime.

When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence³.

¹ Army Act, 1881 (44 & 45 Vict. c. 58), s. 162, sub-ss. 1-6.

² Ibid. Contrast the position of the army in relation to the law of the land in France. The fundamental principle of French law is, as it apparently always has been, that every kind of crime or offence committed by a soldier or person subject to military law must be tried by a military tribunal. See *Code de Justice Militaire*, Arts. 55, 56, 76, 77, and Le Faure, *Les Lois Militaires*, pp. 167, 173.

³ Stephen, *History of Criminal Law*, i. pp. 204-206, and compare Clode, *Military Forces of the Crown*, ii. pp. 125-155. The position of a soldier is curiously illustrated by the following case. *X* was a sentinel on board the "*Achille*," when she was paying off. "The orders to him from the preceding sentinel were, to keep off all "boats, unless they had officers with uniforms in them, or unless the "officer on deck allowed them to approach; and he received a musket, "three blank cartridges, and three balls. The boats pressed; upon "which he called repeatedly to them to keep off; but one of them "persisted and came close under the ship; and he then fired at a "man who was in the boat, and killed him. It was put to the jury "to find, whether the sentinel did not fire under the mistaken im- "pression that it was his duty; and they found that he did. But a "case being reserved, the judges were unanimous that it was, never- "theless, murder. They thought it, however, a proper case for a "pardon; and further, they were of opinion, that if the act had been "necessary for the preservation of the ship, as if the deceased had "been stirring up a mutiny, the sentinel would have been justified." 1 Russell, *Crimes and Misdemeanors* (4th ed.), p. 823, on the authority of *Rex v. Thomas*, East, T., 1816, MS., Bayley, J. The date of the decision is worth noticing; no one can suppose that the judges of 1816 were disposed to underrate the rights of the Crown and its servants. The judgment of the Court rests upon and illus-

This is a matter which requires explanation.

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VII.

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bonâ fide obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier may be, both in theory and practice, a difficult one. He may, as it has been well said, be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. His situation and the line of his duty may be seen by considering how soldiers ought to act in the following cases.

During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal as well as from a military point of view to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and as citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no

trates the incontrovertible principle of the Common Law that the fact of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian.

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doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd whom he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order therefore to fire is not in itself a lawful order, that is, the colonel or other officer who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer, given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide:—

“I do not think, however, that the question how
 “far superior orders would justify soldiers or sailors
 “in making an attack upon civilians has ever been
 “brought before the courts of law in such a manner
 “as to be fully considered and determined. Probably
 “upon such an argument it would be found that the
 “order of a military superior would justify his in-
 “feriors in executing any orders for giving which they
 “might fairly suppose their superior officer to have

“good reasons. Soldiers might reasonably think
 “that their officer had good grounds for ordering
 “them to fire into a disorderly crowd which to them
 “might not appear to be at that moment engaged in
 “acts of dangerous violence, but soldiers could hardly
 “suppose that their officer could have any good
 “grounds for ordering them to fire a volley down a
 “crowded street when no disturbance of any kind
 “was either in progress or apprehended. The doc-
 “trine that a soldier is bound under all circumstances
 “whatever to obey his superior officer would be fatal
 “to military discipline itself, for it would justify the
 “private in shooting the colonel by the orders of the
 “captain, or in deserting to the enemy on the field of
 “battle on the order of his immediate superior. I
 “think it is not less monstrous to suppose that
 “superior orders would justify a soldier in the
 “massacre of unoffending civilians in time of peace,
 “or in the exercise of inhuman cruelties, such as the
 “slaughter of women and children, during a rebellion.
 “The only line that presents itself to my mind is
 “that a soldier should be protected by orders for
 “which he might reasonably believe his officer to
 “have good grounds. The inconvenience of being
 “subject to two jurisdictions, the sympathies of which
 “are not unlikely to be opposed to each other, is an
 “inevitable consequence of the double necessity of
 “preserving on the one hand the supremacy of the
 “law, and on the other the discipline of the army¹.”

The hardship of a soldier's position resulting from

¹ Stephen, *Hist. Criminal Law of England*, i. pp. 205, 206.

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this inconvenience is much diminished by the power of the Crown to nullify the effect of an unjust conviction by means of a pardon¹. While however a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of enquiry before a civil tribunal, and cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime².

Soldier's
position as
member of
army.

A soldier's position as a member of the army.— A citizen on entering the army becomes liable to special duties as being “a person subject to military law.” Hence acts which if done by a civilian would be either no offence at all or only slight misdemeanors, e.g. an insult or a blow offered to an officer, may when done by a soldier become serious crimes and

¹ As also by the right of the Attorney-General as representing the Crown to enter a *nolle prosequi*. See Stephen, *History of Criminal Law*, i. p. 496, and Archbold, *Pleading in Criminal Cases* (17th ed.), p. 105.

² *Buron v. Denman*, 2 Ex. 167, is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not in any way support the doctrine erroneously grounded upon it. What the judgment in *Buron v. Denman* shows is that an act done by an English military or naval officer in a foreign country to a foreigner in discharge of orders received from the Crown may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court. Compare *Feather v. The Queen*, 6 B. & S. 257, 295, *per Curiam*.

expose the person guilty of them to grave punishment. A soldier's offences moreover can be tried and punished by a Court-martial. He therefore in his military character of a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law: but though this is so, it is not to be supposed that even as regards a soldier's own position as a military man the rule of the ordinary law is, at any rate in time of peace, excluded from the army.

The general principle on this subject is that the Courts of Law have jurisdiction to determine who are the persons subject to military law, and whether a given proceeding alleged to depend upon military law is really justified by the rules of law which govern the army.

Hence flow the following (among other) consequences.

The civil Courts determine whether a given person is or is not "a person subject to military law"¹.

Enlistment, which constitutes the contract by which a person becomes subject to military law, is a civil proceeding², and a civil Court will enquire whether a man has been duly enlisted, or whether he is or is not entitled to his discharge³.

If a Court-martial in any way exceed its power,

¹ See Army Act, 1881 (44 & 45 Vict. c. 58), secs. 175-184, and compare *Wolfe Tone's Case*, 27 St. Tr. 614.

² See Army Act, 1881 (44 & 45 Vict. c. 58), s. 8.

³ *Ibid.* s. 96.

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e.g. by changing the country where a prisoner is imprisoned under circumstances which do not legally warrant the change, a civil Court will grant a writ of *habeas corpus* and discharge the prisoner from custody¹.

Lastly, the whole existence and discipline of the standing army, at any rate in time of peace, depends upon the passing of an annual Mutiny Act. If a Mutiny Act were not in force, a soldier would not be bound by military law. Desertion would be at most only a breach of contract, and striking an officer would be no more than an assault.

Militia.

*As to the Militia*².—The militia is the constitutional force existing under the law of the land for the defence of the country, and the older Militia Acts, especially 14 Car. II, c. 3, show that in the seventeenth century Parliament meant to rely for the defence of England upon this national army raised from the counties and placed under the guidance of country gentlemen. The militia may still be raised by ballot, and is in theory a local force levied by conscription. But the power of raising by ballot has been for a considerable time suspended³, and the militia, like the regular army, is in fact recruited by voluntary enlistment.

The militia is from its nature a body hardly capable of being used for the purpose of overthrowing Parliamentary government. But even with regard to the militia, care has been taken by the legislature to ensure that it shall be subject to the rule of

¹ *In re Allen*, 30 L. J. (Q. B.), 38.

² See Militia Act, 1882, 45 & 46 Vict. c. 49.

³ See 28 & 29 Vict. c. 46.

law. The members of the local army are (speaking in general terms) subject to military law only when in training or when the force is embodied. Embodiment indeed converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad. But the embodiment can lawfully take place only in "case of imminent national danger or of great emergency." If Parliament is sitting, the occasion for embodying the militia must be communicated to Parliament before the proclamation for embodying it is issued. If Parliament is not sitting, a proclamation must be issued for the meeting of Parliament within ten days after the Crown has ordered the militia to be embodied¹. Add to this, that the maintenance of discipline among the members of the militia when it is embodied depends on the continuance of the annual Mutiny Act².

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¹ Militia Act, 1882 (45 & 46 Vict. c. 49), s. 18.

² There exists an instructive analogy between the position of persons subject to military law, and the position of the clergy of the Established Church.

A clergyman of the National Church, like a soldier of the National Army, is subject to duties and to Courts to which other Englishmen are not subject. He is bound by restrictions as he enjoys privileges peculiar to his class, but the clergy are no more than soldiers exempt from the law of the land. Any deed which would be a crime or a wrong when done by a layman, is a crime or a wrong when done by a clergyman, and is in either case dealt with by the ordinary tribunals.

Moreover, as the Common Law Courts determine the legal limits to the jurisdiction of Courts-martial, so the same Courts in reality determine (subject of course to Acts of Parliament) what are the limits to the jurisdiction of ecclesiastical Courts.

The original difficulty, again, of putting the clergy on the same

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Revenue.

VI. *The Revenue*¹.—As in treating of the army my aim was simply to point out what were the principles determining the relation of the armed forces of the country to the law of the land; so in treating of the revenue my aim is not to give even a sketch of the matters connected with the raising, the collection, and the expenditure of the national income, but simply to show that the collection and expenditure of the revenue, and all things appertaining thereto, are governed by strict rules of law. Fix your attention upon three points—the *source* of the public revenue—the *authority* for expending the public revenue—and the *securities* provided by law for the due appropriation of the public revenue, that is, for its being expended in the exact manner which the law directs.

Source.

Source of Public Revenue.—It is laid down by Blackstone and other authorities that the revenue consists of the hereditary or “ordinary” revenue of the Crown and of the “extraordinary” revenue depending

footing as laymen, was at least as great as that of establishing the supremacy of the civil power in all matters regarding the army. Each of these difficulties was met at an earlier date and has been overcome with more completeness in England than in some other countries. We may plausibly conjecture that this triumph of law was due to the acknowledged supremacy of the King in Parliament, which itself was due to the mode in which the King, acting together with the two Houses, manifestly represented the nation and therefore was able to wield the whole moral authority of the state.

¹ Stephen, *Commentaries*, ii. pp. 530–583; Hearn, *Government of England*, c. 13, pp. 325–360; May, *Parliamentary Practice*, 588–643; See Exchequer and Audit Act, 1866, 29 & 30 Vict. c. 39, and 1 & 2 Vict. c. 2, s. 2.

upon taxes imposed by Parliament. Historically this distinction is of interest. But for our purpose we need hardly trouble ourselves at all with the hereditary revenue of the Crown, arising from Crown lands, droits of admiralty, and the like. It forms an insignificant portion of the national resources, amounting to not much more than £500,000 a year. It does not moreover at the present moment belong specially to the Crown, for it was commuted at the beginning of the reign of the present Queen as it was at the beginning of the reign of William IV for a fixed "civil list," or sum payable yearly for the support of the dignity of the Crown. The whole then of the hereditary revenue is now paid into the national exchequer and forms part of the income of the nation. We may therefore, putting the hereditary revenue out of our minds, direct our whole attention to what is oddly enough called the "extraordinary," but is in reality the ordinary or Parliamentary revenue of the nation.

The whole of the national revenue amounts in round numbers to somewhere about £87,000,000¹ annually. It is (if we put out of sight the small hereditary revenue of the Crown) raised wholly by taxes imposed by law. The national revenue therefore depends wholly upon law, and upon statute law; it is the creation of Acts of Parliament.

While no one can now a days fancy that taxes can be raised otherwise than in virtue of an Act of

¹ The revenue for the year ending 31st March, 1884, was £87,205,184. See *Statesman's Year Book*, 1885, p. 226.

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Parliament, there prevails it may be suspected with many of us a good deal of confusion of mind as to the exact relation between the raising of the revenue and the sitting of Parliament. People often talk as though, if Parliament did not meet, no taxes would be legally payable, and the assembling of Parliament were therefore secured by the necessity of filling the national exchequer. This idea is encouraged by the study of periods, such as the reign of Charles I, during which the Crown could not legally obtain necessary supplies without the constant intervention of Parliament. But the notion that at the present day no money could legally be levied if Parliament ceased to meet is unfounded. Millions of money would come into the Exchequer even though Parliament did not sit at all. For though all taxation depends upon Act of Parliament, it is far from being the case that all taxation now depends upon annual or temporary Acts.

Taxes are made payable in two different ways, i.e. either by permanent or by yearly Acts.

Taxes, the proceeds of which amount to nearly six-sevenths of the whole yearly revenue are imposed by permanent Acts; such taxes are the land tax¹, the customs², the excise³, the stamp duties⁴, and the like. These taxes would continue to be payable even though Parliament should not be convened for

¹ 38 George III, c. 5.

² Customs Tariff Act, 1876, 39 & 40 Vict. c. 35; Stephen, *Commentaries*, ii. p. 565.

³ See Stephen, *Commentaries*, ii. pp. 566-569.

⁴ Stamp Act, 1870, 33 & 34 Vict. c. 97.

years. We should all, to take an example which comes home to every one, be legally compellable to buy the stamps for our letters even though Parliament did not meet again till (say) A.D. 1900. Lecture
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Other taxes, and notably the income tax, the proceeds of which make up the remaining seventh of the national income, are imposed by yearly Acts. If by any chance Parliament should not be convened for a year, no one would be under any legal obligation to pay income tax.

This distinction between revenue depending upon permanent Acts and revenue depending upon temporary Acts is worth noting, but the main point of course to be borne in mind is that all taxes are imposed by statute, and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under Act of Parliament.

Authority for expending revenue.—At one time, revenue once raised by taxation was in truth and in reality a grant or gift by the Houses of Parliament to the Crown. Such grants as were made to Charles the First or James the First were truly moneys given to the King. He was as a matter of moral duty bound, out of the grants made to him, as out of the hereditary revenue, to defray the expenses of government; and the gifts made to the King by Parliament were never intended to be “money to put into his own pocket,” as the expression goes. Still it was in truth money of which the King or his Ministers could and did regulate the distribution. One of Authority
for expen-
diture.

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the singularities which mark the English constitution is the survival of mediæval notions which more or less identified the King's property with the national revenue after the passing away of the state of society to which such ideas naturally belonged; in the time of George the Third many public expenses, as for example the salaries of the judges, were charged upon the civil list, and thus were mixed up with the King's private expenditure. At the present day, however, the whole public revenue is treated not as the King's property but as public income; and as to this two matters deserve special observation.

First. The whole revenue of the nation is paid into the Bank of England to the "account of Her Majesty's Exchequer¹," mainly through the Inland Revenue Office². That office is a mere place for the receipt of taxes; it is a huge money-box into which day by day moneys paid as taxes are dropped, and whence such moneys are taken daily to the Bank. What (I am told) takes place is this. Each day large amounts are received at the Inland Revenue Office; two gentlemen come there each afternoon in a cab from the Bank; they go through the accounts for the day with the proper officials; they do not leave till every item is made perfectly clear; they then take all the money received, and drive off with it and pay it into the Bank of England.

¹ See Exchequer and Audit Act, 1866 (29 & 30 Vict. c. 39), s. 10, and *Control and Audit of Public Receipts and Expenditure*, pp. 7, 8.

² £54,437,945 was collected in the year 1884-5 by the Inland Revenue establishment.

Secondly. Not a penny of revenue can be legally expended except under the authority of some Act of Parliament. Lecture
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This authority may be given by a permanent Act, as for example by the Civil List Act, 1 & 2 Vict. c. 2, or by the National Debt Act, 1870; or it may be given by the Appropriation Act, that is, the annual Act by which Parliament "appropriates" or fixes the sums payable to objects (the chief of which is the support of the army and navy) which are not provided for, as is the payment of the National Debt, by permanent Acts of Parliament.

The whole thing, to express it in general terms, stands thus. There is paid into the Bank of England a national income raised by different taxes amounting to about £87,000,000 per annum. This £87,000,000 constitutes the revenue or "consolidated fund." Every penny of it is, unless the law is broken, paid away in accordance with Act of Parliament. The authority to make payments from it is given in many cases by permanent Acts; thus the whole of the interest on the National Debt is payable out of the consolidated fund under the National Debt Act, 1870. The order or authority to make payments out of it is in other cases given by a yearly Act, namely the Appropriation Act, which determines the mode in which the supplies granted by Parliament (and not otherwise appropriated by permanent Acts) are to be spent. In either case, and this is the point to bear in mind, payments made out of the national revenue are made by and under the authority of the law,

Lecture namely, under the directions of some special Act of
VII. Parliament.

The details of the method according to which supplies are annually voted and appropriated by Parliament are amply treated of in works which deal with Parliamentary practice¹. The matter which requires our attention is the fact that each item of expenditure (such for example as the wages paid to the army and navy) which is not directed and authorised by some permanent Act is ultimately authorised by the Appropriation Act for the year, or by special Acts which for convenience are passed prior to the Appropriation Act and are enumerated therein. The expenditure therefore, no less than the raising of taxation, depends wholly and solely upon Parliamentary enactment.

Security
for proper
expendi-
ture.

Security for the proper appropriation of the revenue.—What, it may be asked, is the real security that moneys paid by the taxpayers are not expended otherwise than is intended by Parliament? If a Minister had the power to divert sums intended for one object to another purpose he would constantly be tempted to do so, and this not from any fraudulent or bad intention, but from a desire to promote the public service. He might, for instance, think that a million granted for the purchase of pictures in the National Gallery would be far better expended on strengthening the navy; and entertaining this view, almost certainly would, if he had the power, use moneys granted for the promotion of art in the

¹ See especially May, *Parliamentary Practice*, pp. 588-643.

building of ironclads. Nor is it at all certain that the mere letter of the law would be sufficient to prevent diversions of public money which, even when well intended, would in fact deprive Parliament of complete control over the national expenditure. It is quite clear that some security is needed to prevent misappropriation or irregular expenditure of the funds granted by Parliament, and the question to determine is what is the machinery by which this end is attained.

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This security is provided by an elaborate system of control and audit, under which not a penny of public money can be expended by the Ministry without the authority or sanction of persons (many of them quite independent of Ministers) who are responsible for the due application of the revenue.

The centre of this system of Parliamentary control is the Comptroller and Auditor General¹.

Comp-
troller
General.

This high official is absolutely independent of the Cabinet, and can take no part in politics, for he cannot be a member of the House of Commons or a peer of Parliament. He in common with his subordinate—the Assistant Comptroller and Auditor General—is appointed by a patent under the Great Seal, holds his office during good behaviour, and can be removed only on an address from both Houses of Parliament². He is head of the Exchequer and Audit Department, and combines in his own person

¹ See *Control and Audit of Public Receipts and Expenditure*, 1885.

² See the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39, sect. 3).

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two different characters which formerly belonged to different officials ; he is Comptroller of the issue of public money, he is Auditor of public accounts ; he has therefore to perform two different functions.

In exercise of his duty of control, the Comptroller General is bound, with the aid of the officials under him, to see that the whole of the national revenue (which, as you will remember, is lodged in the Bank of England to the account of the Exchequer) is paid out under legal authority, that is under the provisions of some Act of Parliament, and for a purpose authorised by law.

The Comptroller General is enabled to do this because whenever the Treasury (through which office alone the public moneys are drawn out from the Bank) needs to draw out money for the public service, the Treasury must make a requisition to the Comptroller General and obtain from him what is called a grant of credit, that is an authority from the Comptroller General authorising the payment from the public moneys at the Bank of the definite sum required for the purpose for which it is required¹.

The payments made by the Treasury are (as already pointed out) made either under some permanent Act for what are technically called "consolidated fund services," as for example to meet the interest on the National Debt², or under the yearly Appropriation Act for what are technically called "supply ser-

¹ See *Control and Audit*, 1885, pp. 61-64, Form No. 8 to No. 12.

² See National Debt Act, 1870.

vices," as for example to meet the expenses of the army or the navy.

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In either case the Comptroller General must, before granting the necessary credit, satisfy himself that the payment proposed to be made by the Treasury is made for the purpose of and in the strictest compliance with the terms of the Act under which it is to be made; he must also satisfy himself that every legal formality requisite for obtaining the issue of public money from the Bank has been complied with. Unless and until he is satisfied, he ought not to grant and will not grant a credit for the amount required, and until this credit is obtained the money required cannot be drawn out of the Bank.

Thus where the Comptroller is required to grant a credit for consolidated fund services, e.g. for the payment of interest on the National Debt, he must before granting the credit be satisfied that the payment is authorised by the terms of the permanent Act (in the particular case the National Debt Act 1870) under the authority of which it is to be made, and that every formality required by the Act has been complied with.

So, again, where a Comptroller is required to grant a credit for the supply services, e.g. for the expenses of the army or navy, he is bound to see both that all necessary formalities (which in this case are elaborate) are complied with and that a vote of Parliament authorises the proposed expenditure, or in other words that it is authorised by the Appropriation Act. The duties of the Comptroller General in this respect

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have been thus described. "In order to justify this
 "official in issuing moneys to the Government, he
 "must of course satisfy himself that a Ways and
 "Means Act of the kind already described has been
 "duly passed, and that it covers the amount of
 "money for which application is made. There must,
 "moreover, be presented to him one or more royal
 "orders authorising the Treasury to apply the supplies
 "granted to the Crown by the Ways and Means
 "Act covering the same, in conformity to the parlia-
 "mentary vote. This done, he grants to the Treasury,
 "on its application, a general credit on the Exchequer
 "accounts at the Bank of England to the amount
 "limited by the votes; and the Treasury, operating
 "upon that credit, issues orders to the Bank to
 "transfer money to the account of the Paymaster-
 "General, by whom it is paid out, as required, to the
 "different services¹."

These formalities may appear, and no doubt generally are, mere matters of form, but they give an opportunity to an official who has no interest in deviating from the law for preventing even the least irregularity on the part of the Ministry. The Comptroller's power of putting a check on government expenditure has, oddly enough, been pushed to its extreme length in comparatively recent times. In 1811 England was in the midst of the great war with France; the King was a lunatic, a Regency Bill was not yet passed, and a million pounds was required for the payment of the navy. Lord Grenville,

¹ Traill, *Central Government*, pp. 44, 45.

the then Auditor of the Exchequer, whose office corresponded to a certain extent with that of the present Comptroller and Auditor General, refused to draw the necessary order on the Bank, and thus prevented the million, though granted by Parliament, from being drawn out. The ground of his lordship's refusal was that he had received no authority under the Great Seal or the Privy Seal, and the reason why there was no authority under the Privy Seal was that the King was incapable of affixing the Sign Manual, and that the Sign Manual not being affixed, the clerks of the Privy Seal felt, or said they felt, that they could not consistently with their oaths allow the issue of letters of Privy Seal upon which the warrant under the Privy Seal was then prepared. All the world knew the true state of the case. The money was granted by Parliament, and the irregularity in the issue of the warrants was purely technical, yet the law officers—members themselves of the Ministry—advised that Lord Grenville and the clerks of the Privy Seal were in the right. This inconvenient and, as it seems to modern readers, unreasonable display of legal scrupulosity masked, it may be suspected, a good deal of political by-play. If Lord Grenville and his friends had not been anxious that the Ministry should press on the Regency Bill, the officials of the Exchequer would perhaps have seen their way through the technical difficulties which, as it was, appeared insurmountable, and it is impossible not to suspect that Lord Grenville acted rather as a party leader than as Auditor

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of the Exchequer. But be this as it may, the debates of 1811¹ prove to demonstration that a Comptroller General can if he chooses put an immediate check on any irregular dealings with public moneys.

In exercise of his duty as Auditor the Comptroller General audits all the public accounts; he reports annually to Parliament upon the accounts of the past year. Accounts of the expenditure under the Appropriation Act are submitted by him at the beginning of every session to the Public Accounts Committee of the House of Commons—a Committee appointed for the examination of the accounts—showing the appropriation of the sums granted by Parliament to meet the public expenditure. This examination is no mere formal or perfunctory supervision; a glance at the reports of the Committee shows that the smallest expenses which bear the least appearance of irregularity, even if amounting only to a pound or two, are gone into and discussed by the Committee. The results of their discussions are published in reports submitted to Parliament.

The general result of this system of control and audit is, that in England we possess accounts of the national expenditure of an accuracy which cannot be rivalled by the public accounts of other countries, and that every penny of the national income is expended under the authority and in accordance with the provisions of some Act of Parliament².

¹ Cobbett's *Parl. Debates*, xviii. pp. 678, 734, 787.

² The main features of the system for the control and audit

How, a foreign critic might ask, is the authority of the Comptroller General compatible with the orderly transaction of public business; how, in short, does it happen that difficulties like those which arose in 1811 are not of constant recurrence? Lecture
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The general answer of course is, that high English officials, and especially officials removed from the sphere of politics, have no wish or temptation to hinder the progress of public business; the Auditor of the Exchequer was in 1811, be it noted, a peer and a statesman. The more technical reply is, that the law provides two means of overcoming the per-

of national expenditure have been authoritatively summarised as follows:—

“The gross revenue collected is paid into the Exchequer.

“Issues from the Exchequer can only be made to meet expenditure which has been sanctioned by Parliament, and to an amount not exceeding the sums authorised.

“The issues from the Exchequer and the audit of Accounts are under the control of the Comptroller and Auditor General, who is an independent officer responsible to the House of Commons, and who can only be removed by vote of both Houses of Parliament.

“Such payments only can be charged against the vote of a year as actually came in course of payment within the year.

“The correct appropriation of each item of Receipt and Expenditure is insured.

“All unexpended balances of the grants of a year are surrendered to the Exchequer, as also are all extra Receipts and the amount of Appropriations-in-Aid received in excess of the sum estimated to be taken in aid of the vote.

“The accounts of each year are finally reviewed by the House of Commons, through the Committee of Public Accounts, and any excess of expenditure over the amount voted by Parliament for any service, must receive legislative sanction.”—*Control and Audit of Public Receipts and Expenditure*, 1885, pp. 24, 25.

Lecture versity or factiousness of any Comptroller who should
VII. without due reason refuse his sanction to the issue of public money. He can be removed from office on an address of the two Houses, and he probably might, it has been suggested, be coerced into the proper fulfilment of his duties by a mandamus¹ from the High Court of Justice. The worth of this suggestion, made by a competent lawyer, has never been, and probably never will be, tested. But the possibility that the executive might have to seek the aid of the Courts in order to get hold of moneys granted by Parliament, is itself a curious proof of the extent to which the expenditure of the revenue is governed by law, or, what is the same thing, may become dependent on the decision of the judges upon the meaning of an Act of Parliament.

Ministerial
 responsi-
 bility.

VII. *The Responsibility of Ministers.*—Ministerial responsibility means two utterly different things.

It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons. This is a matter depending on the conventions of the constitution with which law has no direct concern.

It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part. This responsibility, which is a matter of law, rests on the following foundation. You will not find in the law of England,

¹ See Bowyer, *Commentaries on Constitutional Law*, p. 210; Hearn, *Government of England*, pp. 347, 348.

as you do in most foreign constitutions, an explicit statement that the acts of the monarch must always be done through a Minister, and that all orders given by the Crown must, when expressed in writing, as they generally are, be countersigned by a Minister. But practically the rule exists. In order that an act of the Crown may be recognised as an act of the Crown or have any legal effect, it must in general be done through a Minister or be done under some seal, as, for example, the Great Seal or the Privy Seal, which is in the keeping of a Minister. Thus the "Secretaries of State are the channels which convey the Royal pleasure throughout the body politic both at home and abroad. The countersignature of one of them is necessary to give effect to the Royal sign manual. The patronage of the Crown both in Church and State is administered under this safeguard. To every public document signed by the Sovereign the signature of a Secretary of State is appended, and the Minister must answer for what the Crown has done¹." Numerous acts, again, can be commanded by the Crown only under particular seals, such as the Signet, the Privy Seal, or the Great Seal; and in many instances for the due giving of a royal order, e.g. for the making of a grant, several of these seals are required². Now, as

¹ Clode, *Military Forces of the Crown*, ii. pp. 320, 321, citing the words of Sir James Graham in the *Military Organisation Report*, 1860, p. i; *The Elsebe*, 5 Rob. 173, 177; *Buron v. Denman*, 2 Ex. 167, 189.

² See however the Great Seal Act, 1884, 47 & 48 Vict. c. 30.

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each of these seals is in the keeping of separate officials, and can be affixed only with the sanction of the Minister who keeps it, the result is that at least one Minister, and often more, must take part in any act of the Crown, which has any legal effect, e.g. the making of a grant, the giving an order, or the signing of a treaty. But the Minister or servant of the Crown who thus takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Now suppose that the act done is illegal, the Minister concerned in it becomes at once liable to criminal or civil proceedings in a Court of Law. In some instances it is true, the only legal mode in which his offence could be reached may be an impeachment. But an impeachment itself is a regular though unusual mode of legal procedure before a recognised tribunal, namely, the High Court of Parliament. Impeachments indeed may, though one took place as late as 1805, be thought now obsolete, but the cause why this mode of enforcing Ministerial responsibility is almost out of date is partly that Ministers are now rarely in a position where there is even a temptation to commit the sort of crimes for which impeachment is an appropriate remedy, and partly that the result aimed at by impeachment could now in many cases be better obtained by proceedings before an ordinary Court. The point however which should never be forgotten is this; it is now well established law that

the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind Parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law.

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The sovereignty of Parliament and the supremacy of the law of the land—the two principles which pervade the whole of the English constitution—may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this is not so; the sovereignty of Parliament (as contrasted with other forms of sovereign power) favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise and thus increases the authority of Parliamentary sovereignty.

Parliamentary
sovereignty and the
rule of law.

The sovereignty of Parliament favours the supremacy of the law of the land.

Parliamentary
sovereignty favours
rule of law.

That this should be so arises in the main from two characteristics or peculiarities which distinguish the English Parliament from other sovereign powers.

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The first of these characteristics is that the commands of Parliament (consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must therefore always take the shape of formal and deliberate legislation. The will of Parliament¹ can be expressed only through an Act of Parliament.

This is no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch, such as Louis XIV, Napoleon I, or Napoleon III might effect by ordinances or decrees, or which the different constituent assemblies of France, and above all the famous Convention, carried out by sudden resolutions. The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges. A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognizance) or even of the changes

¹ A strong, if not the strongest, argument in favour of the so called "bi-cameral" system, is to be found in the consideration that the co-existence of two legislative chambers prevents the confusion of resolutions passed by either House with laws, and thus checks the substitution of the arbitrary will of an assembly for the supremacy of the ordinary law of the land.

which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent. All this, which seems natural enough to an English lawyer, would greatly surprise many foreign legists, and no doubt often does give a certain narrowness to the judicial construction of statutes. It contributes greatly however both (as I have already pointed out) to the authority of the judges and to the fixity of the law¹.

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The second of these characteristics is that the English Parliament as such has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive government. No doubt in modern times the House of Commons has in substance obtained the right to designate for appointment the Prime Minister and the other members of the Cabinet. But this right is, historically speaking, of recent acquisition, and is exercised in a very roundabout manner; its existence does not affect the truth of the assertion that the Houses of Parliament do not directly

¹ The principle that the sovereign legislature can express its commands only in the particular form of an Act of Parliament originates of course in historical causes; it is due to the fact that an Act of Parliament was once in reality what it still is in form, a law "enacted by the King with the assent of the Lords and Commons." It is a curious instance of the logical rigour with which the principle is applied by the judges, that the marginal notes to a statute are not regarded as throwing any light on its construction, since they are not in strictness "enacted" by Parliament. See Wilberforce, *Statute Law*, pp. 293, 294; *Clayden v. Green*, L. R., 3 C. P. 511, 522, per Willes J.; *Attorney-General v. G. E. Ry. Co.*, 11 Ch. D. 449, 461, per Baggallay L. J.

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appoint or dismiss the servants of the state; neither the House of Lords nor the House of Commons, nor both Houses combined, could even now issue a direct order to a military officer, a constable or a tax-collector; the servants of the state are still in name what they once were in reality—"servants of the Crown;" and, what is worth careful notice, the attitude of Parliament towards government officials was determined originally and is still regulated by considerations and feelings belonging to a time when the "servants of the Crown" were dependent upon the King, that is, upon a power which naturally excited the jealousy and vigilance of Parliament. Hence several results all indirectly tending to support the supremacy of the law. Parliament, though sovereign, unlike a sovereign monarch who is not only a legislator but a ruler, that is head of the executive government, has never been able to use the powers of the government as a means of interfering with the regular course of law¹; and what is even more important, Parliament has looked with disfavour and jealousy on all exemptions of officials from the ordinary liabilities of citizens or from the jurisdiction of the ordinary Courts; Parliamentary sovereignty has been fatal to the growth of "administrative law." The action, lastly, of Parliament has tended as naturally to protect the independence of the judges as that of other sovereigns to protect the conduct of

¹ Contrast with this the way in which even towards the end of the eighteenth century French Kings interfered with the action of the Courts.

officials. It is worth notice that Parliamentary care for judicial independence has in fact stopped just at that point where on *a priori* grounds it might be expected to end. The judges are not in strictness irremovable; they can be removed from office on an address of the two Houses; they have been made by Parliament independent of every power in the state except the Houses of Parliament.

The idea may suggest itself to you that the characteristics or peculiarities of the English Parliament on which I have just dwelt must now be common to most of the representative assemblies which exist in continental Europe. The French National Assembly, for example, bears a considerable external resemblance to our own Parliament. It is influenced however by a different spirit; it is the heir, in more ways than one, of the Bourbon Monarchy and the Napoleonic Empire. It is apparently (though on this point a foreigner must speak with hesitation) inclined to interfere in the details of administration. It certainly does not look with special favour on the independence or authority of the ordinary judges. It shows no disapprobation of the system of *droit administratif* which Frenchmen—very likely with truth—regard as an institution suited to their country, and it certainly leaves in the hands of the government wider executive and even legislative powers than the English Parliament has ever conceded either to the Crown or to its servants. What is true of France is true under a different form of many

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Tendency
to support
rule of law
often not
found in
foreign
representa-
tive assem-
blies.

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other continental states, such, for example, as Switzerland or Prussia. The sovereignty of Parliament as developed in England supports the supremacy of the law. But this is certainly not true of all the countries which now enjoy representative or Parliamentary government.

Rule
of law
favours
Parliamentary
sovereignty.

The supremacy of the law necessitates the exercise of Parliamentary sovereignty.

The rigidity of the law constantly hampers¹ (and sometimes with great injury to the public) the action of the executive, and from the hard and fast rules of strict law as interpreted by the judges, the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land. Note with care the way in which the necessity for discretionary powers brings about the recourse to exceptional legislation. Under the complex conditions of modern life no government can in times of disorder or of war keep the peace at home or perform its duties towards foreign powers without occasional use of arbitrary authority. In times, for instance, of social disturbance you need not only to punish conspirators, but also to arrest men who are reasonably suspected of conspiracy; foreign revolutionists are known to be spreading sedition throughout the land; order can hardly be maintained unless the executive can expel aliens. When two foreign nations are at war, or when civil contests divide a friendly country into two hostile camps, it is impossible for England to

¹ See pp. 237-243, *ante*.

perform her duties as a neutral unless the Crown has legal authority to put a summary check to the attempts of English sympathisers to help one or other of the belligerents. Foreign nations, again, feel aggrieved if they are prevented from punishing theft and homicide, if, in short, their whole criminal law is weakened because every scoundrel can ensure impunity for his crimes by an escape to England. But this result must inevitably ensue if the English executive has no authority to surrender French or German offenders to the government of France or of Germany. The English executive needs therefore the right to exercise discretionary powers, but the Courts must prevent, and will prevent at any rate where personal liberty is concerned, the exercise by the government of any sort of discretionary power. The Crown cannot, except under statute, expel from England any alien whatever, even though he were a murderer who, after slaughtering a whole family at Boulogne, had on the very day crossed red-handed to Dover. The executive therefore must ask for, and always obtains aid from Parliament. An Alien Act enables the Ministry in times of disturbance to expel any foreigner from the country; a Foreign Enlistment Act makes it possible for the Ministry to check intervention in foreign contests or the supply of arms to foreign belligerents. Extradition Acts empower the government at once to prevent England from becoming a city of refuge for foreign criminals, and to co-operate with foreign states in that general repression of crime in which the whole civilized world has an interest. Nor

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have we yet exhausted the instances in which the rigidity of the law necessitates the intervention of Parliament. There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity. A statute of this kind is (I have pointed out¹) the last and supreme exercise of Parliamentary sovereignty. It legalises illegality; it affords the practical solution of the problem which perplexed the statesmanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive government of every civilized country.

This solution may appear a merely formal one, or at best only a substitution of the despotism of Parliament for the prerogative of the Crown. But this is not so. The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and what is more, by the interpretation put upon the

¹ See pp. 46, 47, 247-252, *ante*.

statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments. In foreign countries, and especially in France, administrative ideas— notions derived from the traditions of a despotic monarchy—have restricted the authority and to a certain extent influenced the ideas of the judges. In England judicial notions have modified the action and influenced the ideas of the executive government. By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.

LECTURE VIII.

THE CONNECTION BETWEEN THE LAW OF THE CONSTITUTION AND THE CONVENTIONS OF THE CONSTITUTION.

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Aim of
lecture.

IN the first of these lectures stress was laid upon the essential distinction between the "law of the constitution," which consisting (as it does) of rules enforced or recognised by the Courts makes up a body of "laws" in the proper sense of that term, and the "conventions of the constitution," which consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, make up a body not of laws, but of constitutional or political ethics; and it was further urged that the law, not the morality of the constitution, forms the proper subject of legal study¹. In accordance with this view, your attention has throughout the six last lectures been exclusively directed to the meaning and applications of two principles which pervade the law of the constitution, namely,

¹ See pp. 24-32, *ante*.

the Sovereignty of Parliament¹ and the Rule of Law². But a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of historians or of statesmen. He ought to ascertain at any rate how, if at all, the law of the constitution is connected with the conventions of the constitution; and a lawyer who undertakes this task will soon find that in so doing he is only following one stage further the path on which we have already entered, and is on the road to discover the last and most striking instance of that supremacy of the law which gives to the English polity the whole of its peculiar colour. My aim therefore in this lecture is to define or ascertain the relation or connection between the legal and the conventional elements in the constitution, and to point out the way in which a just appreciation of this connection throws light upon several subordinate questions or problems of constitutional law.

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Our main end will be attained if an answer is found to each of two questions: What is the nature of the conventions or understandings of the constitution? What is the force or (in the language of jurisprudence) the "sanction" by which is enforced obedience to the conventions of the constitution? these answers will themselves throw light on the subordinate matters to which I have made reference.

¹ See Lectures II-IV.

² See Lectures V-VII.

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constitu-
tional un-
derstand-
ings.I. *The nature of the Conventions of the Constitution.*—

The salient characteristics, the outward aspects so to speak of the understandings which make up the constitutional morality of modern England, can hardly be better described than in the words of Mr. Freeman:—

“ We now have a whole system of political morality,
 “ a whole code of precepts for the guidance of public
 “ men, which will not be found in any page of either
 “ the statute or the common law, but which are in
 “ practice held hardly less sacred than any principle
 “ embodied in the Great Charter or in the Petition of
 “ Right. In short by the side of our written Law
 “ there has grown up an unwritten or conventional
 “ Constitution. When an Englishman speaks of the
 “ conduct of a public man being constitutional or
 “ unconstitutional, he means something wholly dif-
 “ ferent from what he means by conduct being legal
 “ or illegal. A famous vote of the House of Com-
 “ mons, passed on the motion of a great statesman,
 “ once declared that the then Ministers of the Crown
 “ did not possess the confidence of the House of
 “ Commons, and that their continuance in office was
 “ therefore at variance with the spirit of the consti-
 “ tution. The truth of such a position, according to
 “ the traditional principles on which public men have
 “ acted for some generations, cannot be disputed;
 “ but it would be in vain to seek for any trace of
 “ such a doctrine in any page of our written Law.
 “ The proposer of that motion did not mean to
 “ charge the existing Ministry with any illegal act,
 “ with any act which could be made the subject either

“of a prosecution in a lower court or of impeachment
 “in the High Court of Parliament itself. He did
 “not mean that they, Ministers of the Crown, ap-
 “pointed during the pleasure of the Crown, had
 “committed any breach of the Law of which the
 “Law could take cognizance, merely because they
 “kept possession of their offices till such time as the
 “Crown might think good to dismiss them from
 “those offices. What he meant was that the general
 “course of their policy was one which to a majority
 “of the House of Commons did not seem to be
 “wise or beneficial to the nation, and that therefore,
 “according to a conventional code as well under-
 “stood and as effectual as the written Law itself,
 “they were bound to resign offices of which the
 “House of Commons no longer held them to be
 “worthy¹.”

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The one exception which can be taken to this picture of our conventional constitution is the contrast drawn in it between the “written law” and the “unwritten constitution;” the true opposition, as already pointed out, is between laws properly so called, whether written or unwritten, and understandings or practices which though commonly observed are not laws in any true sense of that word at all. But this inaccuracy is hardly more than verbal, and we may gladly accept Mr. Freeman’s words as a starting-point whence to enquire into the nature or common quality of the maxims which make up our body of constitutional morality.

¹ Freeman, *Growth of the English Constitution*, pp. 114, 115.

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of consti-
tutional
under-
standings.

The following are examples¹ of the precepts to which Mr. Freeman refers, and belong to the code by which public life in England is (or is supposed to be) governed. "A Ministry which is outvoted in the House of Commons are in many cases bound to retire from office." "A Cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution." "If an appeal to the electors goes against the Ministry they are bound to retire from office, and have no right to dissolve Parliament a second time." "The Cabinet are responsible to Parliament as a body, for the general conduct of affairs." "They are further responsible to an extent, not however very definitely fixed, for the appointments made by any of their number, or to speak in more accurate language, made by the Crown under the advice of any member of the Cabinet." "The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office." "The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet." These are precepts referring to the position and formation of the Cabinet. It is however easy to find constitutional maxims dealing with other topics. "Treaties can be made without the necessity for any Act of Parliament; but the Crown, or in reality the Ministry representing the Crown, ought not to make any treaty which will not command the approbation of

¹ See, for further examples, p. 27, *ante*.

Parliament." "The foreign policy of the country, the proclamation of war, and the making of peace ought to be left in the hands of the Crown, or in truth of the Crown's servants. But in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed." "The action of any Ministry would be highly unconstitutional if it should involve the proclamation of war or the making of peace in defiance of the wishes of the House." "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point (not definitely fixed), to give way, and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of its responsible advisers, to create or to threaten to create enough new Peers to override the opposition of the House of Lords and thus restore harmony between the two branches of the legislature¹." "Parliament ought to be summoned for the despatch of business at least once in every year." "If a sudden emergency arise, e.g. through the outbreak of an insurrection, or an invasion by a foreign power, the Ministry ought, if they require additional authority, at once to have Parliament convened and obtain any powers which they may need for the protection of the country. Meanwhile Ministers ought to take every step, even at the peril of breaking the

¹ See however Hearn, *Government of England*, p. 168.

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Common character-istic of constitutional under-standings.

These rules (which I have purposely expressed in a lax and popular manner), and a lot more of the same kind, make up the constitutional morality of the day. They are all constantly acted upon, and since they cannot be enforced by any Court of Law have no claim to be considered laws. They are multifarious, differing as it might at first sight appear from each other not only in importance but in general character and scope. They will be found however, on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised; and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the constitution. This matter however requires for its proper understanding some further explanation.

Constitutional conventions are mainly rules for governing exercise of prerogative.

The discretionary powers of the government mean every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority. Thus no statute is required to enable the Crown to dissolve or to convoke Parliament, to

make peace or war, to create new Peers, to dismiss a Minister from office or to appoint his successor. The doing of all these things lies legally at any rate within the discretion of the Crown; they belong therefore to the discretionary authority of the government. This authority may no doubt originate in Parliamentary enactments, and in a limited number of cases actually does so originate. Thus the Naturalization Act, 1870, gives to a Secretary of State the right under certain circumstances to convert an alien into a naturalized British subject; and the Extradition Act, 1870, enables a Secretary of State (under conditions provided by the Act) to override the ordinary law of the land and hand over a foreigner to his own government for trial. With the exercise however of such discretion as is conferred on the Crown or its servants by Parliamentary enactments we need hardly concern ourselves. The mode in which such discretion is to be exercised is (or may be) more or less clearly defined by the Act itself, and is often so closely limited as in reality to become the subject of legal decision and thus pass from the domain of constitutional morality into that of law properly so called. The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the "prerogative"—a term which has caused more perplexity to students than any other expression referring to the constitution. The "prerogative" appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any

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given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, "the sovereign," or if not strictly the "sovereign" in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power. In 1791 the House of Commons compelled the government of the day, a good deal against the will of Ministers, to put on trial Mr. Reeves, the learned author of the *History of English Law*, for the expression of opinions meant to exalt the prerogative of the Crown at the expense of the authority of the House of Commons. Among other statements for the publication of which he was indicted, was a lengthy comparison of the Crown to the trunk, and the other parts of the constitution to the branches and leaves of a great tree. This comparison was made with the object of drawing from it the conclusion that the Crown was the source of all legal power, and that while to destroy the authority of the Crown was to cut down the noble oak under the cover of which Englishmen sought refuge from the storms of Jacobinism, the House of Commons and other institutions were but branches and leaves which might be lopped off without serious damage to the tree¹. The publication of Mr. Reeves's theories during a period of popular excitement may have been injudicious. But a jury, one is happy to know, found that it was not seditious; for his views undoubtedly rested on a sound basis of his-

¹ See 26 St. Tr., 530-534.

torical fact. The power of the Crown was anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers. Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative. If therefore we omit from view (as we conveniently may do) powers conferred on the Crown or its servants by Parliamentary enactments, as for example under an Alien Act, we may use the term "prerogative" as equivalent to the discretionary authority of the executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out. This statement holds good, it should be noted, of all the discretionary powers exercised by the executive, otherwise than under statutory authority; it applies to acts really done by the Queen herself in accordance with her

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personal wishes, to transactions (which are of more frequent occurrence than modern constitutionalists are disposed to admit) in which both the Queen and her Ministers take a real part, and also to that large and constantly increasing number of proceedings which, though carried out in the Queen's name, are in truth wholly the acts of the Ministry. The conventions of the constitution are in short rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the Queen herself or by the Ministry. That this is so may be seen by the ease and the technical correctness with which such conventions may be expressed in the form of regulations in reference to the exercise of the prerogative. Thus to say that a Cabinet when outvoted on any vital question are bound in general to retire from office is equivalent to the assertion that the prerogative of the Crown to dismiss its servants at the will of the King must be exercised in accordance with the wish of the Houses of Parliament; the statement that Ministers ought not to make any treaty which will not command the approbation of the Houses of Parliament means that the prerogative of the Crown in regard to the making of treaties—what the Americans call the “treaty-making power”—ought not to be exercised in opposition to the will of Parliament. So, again, the rule that Parliament must meet at least once a year is in fact the rule that the Crown's legal right or prerogative to call Parliament together at the monarch's pleasure

must be so exercised that Parliament meet once a year. **Lecture VIII.**

This analysis of constitutional understandings is open to the one valid criticism, that though true as far as it goes, it is obviously incomplete; for there are some few constitutional customs or habits which have no reference to the exercise of the royal power. Such, for example, is the understanding—a very vague one at best—that in case of a permanent conflict between the will of the House of Commons and the will of the House of Lords the Peers must at some point give way to the Lower House. Such, again, is the practice by which the judicial functions of the House of Lords are discharged solely by the Law Lords, or the understanding under which Divorce Acts were treated as judicial and not as legislative proceedings. Habits such as these are at bottom customs or rules meant to determine the mode in which one or other or both of the Houses of Parliament shall exercise their discretionary powers, or, to use the historical term, their “privileges.” The very use of the word “privilege” is almost enough to show us how to embrace all the conventions of the constitution under one general head. Between “prerogative” and “privilege” there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament. Understandings then which regulate the exercise of the prerogative determine, or are meant to determine, the way in which one member of the sovereign body,

Some constitutional conventions refer to exercise of Parliamentary privilege.

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namely the Crown, should exercise its discretionary authority; understandings which regulate the exercise of privilege determine, or are meant to determine, the way in which the other members of the sovereign body should each exercise their discretionary authority. The result follows, that the conventions of the constitution looked at as a whole are customs, or understandings as to the mode in which the several members of the sovereign legislative body, which, as you will remember, is the "King in Parliament¹," should each exercise their discretionary authority, whether it be termed the prerogative of the Crown or the privileges of Parliament. Since, however, by far the most numerous and important of our constitutional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and clearness if you treat the conventions of the constitution, as I shall do for the rest of this lecture, as rules or customs determining the mode in which the discretionary power of the executive, or in technical language the prerogative, ought (i.e. is expected by the nation) to be employed.

Aim of
constitu-
tional
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standings.

Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character a step further. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long

¹ See p. 35, *ante*.

run give effect to the will of that power which in modern England is the true political sovereign of the state—the majority of the electors, or (to use popular though not quite accurate language) the nation. At this point comes into view the full importance of the distinction insisted upon in a former lecture¹ between “legal” sovereignty and “political” sovereignty. Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every Court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation. That the conduct of the different parts of the legislature should be determined by rules meant to secure harmony between the action of the legislative sovereign and the wishes of the political sovereign must appear probable from general considerations. If the true ruler or political sovereign of England were, as was once the case, the King, legislation might be carried out in accordance with the King’s will by one of two methods. The Crown might itself legislate, by royal proclamations, or decrees, or some other body, such as a Council of State or Parliament itself, might be allowed to legislate as long as this body conformed to the will of the

¹ See pp. 66–67, *ante*.

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Crown. If the first plan were adopted, there would be no room or need for constitutional conventions. If the second plan were adopted, the proceedings of the legislative body must inevitably be governed by some rules meant to make certain that the Acts of the legislature should not contravene the will of the Crown. The electorate is in fact the sovereign of England. It is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature. The result of this state of things would naturally be that the conduct of the legislature which (*ex hypothesi*) cannot be governed by laws should be regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation. And this is what has actually occurred. The conventions of the constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the "sovereignty of the people." That this is so becomes apparent if we examine into the effect of one or two among the leading articles of this code. The rule that the powers of the Crown must be exercised through Ministers who are members of one or other House of Parliament and who "command the confidence of the House of Commons"

really means that the elective portion of the legislature in effect, though by an indirect process, appoints the executive government; and, further, that the Crown, or the Ministry, must ultimately carry out, or at any rate not contravene, the wishes of the House of Commons. But as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation. The same thing holds good of the understanding or habit in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new Peerages¹. How, it may be said, is the "point" to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its pre-

¹ Mr. Hearn denies, as it seems to me on inadequate grounds, the existence of this rule or understanding. See Hearn, *Government of England*, p. 168.

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rogative in the creation of new Peers? The question is worth raising, because the answer to it throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation. That this is so will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body¹.

Rules as
 to dissolu-
 tion of Par-
 liament.

By far the most striking example of the real sense attaching to a whole mass of constitutional conventions is found in a particular instance, which appears at first sight to present a marked exception to the general principles of constitutional morality. A Ministry placed in a minority by a vote of the Commons have, in accordance with received doctrines, a right to demand a dissolution of Parliament. On the other hand, there are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority and to dissolve the Parliament by which the Ministry are supported. The prerogative in short of dissolution may constitutionally be so employed as to

¹ Compare Bagehot, *English Constitution*, pp. xxv-xxvii.

override the will of the representative body, or, as it is popularly called, "the People's House of Parliament." This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable or necessary whenever the wishes of the legislature are or may fairly be presumed to be different from the wishes of the nation.

This is the doctrine established by the celebrated contests of 1784 and of 1834. In each instance the King dismissed a Ministry which commanded the confidence of the House of Commons. In each case there was an appeal to the country by means of a dissolution. In 1784 the appeal resulted in a decisive verdict in favour of Pitt and his colleagues, who had been brought into office by the King against the will of the House of Commons. In 1834 the appeal led to a verdict equally decisive against Peel and Wellington, who also had been called to office by the Crown against the wishes of the House. The essential

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point to notice is that these contests each in effect admit the principle that the political sovereign whose verdict ultimately determines the right or (what in politics is much the same thing) the power of a Cabinet to retain office is the nation. Much discussion, oratorical and literary, has been expended on the question whether the dissolution of 1784 or the dissolution of 1834 was constitutional. To a certain extent the dispute is verbal, and depends upon the meaning of the word "constitutional." If we mean by it "legal," no human being can dispute that George the Third and his son could without any breach of law dissolve Parliament. If we mean "usual," no one can deny that each monarch took a very unusual step in dismissing a Ministry which commanded a majority in the House of Commons. If by "constitutional" we mean "in conformity with the fundamental principles of the constitution," we must without hesitation pronounce the conduct of George the Third constitutional, i.e. in conformity with the principles of the constitution as they are now understood. He believed that the nation did not approve of the policy pursued by the House of Commons. He was right in this belief. No modern constitutionalist will dispute that the authority of the House of Commons is derived from its representing the will of the nation, and that the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation. George the Third then made use of the prerogative of dissolution for the very purpose for which it exists.

His conduct therefore on the modern theory of the constitution was, as far as the dissolution went, in the strictest sense constitutional. But it is doubtful whether in 1784 the King's conduct was not in reality an innovation, though a salutary one, on the then prevailing doctrine. Any one who studies the questions connected with the name of John Wilkes, or the disputes between England and the American colonies, will see that George the Third and the great majority of George the Third's statesmen maintained up to 1784 a view of Parliamentary sovereignty which made Parliament in the strictest sense the sovereign power. To this theory Fox clung, both in his youth as a Tory and in his later life as a Whig. The greatness of Chatham and of his son lay in their perceiving that behind the Crown, behind the Revolution Families, behind Parliament itself, lay what Chatham calls the "great public," and what we should call the nation, and that on the will of the nation depended the authority of Parliament. In 1784 George the Third was led by the exigencies of the moment to adopt the attitude of Chatham and Pitt. He appealed (oddly enough) from the sovereignty of Parliament, of which he had always been the ardent champion, to that sovereignty of the people which he never ceased to hold in abhorrence. Whether this appeal be termed constitutional or revolutionary is now of little moment; it affirmed decisively the fundamental principle of our existing constitution that not Parliament but the nation is, politically speaking, the supreme power in the state. On this very ground

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the so-called "penal" dissolution was consistently enough denounced by Burke, who at all periods of his career was opposed to democratic innovation, and far less consistently by Fox, who blended in his political creed doctrines of absolute Parliamentary sovereignty with the essentially inconsistent dogma of the sovereignty of the people. Of William the Fourth's action it is hard to speak with decision. The dissolution of 1834 was, from a constitutional point of view, a mistake; it was justified (if at all) by the King's belief that the House of Commons did not represent the will of the nation. The belief itself turned out erroneous, but the large minority obtained by Peel and the rapid decline in the influence of the Whigs proved that though the King had formed a wrong estimate of public sentiment, he was not without reasonable ground for believing that Parliament had ceased to represent the opinion of the nation. Now if it be constitutionally right for the Crown to appeal from Parliament to the electors when the House of Commons has in reality ceased to represent its constituents, there is great difficulty in maintaining that a dissolution is unconstitutional simply because the electors do, when appealed to, support the opinions of their representatives. Admit that the electors are the political sovereign of the state, and the result appears naturally to follow that an appeal to them by means of a dissolution is constitutional whenever there is valid and reasonable ground for supposing that their Parliamentary representatives have ceased to represent their wishes. The constitutionality

therefore of the dissolution in 1834 turns at bottom upon the still disputable question of fact whether the King and his advisers had reasonable ground for supposing that the reformed House of Commons had lost the confidence of the nation. Whatever may be the answer given by historians to this enquiry, the precedents of 1784 and 1834 are decisive; they determine the principle on which the prerogative of dissolution ought to be exercised, and show that in modern times the rules as to the dissolution of Parliament are, like other conventions of the constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the state; that in short the validity of constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty.

The necessity for dissolutions stands in close connection with the existence of Parliamentary sovereignty. Where, as in the United States, no legislative assembly is a sovereign power, the right of dissolution may be dispensed with; the constitution provides security that no change of vital importance can be effected without an appeal to the people; and the change in the character of a legislative body by the re-election of the whole or of part thereof at stated periods makes it certain that in the long run the sentiment of the legislature will harmonise with the feeling of the public. Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right

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Relation of
right of
dissolution
to Parli-
amentary
sove-
reignty.

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of dissolution which enables the Crown or the Ministry to appeal from the legislature to the nation. The security indeed is not absolutely complete. Crown, Cabinet, and Parliament may conceivably favour constitutional innovations which do not approve themselves to the electors. The Septennial Act could hardly have been passed in England, the Act of Union with Ireland would not, it is often asserted, have been passed by the Irish Parliament, if in either instance a legal revolution had been necessarily preceded by an appeal to the electorate. Here, as elsewhere, the constitutionalism of America proves of a more rigid type than the constitutionalism of England. Still, under the conditions of modern political life the understandings which exist with us as to the right of dissolution afford nearly if not quite as much security for sympathy between the action of the legislature and the will of the people as do the limitations placed on legislative power by the constitutions of American States. In this instance, as in others, the principles explicitly stated in the various constitutions of the States, and in the federal Constitution itself, are impliedly involved in the working of English political institutions. The right of dissolution is the right of appeal to the people, and thus underlies all those constitutional conventions which in one way or another are intended to produce harmony between the legal and the political sovereign power.

Sanction
of constitu-
tional con-
ventions.

II. *The sanction by which the conventions of the constitution are enforced.*—What is the sanction by

which obedience to the conventions of the constitution is at bottom enforced? Lecture
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This is by far the most perplexing of the speculative questions suggested by a study of constitutional law. The problem to be solved. Let us bear in mind the dictum of Paley, that it is often far harder to make men see the existence of a difficulty, than to make them, when once the difficulty is perceived, understand its explanation, and in the first place try to make clear to ourselves what is the precise nature of a puzzle of which most students dimly recognise the existence.

Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the Courts. If a Premier were to retain office after a vote of censure passed by the House of Commons; if he were (as did Lord Palmerston under like circumstances) to dissolve or strictly speaking to get the Crown to dissolve Parliament, but, unlike Lord Palmerston, were to be again censured by the newly elected House of Commons, and then, after all this had taken place, were still to remain at the head of the government, no one could deny that such a Prime Minister had acted unconstitutionally. Yet no Court of Law would take notice of his conduct. Suppose, again, that on the passing of the Redistribution Bill by both Houses, the Queen had refused her assent to the measure, or (in popular language) had put her "veto" on it. Here there would have been a gross violation of usage, but the matter could not by any proceeding known to English law be brought before

Lecture the judges. Take another instance. Suppose that
VIII. Parliament were for more than a year not summoned
 for the despatch of business. This would be a course
 of proceeding of the most unconstitutional character.
 Yet there is no Court in the land before which one
 could go with the complaint that Parliament had not
 been assembled¹. Still the conventional rules of the
 constitution, though not laws, are (as it is constantly
 repeated) nearly if not quite as binding as laws.
 They are, or appear to be, respected quite as much
 as most statutory enactments, and more than many.
 The puzzle is to see what is the force which habitually
 compels obedience to rules which have not behind
 them the coercive power of the Courts.

Partial
 answer,
 that con-
 stitutional
 under-
 standings
 often dis-
 obeyed.

The difficulty of the problem before us cannot
 indeed be got rid of but may be shifted and a good
 deal lessened by observing that the invariable obe-
 dience which is assumed to be paid to constitutional
 understandings is itself more or less fictitious. The
 special articles of the conventional code are fre-
 quently disobeyed; a Minister sometimes refuses
 to retire when (as his opponents allege) he ought
 constitutionally to resign office. Not many years
 have passed since the Opposition of the day argued,
 if not convincingly yet with a good deal of plausi-
 bility, that the Ministry had violated a rule em-
 bodied in the Bill of Rights; in 1784 the House of

¹ See 4 Edward III, c. 14; 16 Car. II, c. 1; and 1 William & Mary, Sess. 2, c. 2. Compare these with the repealed 16 Car. I, c. 1, which would have made the assembling of Parliament a matter of law.

Commons maintained, not only by argument but by repeated votes, that Pitt had deliberately defied more than one constitutional precept, and the Whigs of 1834 brought a like charge against Wellington and Peel. Nor is it doubtful that any one who searches through the pages of Hansard will find other instances in which constitutional maxims of long standing and high repute have been set at nought. The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology which treats the successful violation of a constitutional rule as a proof that the maxim was not in reality part of the constitution. If a habit or precept which can be set at nought is thereby shown not to be a portion of constitutional morality, it naturally follows that no true constitutional rule is ever disobeyed.

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Yet though the obedience supposed to be rendered to the separate understandings or maxims of public life is to a certain extent fictitious, the assertion that they have nearly the force of law is not without meaning. Some few of the conventions of the constitution are rigorously obeyed. Parliament, for example, is summoned year by year with as much regularity as though its annual meeting were provided for by a law of nature; and (what is of more consequence) though particular understandings are of uncertain obligation, neither the Crown nor any servant of the Crown ever refuses obedience to the grand principle which, as we have seen, underlies all the conventional precepts of the constitution, namely,

But principle of conformity to will of the nation always obeyed.

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that government must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through that House. This principle is not a law; it is not to be found in the statute-book, nor is it a maxim of common law; it will not be enforced by any ordinary judicial body. Why then has the principle itself, as also have certain conventions or understandings which are closely connected with it, the force of law? This, when the matter is reduced to its simplest form, is the puzzle with which we have to deal. It sorely needs a solution. Many writers of authority however, chiefly because they do not approach the constitution from its legal side, hardly recognise the full force of the difficulty which requires to be disposed of. They either pass it by, or else apparently acquiesce in one of two answers, each of which contains an element of truth, but neither of which fully removes the perplexities of any enquirer who is determined not to be put off with mere words.

Insuffi-
cient
answers.
Impeach-
ment.

A reply more often suggested than formulated in so many words, is that obedience to the conventions of the constitution is ultimately enforced by the fear of impeachment. If this view were tenable, these conventions, it should be remarked, would not be "understandings" at all, but "laws" in the truest sense of that term, and their sole peculiarity would lie in their being laws the breach of which could be punished only by one extraordinary tribunal, namely the High Court of Parliament. But though it may well be

conceded—and the fact is one of great importance—that the habit of obedience to the constitution was originally generated and confirmed by impeachments, yet there are insuperable difficulties to entertaining the belief that the dread of the Tower and the block exerts any appreciable influence over the conduct of modern statesmen. No impeachment for violations of the constitution (since for the present purpose we may leave out of account such proceedings as those taken against Lord Macclesfield, Warren Hastings, and Lord Melville) has occurred for more than a century and a half. The process which is supposed to ensure Mr. Gladstone's or Lord Salisbury's retiring from office when placed in a hopeless minority is obsolete. The arm by which attacks on freedom were once repelled has grown rusty by disuse; it is laid aside among the antiquities of the constitution, nor will it ever, we may anticipate, be drawn again from its scabbard. For in truth impeachment as a means for enforcing the observance of constitutional morality always laboured under one grave defect. The possibility of its use suggested, if it did not stimulate, one most important violation of political usage; a Minister who dreaded impeachment would, since Parliament was the only Court before which he could be impeached, naturally advise the Crown not to convene Parliament. There is something like a contradiction in terms in saying that a Minister is compelled to advise the meeting of Parliament by the dread of impeachment if Parliament should assemble. If the fear of Parliamentary punishment

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were the only difficulty in the way of violating the constitution, we may be sure that a bold party leader would at the present day, as has been done in former centuries, sometimes suggest that Parliament should not meet.

Power of
 public
 opinion.

A second and current answer to the question under consideration is that obedience to the conventional precepts of the constitution is ensured by the force of public opinion. Now that this assertion is in one sense true stands past dispute. The nation expects that Parliament shall be convened annually; the nation expects that a Minister who cannot retain the confidence of the House of Commons shall give up his place, and no Premier even dreams of disappointing these expectations. The assertion therefore that public opinion gives validity to the received precepts for the conduct of public life is true. Its defect is that if taken without further explanation it amounts to little else than a re-statement of the very problem which it is meant to solve. For the question to be answered is at bottom, why is it that public opinion is apparently at least a sufficient sanction to compel obedience to the conventions of the constitution? and it is no answer to this enquiry to say that these conventions are enforced by public opinion. Let it also be noted that many rules of conduct which are fully supported by the opinion of the public are violated every day of the year. Public opinion enjoins the performance of promises and condemns the commission of crimes, but the settled conviction of the nation that promises

ought to be kept does not hinder merchants from going into the *Gazette*, nor does the universal execration of the villain who sheds man's blood prevent the commission of murders. That public opinion does to a certain extent check extravagance and criminality is of course true, but the operation of opinion is in this case assisted by the law, or in the last resort by the physical power at the disposal of the state. The limited effect of public opinion when aided by the police hardly explains the immense effect of opinion in enforcing rules which may be violated without any risk of the offender being brought before the Courts. To contend that the understandings of the constitution derive their coercive power solely from the approval of the public, is very like maintaining the kindred doctrine that the conventions of international law are kept alive solely by moral force. Every one except a few dreamers perceives that the respect paid to international morality is due in great measure, not to moral force, but to the physical force in the shape of armies and navies, by which the commands of general opinion are in many cases supported; and it is difficult not to suspect that in England at least the conventions of the constitution are supported and enforced by something beyond or in addition to the public approval.

What then is this "something"? My answer is, that it is nothing else than the force of the law. The dread of impeachment may have established, and public opinion certainly adds influence to the prevailing dogmas of political ethics. But the sanction

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which constrains the boldest political adventurer to obey the fundamental principles of the constitution, and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.

This is the true answer to the enquiry which I have raised, but it is an answer which undoubtedly requires both explanation and defence.

Explan-
 ation.

The meaning of the statement that the received precepts of the constitution are supported by the law of the land, and the grounds on which that statement is based, can be most easily made apparent by considering what would be the legal results which would inevitably ensue from the violation of some indisputable constitutional maxim.

Yearly
 meeting
 of Parlia-
 ment.

No rule is better established than that Parliament must assemble at least once a year. This maxim, as before pointed out, is certainly not derived from the common law, and is not based upon any statutory enactment. Now suppose that Parliament were prorogued once and again for more than a year, so that for two years no Parliament sat at Westminster. Here we have a distinct breach of a constitutional practice or understanding, but we have no violation of law. What however would be the consequences which would ensue? They would be, speaking generally, that any Ministry who at the present day sanctioned or tolerated this violation of the constitution, and every person connected with the government, would

immediately come into conflict with the law of the land. Lecture
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A moment's reflection shows that this would be so.

The Mutiny Act would in the first place expire, but on the expiration of the Mutiny Act all means of controlling the army without a breach of law would cease. Either the army must be discharged, in which case the means of maintaining law and order would come to an end, or the army must be kept up and discipline must be maintained without legal authority for its maintenance. If this alternative were adopted, every person, from the Commander-in-Chief downwards, who took part in the control of the army, and indeed every soldier who carried out the commands of his superiors, would find that not a day passed without his committing or sanctioning acts which would render him liable to stand as a criminal in the dock. Then, again, though most of the taxes¹ would still come into the Exchequer, large portions of the revenue would cease to be legally due and could not be legally collected, whilst every official who acted as collector would expose himself to actions or prosecutions. The part moreover of the revenue which came in could not be legally applied to the purposes of the government. If the Ministry laid hold of the revenue they would find it difficult to avoid breaches of

¹ The yearly revenue for 1883-84 amounted to £87,205,184; of this, in rough numbers, about £14,000,000 depended upon annual Acts. But if Parliament had never met, about £73,000,000 would, being imposed by permanent Acts, have continued to come in annually into the Exchequer. See Martin, *Statesman's Year Book*, 1885, p. 226, and conf. pp. 318-321, *ante*.

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definite laws which would expose them to appear before the Courts. Suppose however that the Cabinet were willing to defy the law. Their criminal daring would not suffice for its purpose; they could not get hold of the revenue without the connivance or aid of a large number of persons, some of them indeed officials, but some of them such as the Comptroller General, the Governors of the Bank of England, and the like unconnected with the administration. None of them, it should be noted, could receive from the government or the Crown any protection against legal liability, and any of them the moment he employed force would be exposed to resistance supported by the Courts. For the law (it should always be borne in mind) operates in two different ways. It inflicts penalties and punishment upon law-breakers, and (what is of equal consequence) it enables law-respecting citizens to refuse obedience to illegal commands. It legalises passive resistance. The efficacy of such legal opposition is immensely increased by the non-existence in England of anything resembling the *droit administratif* of France¹, or of that wide discretionary authority which is possessed by every continental government. The result is, that an administration which attempted to dispense with the annual meeting of Parliament could not ensure the obedience even of its own officials, and unless prepared distinctly to violate the undoubted law of the land would find itself not only opposed but helpless.

The rule therefore, that Parliament must meet

¹ See pp. 182-210, *ante*.

once a year, though in strictness a constitutional convention which is not a law and will not be enforced by the Courts, turns out nevertheless to be an understanding which cannot be neglected without involving hundreds of persons, many of whom are by no means specially amenable to government influence, in distinct acts of illegality cognizable by the tribunals of the country. This convention therefore of the constitution is in reality based upon and secured by the law of the land.

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This no doubt is a particularly plain case. I have examined it fully, both because it is a particularly plain instance, and because the full understanding of it affords the clue which guides us to the principle on which really rests such coercive force as is possessed by the conventions of the constitution.

To see that this is so let us consider for a moment the effect of disobedience by the government to one of the most purely conventional among the maxims of constitutional morality,—the rule, that is to say, that a Ministry ought to retire on a vote that they no longer possess the confidence of the House of Commons. Suppose that a Ministry, after the passing of such a vote, were to act in 1885 as Pitt acted in 1783, and hold office in the face of the censure passed by the House. There would clearly be a *primá facie* breach of constitutional ethics. What must ensue is clear. If the Ministry wished to keep within the constitution they would announce their intention of appealing to the constituencies, and the House would probably assist in hurrying on a disso-

Resignation of Ministry which has lost confidence of the House of Commons.

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lution. All breach of law would be avoided, but the reason of this would be that the conduct of the Cabinet would not be a breach of constitutional morality; for the true rule of the constitution admittedly is, not that a Ministry cannot keep office when censured by the House of Commons, but that under such circumstances a Ministry ought not to remain in office unless they can by an appeal to the country obtain the election of a House which will support the government. Suppose then that under the circumstances I have imagined, the Ministry either would not recommend a dissolution of Parliament, or, having dissolved Parliament and being again censured by the newly elected House of Commons, would not resign office. It would, under this state of things, be as clear as day that the understandings of the constitution had been violated. It is however equally clear that the House would have in their own hands the means of ultimately forcing the Ministry either to respect the constitution or to violate the law. Sooner or later the moment would come for passing the Mutiny Act or the Appropriation Act, and the House by refusing to pass either of these enactments would involve the Ministry in all the inextricable embarrassments which (as I have already pointed out) immediately follow upon the omission to convene Parliament for more than a year. The breach therefore of a purely conventional rule, of a maxim utterly unknown and indeed opposed to the theory of English law, ultimately entails upon those who break it direct conflict with the undoubted law of the land. We

have therefore a right to assert that the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not law, but in so far as they really possess binding force they derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker.

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It is worth while to consider one or two objections which may be urged with more or less plausibility against the doctrine that the obligatory force of constitutional morality is derived from the law itself.

Objections.

The government (it is sometimes suggested) may by the use of actual force carry through a *coup-d'état* and defy the law of the land. This suggestion is true, but is quite irrelevant. No constitution can be absolutely safe from revolution or from a *coup-d'état*; but to show that the laws may be defied by violence does not touch or invalidate the statement that the understandings of the constitution are based upon the law. They have certainly no more force than the law itself. A Minister who, like the French President in 1851, could override the law could of course overthrow the constitution. The theory propounded aims only at proving that when constitutional understandings have nearly the force of law they derive their power from the fact that they cannot be broken without a breach of law. No one is concerned to show, what indeed never can be shown, that the law can never be defied, or the constitution never be overthrown.

Law may
be over-
powered
by force.

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It should further be observed that the admitted sovereignty of Parliament tends to prevent violent attacks on the constitution. Revolutionists or conspirators generally believe themselves to be supported by the majority of the nation, and, when they succeed, this belief is in general well founded. But in modern England, a party, however violent, who count on the sympathy of the people, can accomplish by obtaining a Parliamentary majority all that could be gained by the success of a revolution. When a spirit of reaction or of innovation prevails throughout the country, a reactionary or revolutionary policy is enforced by Parliament without any party needing to make use of violence. The oppressive legislation of the Restoration in the seventeenth century, and the anti-revolutionary legislation of the Tories from the outbreak of the Revolution till the end of George the Third's reign, saved the constitution from attack. A change of spirit averted a change of form; its flexibility proved its strength¹.

Parliament has never refused to pass Mutiny Act.

If the maintenance of political morality, it may with some plausibility be asked, really depends on the right of Parliament to refuse to pass laws such as the annual Mutiny Act, which are necessary for the maintenance of order, and indeed for the very existence of society, how does it happen that no English Parliament has ever employed this extreme method of enforcing obedience to the constitution?

The true answer to the objection thus raised

¹ See pp. 114-119, *ante*.

appears to be that the observance of the main and the most essential of all constitutional rules, the rule that is to say requiring the annual meeting of Parliament, is ensured without any necessity for Parliamentary action by the temporary character of the Mutiny Act, and that the power of Parliament to compel obedience to its wishes by refusing to pass the Act is so complete that the mere existence of the power has made its use unnecessary. In matter of fact, no Ministry has since the Revolution of 1689 ever defied the House of Commons unless the Cabinet could confide in the support of the country, or, in other words, could count on the election of a House which would support the policy of the government. To this we must add, that in the rare instances in which a Minister has defied the House, the refusal to pass the Mutiny Act has been threatened, and contemplated. Pitt's victory over the Coalition is constantly cited as a proof that Parliament cannot refuse to grant supplies or to pass an Act necessary for the discipline of the army. Yet any one who studies with care the great "Case of the Coalition" will see that it does not support the dogma for which it is quoted. Fox and his friends did threaten and did intend to press to the very utmost all the legal powers of the House of Commons. They failed to carry out their intention solely because they at last perceived that the majority of the House did not represent the will of the country. What the "leading case" shows is, that the Cabinet, when supported by the Crown and therefore possessing the power

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of dissolution, can defy the will of a House of Commons if the House is not supported by the electors. Here we come round to the fundamental dogma of modern constitutionalism; the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation. This is the conclusion in reality established by the events of 1784. Pitt overrode the customs because he adhered to the principles of the constitution. He broke through the received constitutional understandings without damage to his power or reputation; he might in all probability have in case of necessity broken the law itself with impunity. For had the Coalition pressed their legal rights to an extreme length, the new Parliament of 1784 would in all likelihood have passed an Act of Indemnity for illegalities necessitated or excused by the attempt of an unpopular faction to drive from power a Minister supported by the Crown, by the Peers, and by the nation. However this may be, the celebrated conflict between Pitt and Fox lends no countenance to the idea that a House of Commons supported by the country would not enforce the morality of the constitution by placing before any Minister who defied its precepts the alternative of resignation or revolution.

Sub-
ordinate
enquiries.

III. *Answers to subordinate enquiries.*—A clear perception of the true relation between the conventions of the constitution and the law of the land supplies an answer to more than one subordinate question which has perplexed students and commentators.

How is it that the ancient methods of enforcing Parliamentary authority, such as impeachment, the formal refusal of supplies, and the like, have fallen into disuse? Lecture VIII.

Why has impeachment gone out of use?

The answer is, that they are disused because ultimate obedience to the underlying principle of all modern constitutionalism, which is nothing else than the principle of obedience to the will of the nation as expressed through Parliament, is so closely bound up with the law of the land that it can hardly be violated without a breach of the ordinary law. Hence the extraordinary remedies which were once necessary for enforcing the deliberate will of the nation having become unnecessary, have fallen into desuetude. If they are not altogether abolished, the cause lies partly in the conservatism of the English people, and partly in the valid consideration that crimes may still be occasionally committed for which the ordinary law of the land hardly affords due punishment, and which therefore may well be dealt with by the High Court of Parliament.

Why is it that the understandings of the constitution have about them a singular element of vagueness and variability? Why are constitutional understandings variable?

Why is it, to take definite instances of this uncertainty and changeableness, that no one can define with absolute precision the circumstances under which a Prime Minister ought to retire from office? Why is it that no one can fix the exact point at which resistance of the House of Lords to the will of the House of Commons becomes

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unconstitutional? and how does it happen that the Peers could at one time arrest legislation in a way which now would be generally held to involve a distinct breach of constitutional morality? what is the reason why no one can describe with precision the limits to the influence on the conduct of public affairs which may rightly be exerted by the reigning monarch, and how does it happen that George the Third and even George the Fourth, each made his personal will or caprice tell on the policy of the nation in a very different way and degree from that in which Queen Victoria has ever attempted to exercise personal influence over matters of state?

The answer in general terms to these and the like enquiries is, that the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament. The conventional code of political morality is, as already pointed out, merely a body of maxims meant to secure respect for this principle. Of these maxims some indeed, such for example as the rule that Parliament must be convoked at least once a year, are so closely connected with the respect due to Parliamentary or national authority, that they will never be neglected by any one who is not prepared to play the part of a revolutionist; such rules have received the undoubted stamp of national approval, and their observance is secured by the fact that whoever breaks or aids in breaking them will almost immediately find himself

involved in a breach of law. Other constitutional maxims stand in a very different position. Their maintenance up to a certain point tends to secure the supremacy of Parliament, but they are themselves vague, and no one can say to what extent the will of Parliament or the nation requires their rigid observance; they therefore obtain only a varying and indefinite amount of obedience.

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Thus the rule that a Ministry who have lost the confidence of the House of Commons should retire from office is plain enough, and any permanent neglect of the spirit of this rule would be absolutely inconsistent with Parliamentary government, and (as already pointed out¹) would finally involve the Minister who broke the rule in acts of undoubted illegality. But when you come to enquire what are the signs by which you are to know that the House has withdrawn its confidence from a Ministry, whether for example the defeat of an important Ministerial measure or the smallness of a Ministerial majority are a certain proof that a Ministry ought to retire, you ask a question which admits of no absolute reply². All that can be said is, that a Cabinet ought not to continue in power (subject of course to the one exception on which I have before dwelt³) after the expression by the House of Commons of a wish for the

With-
drawal of
confidence
by House
of Com-
mons.

¹ See pp. 377-379, *ante*.

² See Hearn, *Government of England*, chap. ix. pp. 210-283, for an attempt to determine the circumstances under which a Ministry ought or ought not to keep office.

³ See pp. 360-365, *ante*.

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Cabinet's retirement. Of course therefore a Minister or a Ministry must resign if the House passes a vote of want of confidence. But there are a hundred signs of Parliamentary disapproval which, according to circumstances, either may or may not be a sufficient notice that a Minister ought to give up office. The essential thing is that the Ministry should obey the House as representing the nation. But the question whether the House of Commons has or has not indirectly intimated its will that a Cabinet should give up office is not a matter as to which any definite principle can be laid down. The difficulty which now exists in settling the point at which a Premier and his colleagues are bound to hold that they have lost the confidence of the House is exactly analogous to the difficulty which often perplexed statesmen of the last century, of determining the point at which a Minister was bound to hold he had lost the then essential confidence of the King. The ridiculous efforts of the Duke of Newcastle to remain at the head of the Treasury, in spite of the broadest hints from Lord Bute that the time had come for resignation, are exactly analogous to the undignified persistency with which later Cabinets have occasionally clung to office in the face of intimations that the House desired a change of government. As long as a master does not directly dismiss a servant, the question whether the employer's conduct betrays a wish that the servant should give notice must be an enquiry giving rise to doubt and discussion. And if there be sometimes a difficulty in determining what

is the will of Parliament, it must often of necessity be still more difficult to determine what is the will of the nation, or, in other words, of the majority of the electors. Lecture
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The general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons is one of the best established maxims of modern constitutional ethics. But if any enquirer asks how the point at which the Peers are to give way is to be determined, no answer which even approximates to the truth can be given, except the very vague reply that the Upper House must give way whenever it is clearly proved that the will of the House of Commons represents the deliberate will of the nation. The nature of the proof differs under different circumstances. When once the true state of the case is perceived, one can easily understand what on any cut and dried theory of the constitution is very difficult to explain, the relation occupied by modern Cabinets towards the House of Lords. It is certain that for more than half a century Ministries have constantly existed which did not command the confidence of the Upper House, and that such Ministries have, without meeting much opposition on the part of the Peers, in the main carried out a policy of which the Peers did not approve. It is also certain that while the Peers have been forced to pass many bills which they disliked, they have often exercised large though very varying control over the course of legislation. Between 1834 and 1840 the Upper House, under the

When
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guidance of Lord Lyndhurst, repeatedly and with success opposed Ministerial measures which had passed the House of Commons. For many years Jews were kept out of Parliament simply because the Lords were not prepared to admit them. If you search for the real cause of this state of things, you will find that it was nothing else than the fact, constantly concealed under the misleading rhetoric of party warfare, that on the matters in question the electors were not prepared to support the Cabinet in taking the steps necessary to compel the submission of the House of Lords. On any matter upon which the electors are firmly resolved a Premier, who is in effect the representative of the House of Commons, has the means of coercion, namely by the creation of Peers. In a country indeed like England, things are rarely carried to this extreme length. The knowledge that a power can be exercised constantly prevents its being actually put in force. This is so even in private life; most men pay their debts without being driven into Court, but it were absurd to suppose that the possible compulsion of the Courts and the sheriff has not a good deal to do with regularity in the payment of debts. The acquiescence of the Peers in measures which the Peers do not approve arises at bottom from the fact that the nation under the present constitution possesses the power of enforcing, through very cumbersome machinery, the submission of the Peers to the conventional rule that the wishes of the House of Lords must finally give way to the de-

cisions of the House of Commons. But the rule itself is vague, and the degree of obedience which it obtains is varying, because the will of the nation is often not clearly expressed, and further, in this as in other matters, is itself liable to variation. If the smoothness with which the constitutional arrangements of modern England work should, as it often does, conceal from us the force by which the machinery of the constitution is kept under, we may with advantage consult the experience of English colonies. No better example can be given of the methods by which a Representative Chamber attempts in the last resort to compel the obedience of an Upper House than is afforded by the varying phases of the conflict which raged in Victoria during 1878 and 1879 between the two Houses of the Legislature. There the Lower House attempted to enforce upon the Council the passing of measures which the Upper House did not approve, by in effect inserting the substance of a rejected bill in the Appropriation Bill. The Council in turn threw out the Appropriation Bill. The Ministry thereupon dismissed officials, magistrates, county court judges, and others, whom they had no longer the means to pay, and attempted to obtain payments out of the Treasury on the strength of resolutions passed solely by the Lower House. At this point however the Ministry came into conflict with an Act of Parliament, that is with the law of the land. The contest continued under different forms until a change in public opinion finally led to the

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election of a Lower House which could act with the Council. With the result of the contest we are not concerned. Three points however should be noticed. The conflict was ultimately terminated in accordance with the expressed will of the electors; each party during its course put in force constitutional powers hardly ever in practice exerted in England; as the Council was elective, the Ministry did not possess any means of producing harmony between the two Houses by increasing the number of the Upper House. It is certain that if the Governor could have nominated members of the Council, the Upper House would have yielded to the will of the Lower, in the same way in which the Peers always in the last resort bow to the will of the House of Commons.

Why is the personal influence of the Crown uncertain?

How is it, again, that all the understandings which are supposed to regulate the personal relation of the Crown to the actual work of government are marked by the utmost vagueness and uncertainty?

The matter is, to a certain extent at any rate, explained by the same train of thought as that which we have followed out in regard to the relation between the House of Lords and the Ministry. The revelations of political memoirs and the observation of modern public life make quite clear two points, both of which are curiously concealed under the mass of antiquated formulas which hide from view the real working of our institutions. The first is, that while every act of state is done in the name of the Crown,

the real executive government of England is the Cabinet. The second is, that though the Crown has no real concern in a vast number of the transactions which take place under the Royal name, no one of Queen Victoria's predecessors, nor it may be presumed the Queen herself, has ever acted upon or affected to act upon the maxim originated by Thiers, that "the King reigns but does not govern." George the Third took a leading part in the work of administration; his two sons, each in different degrees and in different ways, made their personal will and predilections tell on the government of the country. No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the Queen has under the constitution very considerable influence. The strangeness of this state of things is, or rather would be to any one who had not been accustomed from his youth to the mystery and formalism of English constitutionalism, that the rules or customs which regulate the personal action of the Crown are utterly vague and undefined. The reason of this will however be obvious to any one who has followed these lectures. The personal influence of the Crown exists, not because acts of state are done formally in the Crown's name, but because neither the legal sovereign power, namely Parliament, nor the political sovereign, namely the nation, wishes that the reigning monarch should be without personal weight in the government of the country. The customs or understandings which regulate or control the exercise of

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the Queen's personal influence are vague and indefinite, both because statesmen feel that the matter is one hardly to be dealt with by precise rules, and because no human being knows how far and to what extent the nation wishes that the voice of the reigning monarch should command attention. All that can be asserted with certainty is, that on this matter the practice of the Crown and the wishes of the nation have from time to time varied. George the Third made no use of the so-called veto which had been used by William the Third; but he more than once insisted upon his will being obeyed in matters of the highest importance. None of his successors have after the manner of George the Third made their personal will decisive as to general measures of policy. In small things as much as in great one can discern a tendency to transfer to the Cabinet powers once actually exercised by the King. The scene between Jeannie Deans and Queen Caroline is a true picture of a scene which might have taken place under George the Second; George the Third's firmness secured the execution of Dr. Dodd. At the present day the right of pardon belongs in fact to the Home Secretary. A modern Jeannie Deans would be referred to the Home Office; the question whether a popular preacher should pay the penalty of his crimes would now, with no great advantage to the country, be answered by the Cabinet.

The effect
of sur-
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of Crown.

What, again, is the real effect produced by the survival of prerogative powers?

Here we must distinguish two different things, namely, the way in which the existence of the prerogative affects the personal influence of the Queen, and the way in which it affects the power of the executive government.

The fact that all important acts of state are done in the name of the Queen and in most cases with the cognizance of the Queen, and that many of these acts, such for example as the appointment of judges or the creation of bishops, or the conduct of negotiations with foreign powers and the like, are exempt from the direct control or supervision of Parliament, gives the reigning monarch an opportunity for exercising great influence on the conduct of affairs; and Bagehot has marked out, with his usual subtlety, the mode in which the mere necessity under which Ministers are placed of consulting with and giving information to the Queen secures a wide sphere for the exercise of legitimate influence by a constitutional ruler.

But though it were a great error to underrate the extent to which the formal authority of the Crown confers real power upon the Queen, the far more important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised and constantly are exercised free from Parliamentary control. This is especially the case in all foreign affairs. Parliament may censure a Ministry for misconduct in regard to the foreign policy of the country. But a treaty

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made by the Crown, or in fact by the Cabinet, is valid without the authority or sanction of Parliament; and it is even open to question whether the treaty-making power of the executive might not in some cases override the law of the land¹. However this may be, it is not Parliament, but the Ministry, who direct the diplomacy of the nation, and virtually decide all questions of peace or war. The founders of the American Union showed their full appreciation of the latitude left to the executive government under the English constitution by one of the most remarkable of their innovations upon it. They lodged the treaty-making power in the hands, not of the President, but of the President and the Senate; and further gave to the Senate a right of veto on Presidential appointments to office. These arrangements supply a valuable illustration of the way in which restrictions on the prerogative become restrictions on the discretionary authority of the executive. Were the House of Lords to have conferred upon it by statute the rights of the Senate, the change in our institutions would be described with technical correctness as the limitation of the prerogative of the Crown as regards the making of treaties and of official appointments. But the true effect of the constitutional innovation would be to place a legal check on the discretionary powers of the Cabinet.

The survival of the prerogative, conferring as it does wide discretionary authority upon the Cabinet,

¹ See the *Parlement Belge*, 4 P. D. 129; 5 P. D. (C. A.) 197.

involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the state. When the King was the chief member of the sovereign body Ministers were in fact no less than in name the King's servants. At periods of our history when the Peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the Peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out or tend to carry out the will of the House. When however the Cabinet cannot act except by means of legislation, other considerations come into play. A law requires the sanction of the House of Lords. No government can increase its statutory authority without obtaining the sanction of the Upper Chamber. Thus an Act of Parliament when passed represents, not the absolute wishes of the House of Commons, but these wishes as modified by the influence of the House of Lords. The Peers no doubt will in the long run conform to the wishes of the electorate. But the Peers may think that the electors will disapprove of or at any rate be indifferent to a bill which meets with the approval of the House of Commons. Hence while every action of the Cabinet which is done in virtue of the preroga-

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tive is in fact though not in name under the direct control of the representative chamber, all powers which can be exercised only in virtue of a statute are more or less controlled in their creation by the will of the House of Lords; they are further controlled in their exercise by the interference of the Courts. One example, taken from the history of recent years, illustrates the practical effect of this difference¹. In 1872 the Ministry of the day carried a bill through the House of Commons abolishing the system of purchase in the army. The bill was rejected by the Lords: the Cabinet then discovered that purchase could be abolished by Royal warrant, i.e. in virtue of the prerogative. The system was then and there abolished. The change, it will probably be conceded, met with the approval, not only of the Commons, but of the electors. But it will equally be conceded that had the alteration required statutory authority the system of purchase might have continued in force up to the present day. The existence of the prerogative enabled the Ministry in this particular instance to give immediate effect to the wishes of the electors, and this is the result which under the circumstances of modern politics the survival of the prerogative will in every instance produce. The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons

¹ On this subject there are remarks worth noting in Stephen's *Life of Fawcett*, pp. 271, 272.

becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors.

“I said in this book that it would very much surprise people if they were only told how many things the Queen could do without consulting Parliament, and it certainly has so proved, for when the Queen abolished purchase in the army by an act of prerogative (after the Lords had rejected the bill for doing so), there was a great and general astonishment.

“But this is nothing to what the Queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General commanding-in-chief downwards; she could dismiss all the sailors too; she could sell off all our ships-of-war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a ‘university;’ she could

Lecture “dismiss most of the civil servants; she could pardon
VIII. “all offenders. In a word, the Queen could by
 “prerogative upset all the action of civil govern-
 “ment within the government, could disgrace the
 “nation by a bad peace or war, and could, by dis-
 “banding our forces, whether land or sea, leave us
 “defenceless against foreign nations¹.”

If government by Parliament is ever transformed into government by the House of Commons, the transformation will, it may be conjectured, be effected by use of the prerogatives of the Crown.

Conclusion. Let us cast back a glance for a moment at the results which we have obtained by surveying the English constitution from its legal side.

The constitution when thus looked at ceases to appear that “sort of maze²” which I termed it in my first lecture; it is seen to consist of two different parts; the one part is made up of understandings, customs, or conventions which, not being enforced by the Courts, are in no true sense of the word laws; the other part is made up of rules which are enforced by the Courts, and which, whether embodied in statutes or not, are laws in the strictest sense of the term, and make up the true law of the constitution.

This law of the constitution is, we have further found, in spite of all appearances to the contrary, the true foundation on which the English polity rests, and it gives in truth even to the conventional

¹ Bagehot, *English Constitution*, Introd. pp. xxxv and xxxvi.

² See p. 7, *ante*.

element of constitutional law such force as it really possesses¹. Lecture
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The law of the constitution, again, is in all its branches the result of two guiding principles, which have been gradually worked out by the more or less conscious efforts of generations of English statesmen and lawyers. The first of these principles is the sovereignty of Parliament, which means in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation². This curious process, by which the personal

¹ See pp. 366-382, *ante*.

² A few words may be in place as to the method by which this transfer was accomplished. The leaders of the English people in their contests with royal power never attempted, except in periods of revolutionary violence, to destroy or dissipate the authority of the Crown as head of the state. Their policy, continued through centuries, was to leave the power of the King untouched, but to bind down the action of the Crown to recognised modes of procedure which, if observed, would secure first the supremacy of the law, and ultimately the sovereignty of the nation. The King was acknowledged to be supreme judge, but it was early established that he could act judicially only in and through his Courts; the King was recognised as the only legislator, but he could enact no valid law except as King in Parliament; the King held in his hands all the prerogatives of the executive government, but as was after long struggles determined, he could legally exercise these prerogatives only through Ministers who were members of his Council, and incurred responsibility for his acts. Thus the personal will of the King was gradually identified with and transformed into the lawful and legally expressed will of the Crown. This transformation was based upon the constant use of fictions. It bears on its face that it was the invention of lawyers. If proof of this were wanted we should find it in the fact that the "Parliaments" of France tried to use towards the end of the eighteenth century against the fully developed despotism of the French

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authority of the King has been turned into the sovereignty of the King in Parliament, has had two effects: it has put an end to the arbitrary powers of the monarch; it has preserved intact and undiminished the supreme authority of the state. The second of these principles is what I have called the "rule of law," or the supremacy throughout all our institutions of the ordinary law of the land. This rule of law, which means at bottom the right of the Courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions. If the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the substance of our constitution. The English constitution in short, which appears when looked at from one point of view to be a mere collection of practices or customs, turns out, when examined in its legal aspect, to be more truly than any other polity in the world, except the Constitution of the United States¹, based on the law of the land.

monarchy fictions which recall the arts by which at a far earlier period English constitutionalists had nominally checked the encroachments while really diminishing the sphere of the royal prerogative. Legal statesmanship bears everywhere the same character.

¹ It is well worth notice that the Constitution of the United States as it actually exists, rests to a very considerable extent on judge-made law. Chief Justice Marshall, as the "Expounder of the Constitution," may almost be reckoned among the builders if not the founders of the American polity. See for a collection of his judgments on constitutional questions *The Writings of John Marshall, late Chief Justice of the United States, on the Federal Constitution.*

When we see what are the principles which truly underlie the English polity, we also perceive how rarely they have been followed by statesmen who more or less intended to copy the constitution of England. The sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern the inflexible or rigid constitutions existing in by far the most important of the countries which have adopted any scheme of representative government. The "rule of law" is a conception which in the United States indeed has received a development beyond that which it has reached in England; but it is an idea not so much unknown to as deliberately rejected by the constitution-makers of France, and of other continental countries which have followed French guidance. For the supremacy of the law of the land means in the last resort the right of the judges to control the executive government, whilst the *séparation des pouvoirs* means, as construed by Frenchmen, the right of the government to control the judges. The authority of the Courts of Law as understood in England can therefore hardly co-exist with the system of *droit administratif* as it prevails in France. We may perhaps even go so far as to say that English legalism is hardly consistent with the existence of an official body which bears any true resemblance to what foreigners call "the administration." To say this is not to assert that foreign forms of government are necessarily inferior to the English constitution, or unsuited for a civilized and free people. All that necessarily results from an

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VIII. analysis of our institutions and a comparison of them with the institutions of foreign countries is that the English constitution is still marked far more deeply than is generally supposed by peculiar features, and that these peculiar characteristics may be summed up in the combination of Parliamentary Sovereignty with the Rule of Law.

THE END.

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