THE STATUTE OF WESTMINSTER AND DOMINION STATUS

BY

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PREFACE TO SECOND EDITION

IN this edition I have attempted a thorough revision of the text in order to bring the book up to date, to remove mistakes, and to clarify the exposition. But I have not tried to discuss those important developments in Dominion Status which this war has brought. It is too difficult to estimate them rightly at this time, and it may be assumed that there are more to come.

The principal change I have made is a restatement of my view about the effect of section 2 of the Statute. As the numbering of the pages in this edition is the same as in the first, it may help if I say that the more important alterations occur on the following:

2, 16, 22, 35–7, 43, 53, 63–4, 86, 94, 117, 119–20, 121, 125–6, 129, 131, 150, 152, 155–6, 160, 162–3, 180–2, 188, 190–2, 200, 206, 216, 220, 229, 238, 247, 249–50, 254, 266–9, 274–6, 298, and in notes to Appendixes I and IV.

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PREFACE TO THE FIRST EDITION

IN the following pages I do not attempt an exhaustive examination of the Statute of Westminster, 1931, or of Dominion Status. I confine myself instead to the limited task of explaining what are the effects of the Statute of Westminster upon Dominion Status. These effects have often been exaggerated and are occasionally the subject of controversy. This is due partly to the obscurity or ambiguity of certain provisions of the Statute itself, but more, I think, to a failure to appreciate the precise and limited function which the Statute was intended to perform in the process of defining Dominion Status. It has seemed worth while, therefore, to attempt some explanation of this function, and of the actual terms in which it was carried out in the Statute.

It follows from my limitation of the inquiry that some important aspects of the Statute and of Dominion Status receive in this book only scant treatment or no treatment at all. In particular it has been necessary to concentrate attention upon the rather barren constitutional aspects of Dominion Status and to neglect the more fruitful and perhaps more interesting and certainly more difficult questions of its political and economic origins and implications. But I need not apologize for this neglect. These wider problems are expounded in chapters of unrivalled penetration and interest by Professor W. K. Hancock in his *Survey of British Commonwealth Affairs*, and it is to this book that the reader will turn if he wishes to understand fully the meaning of Dominion Status.

I confess I have found even the limited task of explaining the effects of the Statute upon Dominion Status very difficult to perform clearly and accurately. Such success as I have achieved is due in large measure to the generous assistance I have received from experts. Certain of them prefer to remain anonymous, but I am able to acknowledge my debt to others. The first half of the book was read in typescript by Dr. W. I. Jennings, Reader in English Law in the University of London, who most kindly found time while on holiday to send me valuable suggestions and criticisms; by Mr. C. L. Dillwyn, Student of Christ Church, who freely placed at my disposal his knowledge of colonial history; and by Mr. R. T. E. Latham, Fellow of All Souls' College, to whose supplementary legal chapter in Professor Hancock's *Survey* I am indebted also. Dr. Nicholas Mansergh read the two chapters on the Irish Free State and tried to save me from some of my many errors of over-simplification there.

The book was read in proof by Professor Reginald Coupland and has benefited greatly in exposition and subject-matter from his precept and example. Without his support and encouragement, indeed, it would not have been written. Mr. Gilbert Ryle, Student of Christ Church, cast the eye of a tolerant logician over the whole work and endeavoured to eliminate some of the complicated jargon with which, in common with many other students of political science, I am wont to conceal my thought or the absence of it.

The extent of my obligation to the writings of Professor A. Berriedale Keith will be obvious. I received from Professor Keith also a measure of generous criticism and friendly encouragement at the outset of

my studies in this field which I remember with special gratitude.

My greatest obligation, however, is to Professor K. H. Bailey, Dean of the Faculty of Law in the University of Melbourne. It was my good fortune that Professor Bailey should revisit Oxford while the book was in preparation, and should permit me to draw freely upon his knowledge of the Statute of Westminster, of which his understanding, if I may presume to say so, is unexampled in its depth and clarity.

I should explain, perhaps, that the present book has grown out of my earlier essay, *The Statute of Westminster, 1931*, published by the Clarendon Press in 1933 and now out of print. Enough had happened since 1933 to convince me that I would do better to write an entirely new book on the subject rather than to patch up the former book for a second edition.

I may add that the book has been written during my tenure of a lecturership for research at Christ Church. I take this opportunity to record of my colleagues that I have enjoyed membership of a Senior Common Room where the art of learned conversation still flourishes, but where also, to adapt the words of Dr. Johnson's friend, Mr. Edwards, cheerfulness is always breaking in. And Dr. Johnson himself said: 'Sir, it is a great thing to dine with the Canons of Christ Church.'

K. C. W.

CHRIST CHURCH, OXFORD
12 *January* 1938

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LAW AND CONVENTION

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THE first significant fact about the Statute of Westminster, 1931,[1] is that it is a statute. It belongs, that is to say, to that class of constitutional rules which are usually described as rules of strict law or juridical constitutional rules; it belongs to the body of law, strictly so called. These rules of strict law possess the distinguishing formal characteristic that they are those rules recognized, accepted, and applied by the courts in the determination of disputes; they alone form the law, as that term is understood in the courts. Statutes, statutory orders, prerogative orders, and judicial decisions are all rules of strict law, in the sense in which that term has been defined above; they will all be accepted and applied by a court. These constitutional rules of strict law do not exhaust the whole body of constitutional rules which regulate the system of government in any community. There exists in addition a class of non-legal (though not illegal) constitutional rules, in the sense that they are rules which do not determine decisions in a court. These rules are described by such terms as practices, maxims, usages, customs, or conventions.[2]

[1] 22 Geo. 5, c. 4. The Statute is reproduced as Appendix II to this book.

[2] The best exposition of the nature of these rules is still that of Dicey, in spite of a few misconceptions which later writers have pointed out. See *Law of the Constitution* (9th ed.), especially c. xiv. See also W. I. Jennings, *Cabinet Government*, c. i. The misconceptions are pointed out in W. I. Jennings, *The Law and the Constitution*, c. iii; and in E. C. S. Wade's *Introduction* to the 9th ed. of Dicey's book.

Their sanction is not necessarily weaker than that of the rules of strict law; their formulation is not necessarily vaguer. The essential characteristic distinguishing the two classes of constitutional rule is that rules of strict law are those rules recognized and applied by a court; non-legal rules are those rules which are not recognized and applied by a court. If and when a court does recognize, say, a constitutional custom, as a rule which it will apply in the determination of a dispute before it, then that custom has ceased to be a non-legal rule, and has joined the body of law strictly so called.[1]

The Statute of Westminster, then, is a constitutional rule of strict law. 'Dominion Status' on the other hand cannot be defined exclusively, or indeed mainly, in terms of strict law. It is an expression used to describe the constitutional and international position of the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the

[1] Thus, in *British Coal Corporation* v. *the King*, [1935] A.C. 500, Lord Sankey said: 'But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of Law, to which by the statute of 1833 all appeals within their purview are referred.' (At p. 511.)

It is to be noted that Lord Sankey said 'in truth', not 'in law'. The recognition of constitutional custom and convention as law is unusual in the Judicial Committee. It is doubtful whether Lord Sankey's words here should be taken as laying down a new rule of law. But Duff C. J. appears to treat them as doing so in his judgment in the *Privy Council Appeals Reference*, [1940] S.C.R. 49. Perhaps the most extreme example of the recognition of convention as law is found in the judgment of Duff C. J. in Re *Minimum Wage Act*, [1936] S.C.R., 461, espec. at pp. 476–7. But contrast his words in the *Disallowance and Reservation References*, [1938] S.C.R. 71 at p. 78: 'We are not concerned with constitutional usage. We are concerned with questions of law. . . .' Yet, if some conventions are to be recognised, why not all? See Jennings, 52 *L.Q.R.*, at pp. 177–8.

Irish Free State, and Newfoundland,[1] or any one of them. This constitutional and international position may be set out partly in rules of strict law, such as statutes, passed by the United Kingdom Parliament or by the Parliaments of the Dominions, and judicial decisions, and partly in non-legal rules, such as constitutional conventions. The most important of the rules of strict law which define Dominion Status at present are to be found in a statute of the United Kingdom Parliament, the Statute of Westminster itself. The most important of the non-legal rules are to be found in the constitutional conventions between Great Britain and the Dominions agreed upon and declared at the Imperial Conferences of 1926 and 1930, and set out in the reports of these Conferences.[2] This association of constitutional conventions with law, 'has long been familiar in the history of the British Commonwealth; it has been characteristic of political development both in the domestic government of these communities and in their relations with each other; it has permeated both executive and legislative power'.[3] It is proposed in this book to examine the development of Dominion Status in order to analyse out the elements of law and convention, and to discover their interaction upon each other at certain stages in the development. In particular it is

[1] In 1933 Newfoundland surrendered her status as a Dominion. The status of Eire is considered later, pp. 271 ff.

[2] See Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926; a Committee presided over by Lord Balfour. The Report was adopted by the Conference and is printed as part of the Report of the Conference. Cmd. 2768, pp. 13–30. For 1930, see *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation*, 1929, Cmd. 3479, adopted with certain modifications by the Conference of 1930, and made part of its Report (Cmd. 3717, p. 18).

[3] Cmd. 3479, para. 56.

proposed to concentrate attention upon the most important legal rule, the Statute of Westminster, and the most important collection of non-legal rules, the 1926 and 1930 Reports, and to explain their relation within the concept of Dominion Status. Neither the Statute of Westminster alone, nor the Reports alone, can supply an adequate definition of Dominion Status. The Statute, taken along with other rules of strict law, could supply an adequate definition of the legal status of the Dominions; the Reports, taken along with other non-legal rules, could supply an adequate definition of the conventional status of the Dominions; but it requires a correlation of the two elements to describe the *constitutional* status of the Dominions, and it is this constitutional status which is denoted by the term 'Dominion Status'. Here, as elsewhere in British constitutional development, it is not the isolation of law from convention, but the association of law with convention within the constitutional structure which is the essential characteristic. This proposition is stated dogmatically here. But it is believed that the discussion of the Statute of Westminster and of Dominion Status which follows will illustrate and justify what has been asserted.

It has seemed necessary at the outset first to distinguish constitutional rules of strict law, as exemplified by the Statute of Westminster, from non-legal constitutional rules, as exemplified by the conventions declared in the Imperial Conference Reports, and immediately thereafter to assert the inter-relation and interaction of these two classes of rule, as exemplified in the term 'Dominion Status'. For there is a tendency, in the discussion of British constitutional development, to underestimate the importance of rules of strict law, and