English Legal History
Wed., 16 Nov.
Outline

OVERALL CHRONOLOGY

1485–1603 – Tudors

Henry VIII (1509–1547)
- 1515–1529 — ascendancy of Thomas Wolsey
- 1527–1532 — the "King's Great Matter" (divorce)
- 1532–1540 — Thomas Cromwell; Reformation Parliament; dissolution of the monasteries

Edward VI (1547–53); radical Protestantism

Mary (Philip and Mary) (1553 [1555]–1558); Catholicism

Elizabeth I (1558–1603); perhaps a less radical Protestantism
- 1569 — 39 Articles
- 1587 — execution of Mary Queen of Scots
- 1588 — defeat of the Armada

1603–1714 — Stuarts (with a break 1649–1660)

James I (1603–1625) (James VI of Scotland)
- 1605 — Gunpowder Plot
- 1616 — Dismissal of Coke
- 1621 — The Great Protestation

Charles I (1625–49)
- 1628 — Petition of Right
- 1640–1653 — The Long Parliament (called "the Rump" from 1648–1653)
- 1642–1646 — Civil War
- 1648–1650 — Civil War
- 1649 — execution of Charles I

Commonwealth (1649–1660) – Oliver Cromwell Protector (1653–1658)

Charles II (1660–85, officially from 1649)
- 1660 — Restoration
- 1667 — Impeachment of Clarendon
- 1678 — Popish Plot

James II (1685–88)

William & Mary (1689–1702)
- 1689 — Glorious Revolution; Bill of Rights

Anne (1702–14)
- 1707 — Act of Union (of England and Scotland)
- 1710–1714 — ascendancy of Bolingbroke

EQUITY, FORUM SHOPPING AND REFORM

1. Sir John Fyneux, ?1441–1525, JCP, 1494–5, CJKB, 1495–1525

   Sir Edward Coke, 1552–1634, CJCP 1606–13, CJKB, 1613–16

   Sir Matthew Hale, 1609–1676, CB 1660–71, CJKB, 1671–76

2. Themes to add to the review of politics:

a. The ancient constitution, fundamental law, divine right of kings, feudal law. The ideas of the ancient constitution and of fundamental law can be found, though not in these terms, in the Middle Ages. While the terms can be found interchangeably in the 16th and 17th centuries, the first usage, ancient constitution, tends to focus on immemorial antiquity, the notion that the common law or certain liberties of the subject can be traced back to Anglo-Saxon times— perhaps even to Britain before the Romans arrived. The second usage, fundamental law, can be associated with these ideas, but it can also mean divine law or natural law, terms which, as we have seen, could be used in medieval legal theory to trump positive law.

   The divine right of kings also has some medieval antecedents. The power of the king, of course, comes from God. We saw, however, that many medieval thinkers tended to find ways to separate divine authority from the person of the king when the king failed to obey the law and hence to legitimate some sort of redress. The theory of the divine right of kings that emerged in the late 16th century did not have these elements. If the king disobeyed the law it was for God to punish him and for the subject to obey.

   The notion of the feudal law is the last of the ideas to emerge. It is the product of the early 17th century and antiquarians, such as Henry Spelman and John Selden. In political discourse it's somewhat of a wild card. It can, of course, be used to deny the historicity of the ancient constitution. If one believes in the ancient constitution strongly enough, however, one can make use of the feudal law idea to make a contemporary point. Magna Carta then becomes the reassertion of the liberties of the ancient constitution after the imposition of the Norman yoke, which could be regarded as a perversion of the feudal law.

   In one sense both the ancient constitution and the feudal law are opposed to the divine right of kings, because they both suggest that the polity is bound by what happened in the past. If we chrystalize these ideas, we turn them into charicatures. Most men of the 17th century held a number of them together. Nonetheless, among the parliamentarians, who emerge in the 1620s and 1630s a notion developed that England had once been free (this was the ancient constitution) and then passed under the "Norman yoke." Ancient liberty, however, was reflected in the common law. This idea certainly had a place for royal prerogative, not even Coke was so extreme as to deny it, but it had no place for the divine right of kings nor for fancy foreign ideas like sovereignty.

   The civil lawyers, those who had studied Roman law in the universities and practiced in courts that directly or indirectly accepted civil law, because of their Romanist training, tended in the direction of absolutism, though not all. Isaac Dorislaus, who was a doctor of civil law, became a regicide in 1649. The important point here is that the common law and the common lawyers in the early seventeenth century were associated with the anti-royalist or parliamentary party. Ultimately, of course, that party was to triumph.

b. Court vs. countryside. This opposition has become controversial in the historiography, but it seems to work in this respect: The common lawyers were associated with the gentry and the knights. Indeed, many of them were members of that class. The civilians were also members of that class, but their origins were slightly lower. They were second sons, or they came from poorer families. Hence they were more dependent on royal patronage. Whether we can go on to see the Civil War as arising out of increasing divisions between court and countryside is a far more controversial matter.

One recent treatment of the subject suggests that late medieval and Tudor government was dependent on the participation of a large number of men from the country who certainly by this period can be called gentry. These men performed a wide variety of local functions. They also served in the Commons. When Charles I decided to rule without parliament in the 1630s, he cut himself off from the vital link with the country and hence court and country tended to polarize. This reworking of the traditional account of court vs. countryside tends to emphasize, as do most modern accounts, events just prior to 1640 rather than events going all the way back to late Elizabeth, much less events going all the way back to the Middle Ages, as being at the root of the Revolution.

3. The common law in trouble

   a. The struggle among the common-law courts

      i. c.17 of Magna Carta, the Marshall of Marshalsea, debt by bill rather than by writ, bills of Middlesex, latitats, fictitious bills of Middlesex (16th century)

      ii. The expansion of case under Fyneux, assumpsit for non-feasance (c 1500), assumpsit for non-payment of debt (c 1530), trover and conversion (1530's), ejectment (also under Fyneux), defamation (also under Fyneux)

      iii. The final development in the Restoration after stat. of 13 Car. 2 (sess. 2), c. 2 (1661), denies special bail where the cause of action is fictitious, KB then amends the *latitat* by using the *ac etiam* clause, which avoids the stat. Finally development Sir Francis North CJCP extends *latitat* to CP with the approval of Nottingham C

      iv. The development of the court of the Exchequer—*quominus*—17th century

   b. Reform of procedure

      i. Statute of Jeofails (1540) and the rise of the requirement of formal demurrer

      ii. Motions in banc and various ways of getting records of what happened in the country—best considered below under review

      iii. Decline of Law French, Latin and court hand—1731

      iv. Double pleading—1705

      v. Special pleading—leads to a complicated debate ultimately resolved in the 19th century

   c. Review of decisions—change in the nature of the trial

      i. Proceedings in error, courts of error (CP for most local courts, KB for local courts of record and CP, Council Ch for Exch [1375] and later Ex Ch for KB [1585]), the non-statutory Exchequer Chamber, appeal as we understand it (19th c)

      ii. Motions in banc: The rule *nisi* ('rule absolute' = the verdict below is entered as a judgment; 'rule discharged' = the verdict below is not entered), motions in arrest of judgment, judgment notwithstanding the verdict, new trial, reservation of points by judges, review of damage awards under the table

      iii. Review of chancery (rise of Lords 1675), the privy council (ecclesiastical courts and the colonies) (17th and 18th centuries), the courts of appeal and the House of Lords (19th c)

iv. The prerogative writs, prohibition, *quo warranto*, *habeas corpus*, *mandamus*, *certiorari* (largely criminal), declarations and applications (19th c), administrative law (largely a 20th c. development)

d. Legal literature—reports and abridgements—*Spellman's Reports*, Fitzherbert's abridgement of the Year Books, Viner's abridgment of the modern reports, Blackstone

4. *Slade's Case* as indicating many of these developments

5. Summary of internal developments

   a. We end the 17th century with three jurisdictionaly co-equal central royal courts and a considerably simplified procedure to get cases going

   b. Conscious reform of procedure, some of which comes about as the result of statute, of which the most important is probably the Statute of Jeofails of 1540. Major procedural reform does not take place until the 19th century.

   c. Related to the reform of procedure is the development of a number of mechanisms that allow review of decisions. The most important of these are the motions in banc, that allow the full court to get some sense of what happened at trial and hence to develop the law.

   d. Things were changing, slowly but they were changing. The medieval focus on what looks to us as more like procedure has become what looks to us more like substance. This is illustrated both in the change in the nature of what gets reported and, ultimately, in Blackstone's great treatise in the middle of the second half of the 18th century.

6. Competition with other courts. The danger of offering a unitary explanation of what happened, but there are some elements that appear in some of them and one in all of them:

   a. Not all of the non-common law courts applied civil law and made use of civilians rather than common lawyers, but some of them did. Others had elements of Romano-canonical procedure in the way they operated. To the extent that the debates about law in the sixteenth and seventeenth centuries focused on the distinction between common law and civil law, the fate of these courts was bound up in that debate.

   b. To the extent that common law vs. civil law debate can be reduced to a naked competition between two competing branches of the legal profession, that competition is also involved in the fate of these courts.

   c. To the extent that common law vs. civil law debate can be reduced to a political debate that pitted the common law, on the one side, against extended views of the king's prerogative on the other, that debate is also involved in the fate of these courts.

   d. Sir Edward Coke and the prohibition campaign

7. Competition with the Chancery. Until the sixteenth century there is not much indication that the common lawyers are concerned about the Chancery. The real development is the 16th century settlement started by Thomas More. The Coke-Ellesmere debate is more personalities than anything else.

8. Competition from other conciliar courts. (We'll run through this list twice in the lecture):

   Star Chamber (records start 1540, abolished 1641)

   Requests (records start 1493, not abolished 1641 but dies out to be replaced by urban courts of requests)

Council of the North, Wales (basically 16th c, go into disuse during the Interregnum, brief revival of Wales during the Restoration)

Admiralty (?14th c., reorganized in 16th c. never abolished but was the chief butt of anti-civilianism in the Restoration, merged into the Probate, Divorce, and Admiralty Division of the High Court in 1875)

Court of the Constable and Marshall; Marshall's Court (last met 1955)

9. The Reformation and the Ecclesiastical Courts. High Commission (criminal) and the High Court of Delegates (non-criminal). The former died in the 1640s, never revived. The latter still exists but much reduced because of the 1857 transfer of jurisdiction to Probate, Divorce and Admiralty.

10. Law making and law reform
    a. The notion of the immutable common law—Maine's theory of fiction, equity and legislation
    b. Case law and precedent
    c. Fictions
    d. Equity and legal change—uses, married women's property, some commercial advances that antedated statute, matrimonial home
    e. Legislation—legislation and adjudication combined, the statute rolls begin 1299, parliament rolls 1290—the work of the Reformation Parliament, the High Court idea in the 17th century
    f. Interpretation of statutes, *Dr. Bonham's Case* (1610), the ultimate loss even of the narrow equity of the statute
    g. Law reform—civil war and interregnum—1641 Star Chamber—1645 military tenures—1650 Latin and Law French—the Hale Comm'n in 1652: simplification of process and pleading, small claims, abolish imprisonment for debt, civil marriage, land registration, the run of scary criminal statutes, almost all reversed in 1660. Simplification of process continues piecemeal, small claims do get established in the city courts of requests, imprisonment for debt not abolished until 19th c., land registration doesn't come until 1925, civil marriage not until 19th c.

11. The common law won. Why did it happen?
    a. Politics.
    b. Other explanations:

       The reform movement that ultimately succeeded was begun by Sir John Fyneux at the beginning of the 16th century before the Reformation and before the politics divided the way they did in the early 17th century. That the country was willing to wait for almost a century for the common law to get its act together is a tribute both to innate English conservatism and to the rise of the nation-state at the time. The new nation-state demanded a law for the nation-state, but unlike the French, the English already had a law that could be said without too much anachronism to be a law for the whole nation.

       There is no question that the common lawyers both at the beginning of the 16th c and throughout the 17th c thought that they were fighting for their jobs. That is probably enough

to explain their motivations professionally. But they argued their case in terms of principles, principles in which many of them believed and which were sufficiently powerful that they succeeded in convincing others.

Fyneux was the least articulate about what he was trying to do, but what he did all seemed headed toward the end of a comprehensive system of private law for the whole nation that was considerably easier to use than what existed when he came to office.

In the case of Coke the principle was clearly, at least at the end of his career, one of a monarchy more limited than James I would have liked. If we would be wildly anachronistic in seeing much democracy in this, it certainly was one in which shared goverment would replace autarchy.

In the case of Hale the argument is somewhat different. The focus in Hale's case is on the never-stated proposition that the system of private law had served the country well; radical reform would be extremely disruptive; the system can be reformed with fixes.

Combined the efforts of these three men, and those like them, ensured the continuation of the common law and a political tradition that saw the relation of sovereign and citizen in terms of mutual rights and duties.

As Edmund Burke said in his famous speech urging moderation in dealing with the American colonies: "England, Sir, is a nation, which still I hope respects, and formerly adored, her freedom. The colonists emigrated from you when this part of your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles." Edmund Burke, Speech on Conciliation with the Colonies (1775)