

**NINE LECTURES ON THE
EARLIER CONSTITUTIONAL
HISTORY OF CANADA; PP.
1-97**

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Nine Lectures on the Earlier Constitutional History of Canada; pp. 1-97 by W. J. Ashley

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W. J. ASHLEY

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ON THE
EARLIER CONSTITUTIONAL HISTORY
OF
CANADA,

DELIVERED BEFORE THE UNIVERSITY OF TORONTO IN
EASTER TERM, 1889,

BY
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TO THE

STUDENTS OF THE SECOND YEAR

*In the Department of Political Science in the University
of Toronto.*

WILL you let me dedicate these lectures to you, and ask you to accept the written in place of the spoken word? You will observe that they barely reach down to 1791. Once I thought that I might, without any very considerable labour, arrive at conclusions to lay before you on all or most of the important questions which the history of the Dominion involves. But when I came to 1791 and looked across the gulf to 1867; when I read the titles of all the works already written upon the period as they are collected in Mr. Reade's recent papers in *Canadians*; still more when I turned over Mr. Brymner's *Calendars* of unprinted historical MSS.; may I confess that my heart sank within me? Here was a sufficient task for one man's strength: and yet on the other side Economics were crying out with still louder voice for all the attention I could give. You will not think it strange that I should decide that for the present the social and industrial problems of Canada and America demand all my energy. Deciding thus, it occurred to me that it would be a still further saving of time on your part, and on mine, if, instead of annually redelivering

for the next few years those few lectures on the Earlier Constitutional History to the preparation of which I had been able to give some little care, I might as well call in the aid of the printing press. Nobody will suppose that they claim any more authority now that they form a "book;" and I trust you will not fail to let me know if any of the statements they contain seem exaggerated or unfounded. We may hope that by-and-by Canada's greatest University will have one among its teachers who can devote his main strength to Canada's history; and that a long series of special studies, like that on the Ontarian township, which one of my pupils has already prepared, will furnish the material for a satisfactory treatment of the whole constitutional development. Meanwhile, this little pamphlet, read in conjunction with Dr. Bourinot's two admirable essays on *Federal* and *Local Government*, may perhaps help you to discover some of the broader outlines of Canadian history.

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THE EARLIER CONSTITUTIONAL HISTORY OF CANADA.

LECTURE I.

On the Nature of Constitutional History.

BEFORE we address ourselves to the constitutional history of Canada in particular, it may be worth while to call your attention to the ambiguities which lurk in the terms "constitution" and "constitutional history," and to make clear the sense in which the term "constitutional history" will be used in these lectures. The original meaning of "constitution" is, of course, the way in which a thing is made, the manner in which it is arranged, its putting together, its nature. With this agrees the original meaning of the German term which is used as its equivalent: *Verfassung*—a thing's composition, the character of its construction, the arrangement of its parts. In this sense we can talk of *any* state as having a constitution, and a constitutional history. Every state, by the mere fact that it is a state, *i.e.*, something more than a disconnected number of individuals who chance to live near together, must needs have some form, some characteristics, which cause it to resemble or differ from other political societies: there must be certain ways in which the various elements or parts of which it is composed affect one another. Using the word in this way, Russia or Turkey has a constitution just as much as France or Switzerland.

Early in the 18th century, or even earlier, the word came to be used in a narrower sense, as meaning not only the way in which a government was as a matter of fact

carried on, but the way in which it ought to be carried on, and more specifically, certain rules or recognized principles by which the arbitrary authority of rulers was restricted. Thus Bolingbroke in his *Dissertation upon Parties*, writes, "If this [the freedom and independence of parliament] be shaken, our constitution totters. If it be quite removed, our constitution falls into ruin." In this sense, to take another example, it could be said that during the 18th century, "*Habeas Corpus* was part of the British constitution," by which was meant that it was claimed by the nation generally, and recognized by the Courts and the Executive, that if a man were detained beyond the time really necessary to arrange for a trial, without being brought to trial, his friends had a right to set a process at work which would procure his speedy delivery—or to put it shortly, freedom from arbitrary imprisonment was a recognised part of the British "constitution" at that time. There is, however, a natural tendency to antedate ideas and institutions,—a tendency especially strong in England, where almost every constitutional struggle was regarded by, at any rate, a large part of those engaged in it on one side, as an endeavor to regain or to confirm ancient liberties. Accordingly, the practice has grown up of judging events by a later standard—of calling some action of the government unconstitutional, when, as a matter of fact, the principle which it violated had not yet been generally recognized. In cases like these, the adjective more fitly to be applied would perhaps be "tyrannical," or "unjust," or perhaps not more than "unwise."

From this use of the word came the term "constitutional monarchy," as the common equivalent for limited monarchy. The circumstances of the latter part of the 18th, and of the early part of the 19th century caused this term to receive a still further limitation—to be applied to states which had a king as the possessor of executive authority,