SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY

VOLUME ONE

SELECT ESSAYS

IN

ANGLO-AMERICAN LEGAL HISTORY

By VARIOUS AUTHORS

COMPILED AND EDITED BY A COMMITTEE OF THE
ASSOCIATION OF AMERICAN LAW SCHOOLS

IN THREE VOLUMES
VOLUME I

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PREFACE

DE QUINCEY, in one of his Letters to a Young Man whose Education has been Neglected, quotes Dr. Johnson's pronouncement upon French literature (and it was the kindest thing he had to say about it), that "he valued it chiefly for this reason: that it had a book upon every subject." Even so much as this could hardly be claimed for our own literature in English. To this day it has no complete book upon the history of its own law. The attempts of Blackstone, Crabb, and Reeves are of a past epoch. The progress of a century of historical thought has fixed a great gulf between us and them. To-day, this branch of our literature dates virtually from Mr. Justice Holmes' "The Common Law" and Sir Frederick Pollock's and Professor Maitland's "History" — the first writers in this field (as Hallam says of Montaigne among French classical writers) "whom a gentleman is ashamed not to have read."

The present state of our knowledge of the history of our law may be likened to an unfinished building, whose foundations have been laid and whose frame and beams have been erected. The roof, the walls, the floors, the furnishings and decoration, are yet lacking. Its scope and internal plan, its architecture and its relation of parts, can be already plainly seen. But it cannot yet be inhabited; and many kinds of workmen must labor longer upon it. These foundations are the volumes of Sir Frederick Pollock and Professor Maitland, — resting upon the still deeper Germanic caissons of Professor Heinrich Brunner and his co-workers. This frame and these cross-beams are, on the one hand, the few larger monographs, from Mr. Justice Holmes' "The Common Law" and Professor Bigelow's "Anglo-Norman Procedure,"

of thirty years ago, to the Selden Society's source-books and Mr. Holdsworth's recent first volume; and, on the other hand, the more numerous essays and chapters of the authors represented in these present volumes. But, until now, most of these lesser structural members of the framework have lain scattered about upon the ground, here and there, — ready for use, and yet not fully serviceable because not easily accessible and not assembled in their relations to each other and to the whole. It is the purpose of these volumes to assemble and make accessible these valuable parts of the structure of our legal history.

The season is ripe for this work. It is probable that another generation will pass before the final elaboration of the structure can be attempted. Until the Year Books are entirely re-edited and printed, most of the work will be of a limited and topical scope. It is now time for our profession to take account of past progress, — to put together and to possess in mastery that which has been so far achieved; following the dictate of Goethe: "My maxim in the study of Nature is this: Hold fast what is certain, and keep a watch on what is uncertain."

The times demand, too, of our profession, more cultivation of the taste for history. A counter-balance against the hasty pressure for reform, and against an over-absorption in the narrow experience of the present, is to be sought in the solid influence of history. A true conservatism, and an intelligent progress, must alike be based on historical knowledge, — a knowledge not remaining in the possession of a few scholars, but penetrating abroad into the general consciousness of the profession.

For student and for practitioner alike, we believe that these historical essays will be a welcome enlargement of the horizon of our law. "It is the historians who are my true men," says the genial Montaigne, "for they are pleasant and easy; wherein immediately man in general (the knowledge of whom I hunt after) appears more lively and entire than anywhere besides." And his ingenuous reason for best liking Plutarch and Seneca is a reason which (we confess) has seemed to us likely to commend these present composite vol-

umes to that class of our expected readers who are already immersed in practice; for those ancient writers, he says, "have this great convenience (suited to my humour) that the knowledge I there seek is discoursed in several pieces, not requiring any great trouble of reading long, of which I am incapable; 'tis no great undertaking to take one of them in hand, and I give over to them at pleasure, for they have no necessary chain or dependence upon one another."

To the profession, then, and to all its members, whether in school or out of it, we commend this Collection, in the hope that it may bring into general knowledge the main part of the historical achievements which are not yet contained in independent volumes, and that it may help to stimulate a deeper and wider knowledge of the present meaning of our law as seen in the light of its past. Sooner or later the number of those who themselves take an efficient part in historical legal research will have to be, and will be, much increased. But that day will the sooner come to pass if meantime the number of those can be increased who will read and appreciate what has already been done, and will thus give support and encouragement for such research. Science expands with culture, and, in Matthew Arnold's phrase, "Culture is reading, — but reading with a purpose to guide it, and with system. He does a good work who does anything to help this; indeed, it is the one essential service now to be rendered to education."

In giving account of our labors in the preparation of this Collection, it is our first duty, on behalf of our profession, to thank those authors and publishers who have so freely allowed the reprinting of these essays and chapters. From the leaders of the historical vanguard (so to speak) — of whom Professor Brunner of Berlin, the lamented Professor Maitland of Cambridge, Sir F. Pollock of Oxford, Mr. Justice Holmes of Washington, Professor Ames of Harvard, and Professor Bigelow of Boston, are representative — this consent has been especially welcome.

We must, secondly, express our regret that the limitations of scope and space have forced the omission of many essays

which merited reprinting. All matters of public law, for example — including the history of constitutional law and of municipal corporations — have been left aside; perhaps a later series may be made to include them. Furthermore, in several essays and monographs, the narrow range of details, the lengthy marshalling of the historical evidence, or the impossibility of separating usable parts, has made them ineligible; though a reference-list of such authorities has been appended in the proper places.

A main motive for the Collection was to rescue, from scattered series of periodicals or general treatises on present law, and to assemble in one convenient form, those essays or chapters which are of permanent value and would otherwise fail of the constant and wide perusal which they deserve. Hence the plan did not propose to include any extracts from works devoted entirely and professedly to the history of any part of the law, — such acknowledged masterpieces, for example, as Sir F. Pollock's and Professor Maitland's History of English Law, or Mr. Digby's History of the Law of Real Property, or Mr. Justice Holmes' The Common Law. But, in several instances, exceptions to this plan were allowed. The impelling reason was the Committee's desire to give a certain symmetry to some topics and periods which would otherwise have been imperfectly represented. The present volumes may therefore, it is hoped, serve to illumine in outline the legal history of the last six centuries, and thus to supplement the great treatise of Sir F. Pollock and Professor Maitland, — at least provisionally and until by the completion of the larger undertakings of Mr. Holdsworth and others the same period shall have been more adequately covered.

A more detailed explanation of the Committee's preparatory labors, and of the motives leading to its appointment, will be found in the Proceedings of the Association of American Law Schools for 1905 and 1906, published with the Proceedings of the American Bar Association for those years.

All of the material here collected has been already published elsewhere as essays, articles, or chapters, — with the

exception of Mr. Zane's studies of the Bench and Bar of England, which are now printed for the first time.

The bibliographical footnotes for each of the authors were in some instances furnished by the authors themselves, pursuant to the Committee's request. In other instances, owing to the authors' modest ignoring of that request, the Committee used such notes as could be found in biographical dictionaries; and in still others, no information was obtainable. The brief extra reference-lists, prefixed to the topical divisions of this Collection, include only those articles (the result of the Committee's preliminary gleanings) which it was impossible to include in the reprint. These lists are found chiefly under the special topics of volumes II and III.

Following the prevailing American custom, no attempt has been made to designate the authors, in the title-heading of these essays, by their academic degrees or similar marks of distinction; but in a footnote is placed a record of such distinctions, so far as information was obtainable.

With these explanations, and with apologies for such errors as must inevitably have accompanied the work of a Committee coöperating from three separate headquarters, and corresponding with authors and publishers widely sundered by sea and land, the volumes are committed to the good-will of the profession.

THE COMMITTEE OF THE
ASSOCIATION OF AMERICAN LAW SCHOOLS.
ERNST FREUND,
University of Chicago.
WM. E. MIKELL,
University of Pennsylvania.
JOHN H. WIGMORE, *Chairman.*
Northwestern University.

June 20, 1907.

"Sine historia caecam esse jurisprudentiam." FRANCISCUS BALDUINUS.

"I have no expectation that any man will read history aright who thinks that what was done in a remote age, by men whose names have resounded far, has any deeper sense than what he is doing to-day. There is no age, or state of society, or mode of action, in history to which there is not somewhat corresponding in his life. . . . History must be this or it is nothing: Every law which the State enacts indicates a fact in human nature; that is all. We must in ourselves see the necessary reason for every fact, — see how it could and must be. We assume that we under like influence should be alike affected, and should achieve the like; and we aim to master intellectually the steps, and reach the same height or the same degradation that our fellow, our proxy, has done. All inquiry into antiquity is the desire to do away this wild, savage, and preposterous There or Then, and introduce in its place the Here and Now." RALPH WALDO EMERSON, *Essay on History.*

"For the true historian, two attitudes (as I opine) are requisite. On the one hand, he must find interest and pleasure in the truth of individual facts, — must value details for their own sake. If he possesses genuinely this avidity for the pursuit of truth in its manifold variety, for the bare facts of human life, then he will surely attain satisfaction in his research, regardless of their larger interpretations and tendencies, — just as he takes pleasure in the flowers, without attempting to solve the problems of their botanical classification. Yet, on the other hand, the historian must cultivate breadth of view, — the faculty of generalization. He is not to proceed *a priori,* like the metaphysician. But, while he observes and describes the unfolding of the details, he is to let their general trend be made manifest, — their inter-actions, their developments, their epochs. One after another, the events appear before him; the series unites; it culminates in an Epoch. That distinction between dates which we term an Epoch lies in this, that out of the struggle of the two great opposing forces — the predetermined causation of the past, and the spontaneous variability of the present — new conditions, and thus new periods, gradually emerge. And out of a series of Epochs is built up the whole. . . . Thus, while each separate event of history has its intrinsic value, is worth investigation for its own sake, yet — in view of the direction which modern research is taking (and must indeed insist on taking, if we desire accurate knowledge) — it is fair to say that we run some danger of ignoring the larger aspects, that broad outlook for which every one has a legitimate yearning. Thus to unravel the full trend and meaning of events, while remaining steadfast to the strict principles of scientific research, will indeed be always an unattainable ideal. Yet a true scholarship recognizes that the two processes may and must go hand in hand. Facts without their philosophy are but barren and frigid chronicles. And philosophies of history not built on a rigid basis of fact are but delusive fancies." LEOPOLD VON RANKE, *World History,* Part IX, Sect. II, *The Epochs of Modern History,* Introduction.

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VOLUME I

GENERAL SURVEYS

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A TABLE OF BRITISH REGNAL YEARS

Sovereigns	Commencement of Reign
William I.	October 14, 1066
William II.	September 26, 1087
Henry I.	August 5, 1100
Stephen	December 26, 1135
Henry II.	December 19, 1154
Richard I.	September 23, 1189
John	May 27, 1199
Henry III	October 28, 1216
Edward I.	November 20, 1272
Edward II.	July 8, 1307
Edward III.	January 25, 1326
Richard II.	June 22, 1377
Henry IV.	September 30, 1399.
Henry V.	March 21, 1413
Henry VI.	September 1, 1422
Edward IV.	March 4, 1461
Edward V.	April 9, 1483
Richard III.	June 26, 1483
Henry VII.	August 22, 1485
Henry VIII.	April 22, 1509
Edward VI.	January 28, 1546
Mary	July 6, 1553
Elizabeth	November 17, 1558
James I.	March 24, 1603
Charles I.	March 27, 1625
The Commonwealth	January 30, 1649
Charles II[1].	May 29, 1660
James II.	February 6, 1685
William and Mary	February 13, 1689
Anne	March 8, 1702
George I.	August 1, 1714
George II.	June 11, 1727
George III.	October 25, 1760
George IV.	January 29, 1820
William IV.	June 26, 1830
Victoria	June 20, 1837
Edward VII.	January 22, 1901

[1] Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth year of his reign.

PART I.

BEFORE THE NORMAN CONQUEST

SELECT ESSAYS
IN
ANGLO-AMERICAN LEGAL HISTORY

1. A PROLOGUE TO A HISTORY OF ENGLISH LAW[1]

By Frederic William Maitland[2]

SUCH is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web. The oldest utterance of English law that has come down to us has Greek words in it: words such as *bishop*, *priest*, and *deacon*.[3] If we would search out the origins of Roman law, we must study Babylon: this at least was the opinion of the great Romanist of our own day.[4] A statute of limitations must be set; but it must be arbitrary. The web must be rent; but, as we rend it, we may watch

[1] This essay was first published in the Law Quarterly Review, 1898, vol. XIV, pp. 13-33; and afterwards was prefixed to the second edition of the "History of English Law," 1899 (Cambridge, University Press; Boston, Little, Brown & Co.).

[2] 1850-1906; M. A., Trinity College (Cambridge); Barrister of Lincoln's Inn; Reader of English Law at Cambridge, 1888; Downing Professor of the Laws of England at Cambridge, 1888-1906; Bencher of Lincoln's Inn; LL. D., D. C. L., Oxford, Glasgow, Cracow.

Other Publications: Gloucester Pleas, 1884; Justice and Police, 1885; Bracton's Note-Book, 1887; History of English Law before the Time of Edward I (with Sir F. Pollock), 1895; Domesday Book and Beyond, 1897; Township and Borough, 1898; Canon Law in England, 1898; Introduction to Gierke's Political Theories of the Middle Ages, 1900; English Law and the Renaissance, 1901; prefaces to several volumes of the Selden Society's publications; editor of the Year-Books of Edward II (Selden Society, 1904-6). The miscellaneous essays and minor books of Professor Maitland are now being edited for publication in collected form by the University Press, Cambridge (Eng.).

[3] Æthelb. 1.

[4] Ihering, Vorgeschichte der Indoeuropäer; see especially the editor's preface.

the whence and whither of a few of the severed and ravelling threads which have been making a pattern too large for any man's eye.

To speak more modestly, we may, before we settle to our task, look round for a moment at the world in which our English legal history has its beginnings. We may recall to memory a few main facts and dates which, though they are easily ascertained, are not often put together in one English book, and we may perchance arrange them in a useful order if we make mile-stones of the centuries. [1]

By the year 200 Roman jurisprudence had reached its zenith. Papinian was slain in 212,[2] Ulpian in 228.[3] Ulpian's pupil Modestinus may be accounted the last of the great lawyers.[4] All too soon they became classical; their successors were looking backwards, not forwards. Of the work that had been done it were folly here to speak; but the law of a little town had become ecumenical law, law alike for cultured Greece and for wild Britain. And yet, though it had assimilated new matter and new ideas, it had always preserved its tough identity. In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously summed up in the living and growing body of the law.

Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (*ecclesiae*) of nonconformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be; but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, if not a crim-

[1] The following summary has been compiled by the aid of Karlowa, Römische Rechtsgeschichte, 1885 — Krüger, Geschichte der Quellen des römischen Rechts, 1888 — Conrat, Geschichte der Quellen des römischen Rechts im früheren Mittelalter, 1889 — Maassen, Geschichte der Quellen des canonischen Rechts, 1870 — Löning, Geschichte des deutschen Kirchenrechts, 1878 — Sohm, Kirchenrecht, 1892 — Hinschius, System des katholischen Kirchenrechts, 1869 ff. — A. Tardif, Histoire des sources du droit canonique, 1887 — Brunner, Deutsche Rechtsgeschichte, 1887 — Schröder, Lehrbuch der deutschen Rechtsgeschichte, ed. 2, 1894 — Esmein, Cours d'histoire du droit français, ed. 2, 1895 — Viollet, Histoire du droit civil français, 1893.

[2] Krüger, op. cit. 198; Karlowa, op. cit. i. 736.

[3] Krüger, op. cit. 215; Karlowa, op. cit. i. 741.

[4] Krüger, op. cit. 226; Karlowa, op. cit. i. 752.

inal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of "benefit and burial societies" they would obtain some protection for their communal property.[1] But internally they were developing what was to be a system of constitutional and governmental law, which would endow the overseer (*episcopus*) of every congregation with manifold powers. Also they were developing a system of punitive law, for the offender might be excluded from all participation in religious rites, if not from worldly intercourse with the faithful.[2] Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a pre-eminence for itself and its overseer.[3] Long indeed would it be before this overseer of a non-conformist congregation would, in the person of his successor, place his heel upon the neck of the prostrate Augustus by virtue of God-made law. This was not to be foreseen; but already a merely human jurisprudence was losing its interest. The intellectual force which some years earlier might have taken a side in the debate between Sabinians and Proculians now invented or refuted a christological heresy. Ulpian's priesthood[4] was not priestly enough.[5]

The decline was rapid. Long before the year 300 jurisprudence, the one science of the Romans, was stricken with sterility;[6] it was sharing the fate of art.[7] Its eyes were

[1] Löning, op. cit. i. 195 ff.; Sohm, op. cit. 75. Löning asserts that in the intervals between the outbursts of persecution the Christian communities were legally recognized as *collegia tenuiorum*, capable of holding property. Sohm denies this.

[2] Excommunication gradually assumes its boycotting traits. The clergy were prohibited, while as yet the laity were not, from holding converse with the offender. Löning, op. cit. i. 264; Hinschius, op. cit. iv. 704.

[3] Sohm, op. cit. 378 ff.; Löning, op. cit. i. 423 ff.

[4] Dig. 1. 1. 1.

[5] The moot question (Krüger, op. cit. 203; Karlowa, op. cit. i. 739) whether the Tertullian who is the apologist of Christian sectaries is the Tertullian from whose works a few extracts appear in the Digest may serve as a mnemonic link between two ages.

[6] Krüger, op. cit. 260; Karlowa, op. cit. i. 932.

[7] Gregorovius, History of Rome (transl. Hamilton), i. 85.

turned backwards to the departed great. The constitutions of the emperors now appeared as the only active source of law. They were a disordered mass, to be collected rather than digested. Collections of them were being unofficially made: the *Codex Gregorianus*, the *Codex Hermogenianus*. These have perished; they were made, some say, in the Orient.[1] The shifting eastward of the imperial centre and the tendency of the world to fall in two halves were not for the good of the West. Under one title and another, as *coloni*, *laeti*, *gentiles*, large bodies of untamed Germans were taking up their abode within the limit of the empire.[2] The Roman armies were becoming barbarous hosts. Constantine owed his crown to an Alamannian king.[3]

It is on a changed world that we look in the year 400. After one last flare of persecution (303), Christianity became a lawful religion (313). In a few years it, or rather one species of it, had become the only lawful religion. The "confessor" of yesterday was the persecutor of to-day. Heathenry, it is true, died hard in the West; but already about 350 a pagan sacrifice was by the letter of the law a capital crime.[4] Before the end of the century cruel statutes were being made against heretics of all sorts and kinds.[5] No sooner was the new faith lawful, than the state was compelled to take part in the multifarious quarrels of the Christians. Hardly had Constantine issued the edict of tolerance, than he was summoning the bishops to Arles (314), even from remote Britain, that they might, if this were possible, make peace in the church of Africa.[6] In the history of law, as well as in the history of dogma, the fourth century is the century of ecclesiastical councils. Into the debates of the spiritual parliaments of the empire[7] go what-

[1] Krüger, op. cit. 277 ff.; Karlowa, op. cit. i. 941 ff. It is thought that the original edition of the Gregorianus was made about A. D. 295, that of the Hermogenianus between 314 and 324. But their dates are uncertain. For their remains see Corpus Iuris Anteiustiniani.

[2] Brunner, op. cit. i. 32-39. [3] Ibid. 38. [4] Löning, op. cit. i. 44.

[5] Löning, op. cit. i. 97-98, reckons 68 statutes from fifty-seven years (380-438).

[6] Hefele Conciliengeschichte, i. 201. For the presence of the British bishops, see Haddan and Stubbs, Councils, i. 7.

[7] Sohm, op. cit. 443: "Das ökumenische Koncil, die Reichssynode . . . bedeutet ein geistliches Parlament des Kaisertums."

ever juristic ability and whatever power of organization are left among mankind. The new supernatural jurisprudence was finding another mode of utterance; the bishop of Rome was becoming a legislator, perhaps a more important legislator than the emperor.[1] In 380 Theodosius himself commanded that all the peoples which owned his sway should follow, not merely the religion that Christ had delivered to the world, but the religion that St. Peter had delivered to the Romans.[2] For a disciplinary jurisdiction over clergy and laity the state now left a large room wherein the bishops ruled.[3] As arbitrators in purely secular disputes they were active; it is even probable that for a short while under Constantine one litigant might force his adversary unwillingly to seek the episcopal tribunal.[4] It was necessary for the state to protest that criminal jurisdiction was still in its hands.[5] Soon the church was demanding, and in the West it might successfully demand, independence of the state and even a dominance over the state: the church may command and the state must obey.[6] If from one point of view we see this as a triumph of anarchy, from another it appears as a triumph of law, of jurisprudence. Theology itself must become jurisprudence, albeit jurisprudence of a supernatural sort, in order that it may rule the world.

Among the gigantic events of the fifth century the issue of a statute-book seems small. Nevertheless, through the turmoil we see two statute-books, that of Theodosius II and that of Euric the West Goth. The Theodosian code was an official collection of imperial statutes beginning with those of Constantine I. It was issued in 438 with the consent of Valentinian III who was reigning in the West. No perfect copy of it has reached us.[7] This by itself would tell a sad

[1] Sohm, op. cit. 418. If a precise date may be fixed in a very gradual process, we may perhaps see the first exercise of legislative power in the decretal (A. D. 385) of Pope Siricius.
[2] Cod. Theod. 16. 1. 2.
[3] Löning, op. cit. i. 262 ff.; Hinschius, op. cit. iv. 788 ff.
[4] Löning, op. cit. i. 293; Karlowa, op. cit. i. 966. This depends on the genuineness of Constit. Sirmond. 1.
[5] Löning, op. cit. i. 305; Hinschius, op. cit. iv. 794.
[6] Löning, op. cit. i. 64-94.
[7] Krüger, op. cit. 285 ff.; Karlowa, op. cit. i. 944.

tale; but we remember how rapidly the empire was being torn in shreds. Already Britain was abandoned (407). We may doubt whether the statute-book of Theodosius ever reached our shores until it had been edited by Jacques Godefroi.[1] Indeed we may say that the fall of a loose stone in Britain brought the crumbling edifice to the ground.[2] Already before this code was published the hordes of Alans, Vandals, and Sueves had swept across Gaul and Spain; already the Vandals were in Africa. Already Rome had been sacked by the West Goths; they were founding a kingdom in southern Gaul and were soon to have a statute-book of their own. Gaiseric was not far off, nor Attila. Also let us remember that this Theodosian Code was by no means well designed if it was to perpetuate the memory of Roman civil science in a stormy age. It was no "code" in our modern sense of that term. It was only a more or less methodic collection of modern statutes. Also it contained many things that the barbarians had better not have read; bloody laws against heretics, for example.

We turn from it to the first monument of Germanic law that has come down to us. It consists of some fragments of what must have been a large law-book published by Euric for his West Goths, perhaps between 470 and 475.[3] Euric was a conquering king; he ruled Spain and a large part of southern Gaul; he had cast off, so it is said, even the pretence of ruling in the emperor's name. Nevertheless, his laws are not nearly so barbarous as our curiosity might wish them to be. These West Goths who had wandered across Europe were veneered by Roman civilization. It did them little good. Their later law-books, that of Reckessuinth (652-672), that of Erwig (682), that of Egica (687-701), are said to be verbose and futile imitations of Roman codes. But Euric's laws are sufficient to remind us that the order of date among these *Leges Barbarorum* is very different from the order of

[1] The Breviary of Alaric is a different matter.

[2] Bury, History of the Later Roman Empire, i. 142: "And thus we may say that it was the loss or abandonment of Britain in 407 that led to the further loss of Spain and Africa."

[3] Zeumer, Leges Visigothorum Antiquiores, 1894; Brunner, op. cit. i. 320; Schröder, op. cit. 230.

barbarity. Scandinavian laws that are not written until the thirteenth century will often give us what is more archaic than anything that comes from the Gaul of the fifth or the Britain of the seventh. And, on the other hand, the mention of Goths in Spain should remind us of those wondrous folk-wanderings and of their strange influence upon the legal map of Europe. The Saxon of England has a close cousin in the Lombard of Italy, and modern critics profess that they can see a specially near kinship between Spanish and Icelandic law.[1]

In legal history the sixth century is the century of Justinian. But in the west of Europe this age appears as his, only if we take into account what was then a remote future. How powerless he was to legislate for many of the lands and races whence he drew his grandiose titles — *Alamannicus*, *Gothicus*, *Francicus* and the rest — we shall see if we inquire who else had been publishing laws. The barbarians had been writing down their customs. The barbarian kings had been issuing law-books for their Roman subjects. Books of ecclesiastical law, of conciliar and papal law, were being compiled.[2]

The discovery of fragments of the laws of Euric the West Goth has deprived the *Lex Salica* of its claim to be the oldest extant statement of Germanic custom. But if not the oldest, it is still very old; also it is rude and primitive.[3] It comes to us from the march between the fifth and the sixth centuries; almost certainly from the victorious reign of Chlodwig (486-511). An attempt to fix its date more closely brings out one of its interesting traits. There is nothing distinctively heathen in it; but (and this makes it unique[4]) there is

[1] Ficker, Untersuchungen zur Erbenfolge, 1891-5; Ficker, Ueber nähere Verwandtschaft zwischen gothisch-spanischem und norwegisch-isländischem Recht (Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. 456 ff.). These attempts to reconstruct the genealogy of the various Germanic systems are very interesting, if hazardous.

[2] For a map of Europe at the time of Justinian's legislation see Hodgkin, Italy and her Invaders, vol. iv. p. 1.

[3] Brunner, op. cit. i. 292 ff.; Schröder, op. cit. 226 ff.; Esmein, op. cit. 102 ff.; Dahn, Die Könige der Germanen, vii. (2) 50 ff.; Hessels and Kern, Lex Salica, The ten texts, 1880.

[4] However, there are some curious relics of heathenry in the *Lex Frisionum*: Brunner, op. cit. i. 342.

nothing distinctively Christian. If the Sicambrian has already bowed his neck to the catholic yoke, he is not yet actively destroying by his laws what he had formerly adored.[1] On the other hand, his kingdom seems to stretch south of the Loire, and he has looked for suggestions to the laws of the West Goths. The *Lex Salica*, though written in Latin, is very free from the Roman taint. It contains in the so-called Malberg Glosses many old Frankish words, some of which, owing to mistranscription, are puzzles for the philological science of our own day. Like the other Germanic folk-laws, it consists largely of a tariff of offences and atonements; but a few precious chapters, every word of which has been a cause of learned strife, lift the curtain for a moment and allow us to watch the Frank as he litigates. We see more clearly here than elsewhere the formalism, the sacramental symbolism of ancient legal procedure. We have no more instructive document; and let us remember that, by virtue of the Norman Conquest, the *Lex Salica* is one of the ancestors of English law.

Whether in the days when Justinian was legislating, the Western or Ripuarian Franks had written law may not be certain; but it is thought that the main part of the *Lex Ribuaria* is older than 596.[2] Though there are notable variations, it is in part a modernized edition of the *Salica*, showing the influence of the clergy and of Roman law. On the other hand, there seems little doubt that the core of the *Lex Burgundionum* was issued by King Gundobad (474-516) in the last years of the fifth century.[3]

Burgundians and West Goths were scattered among Roman provincials. They were East Germans; they had long been Christians, though addicted to the heresy of Arius. They could say that they had Roman authority for their occupation of Roman soil. Aquitania Secunda had been made over to the West Goths; the Burgundians vanquished by

[1] Greg. Turon. ii. 22 (ed. Omont, p. 60): "Mitis depone colla, Sicamber; adora quod incendisti, incende quod adorasti."

[2] Brunner, op. cit. i. 303 ff.; Schröder, op. cit. 229; Esmein, op. cit. 107. Edited by Sohm in Monumenta Germanica.

[3] Brunner, op. cit. i. 332 ff.; Schröder, op. cit. 234; Esmein, op. cit. 108. Edited by v. Salis in M. G.

Aetius had been deported to Savoy.[1] In their seizure of lands from the Roman possessors they had followed, though with modifications that were profitable to themselves, the Roman system of billeting barbarian soldiers.[2] There were many *Romani* as well as many *barbari* for whom their kings could legislate. Hence the *Lex Romana Burgundionum* and the *Lex Romana Visigothorum*. The former [3] seems to be the law-book that Gundobad promised to his Roman subjects; he died in 516. Rules have been taken from the three Roman *codices*, from the current abridgments of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of this book. Far more comprehensive and far more important was the Breviary of Alaric or *Lex Romana Visigothorum*.[4] Euric's son, Alaric II, published it in 506 as a statute-book; among the *Romani* of his realm it was to supplant all older books. It contained large excerpts from the Theodosian Codex, a few from the *Gregorianus* and *Hermogenianus*, some post-Theodosian constitutions, some of the *Sententiae* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. The greater part of these texts was equipped with a running commentary (*interpretatio*) which attempted to give their upshot in a more intelligible form. It is thought nowadays that this "interpretation" and the sorry version of Gaius represent, not Gothic barbarism, but degenerate Roman science. A time had come when lawyers could no longer understand their own old texts and were content with debased abridgments.[5]

The West Goths' power was declining. Hardly had Alaric issued his statute-book when he was slain in battle by the Franks. Soon the Visigothic became a Spanish kingdom. But it was not in Spain that the *Breviarium* made its permanent mark. There it was abrogated by Reckessuinth when he issued a code for all his subjects of every race.[6] On the other hand, it struck deep root in Gaul. It became the prin-

[1] Brunner, op. cit. i. 50-1. [2] Ibid. 64-7.
[3] Krüger, op. cit. 317; Brunner, op. cit. i. 354; Schröder, op. cit. 234. Edited by v. Salis in M. G.
[4] Krüger, op. cit. 309; Brunner, op. cit. i. 358. Edited by Hänel, 1849.
[5] Karlowa, op. cit. i. 976.
[6] See above, p. 17.

cipal, if not the only, representative of Roman law in the expansive realm of the Franks. But even it was too bulky for men's needs. They made epitomes of it and epitomes of epitomes.[1]

Then, again, we must remember that while Tribonian was busy upon the Digest, the East Goths were still masters of Italy. We recall the event of 476; one emperor, Zeno at Byzantium, was to be enough. Odovacer had ruled as patrician and king. He had been conquered by the East Goths. The great Theodoric had reigned for more than thirty years (493-526); he had tried to fuse Italians and Goths into one nation; he had issued a considerable body of law, the *Edictum Theodorici*, for the more part of a criminal kind.[2]

Lastly, it must not escape us that about the year 500 there was in Rome a monk of Scythian birth who was labouring upon the foundations of the *Corpus Iuris Canonici*. He called himself Dionysius Exiguus. He was an expert chronologist and constructed the Dionysian cycle. He was collecting and translating the canons of eastern councils; he was collecting also some of the letters (decretal letters they will be called) that had been issued by the popes from Siricius onwards (384-498).[3] This *Collectio Dionysiana* made its way in the West. Some version of it may have been the book of canons which our Archbishop Theodore produced at the Council of Hertford in 673.[4] A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774.[5] It helped to spread abroad the notion that the popes can declare, even if they can not make, law for the universal church, and thus to contract the sphere of secular jurisprudence.

In 528 Justinian began the work which gives him his fame in legal history; in 534, though there were novel constitu-

[1] The epitomes will be found in Hänel's edition, Lex Romana Visigothorum, 1849.

[2] Brunner, op. cit. i. 365; Karlowa, op. cit. i. 947 ff. Edited by Bluhme in M. G.

[3] Maassen, op. cit. i. 422 ff.; Tardif, op. cit. 110. Printed in Migne, Patrologia, vol. 67.

[4] Haddan and Stubbs, Councils, iii. 119. See, however, the remarks of Mr. C. H. Turner, Eng. Hist. Rev. ix. 727.

[5] Maassen, op. cit. i. 441.

tions to come from him, it was finished. Valuable as the code of imperial statutes might be, valuable as might be the modernized and imperial edition of an excellent but ancient schoolbook, the main work that he did for the coming centuries lies in the Digest. We are told nowadays that in the Orient the classical jurisprudence had taken a new lease of life, especially in the schools at Berytus.[1] We are told that there is something of a renaissance, something even of an antiquarian revival visible in the pages of the Digest, a desire to go back from vulgar practice to classical text, also a desire to display an erudition that is not always very deep. Great conqueror, great builder, great theologian, great law-giver, Justinian would also be a great master of legal science and legal history. The narrow escape of his Digest from oblivion seems to tell us that, but for his exertions, very little of the ancient treasure of wisdom would have reached modern times; and a world without the Digest would not have been the world that we know. Let us, however, remember the retrospective character of the book. The *ius*, the unenacted law, ceased to grow three hundred years ago. In time Justinian stands as far from the jurists whose opinions he collects as we stand from Coke or even from Fitzherbert.

Laws have need of arms: Justinian knew it well. Much depended upon the fortunes of a war. We recall from the Institutes the boast that Africa has been reclaimed. Little was at stake there, for Africa was doomed to the Saracens; nor could transient success in Spain secure a western home for the law-books of Byzantium.[2] All was at stake in Italy. The struggle with the East Goths was raging; Rome was captured and recaptured. At length the emperor was victorious (552), the Goths were exterminated or expelled; we hear of them no more. Justinian could now enforce his laws in Italy, and this he did by the pragmatic sanction *pro petitione Vigilii* (554).[3] Fourteen years were to elapse and then the Lombard hordes under Alboin would be pouring

[1] Krüger, op. cit. 319.
[2] Conrat, op. cit. i. 32.
[3] Krüger, op. cit. 354; Karlowa, op. cit. i. 938; Hodgkin, Italy and her Invaders, vi. 519.

down upon an exhausted and depopulated land. Those fourteen years are critical in legal history; they suffer Justinian's books to obtain a lodgment in the West. The occidental world has paid heavily for Code and Digest in the destruction of the Gothic kingdom, in the temporal power of the papacy, and in an Italy never united until our own day; but perhaps the price was not too high. Be that as it may, the coincidence is memorable. The Roman empire centred in New Rome has just strength enough to hand back to Old Rome the guardianship of her heathen jurisprudence, now "enucleated" (as Justinian says) in a small compass, and then loses for ever the power of legislating for the West. True that there is the dwindling exarchate in Italy; true that the year 800 is still far off; true that one of Justinian's successors, Constantine IV, will pay Rome a twelve days' visit (663) and rob it of ornaments that Vandals have spared;[1] but with what we must call Græco-Roman jurisprudence, with the Ecloga of Leo the Isaurian and the Basilica of Leo the Wise, the West, if we except some districts of southern Italy,[2] has no concern. Two halves of the world were drifting apart, were becoming ignorant of each other's language, intolerant of each other's theology. He who was to be the true lord of Rome, if he loathed the Lombard, loved not the emperor. Justinian had taught Pope Vigilius, the Vigilius of the pragmatic sanction, that in the Byzantine system the church must be a department of the state.[3] The bishop of Rome did not mean to be the head of a department.

During some centuries Pope Gregory the Great (590-604) is one of the very few westerns whose use of the Digest can be proved.[4] He sent Augustin to England. Then "in Augustin's day," about the year 600, Æthelbert of Kent set in writing the dooms of his folk "in Roman fashion."[5] Not

[1] Gregorovius, History of Rome (transl. Hamilton), ii. 153 ff.; Oman, Dark Ages, 237, 245.

[2] For Byzantine law in southern Italy, see Conrat, op. cit. i. 49.

[3] Hodgkin, Italy and her Invaders, iv. 571 ff.: "The Sorrows of Vigilius."

[4] Conrat, op. cit. i. 8.

[5] Liebermann, Gesetze der Angelsachsen, p. 3. The first instalment of Dr. Liebermann's great work comes to our hands as these pages go through the press. Bede, Hist. Eccl. lib. 2, c. 5 (ed. Plummer, i. 90):

improbably he had heard of Justinian's exploits; but the dooms, though already they are protecting with heavy *bót* the property of God, priests and bishops, are barbarous enough. They are also, unless discoveries have yet to be made, the first Germanic laws that were written in a Germanic tongue. In many instances the desire to have written laws appears so soon as a barbarous race is brought into contact with Rome.[1] The acceptance of the new religion must have revolutionary consequences in the world of law, for it is likely that heretofore the traditional customs, even if they have not been conceived as instituted by gods who are now becoming devils, have been conceived as essentially unalterable. Law has been the old; new law has been a contradiction in terms. And now about certain matters there must be new law. What is more, "the example of the Romans" shows that new law can be made by the issue of commands. Statute appears as the civilized form of law. Thus a fermentation begins and the result is bewildering. New resolves are mixed up with statements of old custom in these *Leges Barbarorum.*

The century which ends in 700 sees some additions made to the Kentish laws by Hlothær and Eadric, and some others made by Wihtræd; there the Kentish series ends. It also sees in the dooms of Ine the beginning of written law in Wessex.[2] It also sees the beginning of written law among the Lombards; in 643 Rothari published his edict;[3] it is accounted to be one of the best statements of ancient German usages. A little later the Swabians have their *Lex Alamannorum*,[4] and the Bavarians their *Lex Baiuwariorum.*[5]

"iuxta exempla Romanorum." Bede himself (Opera, ed. Giles, vol. vi. p. 321) had read of Justinian's Codex; but what he says of it seems to prove that he had never seen it: Conrat, op. cit. i. 99.

[1] Brunner, op. cit. i. 283. So native princes in India have imitated the Indian Penal Code within their states.

[2] Whether we have Ine's code or only an Alfredian recension of it is a difficult question, lately discussed by Turk, Legal Code of Alfred (Halle, 1893), p. 42.

[3] Brunner, op. cit. i. 368; Schröder, op. cit. 236. Edited by Bluhme in M.G.

[4] Brunner, op. cit. i. 308; Schröder, op. cit. 238. Edited by Lehmann in M. G. There are fragments of a *Pactus Alamannorum* from circ. 600. The *Lex* is supposed to come from 717-9.

[5] Brunner, op. cit. i. 313; Schröder, op. cit. 239. Edited by Merkel in M. G. This is now ascribed to the years 739-48.

It is only in the Karolingian age that written law appears among the northern and eastern folks of Germany, the Frisians, the Saxons, the Angli and Warni of Thuringia, the Franks of Hamaland.[1] To a much later time must we regretfully look for the oldest monuments of Scandinavian law.[2] Only two of our "heptarchic" kingdoms leave us law, Kent and Wessex, though we have reason to believe that Offa the Mercian (ob. 796) legislated.[3] Even Northumbria, Bede's Northumbria, which was a bright spot in a dark world, bequeaths no dooms. The impulse of Roman example soon wore out. When once a race has its *Lex*, its aspirations seem to be satisfied. About the year 900 Alfred speaks as though Offa (circ. 800), Ine (circ. 700), Æthelbert (circ. 600) had left him little to do. Rarely upon the mainland was there any authoritative revision of the ancient *Leges*, though transcribers sometimes modified them to suit changed times, and by so doing have perplexed the task of modern historians. Only among the Lombards, who from the first, despite their savagery, seem to show something that is like a genius for law,[4] was there steadily progressive legislation. Grimwald (668), Liutprand (713-35), Ratchis (746), and Aistulf (755) added to the edict of Rothari. Not by abandoning, but by developing their own ancient rules, the Lombards were training themselves to be the interpreters and in some sort the heirs of the Roman *prudentes*.

As the Frankish realm expanded, there expanded with it a wonderful "system of personal laws."[5] It was a system of racial laws. The *Lex Salica*, for example, was not the law of a district, it was the law of a race. The Swabian, wherever he might be, lived under his Alamannic law, or, as an expressive phrase tells us, he lived Alamannic law (*legem vivere*). So Roman law was the law of the Romani. In a famous, if exaggerated sentence, Bishop Agobard of Lyons

[1] Brunner, op. cit. i. 340 ff.; Schröder, op. cit. 240 ff. Edited by v. Richthofen and Sohm in M. G.

[2] K. Maurer, Ueberblick über die Geschichte der nordgermanischen Rechtsquellen in v. Holtzendorff, Encyklopädie.

[3] Alfred, Introduction, 49, § 9 (Liebermann, Gesetze, p. 46).

[4] Brunner, op. cit. i. 370; Schröder, op. cit. 235.

[5] Brunner, op. cit. i. 259; Schröder, op. cit. 225; Esmein, op. cit. 57.

has said that often five men would be walking or sitting together and each of them would own a different law.[1] We are now taught that this principle is not primitively Germanic. Indeed in England, where there were no Romani, it never came to the front, and, for example, "the Danelaw" very rapidly became the name for a tract of land.[2] But in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of the population, the bulk of which was Gallo-Roman, and the barbarians, at least in show, had made their entry as subjects or allies of the emperor. It was natural then that the Romani should live their old law, and, as we have seen, their rulers were at pains to supply them with books of Roman law suitable to an age which would bear none but the shortest of law-books. It is doubtful whether the Salian Franks made from the first any similar concession to the provincials whom they subdued; but, as they spread over Gaul, always retaining their own *Lex Salica*, they allowed to the conquered races the right that they claimed for themselves. Their victorious career gave the principle an always wider scope. At length they carried it with them into Italy and into the very city of Rome. It would seem that among the Lombards, the Romani were suffered to settle their own disputes by their own rules, but Lombard law prevailed between Roman and Lombard. However, when Charles the Great vanquished Desiderius and made himself king of the Lombards, the Frankish system of personal law found a new field. A few years afterwards (800) a novel Roman empire was established. One of the immediate results of this many-sided event was that Roman law ceased to be the territorial law of any part of the lands that had become subject to the so-called Roman Emperor. Even in Rome it was reduced to the level of a personal or racial law, while in northern Italy there were many Swabians who lived Alamannic, of Franks who lived

[1] Agobardi Opera, Migne, Patrol. vol. 104, col. 116: "Nam plerumque contingit ut simul eant aut sedeant quinque homines et nullus eorum communem legem cum altero habeat."

[2] Stubbs, Constit. Hist. i. 216. See, however, Dahn, Könige der Germanen, vii. (3), p. 1 ff.

Salic or Ripuarian law, besides the Lombards.[1] In the future the *renovatio imperii* was to have a very different effect. If the Ottos and Henries were the successors of Augustus, Constantine, and Justinian, then Code and Digest were *Kaiserrecht*, statute law for the renewed empire. But some centuries were to pass before this theory would be evolved, and yet other centuries before it would practically mould the law of Germany. Meanwhile Roman law was in Rome itself only the personal law of the Romani.

A system of personal laws implies rules by which a "conflict of laws" may be appeased, and of late years many of the international or intertribal rules of the Frankish realm have been recovered.[2] We may see, for example, that the law of the slain, not that of the slayer, fixes the amount of the wergild, and that the law of the grantor prescribes the ceremonies with which land must be conveyed. We see that legitimate children take their father's, bastards their mother's law. We see also that the churches, except some which are of royal foundation, are deemed to live Roman law, and in Italy, though not in Frankland, the rule that the individual cleric lives Roman law seems to have been gradually adopted.[3] This gave the clergy some interest in the old system. But German and Roman law were making advances towards each other. If the one was becoming civilized, the other had been sadly barbarized, or rather vulgarized. North of the Alps the current Roman law regarded Alaric's *Lex* as its chief authority. In Italy Justinian's Institutes and Code and Julian's epitome of the Novels were known, and someone may sometimes have opened a copy of the Digest. But everywhere the law administered among the Romani seems to have been in the main a traditional, customary law which paid little heed to written texts. It was, we are told, *ein römisches Vulgarrecht*, which stood to pure Roman law in the same relation as that in which the vulgar Latin or Romance that people talked stood to the literary language.[4] Not a few of the rules and ideas which

[1] Brunner, op. cit. i. 260. [2] Ibid. 261 ff.
[3] Brunner, op. cit. i. 269; Löning, op. cit. ii. 284.
[4] Brunner, op. cit. i. 255.

were generally prevalent in the West had their source in this low Roman law. In it starts the history of modern conveyancing. The Anglo-Saxon "land-book" is of Italian origin.[1] That England produces no formulary books, no books of "precedents in conveyancing," such as those which in considerable numbers were compiled in Frankland,[2] is one of the many signs that even this low Roman law had no home here; but neither did our forefathers talk low Latin.

In the British India of to-day we may see, and on a grand scale, what might well be called a system of personal laws, of racial laws[3] If we compared it with the Frankish, one picturesque element would be wanting. Suppose that among the native races there was one possessed of an old law-book, too good for it, too good for us, which gradually, as men studied it afresh, would begin to tell of a very ancient but eternally modern civilization and of a skilful jurisprudence which the lawyers of the ruling race would some day make their model. This romance of history will not repeat itself.

During the golden age of the Frankish supremacy, the age which closely centres round the year 800, there was a good deal of definite legislation: much more than there was to be in the bad time that was coming. The king or emperor issued capitularies (*capitula*).[4] Within a sphere which can not be readily defined he exercised a power of laying commands upon all his subjects, and so of making new territorial law for his whole realm or any part thereof; but in principle any change in the law of one of the folks would require that folk's consent. A superstructure of capitularies might be reared, but the *Lex* of a folk was not easily alterable. In 1827 Ansegis, Abbot of St. Wandrille, collected some of the capitularies into four books.[5] His work seems to have found general acceptance, though it shows that many capitularies were speedily forgotten and

[1] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, i. 187.

[2] Brunner, D. R. G. i. 401; Schröder, op. cit. 254. Edited in M. G. by Zeumer; also by E. de Rozière, Recueil général des formules.

[3] The comparison has occurred to M. Esmein, op. cit. 56.

[4] Brunner, op cit. i. 374; Schröder, op. cit. 247; Esmein, op. cit. 116. Edited in M. G. by Boretius and Krause; previously by Pertz.

[5] Brunner, op. cit. i. 382; Schröder, op. cit. 251; Esmein, op. cit. 117.

that much of the Karolingian legislation had failed to produce a permanent effect. Those fratricidal wars were beginning. The legal products which are to be characteristic of this unhappy age are not genuine laws; they are the forged capitularies of Benedict the Levite and the false decretals of the Pseudo-Isidore.

Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went, for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canons were collected into the same book, and the decretal letters of later were added to those of earlier popes. Of the *Dionysiana* we have already spoken. Another celebrated collection seems to have taken shape in the Spain of the seventh century; it has been known as the *Hispana* or *Isidoriana*,[1] for without sufficient warrant it has been attributed to that St. Isidore of Seville (ob. 636), whose *Origines*[2] served as an encyclopædia of jurisprudence and all other sciences. The *Hispana* made it sway into France, and it seems to have already comprised some spurious documents before it came to the hands of the most illustrious of all forgers.

Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the *Hispana;* but into it there had been foisted, besides other forgeries, some sixty decretals professing to come from the very earliest successors of St. Peter. The compiler called himself Isidorus Mercator; he seems to have tried to personate Isidore of Seville. Many guesses have been made as to his name and time and home. It seems certain that he did his work in Frankland and near the middle of the ninth century. He has been sought as far west as le Mans, but suspicion hangs thickest over the church

[1] Maassen, op. cit. i. 667 ff.; Tardif, op. cit. 117. Printed in Migne, Patrol. vol. 84.

[2] For the Roman law of the Origines, see Conrat, op. cit. i. 150. At first or second hand this work was used by the author of our *Leges Henrici*.. That the learned Isidore knew nothing of Justinian's books seems to be proved, and this shows that they were not current in Spain.

of Reims. The false decretals are elaborate mosaics made up out of phrases from the bible, the fathers, genuine canons, genuine decretals, the West Goth's Roman law-book; but all these materials, wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacrosanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome. Episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. Above all (and this is the burden of the song), no accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui.*

Closely connected with this fraud was another. Someone who called himself a deacon of the church of Mainz and gave his name as Benedict, added to the four books of capitularies, which Ansegis had published, three other books containing would-be, but false, capitularies, which had the same bent as the decretals concocted by the Pseudo-Isidore. These are not the only, but they are the most famous manifestations of the lying spirit which had seized the Frankish clergy. The Isidorian forgeries were soon accepted at Rome.

The popes profited by documents which taught that ever since the apostolic age the bishops of Rome had been declaring, or even making, law for the universal church. On this rock or on this sand a lofty edifice was reared.[1]

And now for the greater part of the Continent comes the time when ecclesiastical law is the only sort of law that is visibly growing. The stream of capitularies ceased to flow; there was none to legislate; the Frankish monarchy was going to wreck and ruin; feudalism was triumphant. Sacerdotalism also was triumphant, and its victories were closely connected with those of feudalism. The clergy had long been striving to place themselves beyond the reach of the state's tribunals. The dramatic struggle between Henry II

[1] The Decretales Pseudo-Isidorianae were edited by Hinschius in 1863. See also Tardif, op. cit. 133 ff.; Conrat, op. cit. i. 299; Brunner, op. cit. i. 384.

and Becket has a long Frankish prologue.[1] Some concessions had been won from the Merovingians; but still Charles the Great had been supreme over all persons and in all causes. Though his realm fell asunder, the churches were united, and united by a principle that claimed a divine origin. They were rapidly evolving law which was in course of time to be the written law of an universal and theocratic monarchy. The mass, now swollen by the Isidorian forgeries, still rolled from diocese to diocese, taking up new matter into itelf. It became always more lawyerly in form and texture as it appropriated sentences from the Roman law-books and made itself the law of the only courts to which the clergy would yield obedience. Nor was it above borrowing from Germanic law, for thence it took its probative processes, the oath with oath-helpers and the ordeal or judgment of God. Among the many compilers of manuals of church law three are especially famous: Regino, abbot of Prüm (906-915);[2] Burchard, bishop of Worms (1012-1023);[3] and Ivo, bishop of Chartres (ob. 1117).[4] They and many others prepared the way for Gratian, the maker of the church's Digest, and events were deciding that the church should also have a Code and abundant Novels. In an evil day for themselves the German kings took the papacy from the mire into which it had fallen, and soon the work of issuing decretals was resumed with new vigour. At the date of the Norman Conquest the flow of these edicts was becoming rapid.

Historians of French and German law find that a well-marked period is thrust upon them. The age of the folk-laws and the capitularies, "the Frankish time," they can restore. Much indeed is dark and disputable; but much has been made plain during the last thirty years by their unwearying labour. There is no lack of materials, and the materials are of a strictly legal kind: laws and statements of law. This done, they are compelled rapidly to pass through several centuries to a new point of view. They

[1] Hinschius, op. cit. iv. 849 ff.
[2] Tardif, op. cit. 162. Printed in Migne, Patrol. vol. 132; also edited by Wasserschleben, 1840.
[3] Ibid. 164. Printed in Migne, Patrol. vol. 140.
[4] Ibid. 170. Printed in Migne, Patrol. vol. 161.

take their stand in the thirteenth among law-books which have the treatises of Glanvill and Bracton for their English equivalents. It is then a new world that they paint for us. To connect this new order with the old, to make the world of "the classical feudalism"[1] grow out of the world of the folk-laws is a task which is being slowly accomplished by skilful hands; but it is difficult, for, though materials are not wanting, they are not of a strictly legal kind; they are not laws, nor law-books, nor statements of law. The intervening, the dark age, has been called "the diplomatic age," whereby is meant that its law must be hazardously inferred from *diplomata*, from charters, from conveyances, from privileges accorded to particular churches or particular towns. No one legislates. The French historian will tell us that the last capitularies which bear the character of general laws are issued by Carloman II in 884, and that the first legislative *ordonnance* is issued by Louis VII in 1155.[2] Germany and France were coming to the birth, and the agony was long. Long it was questionable whether the western world would not be overwhelmed by Northmen and Saracens and Magyars; perhaps we are right in saying that it was saved by feudalism.[3] Meanwhile the innermost texture of human society was being changed; local customs were issuing from and then consuming the old racial laws.

Strangely different, at least upon its surface, is our English story. The age of the capitularies (for such we well might call it) begins with us just when it has come to its end upon the Continent. We have had some written laws from the newly converted Kent and Wessex of the seventh century. We have heard that in the day of Mercia's greatness Offa (ob. 796), influenced perhaps by the example of Charles the Great, had published laws. These we have lost; but we have no reason to fear that we have lost much else. Even Egbert did not legislate. The silence was broken by

[1] We borrow *féodalité classique* from M. Flach: Les origines de l'ancienne France, ii. 551.

[2] Esmein, op. cit. 487-8; Viollet, op. cit. 152. Schröder, op. cit. 624: "Vom 10. bis 12. Jahrhundert ruhte die Gesetzgebung fast ganz . . . Es war die Zeit der Alleinherrschaft des Gewohnheitsrechts."

[3] Oman, The Dark Ages, 511.

Alfred, and then we have laws from almost every king: from Edward, Æthelstan, Edmund, Edgar, Æthelred, and Cnut. The age of the capitularies begins with Alfred, and in some sort it never ends, for William the Conqueror and Henry I take up the tale.[1] Whether in the days of the Confessor, whom a perverse, though explicable, tradition honoured as a pre-eminent lawgiver, we were not on the verge of an age without legislation, an age which would but too faithfully reproduce some bad features of the Frankish decadence, is a question that is not easily answered. Howbeit, Cnut had published in England a body of laws which, if regard be had to its date, must be called a handsome code. If he is not the greatest legislator of the eleventh century, we must go as far as Barcelona to find his peer.[2] He had been to Rome; he had seen an emperor crowned by a pope; but it was not outside England that he learnt to legislate. He followed a fashion set by Alfred. We might easily exaggerate both the amount of new matter that was contained in these English capitularies and the amount of information that they give us; but the mere fact that Alfred sets, and that his successors, and among them the conquering Dane, maintain, a fashion of legislating, is of great importance. The Norman subdues, or, as he says, inherits a kingdom in which a king is expected to publish laws.

Were we to discuss the causes of this early divergence of English from continental history we might wander far. In the first place, we should have to remember the small size, the plain surface, the definite boundary of our country. This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation. Also we

[1] As to the close likeness between the English dooms and the Frankish capitularies, see Stubbs, Const. Hist. i. 223. We might easily suppose direct imitation, were it not that much of the Karolingian system was in ruins before Alfred began his work.

[2] The Usatici Barchinonensis Patriae (printed by Giraud, Histoire du droit français, ii. 465 ff.) are ascribed to Raymond Berengar I and to the year 1068 or thereabouts. But how large a part of them really comes from him is a disputable question. See Conrat, op. cit. i. 467; Ficker, Mittheilungen des Instituts für österreichische Geschichtsforschung, 1888, ii. p. 236.

should notice that the kingship of England, when once it exists, preserves its unity: it is not partitioned among brothers and cousins. Moreover we might find ourselves saying that the Northmen were so victorious in their assaults on our island that they did less harm here than elsewhere. In the end it was better that they should conquer a tract, settle in villages and call the lands by their own names, than that the state should go to pieces in the act of repelling their inroads. Then, again, it would not escape us that a close and confused union between church and state prevented the development of a body of distinctively ecclesiastical law which would stand in contrast with, if not in opposition to, the law of the land.[1] Such power had the bishops in all public affairs, that they had little to gain from decretals forged or genuine,[2] indeed Æthelred's laws are apt to become mere sermons preached to a disobedient folk. However, we are here but registering the fact that the age of capitularies, which was begun by Alfred, does not end. The English king, be he weak like Æthelred or strong like Cnut, is expected to publish laws.

But Italy was to be for a while the focus of the whole world's legal history. For one thing, the thread of legislation was never quite broken there. Capitularies or statutes which enact territorial law came from Karolingian emperors and from Karolingian kings of Italy, and then from the Ottos and later German kings. But what is more important is that the old Lombard law showed a marvellous vitality and a capacity of being elaborated into a reasonable and progressive system. Lombardy was the country in which the principle of personal law struck its deepest roots. Besides Lombards and Romani, there were many Franks and Swabians who transmitted their law from father to son. It was long before the old question *Qua lege vivis?* lost its importance. The " conflict of laws " seems to have favoured the growth of a mediating and instructed jurisprudence.

[1] Stubbs, Const. Hist. i. 263: " There are few if any records of councils distinctly ecclesiastical held during the tenth century in England."

[2] There seem to be traces of the Frankish forgeries in the Worcester book described by Miss Bateson, E. H. R. x. 712 ff. English ecclesiastics were borrowing, and it is unlikely that they escaped contamination.

Then at Pavia, in the first half of the eleventh century, a law-school had arisen. In it men were endeavouring to systematize by gloss and comment the ancient Lombard statutes of Rothari and his successors. The heads of the school were often employed as royal justices (*iudices palatini*); their names and their opinions were treasured by admiring pupils. From out this school came Lanfranc. Thus a body of law, which though it had from the first been more neatly expressed than, was in its substance strikingly like, our own old dooms, became the subject of continuous and professional study. The influence of reviving Roman law is not to be ignored. These Lombardists knew their Institutes, and, before the eleventh century was at an end, the doctrine that Roman law was a subsidiary common law for all mankind (*lex omnium generalis*) was gaining ground among them; but still the law upon which they worked was the old Germanic law of the Lombard race. Pavia handed the lamp to Bologna, Lombardy to the Romagna.[1]

As to the more or less that was known of the ancient Roman texts there has been learned and lively controversy in these last years.[2] But, even if we grant to the champions of continuity all that they ask, the sum will seem small until the eleventh century is reached. That large masses of men in Italy and southern France had Roman law for their personal law is beyond doubt. Also it is certain that Justinian's Institutes and Code and Julian's Epitome of the Novels were beginning to spread outside Italy. There are questions still to be solved about the date and domicile of various small collections of Roman rules which some regard

[1] Boretius, Preface to edition of Liber legis Langobardorum, in M. G.; Brunner, op. cit. i. 387 ff.; Ficker, Forschungen zur Reichs- u. Rechtsgeschichte Italiens, iii. 44 ff., 139 ff.; Conrat, op. cit. i. 393 ff.

[2] It is well summed up for English readers by Rashdall, Universities of Europe, i. 89 ff. The chief advocate of a maximum of knowledge has been Dr. Hermann Fitting in Juristische Schriften des früheren Mittelalters, 1876, Die Anfänge der Rechtsschule zu Bologna, 1888, and elsewhere. He has recently edited a Summa Codicis (1894) and some Quaestiones de iuris subtilitatibus, both of which he ascribes to Irnerius. See also Pescatore, Die Glossen des Irnerius, 1888; Mommsen, Preface to two-volume edition of the Digest; Flach, Etudes critiques sur l'histaire du droit romain, 1890; Besta, L'Opera d'Irnerio, 1896; Ficker, op. cit. vol. iii, and Conrat, op. cit. passim.

as older than or uninfluenced by the work of the Bolognese glossators. One critic discovers evanescent traces of a school of law at Rome or at Ravenna which others cannot see. The current instruction of boys in grammar and rhetoric involved some discussion of legal terms. Definitions of *lex* and *ius* and so forth were learnt by heart; little catechisms were compiled;[1] but of anything that we should dare to call an education in Roman law there are few, if any, indisputable signs before the school of Bologna appears in the second half of the eleventh century. As to the Digest, during some four hundred years its mere existence seems to have been almost unknown. It barely escaped with its life. When men spoke of "the pandects" they meant the Bible.[2] The romantic fable of the capture of an unique copy at the siege of Amalfi in 1135 has long been disproved; but, if some small fragments be neglected, all the extant manuscripts are said to derive from two copies, one now lost, the other the famous Florentina, written, we are told, by Greek hands in the sixth or seventh century. In the eleventh the revival began. In 1038 Conrad II, the emperor whom Cnut saw crowned, ordained that Roman law should be once more the territorial law of the city of Rome.[3] In 1076 the Digest was cited in the judgment of a Tuscan court.[4] Then, about 1100, Irnerius was teaching at Bologna.[5]

Here, again, there is room for controversy. It is said that he was not self-taught; it is said that neither his theme nor his method was quite new; it is said that he had a predecessor at Bologna, one Pepo by name. All this may be true and is probable enough: and yet undoubtedly he was soon regarded as the founder of the school which was

[1] See E. J. Tardif, Extraits et abrégés juridiques des étymologies d'Isidore de Séville, 1896.

[2] Conrat, op. cit. i. 65.

[3] M. G. Leges, ii. 40; Conrat, op. cit. i. 62.

[4] Ficker, Forschungen, iii. 126, iv. 99; Conrat, op. cit. 67. Apparently the most industrious research has failed to prove that between 603 and 1076 any one cited the Digest. The bare fact that Justinian had issued such a book seems to have vanished from memory. Conrat, op. cit. i. 69.

[5] In dated documents Irnerius (his name seems to have really been Warnerius, Guarnerius) appears in 1113 and disappears in 1125. The University of Bologna kept 1888 as its octocentenary.

teaching Roman law to an intently listening world. We with our many sciences can hardly comprehend the size of this event. The monarchy of theology over the intellectual world was disputed. A lay science claimed its rights, its share of men's attention. It was a science of civil life to be found in the human heathen Digest.'[1]

A new force had begun to play, and sooner or later every body of law in western Europe felt it. The challenged church answered with Gratian's Decretum (circ. 1139) and the Decretals of Gregory IX (1234). The canonist emulated the civilian, and for a long while maintained in the field of jurisprudence what seemed to be an equal combat. Unequal it was in truth. The Decretum is sad stuff when set beside the Digest, and the study of Roman law never dies. When it seems to be dying it always returns to the texts and is born anew. It is not for us here to speak of its new birth in the France of the sixteenth or in the Germany of the nineteenth century; but its new birth in the Italy of the eleventh and twelfth concerns us nearly. Transient indeed but all-important was the influence of the Bologna of Irnerius and Gratian upon the form, and therefore upon the substance, of our English law. The theoretical continuity or "translation" of the empire, which secured for Justinian's books their hold upon Italy, and, though after a wide interval, upon Germany also, counted for little in France or in England. In England, again, there was no mass of Romani, of people who all along had been living Roman law of a degenerate and vulgar sort and who would in course of time be taught to look for their law to Code and Digest. Also there was no need in England for that *reconstitution de l'unité nationale* which fills a large space in schemes of French history, and in which, for good and ill, the Roman texts gave their powerful aid to the centripetal and monarchical forces. In England the new learning found

[1] Esmein, op. cit. 347: "Une science nouvelle naquit, indépendante et laïque, la science de la société civile, telle que l'avaient dégagée les Romains, et qui pouvait passer pour le chef-d'œuvre de la sagesse humaine . . . Il en résulta qu'à côté du théologien se plaça le légiste qui avait, comme lui, ses principes et ses textes, et qui lui disputa la direction des esprits avides de savoir."

a small, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma. But all this we shall see in the sequel.

2. THE DEVELOPMENT OF TEUTONIC LAW[1]

By Edward Jenks[2]

THE epoch in which the states of Western Europe are now living, has a history and a unity of its own, and is peculiarly suitable as material for the study we are about to undertake. It is our own epoch, we know more about it than we know of any other, it appeals more powerfully to us than any other, we have inherited its traditions, we breathe its ideas. Dispute as we may about the details, we know that the Roman Empire fell as a political power, that the sceptre of Western Europe passed from the Roman to the Teuton. That the influence of Rome long overshadowed the new forces which took her place, may be readily admitted; the Teuton did not begin to write history on a clean sheet. But the child who starts by copying his letters, in time proceeds to make letters of his own; and if Clovis and his successors were fond of wearing the cast off clothes of the Cæsars, they none the less set a new fashion of wearing them. Nowhere is this truth more abundantly clear than in the history of Teutonic law. Alongside of the elaborate system which generations of Roman

[1] This passage is extracted from "Law and Politics in the Middle Ages," 1898, cc. I, II, pp. 6-55, and Appendix, pp. 321-326 (New York: Henry Holt & Co.).

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Other Publications: Constitutional Experiments of the Commonwealth, 1891; The Doctrine of Consideration in English Law, 1893; The Government of Victoria, Australia, 1893; History of the Australasian Colonies, 1896; Outline of English Local Government, 1895; Modern Land Law, 1899; A Short History of Politics, 1902; Edward I, 1902; Parliamentary England, 1903.

jurists had expounded, and Imperial legislators fashioned into shape, there grew up, under totally different circumstances, a group of kindred Teutonic laws, at first utterly incoherent, gradually assuming order and system. It is in these that we trace the growth of the idea of Law.

The oldest monuments of Teutonic legal history have received the name of *Leges Barbarorum*. But the title is apt to be misleading. Even in the Frank kingdoms, where the conscious imitation of Rome was strongest, there is at first no attempt at legislation in the modern sense. Beyond doubt the *Leges* were, in most cases, the work of kings, to the extent that they were drawn up by royal direction, and published under royal auspices. Quite possibly, too, the kings who collected them took the opportunity of modifying certain details during the process. But the notion of the king, *i. e.* the State, as the source of legislation, is yet far distant. Several of these codes profess to give their own account of the way in which they were drawn up; and, in spite of all the criticism which has been directed against the more extravagant pretensions of the so-called historical school, there can be little doubt that these accounts contain a large element of truth. The famous *Lex Salica*, the custumal of the race which became overlords of half Western Europe, contains a prologue which, though doubtless of later date than the first redaction of the custumal itself, is yet of great antiquity, and which describes the collection of the *origines causarum* by four chosen men (whose names and districts are given) after lengthy discussions with the *judices*, or presidents of the local assemblies. The first Burgundian code (early sixth century), known as the *Lex Gundobada*, describes itself as a "definition," and is confirmed by the seals of thirty-one counts. The oldest code of the Alamanni, no longer extant in a complete form, is known by the suggestive title of *Pactus* or Agreement; while the extant edition, dating from the early years of the eighth century, professes to have been drawn up by the king, with the aid of thirty-three bishops, thirty-four dukes, seventy-two counts, and a great multitude of people. The Anglo-Saxon kings describe themselves as "setting" (*âsettan*), "fastening" (*gefæstnode*), or "securing"

(*getrymede*) their laws.[1] Owing to the scantiness of external evidence, it is impossible to assert with confidence the precise character of the process adopted in the earliest times. But a curious story preserved by the Saxon annalist Widukind[2] shows that, even in the tenth century, and under so powerful a monarch as Otto the Great, Law was regarded as a truth to be discovered, not as a command to be imposed. The question was, whether the children of a deceased person ought to share in the inheritance of their grandfather, along with their uncles. It was proposed that the matter should be examined by a general assembly convoked for the purpose. But the king was unwilling that a question concerning the difference of laws should be settled by an appeal to numbers. So he ordered a battle by champions; and, victory declaring itself for the party which represented the claims of the grandchildren, the law was solemnly declared in that sense. The original proposal would have been an appeal to custom; but the plan actually adopted reveals the thought, that even custom is not conclusive proof, that Law is a thing which exists independently of human agency, and is discoverable only in the last resort by an appeal to supernatural authority.

There is one circumstance connected with the compilation of the Laws of the Barbarians which is specially suggestive of influences leading to the developement of rudimentary ideas of Law. By far the most important of these codes are directly connected with migrations and conquests. The Teutonic settlements west of the Rhine were the first to produce compilations of Teutonic law, and it may be, and indeed is, often asserted, that this fact is due to the example of the Code of Theodosius, the great monument of Roman jurisprudence which confronted the invaders of the Empire. But the real epoch of law-producing activity coincides closely with the conquering careers of Charles Martel, Pepin the Short, and Charles the Great. During this period are produced the Laws of the Alamanni, the Bavarians, the Frisians, the Thuringians, and the Saxons. In England, the Anglo-Saxon migrations give rise to a scanty crop of laws; but

[1] Schmid, *Gesetze der Angelsachsen*, ed 2. *Æthelbirt*, p. 2, Ine. p. 20.
[2] Widukind, *Annales* (Mon. Germ., SS. fo. iii. p. 440).

the real activity comes with the conquests by the Danes. On the other hand, in Scandinavia, of all Teutonic countries the most isolated, the oldest extant code dates from the end of the twelfth century or the beginning of the thirteenth. The fact is an illustration of the great principle, that mixture or, at least, contact of races is essential to progress. The discovery of differences is needed to stimulate thought and produce coherence. Resistance and attack are alike provocative of definition. The conqueror wishes to enforce his customs upon his new subjects. He must needs explain what they are. The conquered demand the retention of their ancient practices. They are compelled to formulate their claims. So it is when Charles the Great conquers Western Europe. So it is again when William conquers the English, when the English conquer India, when Napoleon conquers Germany.

This fact will, perhaps, help to account for one feature of the *Leges Barbarorum* which has often puzzled readers of them. They omit so many things that we should consider important; and they relate in minute detail matters which seem to us trivial. But, if we remember that the process which produced them was probably a very troublesome one, we shall be inclined to think that their compilers only recorded what was absolutely necessary. And this comprised just those points which the processes of migration and conquest had rendered doubtful. The ancient custom had received a shock; men doubted how far some of its terms would apply to new conditions. Even very modern systems of law frequently omit all mention of rules which are really fundamental. No statute, no recorded decision of an English law court, says that a man may destroy a chattel which belongs to him. Why should it? No one doubts the fact. Much less does a primitive code trouble itself about theoretical completeness. Law is the expression of order and settled rule; but it is none the less true that the law came because of offences, that is, because of variations from existing rule. And it is to law-breakers, paradox as it may sound, that the progress of law is due; for what we call Progress is simply the attempt of the individual to extend his freedom of action

beyond those bounds which have hitherto been deemed inexorable. The criminal and the reformer are alike law-breakers. The criminal is the man who endeavours to return to a state of things which society has once practised, but has condemned as the result of experience. The murderer, the thief, the bigamist, are unfortunate survivals from a bygone age. The reformer is the man who advocates what society has hitherto deemed unlawful, because it has not been tried. And so, when we read our Barbarian Codes, and find that they say a good deal about summoning to courts, about rules of inheritance, about foul language, and a very great deal about money compensation for acts of violence, we shall begin dimly to picture to ourselves an older state of things, in which differences of opinion were settled by clubs and spears, in which (whatever the reason) a dead man's belongings did not pass to his relatives, in which the most virulent abuse was common pleasantry, and in which the blood feud, itself, doubtless, a step towards better things, was treated as a fine art.

Many other features of the *Leges Barbarorum* deserve to be noticed; but space forbids the mention of more than one. They are laws of peoples, not of places. Even during the later Middle Ages, even in our own day, the principle, that all persons living in a certain place are subject to the law of that place, has to submit to substantial exceptions. In the days which followed the downfall of the Roman Empire, the principle was not recognized at all. The provincials of Gaul, at the time of the Teutonic invasions, lived under a great and uniform system, devised by the jurists and officials of the Roman empire, and embodied in the Theodosian Code and other monuments. The invaders had no thought of depriving them of this privilege. They did indeed, in some cases, publish special codes for their Roman subjects; and so we get a *Lex Romana Wisigothorum*, a *Lex Romana Burgundionum* and (possibly) a *Lex Romana Curiensis*. But it seems again probable, that these compilations are merely attempts to settle inevitable conflicts of legal principles; and, in any case, it is worthy of notice that they are full of references to the Theodosian Code, the Sentences

of Paulus, the *Lex Aquilia*, and other purely Roman sources.[1] Amongst the Teutonic populations of the north and east, the question of the provincials would, for obvious reasons, be less important; but the curious reference in the *Lex Salica* to the man *qui legem salicam vivit*,[2] seems to indicate a similar principle. For slightly later days, the matter is set at rest by the decree of Chlothar II. — "We have ordained that the conduct of cases between Romans shall be decided by the Roman Laws."

It is not to be supposed, that the invaders accorded to the provincials a principle which they denied to themselves. In truth, it is somewhat difficult to see how migratory groups could arrive at the notion of a *lex terræ*, unless they were prepared to change their customs with each migration. A great and luminous critic, the late M. Fustel de Coulanges, has, indeed, attempted to deny the occurrence of a migratory epoch, or *Völkerwanderung*, as well as the recognition of racial differences by the barbarians.[3] But, as the same learned historian gives an excellent account of at least a score of new German settlements, hostile or friendly, with the Empire,[4] the first question resolves itself into one of figures; while his elaborate attempt to prove that the terms *Franci* and *Romani* are names of ranks rather than of races,[5] would seem, if successful, to point to the fact that the Teutons settled down as an aristocracy upon the enslaved provincials — a doctrine which is M. Fustel's pet aversion. Certain it is, that the barbarians themselves clearly recognized the principle of the personality of laws. The oldest part of the *Lex Ribuaria* (Tit. 31) contains the following conclusive passage: — "This also we determine, that a Frank, a Burgundian, an Alamann, or in whatever nation he shall have dwelt, when accused in court in the Ribuarian country, shall answer according to the law of the place where he was born. And

[1] *Lex Romana Burgundionum*, Titt. I. (3), IV. (3), V. (2), XIX. (2), etc.
[2] *Lex Salica*, Tit. XLI. (1).
[3] Fustel de Coulanges, *L'Invasion Germanique*, pp. 340 and 543.
[4] *Ibid.*, Bk. II. capp. iv.-x.
[5] Fustel de Coulanges, *L'Invasion Germanique*, pp. 340 and 543. (Nouvelles Recherches, pp. 561, *sqq.*).

if he be condemned, he shall bear the loss, not according to Ribuarian law, but according to his own law." Doubtless, even here, we may see foreshadowings of those influences which are soon to localize law. Doubtless, the mixing of races is rendering genealogical questions difficult, and we seem almost to discover a period in which a man may claim to live according to any law, may make any *professio juris*, that he likes, provided he does it in the proper way. But this is only a concession to practical difficulties. Law is at first as much personal as is religion; and a profession of law is much like a profession of faith.

The second stage in the history of Teutonic Law is, apparently, very modern in character. It looks like positive political legislation, as we understand it at the present day. The Capitularies of the Karolingian House, and of the Beneventine Princes, the statutes and edicts of the Lombard kings and dukes, and even some of the Dooms of the Anglo-Saxon kings, are alleged to be examples of this kind. But here we come upon one of the great sources of error in medieval history. The Frank Empire, in both its stages, was, in a very important sense, a sham Empire. It aimed at reproducing the elaborate and highly organized machinery of the Roman State. Just as a party of savages will disport themselves in the garments of a shipwrecked crew, so the Merowingian and Karolingian kings and officials decked themselves with the titles, the prerogatives, the documents, of the Imperial State. No doubt the wisest of them, such as Charles the Great, had a deliberate policy in so doing. But the majority seem to have been swayed simply by vanity, or ambition, or admiration. Their punishment was the downfall of the Frank Empire; but they might have been consoled for their failure, could they have looked forward a thousand years, and seen their pretensions gravely accepted by learned historians on the faith of documents pillaged from the Imperial chancery, which they scattered abroad without understanding their contents. The Frank Empire was, from first to last, a great anachronism. With a genuine civilization equal in degree to that of their kindred in Britain and Scandinavia, the Germans of continental Europe found them-

selves called upon to live up to the elaborate civilization of the Roman Empire. They broke down under the strain; and their breakdown is the first great tragedy in modern history, the parent of many tragedies to follow. Those who doubt the possibility of such an explanation, may be referred to the "Parliaments" and "Cabinets" of Samoa, and to the "Polynesian Empire."

Now one of the most splendid prerogatives of the Roman Emperor was his power of legislation. Quite naturally, his imitators, the Frankish kings and emperors, strove to exercise it. Hence the *Capitula*, or royal and imperial edicts, which, at any rate for some time, no doubt played a great part in the history of Teutonic law. The difficult questions connected with them have been acutely discussed by competent critics, who are not by any means unanimous.[1] But one or two results seem clear.

The *Capitula* are distinguishable from the *Leges*. They emanate directly from royal authority, they deal with less important matters, they have, probably, a less permanent effect. In the pure type of Capitulary, the *Capitula per se scribenda*, there is no pretence of collecting the law from the mouth of the people. Many of them are mere directions to royal officials. The great *Capitulare de Villis*, the equally important *Capitulare de Justitiis Faciendis*, of Charles the Great, are of this character. It is very doubtful if the *Capitula* of one king bound his successors; for we frequently find almost verbatim repetitions by successive monarchs. On the other hand, some of the *Capitula* are *legibus addita* — incorporated by general consent with, and treated thenceforward as part of, a *Lex*, or custumal. Many of these are now so embedded in the texts of the *Leges*, that it requires a trained eye to detect them. Others, like the great *Capitulare Saxonicum* of the year 797, declare openly their origin, and testify to the premature appearance of an idea which is, ultimately, to revolutionize law, the idea that the king

[1] Cf. Boretius, *Beiträge zur Capitularienkritik*. F. de Coulanges, *De la confection des lois au temps des Carolingiens* (Nouvelles Recherches). M. Thévenin, *Lex et Capitula* (Bibliothèque de l'Ecole des Hautes Etudes, 1878, fasc. 35, p. 137, *sqq.*).

proposes new laws, and the people accept them. A large number of Saxons, gathered together from divers *pagi*, Westphalian and Eastphalian, unanimously consent to the adoption of the Frankish *Capitula*, with certain modifications.

Moreover, the *Capitula* are of great importance in stimulating the new idea that Law is territorial, for the *Capitula* of a monarch bound all within his realm, or such part of it as the *Capitula* might specify. We are obliged to suppose, also, that they secured practical obedience, at least during the better days of the Frank monarchy; for they were twice collected in a convenient form, once by the Abbot Ansegis in the year 827, again, with daring interpolations, by the so-called Benedict, some twenty years later.

But, it must be repeated, the Capitularies are hothouse plants, due to the stimulus of Roman ideals. The monuments of the purely German countries which resemble them in name, *e. g.* the Decrees of the Bavarian Tassilo, turn out, on inspection, to be true *Leges*, produced or, at least, accepted by a popular assembly under Frankish influence. The Anglo-Saxon Dooms are really declarations of folk-law by Clan chiefs, acting as mouthpieces of their clans, at least until Ecgberht has brought back imperial notions from the court of Charles the Great. In isolated Scandinavia, there is no trace of royal legislation at this period. And when the Frank empire falls to pieces in the ninth century, it will be long before the kings who rise up out of its ruins claim the power to make laws. If we leave England out of sight, there is an almost unbroken silence in the history of Teutonic law during the tenth and eleventh centuries. The Roman Empire, real and fictitious, is dead, and, with it, the idea of legislation, if not of Law. When the idea revives again, in the prospering France of the thirteenth century, we find the legists asserting the royal power of legislation in maxims which are simply translations of the texts of Roman Law. "That which pleases him" (the king) "to do, must be held for law," says Beaumanoir. A century later, Bouteillier is careful to explain that the king may make laws, *qui est empereur en son royaume.*

And now, if we are asked the question — Did men during those tenth and eleventh centuries live without Law? — the answer we must give is, that they mostly did, and that evil were the results. In the far south-west, where the Visigothic settlers had been crushed out of existence between the Saracens and the provincials, in Acquitaine, Gascony, Navarre, and Provence, the old Roman Law had remained the every-day law of the people. This is the country of the Langue d'Oc, the later *pays de droit écrit*. But, elsewhere, the old Empire of Charles the Great had become a country of what the Germans call *Sonderrecht;* each little district had its own special law. For this was just the epoch of feudalism, and the political unit was no longer the clan, or the people, but the fief, the district under the control of a *seigneur*, or lord. Of the place of feudalism in political history, we shall have to speak when we deal with the State; here we are concerned only with its influence on notions of Law.

The feudal *seigneur* derived his powers from two sources. On the one hand, he represented a little bit of the imperial authority of Charles the Great, which had, so to speak, set up for itself. This is the true *droit seigneurial*. On the other hand, he had become, not merely lord, but proprietor of his district, and, in this character, he exercised *droit foncier*. He might claim seigneurial rights over land in which he had ceased to have property; and he might be merely proprietor of land of which another was *seigneur*, although in this case he was hardly a feudal lord. Again, his claims as *seigneur* might be more or less extensive; he might be duke, count, baron, or simply *seigneur justicier*. He might claim High, Middle, or Low Justice. But the principle in any case was, that he administered the law of the fief, not the law of the land, or the king, or the people. If there is a dispute as to what this law is, we must go, as Bouteillier tells us, to the *greffe*, or register of the court of the fief. If this is silent on the point, we must call the men of the fief together, and hold an *enquête par tourbe*, an enquiry by the multitude.[1]

[1] *La Somme Rurale* (ed Le Caron), Bk. I. Tit. 2.

This state of things, the result of the total breakdown of the Frankish scheme of government, had certain well-marked effects on the history of Law. In the first place, it stamps Law definitely as a local institution. Agriculture is almost the sole industry of the period. To pursue agriculture, one must occupy land; to rule agriculturists, one must rule them through their land. Feudalism expressed itself through land-holding; it was a military system with land as the reward of service.

So, too, the peculiar character of the Fief led up to the famous, but much misunderstood doctrine, of *judicium per pares*, "judgement by peers." The personal nature of the tie between lord and man forbade the hypothesis that any general rules would cover the terms of relationship. Therefore, the vassal demanded to be tried by the special law of his fief. The contractual character of the feudal bond enabled him to refuse to leave himself entirely at the mercy of the lord as sole judge. Besides, the question might be between a vassal and the lord himself; and the lord could hardly be judge in his own cause. So the principle was firmly established, that the feudal court, at least in the case of freemen, is a court in which the lord is merely president, and the *pares*, or *homage*, *i. e.* the men of the same fief, are judges. These are totally different in character from the modern jury, with which they are often confused. The modern jury takes its law from the judge, and finds the truth of the facts. The *pares* declared the law, *i. e.* the rule of the fief; and left the facts to be settled by some formal process. Trial by jury gives, in fact, where it is successful, the death blow to trial by peers.

Once more, the law of the Fief is the law of a court. The power of holding a court was not the only privilege which the feudal *seigneur* inherited from the days of Charles the Great. But it was the one he valued most, because it brought him in a steady revenue, in fees and fines, and enabled him to keep an eye on what was happening among his vassals. Moreover, long after the military, the fiscal, and the administrative powers of the *seigneur* had disappeared or become unimportant, his judiciary powers remained almost intact.

So feudal law is essentially a law of courts. No doubt, certain general principles run through it all, and, later on, we shall see attempts, such as the *Libri Feudorum*, to state these in a universal form. No doubt, the right of appeal from lord to overlord tended to produce a certain uniformity in wide areas. But these appearances are apt to be delusive. The ideal type of feudal law is that so graphically depicted in the works which pass under the title of the *Assises de Jérusalem*, and which profess to describe the usages of that curious product of the Crusades, the Latin kingdoms of Palestine. These are divided into the Assises of the High and of the Low or Burgess Court respectively. Each court has its own law.

The results of this fact are not very easy to describe; but very important to understand. The law of a court, as opposed to the law declared by a king or a popular assembly, will be hesitating, very deferential to precedent, not always very consistent, delighting in small shades of difference, difficult to discover. These are the special characteristics of true feudal law. Where we find bold principles, simplicity, uniformity, in so-called feudal law — for example, in English law of the thirteenth century — we may be very sure that some alien influence has been at work.

Finally, the feudalism of law is responsible for one more result of great importance. Feudal law is for men of fiefs; but all men, even in the palmy days of feudalism, are not men of fiefs. Priests are not, the rising class of merchants is not, the Jews are not. Yet they must have Law. Leaving the Jews for the present, let us look at the priests and the merchants.

In the early days of the Frank dominion, the churches lived under Roman Law. For one thing, the Christian Emperors had legislated freely on ecclesiastical matters, long before the Teutons were converted to Christianity; and the Merowingians could hardly venture to meddle with the organization of that mighty power which had destroyed their ancient gods, and done so much to give them the victory over their enemies. For another, the churches were corporations, juristic persons; and it took the Teutonic mind a long time

to grasp the highly complex notion of a corporation.[1] No doubt, the individual mass priest of Frankish times lived under his folk-law; but the great foundations of regular clergy, which sprang up so thickly under the fostering care of the orthodox Franks, could find little in the *Leges Barbarorum* to meet their case.

As time went on, however, new influences manifested themselves. The disappearance of the Emperors from Rome, the schism between Eastern and Western Christianity, left the Popes in a commanding position with regard to the Western Church. They stepped into the place of the Roman Emperor, and issued Decretals which the clergy considered as binding in ecclesiastical matters. From the earliest times, also, General Councils of the Church had met, and had legislated on matters of faith and discipline. Towards the end of the fifth century, a collection of these decrees and resolutions was made by Dionysius Exiguus, and was regarded as of great authority in Church matters. Neither did the Church disdain the help of the secular arm, especially in such delicate matters as tithes and patronage, in which the lay mind might require the use of carnal weapons. The alliance between the earlier Karolingians and the Papal See is marked by the appearance of ecclesiastical Capitula, many of them founded on Conciliar resolutions, in which, although the Frank Emperor maintains the royal claims, the Church gets it pretty much her own way.[2] Similar documents are found amongst the Anglo-Saxon laws;[3] and even the Scandinavian codes have their *kirkiubolkær*, or Church Books.[4] But ecclesiastical legislation becomes more and more independent as time goes on. A great stimulus is given by the work of the forger who calls himself Isidorus Mercator, which appears in the ninth century; and which incorporates with the work of Dionysius Exiguus some sixty so-called Decretals of more than doubt-

[1] On this interesting point, see Gierke, *Deutsches Genossenschaftsrecht*, and Pollock and Maitland, *History of English Law*, vol. i. pp. 469-495.

[2] Cf. the Capitularies of 802 (*a sacerdotibus proposita*), of 803-4 (*ad Salz*), of 813 (*e Canonibus excerpta*), all in Boretius, vol. i. (M. G., 4to) pp. 105, 119, 173.

[3] Cf. Edgar's Ecclesiastical Laws and Knut's Ecclesiastical Laws, in Schmid, *op. cit.*, pp. 184 and 250.

[4] Cf. *Westgötalagen*, ed. Beauchet, pp. 131, *sqq.*

ful authenticity. Three centuries later, the great work of Gratian of Bologna, the *Decretum Gratiani*, though obviously the work of a private expounder, was received as an authoritative statement of ecclesiastical law. Later still, in the year 1234, come the Five Books of Gregory IX., in 1298 the "Sext," or sixth book, of Boniface VIII., in 1317 the Decretals of Clement V., the "Clementines." By this time, the Church has grown strong enough to repudiate the system which was its foster mother. Roman Law, after all, is the work of laymen; and by this time the Church has become a sacred caste, and will acknowledge no secular authority. Alexander III. forbids the regular clergy to leave their cloisters to hear lectures on "the laws" and physic. In 1219 comes the Bull *Super Speculam*, in which Honorius extends the prohibition to all beneficed clerks.[1] This is not the place in which to discuss the difficult question of the border line between the provinces of Canon and secular law. It is sufficient to say that, from the ninth century to the close of the Middle Ages, not the most autocratic monarch of Western Europe, not the most secular of lawyers, would have dreamed of denying the binding force, within its proper sphere, of the Canon Law. It had its own tribunals, its own practitioners, its own procedure; it was a very real and active force in men's lives. And yet, it would puzzle an Austinian jurist to bring it within his definition of Law. The State did not make it; the State did not enforce it.

The case of the Law Merchant is equally instructive. Trade and commerce, almost extinct in the Dark Ages which followed the downfall of the Karolingian Empire, revived with the better conditions of the eleventh century, and were stimulated into sudden activity by the Crusades. The new transactions to which they gave rise were beyond the horizon of the law of the Fief and the old folk-law of the market. Gradually, the usages of merchants hardened into a cosmopolitan law, often at positive variance with the principles of local law, but none the less acquiesced in for mercantile transactions, and enforced by tribunals of commanding eminence and world-wide reputation, such as the courts of the Han-

[1] Decretals of Gregory IX. (ed. Friedberg), Bk. III. Tit. 50, c. 10.

seatic League, and the *Parloir aux Bourgeois* at Paris. Occasionally, some special rule of the Law Merchant receives official sanction from king or *seigneur*. But, for the most part, the Law Merchant is obeyed, no one knows why. It is simply one of several authorities of different origin, which may, and in fact do, come into conflict at many points. The need of a reconciling influence is obvious. In the thirteenth century the Teutonic world is still awaiting the solution of the all-important question — What is Law? It is the glory of England that she, of all the countries of Teutonic Europe, was the first to furnish that solution.

At the time of the Norman Conquest, England is, from a legal standpoint, the most backward of all Teutonic countries, save only Scandinavia. While France and Germany have their feudal laws, which, fatal as they are to unity and good government, are yet elaborate and complete within their own sphere; while Spain, after long harrying by the Moslem, is awaking once more to brilliant life and precocious political development under Sancho the Strong and Cid Campeador; England is still in the twilight of the folk-laws, and, seemingly, without hope of progress. England had never been part of the Frank Empire; and such rudiments of a feudal system as she possessed before the Conquest cannot be compared with the highly organized feudalism of the Continent. To revert again to the admirable French distinction, there might be in England a *justice foncière*, there was little or no *justice seigneuriale*. In later times, this fact was of infinite benefit; in the days before the Conquest it was one of the chief reasons why English law lagged behind in the race. The feeble Imperialism of Eadgar and Eadward, even the rude vigour of Knut, seem to have left little permanent impress on English law. When, at the beginning of the twelfth century, an English writer is trying to describe English law, in the so-called *Leges Henrici*, he ventures to quote as authorities the antiquated Lex Salica and Lex Ribuaria.[1] About the same time the author of the book known as the Laws of Edward the Confessor resorts, for his explanation of the title of "king," to the old story of the correspondence

[1] See Schmid, *Gesetze der Angelsachsen*, ed. 2, pp. 482, 485.

between Pepin the Short and Pope "John."[1] Evidently, English law was, even then, in a very rudimentary state.

But the Norman Conquest soon changed all this. The Normans were the most brilliant men of their age; and their star was then at its zenith. As soldiers, as ecclesiastics, as administrators, above all, as jurists, they had no equals, at least north of the Alps. The vigour which they had brought with them from their Scandinavian home had become infused, during the century which followed the treaty of St. Clair sur Epte, with the subtlety and the clerkly skill of the Gaul. The combination produced a superb political animal. The law and the administration of Normandy in the eleventh and twelfth centuries are models for the rest of France.[2] Wherever the Norman goes, to England, to Sicily, to Jerusalem, he is the foremost man of his time. We cannot leave these facts out of account in explaining the place of England in the history of Law.

But the greatest genius will do little unless he is favoured by circumstances; and circumstances favoured the Normans in England. The more rudimentary the English law, the more plastic to the hand of the reformer. While Philip Augustus and St. Louis found themselves hampered at every turn by the network of feudalism, while even the great Barbarossa was compelled to temporize with his vassals, and to respect the privileges of the Lombard League, Henry Beauclerk and Henry of Anjou found it no impossible task to build up a new and uniform system of law for their subjects, and to pave the way for still greater changes in the future. We have now to note the effect of the Norman Conquest on the history of Law.

In the first place, it converted the law of England into a *lex terræ*, a true local law. There is to be no longer a law of the Mercians, another of the West Saxons, and another of the Danes, not even a law for the English and a law for

[1] Schmid, *Gesetze der Angelsachsen*, at p. 500.

[2] Luchaire, *Manuel des Institutions Françaises*, p. 257, n. See the interesting excursus on the history of Norman Law by Brunner, *Entstehung der Schwurgerichte*, cap. vii., and by the same author in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, Part I., 5th ed., pp. 303-348.

the Normans, but a law of the land. It took about a century to accomplish this result, which we doubtless owe to feudal principles. England was one great fief in the hands of the king, and it was to have but one law. Writing in the reign of Henry II., Glanville can speak of the "law and custom of the realm." Such a phrase would then have been meaningless in the mouth of a French or German jurist. About this time a celebrated expression makes its appearance in England. Men begin to speak of the "Common Law." The phrase is not new; but its application is suggestive. Canonists have used it in speaking of the general law of the Church, as distinguished from the local customs of particular churches. We may trace it back even to the Theodosian Code.[1] In the wording of a Scottish statute of the sixteenth century, (and this is very suggestive), it will mean the Roman Law.[2] But, in the mouth of an English jurist of the thirteenth century, it means one thing very specially, viz. the law of the royal court. And because the royal court is very powerful in England, because it has very little seigneurial justice to fight against, because the old popular courts are already antiquated, the law of the royal court rapidly becomes the one law *common* to all the realm, the law which swallows up all, or nearly all, the petty local and tribal peculiarities of which English law, at the time of the Conquest, is full. The Common Law is the *jus et consuetudo regni* with a fuller development of meaning. It is not only territorial; it is supreme and universal. This is the first great result of the Conquest.

Again, the Common Law is the law of a court. When the Normans first settled in England, they endeavoured to collect law, somewhat in the old way of the *Leges Barbarorum*, through the wise men of the shires and the inquests of the king's officials. At least, that was long the tradition; and whether or no the *Leges Eadwardi* which have come down to us are the result of such a process, we may be pretty sure that the Norman kings made some effort to ascertain what really were the provisions of those laws and customs of the

[1] Pollock and Maitland, *History*, vol. i. pp. 155, 156.
[2] Acts of the Parliament of Scotland, 1540, cap. i. vol. ii. p. 356.

English, which they more than once promised to observe.[1] But these were too formless and too antiquated to suffice for the needs of an expanding generation. The whole work of legal administration had to be put on a different footing.

This result is achieved in the twelfth century by the two Henries. Henry Beauclerk begins the practice of sending his ministers round the country to hear cases in the local courts. This is a momentous fact in the history of English law; but it will be observed that it is not legislation at all, merely an administrative act. Neither is it quite original; for the tradition of the Karolingian *missi*, or perambulating officials, may have floated down to the twelfth century, and the French kings are holding *Échiquiers* in Normandy, and *Grands Jours* in Champagne. But these are irregular and unsystematic; in the fourteenth century we find Philip the Fair promising to hold two Exchequers and two Great Days a year, which implies that Exchequers and Great Days have been rare of late.[2] By that time the English circuit system has been long a fixed institution, working with regularity and despatch. It has stood the shock of Stephen's reign; under the great king who is both Norman and Angevin, it has struck its roots deep into the soil. Before the end of the twelfth century, the king's court has become the most powerful institution in the kingdom, a highly organized body of trained officials, who make regular visitations of the counties, but who have a headquarters by the side of the king himself. This court is at first financial, administrative, judicial. In course of time the judicial element consolidates itself; it becomes professional. It devises regular forms of proceeding; the first extant Register of Writs dates from 1227, but, doubtless, earlier registers have existed for some time in the archives of the Court. Above all, it keeps a strict and unassailable record of all the cases which come before it. Any doubt as to precedent can be set at rest by a reference to the Plea Rolls, which certainly begin before the close of the twelfth century. Later on, it publishes its proceedings

[1] Stubbs, *Select Charters*, ed. 5, pp. 84 (William I.), 96 (Henry I.), 119 (Stephen).

[2] Laurière, *Ordonnances des rois de France*, ann. 1312, vol. xii. p. 354.

in a popular form; the first Year Book comes from 1292. Between the accession of Henry I. and the death of Henry III., this Court has declared the Common Law of England. That law is to be found, not in custumals, nor in statutes, nor even in text-books; but in the forms of writs, and in the rolls of the King's Court. It is judiciary law; the men who declared it were judges, not legislators, nor wise men of the shires. No one empowered them to declare law; but it will go hard with the men who break the law which they have declared.

Still, we have not reached the end of the effects of the Norman Conquest. If the English king had his court at Westminster, the French king had his *Parlement* at Paris, the German Kaiser his *Hofgericht* at Mainz or Frankfort, the kings of Leon and Castile their *Audiencia Real* at Leon or Valladolid. Though the Parlement of Paris and the Imperial Hofgericht had infinitely less power in the thirteenth century than the King's Court in England; yet the Exchequer Records of Normandy and the *Olim* or judgement rolls of the Parlement of Paris may be compared with the Plea Rolls of England; and the *Style de du Breuil* and the *Grant Stille de la Chancellerie de France* may rank beside the Register of Writs, for the work of Breuil at least was regarded as official.[1] But the Norman Conquest had strengthened the position of the Crown in England in more ways than one. Not only was the king of England in the thirteenth century infinitely more powerful within his realm than the king of the English in the tenth; he was more powerful than the French king in France, far more powerful than the German Kaiser in Germany. Without insisting on the military side of the Norman Conquest, we may notice the fact that the kingship of England was, in the hands of William and his successors, emphatically a "conquest," not a heritage or an elective office. And, when we come to look at the ideas which have gone to make up our notion of property, we shall find that the *nouveau acquêt*, the "conquest," is much more at the disposal of its master than the heritage of the office. The Norman Duke who acquired England made good use of that

[1] Viollet, *Précis de l'Histoire du Droit Français*, p. 160.

idea. He maintained an elaborate pretence of heirship to Edward the Confessor; but all men must have seen that it was a solemn farce. As Duke of Normandy, he owed at least nominal allegiance to the King of the French; as king of England he was "absolute." All was his to give away; what he had not expressly given away, belonged without question to him. Among the documents of the Anglo-Norman period, the *charter* plays a prominent part; and a learned jurist has explained that the essential feature of a charter is that it is a "dispositive" document, a document which transfers to B some right or interest which at present belongs to A.[1] So we get the long and important series of English charters, which culminates in the Great Charter of John and the Merchant Charter of Edward I. When the English Justinian is making his great enquiry into the franchises which his barons claim to exercise, he insists, and nearly succeeds in maintaining, that, for every assertion of seigneurial privilege, the claimant shall show a royal charter.[2] It would have been absurd for Philip the Fair or Rudolf of Habsburg to make such a demand; for their feudatories held franchises by older titles than their own, unless indeed the German Kaiser had founded himself on the authority of Charles the Great. The Charter is not a peculiarly English institution; the town charters of Germany and France go back at least to the twelfth century.[3] But the charter as a monument of general law is peculiar to, or at least specially characteristic of England; and it is one of the many signs that the English monarchy of the twelfth and thirteenth centuries was the most powerful and centralized monarchy of the Teutonic world. England was a royal domain.

But the lord of a domain may make rules for its management, at least with the concurrence of his managing officials. If any precedent were required for this assertion, we have it in the *Capitulare de Villis* of Charles the Great. But it is

[1] Brunner, *zur Rechtsgeschichte der römischen und germanischen Urkunde*, p. 211.

[2] Pollock and Maitland, *History*, vol. i. p. 559.

[3] Stobbe, *Geschichte der deutschen Rechtsquellen*, Pt. I. p. 485. Esmein, *Histoire du Droit Français*, 2nd. ed., p. 312. It is noteworthy that one of the oldest and most important of French town-charters, the so-called *Etablissemens de Rouen*, was granted by an English king.

one of the earliest ideas of proprietorship. Long before the descendants of Hugues Capet ventured to legislate as Kings of France, they issued ordinances for their domains. The great feudatories of the French Crown, the Dukes of Normandy and Brittany, the Counts of Champagne and Poitou, did the like. The legislation of the smaller States of Germany, the feudal domains of the Princes of the Empire, begins in a similar way. And so it is quite natural to find, in the England of Anglo-Norman times, Assises and Ordinances which come nearer to modern ideas of law than anything we have seen yet in our search. The Assises of Clarendon and Northampton, the Assise of Arms, the Woodstock Assise of the Forest, the Assise of Measures in 1197, the Assise of Money in 1205, all these look as though royal legislation is going to take the place of all other law. If Henry of Anjou had been succeeded by one as able as himself, with the magnificent machinery of the royal court to back him, and with no great feudatories to hold him in check, England might very well have come to take her law from the mouth of the king alone. But, fortunately for England, Henry's three successors were not men of his stamp. Richard was able, but frivolous; John, able, but so untrustworthy, that his servants turned against him; Henry, weak and incapable. The danger of royal absolutism passed away. There was even danger that the power of legislation would pass away too. For not only had the royal authority fallen into weak hands. The king's judges seemed to have lost their inventive power; and the list of writs was almost closed when the third Henry died. Henceforth judicial legislation would proceed only by the slow steps of decision and precedent. But there arises a king who, consciously or unconsciously, by genius or good luck, is destined to be famous for all time as the propounder of the great idea which is to crown the work of England in the history of Law. Law has been declared by kings, by landowners, by folks, by judges, by merchants, by ecclesiastics. If we put all these forces together, we shall get a law which will be infinitely stronger, better, juster, above all, more comprehensive, than the separate laws which have preceded it. "That which touches all, shall be

discussed by all." How far Edward foresaw this result, how far he desired it, how far he borrowed the ideas of others, how far he acted willingly, must be left for specialists to decide. But the broad fact remains, that he created the most effective law-declaring machine in the Teutonic world of his day, that he gave to England her unique place in the history of Law. One part only of the scheme was a temporary failure. Though Edward succeeded, after a sharp struggle, in compelling the nominal adhesion of the clergy to the new system, the Canon Law continued, for two centuries and a half, to be a real rival of the national law. But its day came at last; and, after the Reformation, the clergy found themselves legislated for by a Parliament in which they had ceased to have any effective share. Though a just judgement upon an unpatriotic policy, it was a blot on the system, which has never yet been quite removed. But, with the Reformation, the modern idea of Law was at last realized; and Hobbes could truly say, in words which became the text of Austin's teaching — "Civil Law is, to every subject, those Rules which the Commonwealth hath commanded him." But this was the result of a thousand years of history; and, as yet, it was true of England alone.[1]

In this important matter, we are apt to be deceived. For, if we look to the continent of Europe, we see that there are *États Généraux* in France, *Cortes* in Castile and Aragon, a *Reichstag* or Diet of the Holy Roman Empire in Germany. And these bodies do, undoubtedly, declare a certain amount of law. But the great mass of the collection of French *Ordonnances* which has been edited by M. Laurière and his successors, was never submitted to the États Généraux; it is the work of the king and his Council. The scanty legislation of the Cortes does not suffice for the needs of Spain, which have to be met by such compilations as *El fuero viejo de Castilla, El fuero Juzgo,* and *Las Siete Partidas,* which are not legislation at all, but merely new editions of the old *Leges Wisigothorum,* collections of judicial decisions, and adaptations of the Pandects. In Germany, the Diet ceases to be an effective body from the death of Frederick II.; and, though

[1] Hobbes, *Leviathan,* cap. xxvi.

Frederick III. and Maximilian make a gallant attempt to restore its prestige, it never becomes the normal law-declaring organ for Germany. Only in Scandinavia does the success of the *Riksdaag* at all bear comparison with the work of the English Parliament. In Scandinavia there is a rapid and brilliant display of legal activity in the thirteenth century. The folk-laws of Norway, Sweden, Denmark, and Iceland are collected, and are rapidly followed by true national laws, the Landslög of King Magnus Lagabötir for Norway, and King Magnus Eriksson's Landslag (the so-called "MELL") for Sweden. Thenceforward, through the Union of Calmar, the modern idea of Parliamentary law seems to be making its triumphant way, until it is checked by the political troubles of the sixteenth and seventeenth centuries. But, unhappily, the history of Scandinavia is too obscure a subject to be handled safely by any but a specialist.

It is from France and Germany that we learn most clearly and unmistakeably the results which followed from a failure to grasp the Edwardian idea of Law. In France and Germany, the law which prevailed from the thirteenth to the sixteenth centuries was feudal, local, municipal, royal; but not national. The feudal and local laws begin to appear in the thirteenth century in the form of text-books, evidently the work of private compilers, though in some cases in an impersonal guise. Thus we get the *Trés Ancien Coutumier* of Normandy and its successors, the *Conseil* of Pierre de Fontaines for the Vermandois, the *Livre de Jostice et Plet* and the *Établissemens le Roy* for the Orléanais, the customs of Clermont in Beauvoisis by Philippe Beaumanoir. Thus also we get the *Saxon Mirror* of Eike von Repgowe, the *German Mirror*, the *Suabian Mirror*, and the *Little Kaiser's Law* for Germany. But there is a curious difference between the fates of the two groups. For while, in France, the purely expository character of the text-books is rarely lost sight of, while Boutillier, as previously pointed out, expressly tells us that the authoritative law must be searched for in the *greffe* of the court or the *enquête par tourbe*, in Germany the *Rechtsbücher* seem to have been accepted, in all good faith, as actual law. The reason for this curious difference is not easy to

find. We may suspect it to lie in the clerkly qualities of the French court officials. We know that some at least of the French courts kept careful records, and used the regular forms; the German *Weisthümer* and the German form-books, the decisions of the Court at Ingelheim and the *Oordelboek* of Drenthe, the *Summa prosarum dictaminis* and the *Summa curiæ regis*, seem to have been poor by comparison. At a certain stage of its history, the life of an institution depends on its using stereotyped forms. So the text-books of Eike von Repgowe and others came to be accepted in Germany as Law, although men must have known them to be the work of private jurists. Documents of the fifteenth century quote the *Suabian Mirror* (under its later name of *Kaiserrecht*) as a textual authority;[1] and all kinds of legends grow up, which attribute the authorship of the *Saxon Mirror* to kings and emperors.[2]

On the other hand, the French mind clung to the idea that the text-books were not themselves Law; and, in the fifteenth century, we find a most interesting process going on. The uncertainty and obscurity of the local customs had at last aroused the hostility of the kings who were building up a great centralizing monarchy in France; and, though they did not venture to alter those local customs which were so fatal an obstacle to their policy, they determined that at least they should be known and recorded. Perhaps they had a presentiment that greater things might happen as a result of the step. Perhaps they thought that a custom once formulated might be altered; at least there would be something to attack. Perhaps they dreamed of a unified France, living under one law. If so, they must have had a rude awakening. For when, as the results of the labours of Charles VII., Louis XI., Charles VIII., and Louis XII., the official *Coutumiers* are finally before the world, it is a startling picture that they reveal to us. Each district lives under its own law, and is judged by its feudal *seigneurs*. Not merely great feudal

[1] See, for example, the document given in Loersch and Schröder, *Urkunden zur Geschichte des deutschen Privatrechtes*, ed. 2, Part I. No. 339.

[2] Stobbe, *op. cit.*, p. 318.

princes, but petty *barons* and *seigneurs* claim the right of pit and gallows, of toll, of forfeiture in their fiefs. One is inclined to wonder where the State, as we understand it, finds any place at all. Nowhere can we find a more instructive contrast between the England of Elizabeth and the France of that same day, than in a comparison of Coke's First Institute with one of the official *Coutumiers* of the sixteenth century. The English law-book describes, in crabbed language no doubt, a system which is uniform, simple, and intelligible; the *Coutumier* depicts a state of anarchy and disintegration, of anomalies and inconsistencies. And yet it speaks only of a single district; there are dozens of other *Coutumiers*, and the whole *pays de droit écrit*, to be taken into account. And the mischief is not to be cured by ordinary remedies. Splendid as was the work of the great French jurists of the seventeenth and eighteenth centuries, of Moulin, Guy Coquille, Loisel, Domat, Pothier, it needed the red arm of the Revolution to make a Common Law for France.

A word must be said as to the process by which these official *Coutumiers* were compiled; for it is illuminative of the history of Law. There is no thought of imposing new rules. The custom is, indeed, "projected" by the royal officials, and examined by commissaries of the Parlement of Paris; but, before it can be declared to be law, it must be submitted to an assembly containing representatives of all orders and ranks in the district, and solemnly discussed and accepted by them.[1] This is no mere form. In the great collection of Bourdot de Richebourg,[2] published in the eighteenth century, we find the very names of those who were present, in person or by deputy, at the reading of the various *projets;* we know the very points upon which they raised objections. The object of the redaction is to render the use of the *enquête par tourbe* unnecessary for the future; it declares the custom once and for all. But to do this it holds a great and final *enquête par tourbe;* it collects, but it does not make, the law.

Turning to Germany, we find that there have been attempts

[1] Esmein, *op. cit.*, p. 749.
[2] Bourdot de Richebourg, *Coutumier général.* Paris, 1724.

at a similar process. The *Landrechte* which appear in the fourteenth and fifteenth centuries, the Austrian Landrecht (dating so far back as 1292), the Bavarian Landrecht of 1346, the almost contemporary Silesian Landrecht, are little more than official editions of the *Suabian Mirror* and the *Saxon Mirror*. But the inherent weakness of German legal developement gives rise at this point to the greatest tragedy in the history of Teutonic Law. Overcome by the evils of *Partikularismus*, dazzled by the false glare of the semi-Roman Kaisership, drugged by the fatal influence of the Italian connection, German Law ceases to develope on its own lines, and submits to the invasion of the Roman Law. This time it is not the Code of Theodosius which wins the victory; but that masterpiece of Roman state-craft, the Corpus Juris Civilis of Justinian, which the Glossators and Commentators of Italy have expanded into a marvellous system of scholastic law. Through the universities, through the writers and teachers, through the learned Doctors who fill the courts of Germany, the Roman Law becomes the Common Law of the German Empire. Even feudal law, for which, of course, there is no provision in the work of Justinian, catches the impulse; and the "Feud Books" of Milan are received in Germany proper as the *Decima Collatio Novellarum*, that is, as the legislation of Roman Emperors. The process is going on during the whole of the fifteenth and sixteenth centuries; but the crowning point is the establishment, in the year 1495, of the *Reichskammergericht*, or supreme court of the German Empire, of whose judges at first half, afterwards all, are to be Doctors of the Civil Law. That Roman Law should revive in southern France, in Italy, in Spain, where the provincials had once stood thick as the standing corn, seems natural, and, perhaps, inevitable; that it should invade the very home of Teutonism is nothing less than a tragedy. Thus did Rome conquer Germany, a thousand years after the Roman Empire had ceased to be.[1] We must also remember that Roman Law effected a similar triumph in distant Scotland.

[1] See the process described by Brunner, in Holtzendorff's *Encyklopädie*, Part I. pp. 291-294, and Schröder, *Deutsche Rechtsgeschichte*, pp. 722-731.

But it is possible to exaggerate the triumph. Neither in Germany nor in Scotland did the "reception of the foreign law" wipe out the other laws. At the end of the Middle Ages, the Germans have a maxim: "Town's law breaks land's law, land's law breaks common law." It is only when other sources fail, that we resort to Roman Law. The laws of the towns play a great part in the history of Law. The privileges granted by the town-charters of the thirteenth century have borne fruit, and developed into great bodies of municipal law, which kings and emperors have to respect. Upon the scanty materials of charter privileges and local customs, the *Schöffengerichte* of Germany, the *cours d'échevins* of France, the bailies' courts of Scotland, have built up elaborate systems of local law, which strive to maintain exclusive control within the limits of their jurisdiction. The town laws of Lübeck, Hamburg, Goslar, Vienna, and Magdeburg, the *statuts* of Avignon and Arles, the *plaids de d'échevinage de Reims*, the *Bjarkorätten* of Scandinavia, are among the most important monuments of law in the Middle Ages. But it is very significant to notice that none of these come from England. Chartered boroughs there were, of course, in the land of the Common Law, and some of them had custumals of their own. But they were of small importance; and they stood much in fear of the law of the land. It is very doubtful whether any royal judge in England would have accepted the maxim: "Town's law breaks land's law." Had he done so, it would have been with great reservations and modifications. The victory of the Common Law put very narrow bounds to the growth of municipal custom in England.

Finally, it must not be forgotten, that royal legislation forms an important factor in the law of the later Middle Ages. We have seen what became of it in England; how it was virtually swallowed up in the national law which dates from the end of the thirteenth century. The failure of the Diets and *États Généraux* of the Continent left the new idea to work out its own developement. The success of the feudal monarchy in France gave it prominence there. As each new province is added, by diplomacy or annexation, to the domain of the Crown, the royal *Ordonnances*, fettered only by the

curious right of registration claimed by the Parlements, grow in number and importance. As new spheres of legislation — aliens, marine, literature — make their appearance, they fall into the royal hands. In Germany, the elevation of the great feudatories into independent potentates inspires them with similar ambition; whilst the failure of the Empire reduces the importance of Imperial legislation. But neither in France nor in Germany can the royal legislation compare with the Parliamentary legislation of England. The absolutism of the *ancien régime* is often misunderstood. To suppose that the subjects even of Louis XIV. or Frederick the Great were helpless in the hands of their kings, is grotesque and absurd. Within their own spheres of action, these monarchs were, in a sense, absolute. But those spheres had their limits. For France and Prussia were not countries of one law, but of many laws. And if the king made royal law without let or hindrance, there were other laws which he could not touch. Despite certain faint theoretical doubts, the law which issued from the Parliament at Westminster was supreme over all customs and all privileges; it covered the whole area of human conduct in England, at least after the Reformation. No such assertion could be made of the legislation which came from the Council Chambers of Paris and Berlin.

We are now in a position to sum up the results of our long inquiry into the history of Law. And if, for a moment, we seem to trespass beyond the domain of Law, upon the domain of anthropology, we need only trespass upon paths which the labours of trustworthy guides have made clear for us.

One of the strongest characteristics of primitive man is his fear of the Unknown. He is for ever dreading that some act of his may bring down upon him the anger of the gods. He may not fear his fellow men, nor the beasts of the forest; but he lives in perpetual awe of those unseen powers which, from time to time, seem bent on his destruction. He sows his corn at the wrong season; he reaps no harvest, the offended gods have destroyed it all. He ventures up into a mountain, and is caught in a snow-drift. He trusts himself to a raft, and is wrecked by a storm. He endeavours to propitiate these

terrible powers with sacrifices and ceremonies; but they will not always be appeased. There are terrors above him and around him.

From this state of fear, custom is his first great deliverer. To speculate on the origin of custom is beyond our province; we note only its effects. And these are manifest. What has been done once in safety, may possibly be done again. What has been done many times, is fairly sure to be safe. A new departure is full of dangers; not only to the man who takes it, but to those with whom he lives, for the gods are apt to be indiscriminate in their anger. Custom is the one sure guide to Law; custom is that part of Law which has been discovered. Hence the reverence of primitive societies for custom; hence their terror of the innovator. Custom is the earliest known stage of Law; it is not enacted, nor even declared: it establishes itself, as the result of experience.

But, in all these societies which, for want of a better term, we call "progressive," there are two forces at work which tend to alter custom. As man's powers of reasoning and observation develope, he begins to doubt whether some of the usages which custom has established are, after all, quite so safe as he has thought. The custom of indiscriminate revenge is perceived to lead to the destruction of the community which practises it. The custom of indiscriminate slaughter of game is seen to lead to hunger and starvation. These results are, by man's growing intelligence, apprehended to be the judgement of the gods upon evil practices, no less than the thunderstorm and the earthquake. So the custom of indiscriminate revenge is modified into the blood feud, and, later, into the rule of compensation for injuries. The horde of hunters, living from hand to mouth, becomes the tribe of pastoralists, breeding and preserving their cattle and sheep; and the notion of a permanent connection between the tribe and its cattle becomes slowly recognized. The rudimentary ideas of peace and property make their appearance.

The other force at work is the correlative of this. If old customs are laid aside, new customs must be adopted. As the terror of innovation gradually subsides, as it is found that a new departure does not always call down the anger of the

gods, new practices are introduced, and are gradually accepted. Thus new custom takes the place of old.

Here we have what may be called the negative and the positive sides of Law. Old customs, proved by experience to be bad, are discarded; new customs, likewise proved by experience to be good, are adopted. But it is not to be expected that all should work smoothly. In every community there will be men who cling to the old bad customs, and refuse to accept the new. There will likewise be men who rashly desire to innovate beyond the limits which the general sense of the community considers safe. Some means must be found for keeping these exceptional persons in check. And so we get the appearance of those assemblies which are neither, according to modern notions, legislative, nor executive, nor judiciary, but simply *declaratory*. They declare the folk-right. It would be an anachronism to say that they made Law. We may be quite sure that they do not argue questions of expediency. Not until an old custom has been definitely condemned by the consciousness of the community, do they declare it to be bad — because, in effect, it has ceased to be a custom. Not until a new practice has definitely established itself as the rule of the community, do they declare it to be good. So little do they claim the power of making new law, that when they do, in fact, sanction a new custom, they probably declare it to be of immemorial antiquity. A great deal of existing custom they do not declare at all; just because there is no dispute about it. This accounts, as we have said, for the fragmentary character of such early records of custom as we possess. Where there are no offenders, there is no need to declare the custom. The Law came because of offences.

At first, as we have said, there is no record of custom, in the modern sense. It lives in the consciousness of the community, and is declared, if necessary, by some assembly, more or less comprehensive. But the influences of migration and conquest introduce a new feature. Brought face to face with new circumstances, the community feels that its customs, to which it clings as part of its individuality, are in danger of being lost. It may have invented for itself some rude

system of runes or other symbols; it may, and this is more probable, have come into contact with some higher civilization which possesses a superior art of recording. Such is the case with the earliest monuments of Teutonic Law. They are not even written in Teutonic speech; and this fact has misled some critics into supposing that the *Leges Barbarorum* are really new sets of rules imposed by an alien conqueror. But, below the curious Latin of the Roman scribe, it is easy to read the still ruder language of the Teutonic folk. The famous "Malberg glosses" of the Lex Salica are only the clearest example of a truth which may be traced in all the *Leges Barbarorum.* One has but to turn to the glossaries which accompany the classical editions, to see how the scribes were puzzled by hosts of strange Teutonic phrases for which they could find no Latin equivalents. The Anglo-Saxon and the Scandinavian Laws are transcribed in their native tongues. The *Leges Barbarorum* are not enactments, but records.

For all this, their "redaction" was an epoch in the history of Law. It threatened to make permanent what before was transitory, to stereotype a passing phase. It remained no longer possible to deny the existence of a custom which was recorded in black and white; it was difficult to say that a new custom was old, when no trace of it appeared on the official record. And yet, customs must be altered if communities are to progress; and the Teutonic communities were progressive in no small degree. So there was a chance for a new kind of Law; a Law which should be declared by the conqueror. But the limited character and short duration of the law of such a conqueror even as Charles the Great, shows that the new idea at first met with little success. The Law of the Church, the Law of the Merchants, the Law of the Fief, and the Roman Law, are the real innovating forces which transform the folk-laws into the law of medieval Europe.

Not one of these was Law in the Austinian sense. The Canon Law posed as a revelation, and, as such, was thoroughly in harmony with primitive ideas of Law. That which the folk discovered, through the painful process of experience, to be the will of the unseen Powers, was discovered by

Popes and Councils, through the speedier process of revelation. The Canon Law did not profess to be the command of men; it professed to be the will of God. The Law Merchant and the Feudal Law were, in appearance, the terms of many agreements which merchants and which feudal lords and vassals had implicitly bound themselves to observe. But, at bottom, they were not very different from customs which, as the result of experience, had proved to be those under which, so men thought, the business of trade or of landowning could be best carried on. The Roman Law was the deliberate expression, by the wisdom of ages, of that right reason which men were coming to look upon, more and more, as the true index to the will of the Unseen Powers. Its origin as the command of the Roman Emperor was well-nigh forgotten; and we may be very sure that, in Western Europe at least, it was not enforced by the will of those successors of Justinian who sat upon the trembling throne of Byzantium. Had it been so, the Roman Law would have disappeared for ever when Mahomet II. overthrew the Eastern Empire. But it was just at that time that the Roman Law was "received" in Germany.

We have travelled far, and as yet have seen no justification for the Austinian theory, that Law is the command of the State. As we said before, the first time that this theory becomes approximately true, is when the English Parliament is established at the close of the thirteenth century. This is the crowning work of England in the history of Law. But it is possible to overrate its effect. The great virtue of the English Parliamentary scheme was, that it enabled the exponents of all the customs of the realm to meet together and explain their grievances. If we glance at the Rolls of the English Parliament, we shall find that the great bulk of the petitions which are presented during the first two hundred years of its existence, are complaints of the breach of old customs, or requests for the confirmation of new customs which evil-disposed persons will not observe. These petitions, as we know, were the basis of the Parliamentary legislation of that period. What is this but to say that the Parliament was a law-declaring, rather than a law-making body? Some-

times, indeed, the Parliament did make very new law. It made the Statute of Uses, in defiance of a long-established custom. We happen to know the ostensible objects of the statute; for its framers were careful to record them in the preamble to their work. They were, first, to prohibit secret conveyances of land, second, to put an end to bequests of land by will. The formal recognition of secret conveyances and the formal recognition of the validity of bequests of land, were the direct results of the passing of the statute. The lesson is obvious. The English Parliament was a splendid machine for the declaration of Law; when it tried to make Law it ran the risk of ignominous failure.

The truth must not be pressed too far, but a truth it is, that, even now, Law is rather a thing to be discovered than a thing to be made. To think of a legislator, or even a body of legislators, as sitting down, in the plenitude of absolutism, to impose a law upon millions of human beings, is to conceive an absurdity. How shall such a law be enforced? By a single ruler? By a group of elderly legislators? By a few hundred officials? By an army? We know the power of discipline; and we may grant that a comparatively small but well-disciplined army can control an immense mass of unorganized humanity. But the army must have laws too, and how are these to be enforced? Perhaps by another army?

The simple truth of the matter appears to be this. The making of Law is a supremely important thing; the declaring of Law is an important, but a very different thing. Law is made unconsciously, by the men whom it most concerns; it is the deliberate result of human experience working from the known to the unknown, a little piece of knowledge won from ignorance, of order from chaos. It is begun by the superior man, it is accepted by the average man. But it will not do for the inferior man to spoil the work of his betters, by refusing to conform to it. So Law must be declared, and, after that, enforced. This declaration and enforcement are the work of the official few, of the authorities who legislate and execute. There was plenty of Law in the Middle Ages; but it was, for the most part, ill-declared and badly enforced. The great problem which lay before the statesmen of the

Middle Ages was to devise a machine which should declare and enforce Law, uniformly and steadily. The supreme triumph of English statesmanship is, that it solved this problem some five hundred years before the rest of the Teutonic world. By bringing together into one body representatives of those who made her laws, by confronting them with those who could declare and enforce them, England was able to know what her law was, to declare it with certain voice, and to enforce it thoroughly and completely.

SYNOPTIC TABLE OF SOURCES[1]

NOTES

1. There has been no attempt on the part of the compiler to attain uniformity of spelling or nomenclature. In each case the source has been indicated by its popular title, which, it need hardly be said, is seldom of official origin. The dates assigned to the various items are those generally accepted by the leading specialists.

2. A title in italics indicates that the source was originally the work of a private composer.

3. A title between square brackets, [ ], indicates that the source does not survive in its original form.

[1] The List of Principal Sources, which is made to precede this Synoptic Table in the author's original arrangement has been transferred to Volume II of this Collection, under the first topic, Sources of Legal History. The List gives the publications and editions in which can be found the principal materials for mediæval European legal history.—Eds.

FIFTH CENTURY

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
4	A.D.	A.D.	A.D.	A.D. (Date uncertain.) Lex Salica.	A.D. (466–485?) [Leges Eurici.]	A.D.	A.D.

SIXTH CENTURY

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
1	A.D.	A.D.	A.D. 512 Edictum Theoderici.	A.D. (bet. 511 and 558.) Pactus pro Tenore Pacis Hildeberti (I.) et Chlotharii (I.).	A.D. 517 Lex Gundobada (Burgundians).	A.D.	A.D.
2				Lex Ribuaria (part I.).			
3				(bet. 561 and 584.) Edictum Hilperici (successions and misc.).			
4				Lex Ribuaria (part II.). 596 Hildeberti (II.) Decretio (successions).	586–601. Antiqua. (Lex Wisigothorum.)		

SEVENTH CENTURY

Century	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
1		Æthelbirht's Dooms (Kent).					[Pactus Alamannorum.]		584 & 628	Præceptio Chlotharii (II.) (misc. For Neustria.)				
							614	Edictum Chlotharii (II.). Frank kingdom.)		(Misc. For whole				
2					643	Rothari Edictum Renovationis,	†	Lex Ribuaria (part III.).						
3					668	Grimoaldi Correctio.				652-672 Liber Judicum (Fuero Juzgo).				
4	680	Hatfield Decree against heresy. (North., Mercia, E. Anglia, Kent.) Hlothere's and Eadric's Dooms (Kent). Ine's Ratifications (Wessex).												
	696	Wihtræd's Dooms (Kent).												

EIGHTH CENTURY

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
1				Lex Ribuaria (part IV.).			
				Lex Alamannorum.			
			733 to 735 Liutprandi Leges.				
			733 [Notitia de Actoribus Regis.]				
2				743 Statutum Karlmanni (appropriating church lands).			
			745 Ratchis Edictum et Statuta.				
				Decretum (Lex) Baiwariorum.			
			750 to 755 Statuta Ahistulfi.				
3					768 Capitulare Aquitanicum. (Pippin. Misc.)		
				772 Decretum Tassilonis (Bavaria).			
				775 Decretum Tassilonis (Bavaria).			
			Capitula Aregis (Beneventum).				

4

779 Capitulare (v. Decretum) Haristallense of Charles the Great. (For whole empire. Important rules for administration of justice. ? Extended to Northern Spain.)

780 Consuetudo et Pactum Aregis (Naples).

Capitulatio de Partibus Saxoniæ.

Notitia Italica. (Charles the Great. Sales.)

785? Lex Frisionum.

Capitulare Mantuanum. (Pippin *as king*. Misc.)

Capitulare Pippini. (Procedure. Pilgrims.)

787 Capitulare Mantuanum IIm. (Pippin. Misc.)

787 Capitulare Papiense. (Do. Misc.)

790 Capitulare Pippini. (Misc.)

797 Capitulare Saxonicum.

NINTH CENTURY

Century	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
			800 Statutum Cenomannicum (regulating labour-dues of vassals to their lords).				
			Capitulare de Villis (regulating the management of the royal estates, and containing important general rules).				
			801 Capitula legi Lombardicæ addita (misc.).				
			803 Capitula (apud Aquisgranum) legibus addita. (Murder fines, emancipations, suretyship, abuse of legal process.)				
				808 Lex Thuringorum. Lex Frisionum (Additio sapientium).			
				803 Constitutio in lege Ribuaria mittenda. Lex Saxonum.			
			806 Capitulare Pippini (misc.).				
I			809 Capitula Aquisgranensia. (Pardoned criminals, outlaws, attendance at the local courts.)				
			810 Capitula Aquisgranensia (containing the important clause limiting jurisdiction of the Hundred courts).				
				810 Capitula ad Legem Baiwariorum addita (The 8 bans).			
			? 811 Capitulare de Justitiis Faciendis. (Ordinance regulating competence of various courts, and establishing quarterly circuits of the *missi*.)				
			811 Capitulare de Latronibus (definitely constituting theft as a "plea of the crown," unless committed between two slaves of same master).				
			[Pactum cum Venetis.]		812 Præceptum pro Hispanis (purprestures of Crown lands).		
					? 813 Capitulare Aquisgranense (misc.).		
					815-6 Duæ constitutiones de Hispanis profugis.		
			819 Capitula Legibus Addenda. (Important criminal code, recognising execution against land, also power of making wills.)				

							? 819 ?	Capitula Legi Salicæ addita. Lex Francorum Chamavorum.								
2					823 827 829 836 840	Statutum Olonnense (misc.). *Ansegisi Abbatis Capitularium collectio* (an imperfect collection of the Capitula of Charles the Great, Ludwig I., and Lothar I.). Capitularia Wormatiensia. (Important rules of imperial administration, authorizing "inquisitiones.") *Concordia.* Pactum Sicardi (Naples). Pactum cum Venetis (prob. founded on earlier of 812, not surviving).						844	Præceptum pro Hispanis.		
3					866	Capitula Adelchis (Beneventum).			853 854 864	Capitulare Silvacense (rules for circuit judges). Capitulare Attiniacense (rules for circuit judges). Edictum Pistense (important general ordinance regulating procedure, coinage, military service, weights and measures, etc.).					
4		Ælfred's Code.							884	Capitulare Vernense. (Robberies. Regulation of rival jurisdictions.)					

TENTH CENTURY

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
1	901? Eadweard the Elder's (first) Ordinance.						
	904 Eadweard the Elder's Warnings (C. of Exeter).						
2	Æthelstane's Ordinance for Tithes.						
	Æthelstane's Ordinance of Creatanlea.						
	Judicia Civitatis Lundoniæ.						930 [Ulfljótslög (Iceland).]
	940–946 Eadmund's Proclamations and Institutions.						
3	Eadgar's Counsel of the Hundred.						
	959–975 Eadgar's Counsel (at Andover?).						
	Eadgar's (general) Ordinance (at "Wihtbordestane").		967 Capitulare de duello judiciali.				
4	Æthelred's Counsel at Woodstock.		998 Capitulare de prædiis ecclesiasticis.				

Quarter	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
1		Peace of the English and Danes. (Danegelt.)				The *Capitulare* (collection of Imperial Capitula).								
		Æthelred's Law of Wantage.												
		Counsel of the Witan at Enham (? Ensham).												
	1018	Knut's Counsel at Winchester.												
	?	Witherlags Ret (Knut).			1019	Capitulare de Successione.								
					?	*Liber Papiensis.*								
2					1027?	Mandatum de lege Romana.								
					1037	Edictum de Beneficiis.								
3	?	*Rectitudines Singularum Personarum.*			1052	Constitutio de Veneficiis.								
					1070	The *Expositio* (commentary on the Imperial Capitula).								
4		The Ten Statutes of William I.			1077	Pax Italica Henrici Quarti.								
		Ordinance excluding spiritual causes from the Hundred Court.			?	*Lombarda.*								

TWELFTH CENTURY

Quarter.	ENGLAND.	SCOTLAND.	ITALY.	GERMANY.	FRANCE.	SPAIN.	SCANDINAVIA.
	A.D. 1100 Charter of Liberties (Henry I.).	A.D.	A.D.	A.D.	A.D.	A.D.	A.D.
	1108? Ordinance for holding courts of County and Hundred.		1103 Pax Generalis Henrici Quarti.				
	Leges Edwardi Confessoris.		1111 Privilegium (Papæ) de Investituris (recognizing imperial rights).				
I	*Leis e custumes que li reis Will. granta al poeple de Engleterre.*						
	Quadripartitus.						
	? 1118 *Leges Henrici Primi.*						1118 [Hafñidaskrá (Iceland).]
			1122 Pax Wormatiensis. (Surrender of imperial rights on investitures.)				
		Leges Quatuor Burgorum.		1125 *Codex epistolaris Babenbergensis.*			
						1127 / 1157 El fuero viejo de Castilla.	
	Consiliatio Cnuti.		1136 Constitutio de feudorum distractione.				
				1140 Freiburger Stadtrecht.			
2	*Instituta Cnuti aliorumque Regum Anglorum.*	Assise Regis David.		Soester Stadtrecht ("Justitia").			

					1152	Constitutio de pace Tenenda. (Criminal Code of Frederick I.)									
							1154	Concessio Investiturarum Episcoporum (Saxony).							
					1154	Constitutiones Feudales. (Roncaglia, General Feudal Code.)									
									1155	Ordonnance de Soissons.					
							1156	Constitutio Ducatus Austriæ.							
3					1157	Edictum in favorem Judæorum.									
					1158	Constitutio de jure feudorum. (Pax Roncalica.)									
							1163	Lübecker Stadtrecht.							
	1164	Record ("Constitutions") of Clavendon.								Établissemens de Rouen.					
	1166	Assise of Clarendon (procedure).			1165	Constitutio de testamentifactione clericorum.									
		[Assise of Novel Disseisin.] [Grand Assise.]					1169	Kölner Stadtrecht.							
	1176	Assises recorded at Northampton.													
	1181	Assise of Arms.			1183	Pacta Placentina (The Lombard League).									
	1184	Assise of Woodstock (Forests).													
4					1186	Constitutio contra Incendiarios.									
				Assise Regis Willelmi.			1188	Magdeburger Stadtrecht.							
					1191–4	Mandatum de Appellationibus.			1196	[Commencement of Exchequer Records (Normandy).]					
					1192	Sententia de feodis Ministerialium.									
	1194	First (?) Plea Roll.			? 1180 – 1200	*Libri Feudorum* vel *Usus Feudales*.				*Très ancien Coutumier de Normandie* (Part I.)					

THIRTEENTH CENTURY

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
					1208	Sententia de Teloneis.	†	Treuga Henrici.	1209	Conventio de feodis regni.			1200–8	Slesvigs Bierkerêt (Denmark).
							†	*Auctor Vetus de Beneficiis.*						Westgötalag (Sweden).
							1215†	*Sachsenspiegel.*						Gulathingslög (Norway).
I	1215	Magna Carta.			1216	Cessio juris spolii.			†	Statuts de Montpellier.	1217	Espejo de todos los derechos.		Skaanelagen (Denmark).
					1218	Sententia de Immunitate Civitatum.								
					1220	Privilegium in favorem principum ecclesiasticorum.			1220	*Très ancien Coutumier de Normandie* (Pt. II.).				*Sjællandske Love* (Denmark).
							1221	Wiener Stadtrecht.						
							1223	Renovatio pacis antiquæ Saxoniæ.						
	1227	The First Register of Writs.			1231	Constitutiones Siculæ.	1231	Edictum contra communia.	1228	Statuts de Marseilles.	1229	Fuero Juzgo.		
								Statutum de constitutionibus.						
					1232	Constitutio in favorem principum.								
								Kulmische Handfeste.						
2			Statuta Alexandri II.				1234	Sententia in favorem ecclesiarum.						
	1235	Statute of Merton.			1235	Constitutio Pacis ("Mainzer Landfried.")							1241	Jydske Lov (Denmark).
									1243	Statuts d'Avignon.				
							†	*Summa prosarum dictaminis.*					1244	Frostuthingslög (Norway).
									1245	Statuts d'Arles.				
							†	*Deutschenspiegel.*	1248	Commencement of the Pleids de l'Echevinage (Reims).				Bjarkeyjarrèttr (Norway).
							†	*Schwabenspiegel.*						

					1251	Constitutio de jure hereditario nepotum.			1254	Commencement of the "Olim."	1252	Fuero Real.	1254	Kiöbenhamns Bierkeret (Denmark).
									1256	Ordonnances de villes.			1255	Bjarkoaratten (Sweden).
									1260	Ordonnance de batailles (St. Louis).				*Grágás* (Iceland).
3	1267	Statute of Marlborough.							1267	Coutumes de Perpignan.			1262	Birger Jarl's Ethsörebrott (Sweden).
									1268	Commencement of Parloir aux Bourgeois (Paris).				
									1269	Edictum de Ecclesiis.			1269	Ribes Bierkeret (Denmark).
							1270	Hamburger Stadtrecht ("Ordelbok").	1270	*Établissemens le Roy* (St. Louis).			1271	Járnsida (Hákonorbók. Norway).
	1275	Statute of Westminster I.							1275	Ordinatio de possessionibus amortisatis.			1274	Magnus Lagabötir's Landslög (Norway).
	1278	Statute of Gloucester.			1276	Sententia de feodo non requisito.							1273–6	Hirdskrá (Norway).
	1279	Statute of Mortmain.					1281	Augsburger Stadtrecht.					1280	Jonsbók (Iceland).
	1283	Statute of Acton Burnel.			1282	Sententia de Partu ("Viliorem conditionem sequi debet").			1283	Coutumes de Toulouse.				
	1284	Statute of Wales.		Leges inter Scottos et Brettos.	1283	Sententia de comitatibus non dividendis.			1284	Ordinatio de pace infracta.				
	1285	Statutes of Westminster II. and Winchester.							1287	Ordinatio de burgesiis.			1284	Ordinances of Alsno and Skeningen (Sweden).
		Circumspecte Agatis		*Regiam Majestatem.*			1292	Hamburger Schiffsrecht.	1291	Ordinatio de Parliamento.				
	1290	Quia Emptores.					1298	Oesterreichisches Landrecht.					1296	Uplandslag (Sweden).
	1292	The First Year Book.			1299	Sententia Alberti I. (excluding women from succession to feudal land).				*Grand Coutumier normand.*				
	1297	Confirmatio Cartarum.						Goslarer Stadtrecht.						Gotlandslag (Sweden).

FOURTEENTH CENTURY

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
							1303	Stadtrecht von Bremen.	1303	Ordinatio pro gubernatione regni.				Westmannalag (Sweden).
							1305?	*Sächsisches Weichbildrecht.*						
	1307	Statute of Carlisle.							1306	Ordonnance de batailles (Philippe le Bel).				
					1310	Sententia contra privilegia civitatum.								
					1313	Constitutio Majestatis.		*Summa curiæ regis.*			1312	Ordinance of Justice.		
1									1314	Mandatum de alodis.	1314	Ordenamento de las Tafurerias.		
									1315	Charte aux Normands.				
			1320?	Articuli in itinere Camerarii.					1320	Ordonnance pour nostre Chambres de nos Comptes.				
							1323	Leges Upstalbomicæ (Zeeland).						
	1324?	Ordinance for Ireland.						*Kleines Kaiserrecht.*						
									?	*Très ancienne coutume de Bretagne.*			1327	Sodermannalag (Sweden).
									1330	Ordonnance d'appels.				Helsingalag (Sweden).
									1340	*Style de du Breuil.*			1334	Magnus Erikson's Usury Law (Sweden).
2							1349	Reichshofrathsabschied.					1344	Ordinance of Upsala (Sweden).
									1345	Ordonnance de Parlement.			1345	Ordinance of Telge (Sweden).

								1346	Bayerisches Landrecht.						
								1347	Münchener Stadtrecht.						
	1349	First Statute of Labourers.										1348	Siete Partidas. Ordinance of Alcala d' Henares.	1347	Magnus Eriksson's Landslag (Sweden).
	1351	Statute of Provisors.						?	Schlesisches Landrecht.	1351	Ordonnance de Police.			1354	*Thord Degn's Artikler* (Denmark).
	1352	Statute of Treasons.													Gårderath (Sweden).
	1353	Statute of Præmunire. Statute of the Staple.						1356	Goldene Bulle.	1355	Ordonnance de l'arrière-ban.				Smålandslag (Sweden).
3	1357	Ordinance for Ireland.													Wisby Stadslag (Sweden).
	1362	Act establishing Quarter Sessions.								1361	Serment des baillis.				Magnus Eriksson's Stadslag (Sweden).
										1363	Ordinatio de Parlamento.	1371	Ley de Toro.		Landbierkerät (Denmark).
										1372	Ordonnance sur le fait des aides.				
										1373	Ordonnance sur l'Amirauté.				
	1381	Statute of Forcible Entry.													
4			1384	Use of Merchis. *Quoniam Attachiamenta.* *Itur Camerarii.*						1389	Ordonnances sur les Assises. *Grant Coustumier de France.*				

FIFTEENTH CENTURY

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
			1405	Curia Quattuor Burgerum.										
									1411	[Coutume d'Anjou et Maine.]				
	1413	Statute of Forgery.												
1	1414	Statute of Heresy.												
									1427	Coutume de Poitou.				
							1422	Nurnberger Reichs-Heers-Ordnung.						
			1425	Article of Heresy.										
			1426	Statute against "particular" and "foreign" laws.										
				Ordinance establishing "Lords Auditors of Complaints."										
			1428	Ordinances for Commissioners of Shires.										
2							1437	Arnsberger Reformation (of Westphalian courts).						
							1438	Kreis-Ordnung.	1438	Sanction pragmatique.				
			1440	Ordo Justiciaria (James II.).			1442	Frankfurter Reformation.					1440?	Christopher's Landslag (Sweden).
			1450	Act for Protection of Leaseholders. Act appointing "Lords of the Articles."			1447	Dithmarsisches Landrecht.	1450	Stille et Coutume de Berry.				

			1455	Statute against hereditary offices.						Coutume de Bretagne.					
				Statute establishing borough councils.											
			1458	Act of feu-farm.						1459	Coutumes de Bourgogne (duché et comté).				
										1461	Coutume de Touraine.				
3			1462	Statute of Provisors.						1462	Ordonnance fondant le Parlement de Bourdeaux.				
										1463	(2nd) Coutume d'Anjou.				
			1469	Act for registration of mortgages.											
				Act of Limitation.			1471	Kammergerichts Ordnung (Friedrich III.).							
				Statute of Appeals.											
			1482	Decision recognizing alienation of land by a married woman.						1477	Ordonnance fondant le Parlement de Dijon.				
	1483	Statute against Benevolences.													
	1487	"Star Chamber" Act.								1484	Coutume de Tours.				
			1491	Statute for holding of Session three times a year.											
4							1495	Kammergerichts Ordnung (Maximilian).		1495	Ordonnance fondant le Parlement de Rennes.				
			1496	Statute for education of heirs of freeholders.						1497	Mandement sur la publication des coutumes.				
							1498	Erbfolge Ordnung.							
							1500	Reichsregiments Ordnung.		1499	Ordonnance fondant le Parlement de Rouen.				

SIXTEENTH CENTURY

Quarter.	ENGLAND.		SCOTLAND.		ITALY.		GERMANY.		FRANCE.		SPAIN.		SCANDINAVIA.	
	A.D.		A.D.		A.D.		A.D.		A.D.		A.D.		A.D.	
				Statute establishing perpetual court at Edinburgh.					1501	Ordonnance fondant le Parlement d'Aix.				
				Statute making heirs liable for ancestor's debts.			1507	*Bambergensis.*	1507	Coutumes de Touraine.				
			1504	Statute requiring notice to boroughs when taxation proposed.					1508	Coutumes d' Anjou.				
										Coutumes du Maine.				
									1509	Coutumes de Troyes.				
1									1510	Coutumes d' Auvergne.				
				Statute for registration of seisins by sheriffs.					1511	Coutumes de Paris.				
							1512	Notariats Ordnung (much about wills).	1514	Coutumes de Poitou.				
										Coutumes d' Angoumois.				
									1520	Coutumes de Bourdeaux.				
							1511 / 1529	Erbfolge Ordnungen.	1521	Coutumes de Bourbonnois.				
									1523	Coutumes de Blois.				
			1526	Statute of successions to goods of minors.										
2	1529	Statute of Embezzlements.	1529	Statute making freeholders responsible for production of their tenants.			1530	Polizei Ordnung und Reformation.						
	1532	Statutes of Uses and Enrolments.	1532	Ordinance establishing College of Justice.			1532	Peinliche Hals-Gerichts Ordnung ("Karolina").	1534	Coutumes de Nivernois.				

	1540	Statute of Wills.	1540	Acts for reformation of Courts.					1539	Ordonnance de Villers-Cotterets.				
3			1555	Statute for notice to quit.			1555	Wurtemberger Landrecht.	1552	Fors de Béarn. (There had been several earlier collections.)				
				Statute against leagues and manrents.										
				Statute for registration of all seisins.					1561	Ordonnance d' Orléans.				
									1564	Ordonnance de Roussillon.				
			1567	Statute for seisins in boroughs.					1566	Ordonnance de Moulins.	1567	Nueva Recopilacion.		
4			1578	Act establishing convention of boroughs.										
			1579	Statute of prescriptions.					1579	Ordonnance de Blois.				
									1580	(Nouvelle) Coutume de Paris.				
			1585	Statute declaring sovereignty of Parliament.					1583	(Nouvelle) Coutume de Normandie.				
				Statute prohibiting clergy acting as judges or advocates.					1585	Coutumes d' Orléans.				
			1587	Constitution Statutes.										
				Statute for furtherance of criminal justice.										
			1599	Statute establishing general Land Registry.										

3. ENGLISH LAW BEFORE THE NORMAN CONQUEST [1]

By Sir Frederick Pollock, Bart.[2]

FOR most practical purposes the history of English law does not begin till after the Norman conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless a student who does not look farther back will be puzzled by relics of archaic law which were not formally discarded until quite modern times, and he may easily be misled by plausible but incorrect explanations of them, such as have been current in Blackstone's time and much later. In rare but important cases it may be needful for advocates and judges to transcend the ordinary limits of the search for authority, and trace a rule or doctrine to its earliest known form in this country. When this has to be done it is quite possible that wrong ancient history may lead to the declaration of wrong modern law. This happened in at least one

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celebrated case within the Queen's reign, in which, as it is now hardly possible to doubt, the House of Lords reversed the ancient law of marriage accepted on the authority of the Church in England as well as in the rest of Western Christendom, being misguided by early documents of which they did not rightly understand either the authority or the effect.[1] The extreme antiquities of our law may not be often required in practice, but it is not safe to neglect them altogether, and still less safe to accept uncritical explanations when it does become necessary to consider them.

Anglo-Saxon life was rough and crude as compared not only with any modern standard but with the amount of civilization which survived, or had been recovered, on the Continent. There was very little foreign trade, not much internal traffic, nothing like industrial business of any kind on a large scale, and (it need hardly be said) no system of credit. Such conditions gave no room for refined legal science applied by elaborate legal machinery, such as those of the Roman Empire had been and those of modern England and the commonwealths that have sprung from her were to be. Such as the men were, such had to be the rules and methods whereby some kind of order was kept among them. Our ancestors before the Norman Conquest lived under a judicial system, if system it can be called, as rudimentary in substance as it was cumbrous in form. They sought justice, as a rule, at their primary local court, the court of the hundred, which met once a month, and for greater matters at a higher and more general court, the county court, which met only twice a year.[2] We say purposely met rather than sat. The courts were open-air meetings of the freemen who were bound to attend them, the *suitors* as they are called in the terms of Anglo-Norman and later medieval law; there was no class of professional lawyers; there were no judges in our sense of learned persons specially appointed to preside, expound the law, and cause justice to be done; the only learning available

[1] See Pollock and Maitland, Hist. Eng. Law, ii. 367 sqq.

[2] There were probably intermediate meetings for merely formal business, which only a small number of the suitors attended: see P. & M., Hist. Eng. L. i. 526.

was that of the bishops, abbots, and other great ecclesiastics. This learning, indeed, was all the more available and influential because, before the Norman Conquest, there were no separate ecclesiastical courts in England. There were no clerks nor, apparently, any permanent officials of the popular courts; their judgments proceeded from the meeting itself, not from its presiding officer, and were regularly preserved only in the memory of the suitors. A modern student or man of business will at first sight wonder how this rude and scanty provision for judicial affairs can have sufficed even in the Dark Ages. But when we have reflected on the actual state of Anglo-Saxon society, we may be apt to think that at times the hundred and the county court found too little to do rather than too much. The materials for what we now call civil business practically did not exist.

There is now no doubt among scholars that the primary court was the hundred court. If the township had any regular meeting (which is quite uncertain), that meeting was not a judicial body. The King, on the other hand, assisted by his Council of wise men, the Witan,[1] had a superior authority in reserve. It was allowable to seek justice at the king's hands if one had failed, after due diligence, to obtain it in the hundred or the county court. Moreover the Witan assumed jurisdiction in the first instance where land granted by the king was in question, and perhaps in other cases where religious foundations or the king's great men were concerned. Several examples of such proceedings are recorded, recited as we should say in modern technical speech, in extant land-charters which declare and confirm the result of disputes, and therefore we know more of them than we do of the ordinary proceedings in the county and hundred courts, of which no written record was kept. But they can have had very little bearing, if any, on the daily lives of the smaller folk. In important cases the county court might be strengthened by adding the chief men of other counties; and, when thus reinforced, there is hardly anything to distinguish it

[1] There is more authority for this short form than for the fuller Witena-Gemót (not witenágemot, as sometimes mispronounced by persons ignorant of Old-English inflexions).

from the Witan save that the king is not there in person.[1]

Some considerable time before the Norman Conquest, but how long is not known, bishops and other great men had acquired the right of holding courts of their own and taking the profits in the shape of fines and fees, or what would have been the king's share of the profits. My own belief is that this began very early, but there is no actual proof of it. Twenty years after the Conquest, at any rate, we find private jurisdiction constantly mentioned in the Domesday Survey, and common in every part of England: about the same time, or shortly afterwards, it was recognized as a main ingredient in the complex and artificial system of feudalism. After having grown in England, as elsewhere, to the point of threatening the king's supremacy, but having happily found in Edward I a master such as it did not find elsewhere before the time of Richelieu, the manorial court is still with us in a form attenuated almost to the point of extinction. It is not material for the later history of English law to settle exactly how far the process of concession or encroachment had gone in the time of Edward the Confessor, or how fast its rate was increasing at the date of the Conquest. There can be no doubt that on the one hand it had gained and was gaining speed before "the day when King Edward was alive and dead,"[2] or on the other hand that it was further accelerated and emphasized under rulers who were familiar with a more advanced stage of feudalism on the Continent. But this very familiarity helped to make them wise in time; and there was at least some foreshadowing of royal supremacy in existing English institutions. Although the courts of the hundred and the county were not the king's courts, the king was bound by his office to exercise some general supervision over their working. He was represented in the county court by the sheriff; he might send out commissioners to inquire and report how justice was done, though he could not interfere with the

[1] Such a court, after the Conquest, was that which restored and confirmed the rights of the see of Canterbury on Penenden Heath: but it was held under a very special writ from the king.

[2] The common form of reference in Domesday Book.

actual decisions. The efficiency of these powers varied in fact according to the king's means and capacity for exercising them. Under a wise and strong ruler like Alfred or Æthelstan they might count for much; under a feeble one like Æthelred they could count for very little.

A modern reader fresh to the subject might perhaps expect to find that the procedure of the old popular courts was loose and informal. In fact it was governed by traditional rules of the most formal and unbending kind.[1] Little as we know of the details, we know enough to be sure of this; and it agrees with all the evidences we have of the early history of legal proceedings elsewhere. The forms become not less but more stringent as we pursue them to a higher antiquity; they seem to have not more but less appreciable relation to any rational attempt to ascertain the truth in disputed matters of fact. That task, indeed, appears to have been regarded as too hard or too dangerous to be attempted by unassisted human faculties. All the accustomed modes of proof involved some kind of appeal to supernatural sanctions. The simplest was the oath of one of the parties, not by way of testimony to particular facts, but by way of assertion of his whole claim or defence; and this was fortified by the oaths of a greater or less number of helpers, according to the nature of the case and the importance of the persons concerned, who swore with him that his oath was true.[2] He lost his cause without a chance of recovery if any slip was made in pronouncing the proper forms, or if a sufficient number of helpers were not present and ready to make the oath. On the other hand the oath, like all archaic forms of proof, was conclusive when once duly carried through. Hence it was almost always an advantage to be called upon to make the oath of proof, and this usually belonged to the defendant. "Gainsaying is ever stronger than affirming . . . . Owning is

[1] There were variations in the practice of different counties after the Conquest (Glanv. xii. 23), and therefore, almost certainly, before. We know nothing of their character or importance, but I should conjecture that they were chiefly in verbal formulas.

[2] Advanced students will observe that this is wholly different from the decisory oath of Roman and modern Romanized procedure, where one party has the option of tendering the oath to the other alone, and is bound by the result.

nearer to him who has the thing than to him who claims."[1] Our modern phrase "burden of proof" is quite inapplicable to the course of justice in Anglo-Saxon courts: the benefit or "prerogative" of proof, as it is called even in modern Scottish books, was eagerly contended for. The swearer and his oath-helpers might perjure themselves, but if they did there was no remedy for the loser in this world, unless he was prepared to charge the court itself with giving false judgment. Obviously there was no room in such a scheme for what we now call rules of evidence. Rules there were, but they declared what number of oath-helpers was required, or how many common men's oaths would balance a thegn's. In the absence of manifest facts, such as a fresh wound, which could be shown to the court, an oath called the "fore-oath" was required of the complainant in the first instance as a security against frivolous suits. This was quite different from the final oath of proof.

Oath being the normal mode of proof in disputes about property, we find it supplemented by ordeal in criminal accusations. A man of good repute could usually clear himself by oath; but circumstances of grave suspicion in the particular case, or previous bad character, would drive the defendant to stand his trial by ordeal. In the usual forms of which we read in England the tests were sinking or floating in cold water,[2] and recovery within a limited time from the effects of plunging the arm into boiling water or handling red-hot iron. The hot-water ordeal at any rate was in use from an early time, though the extant forms of ritual, after the Church had assumed the direction of the proceedings, are comparatively late. Originally, no doubt, the appeal was to the god of water or fire, as the case might be. The Church objected, temporized, hallowed the obstinate heathen customs by the addition of Christian ceremonies, and finally, but not until the thirteenth century, was strong enough to banish them. As a man was not put to the ordeal unless he was

[1] Æthelr. ii. 9.

[2] There is a curious French variant of the cold-water ordeal in which not the accused person, but some bystander taken at random, is immersed: I do not know of any English example.

disqualified from clearing himself by oath for one of the reasons above mentioned, the results were probably less remote from rough justice than we should expect, and it seems that the proportion of acquittals was also larger. Certainly people generally believed to be guilty did often escape, how far accidentally or otherwise we can only conjecture.[1] Another form of ordeal favoured in many Germanic tribes from early times, notwithstanding protest from the Church, and in use for deciding every kind of dispute, was trial by battle: but this makes its first appearance in England and Scotland not as a Saxon but as a distinctly Norman institution.[2] It is hard to say why, but the fact is so. It seems from Anglo-Norman evidence that a party to a dispute which we should now call purely civil sometimes offered to prove his case not only by oath or combat, but by ordeal, as the court might award. This again suggests various explanations of which none is certain.[3]

Inasmuch as all the early modes of proof involved large elements of unknown risk, it was rather common for the parties to compromise at the last moment. Also, since there were no ready means of enforcing the performance of a judgment on unwilling parties, great men supported by numerous followers could often defy the court, and this naturally made it undesirable to carry matters to extremity which, if both parties were strong, might mean private war. Most early forms of jurisdiction, indeed, of which we have any knowledge, seem better fitted to put pressure on the litigants to agree than to produce an effective judgment of compulsory force. Assuredly this was the case with those which we find in England even after the consolidation of the kingdom under the Danish dynasty.

Rigid and cumbrous as Anglo-Saxon justice was in the

[1] The cold-water ordeal was apparently most feared; see the case of Ailward, Materials for Hist. St. Thomas, i. 156, ii. 172; Bigelow, Plac. A.-N. 260. For a full account see Lea, Superstition and Force.

[2] See more in Neilson, Trial by Combat, an excellent and most interesting monograph.

[3] Cases from D. B. collected in Bigelow, Plac. A.-N., 40-44, 61. Even under Henry II we find, in terms, such an offer, but it looks, in the light of the context, more like a rhetorical asseveration — in fact the modern "j'en mettrais ma main au feu" — than anything else: *op. cit.* 196.

things it did provide for, it was, to modern eyes, strangely defective in its lack of executive power. Among the most important functions of courts as we know them is compelling the attendance of parties and enforcing the fulfilment both of final judgments and of interlocutory orders dealing with the conduct of proceedings and the like. Such things are done as of course under the ordinary authority of the court, and with means constantly at its disposal; open resistance to judicial orders is so plainly useless that it is seldom attempted, and obstinate preference of penalties to submission, a thing which now and then happens, is counted a mark of eccentricity bordering on unsoundness of mind. Exceptional difficulties, when they occur, indicate an abnormal state of the commonwealth or some of its members. But this reign of law did not come by nature; it has been slowly and laboriously won. Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the State but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honour to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under a treaty between sovereign States can compel the rulers of those States to fulfil its award. Anglo-Saxon courts had got beyond this most early stage, but not very far beyond it.

The only way to bring an unwilling adversary before the court was to take something of his as security till he would attend to the demand; and practically the only things that could be taken without personal violence were cattle. Distress in this form was practised and also regulated from a very early time. It was forbidden to distrain until right had been formally demanded — in Cnut's time to the extent of three summonings — and refused. Thus leave of the court was required, but the party had to act for himself as best he could. If distress failed to make the defendant appear, the only resource left was to deny the law's protection to the stiff-necked man who would not come to be judged by law. He might be outlawed, and this must have been enough to coerce

most men who had anything to lose and were not strong enough to live in rebellion; but still no right could be done to the complainant without his submission. The device of a judgment by default, which is familiar enough to us, was unknown, and probably would not have been understood.

Final judgment, when obtained, could in like manner not be directly enforced. The successful party had to see to gathering the "fruits of judgment," as we say, for himself. In case of continued refusal to do right according to the sentence of the court, he might take the law into his own hands, in fact wage war on his obstinate opponent. The ealdorman's aid, and ultimately the king's, could be invoked in such extreme cases as that of a wealthy man, or one backed by a powerful family, setting the law at open defiance. But this was an extraordinary measure, analogous to nothing in the regular modern process of law.

The details of Anglo-Saxon procedure and judicial usuage had become or were fast becoming obsolete in the thirteenth century, which is as much as to say that they were already outworn when the definite growth of the Common Law began. But the general features of the earlier practice, and still more the ideas that underlay them, have to be borne in mind. They left their stamp on the course of our legal history in manifold ways; many things in the medieval law cannot be understood without reference to them; and even in modern law their traces are often to be found.

While the customary forms of judgment and justice were such as we have said, there was a comparatively large amount of legislation or at least express declaration of law; and, what is even more remarkable, it was delivered in the mother tongue of the people from the first. Æthelberht, the converted king of Kent, was anxious to emulate the civilization of Rome in secular things also, and reduced the customs of his kingdom, so far as might be, to writing; but they were called *dooms*, not *leges;* they were issued in English, and were translated into Latin only after the lapse of some centuries. Other Kentish princes, and afterwards Ine of Wessex, followed the example; but the regular series of Anglo-Saxon laws begins towards the end of the ninth century with

Alfred's publication of his own dooms, and (it seems) an amended version of Ine's, in which these are now preserved. Through the century and a half between Alfred's time and Cnut's,[1] legislation was pretty continuous and it was always in English. The later restoration of English to the statute roll after the medieval reign of Latin and French was not the new thing it seemed. It may be that the activity of the Wessex princes in legislation was connected with the conquest of the Western parts of England, and the need of having fixed rules for the conduct of affairs in the newly settled districts. No one doubts that a considerable West-Welsh population remained in this region, and it would have been difficult to apply any local West-Saxon custom to them.

Like all written laws, the Anglo-Saxon dooms have to be interpreted in the light of their circumstances. Unluckily for modern students, the matters of habit and custom which they naturally take for granted are those of which we now have least direct evidence. A large part of them is filled by minute catalgues of the fines and compositions payable for manslaughter, wounding, and other acts of violence. We may well suppose that in matters of sums and number such provisions often express an authoritative compromise between the varying though not widely dissimilar usages of local courts; at all events we have an undoubted example of a like process in the fixing of standard measures after the Conquest; and in some of the later Anglo-Saxon laws we get a comparative standard of Danish and English reckoning. Otherwise we cannot certainly tell how much is declaration of existing custom, or what we should now call consolidation, and how much was new. We know from Alfred's preamble to his laws, evidently framed with special care, that he did innovate to some extent, but, like a true father of English statesmen, was anxious to innovate cautiously. On the whole the Anglo-Saxon written laws, though of priceless use to students of the times, need a good deal of circumspection and careful comparison of other authorities for using

[1] The so-called laws of Edward the Confessor, an antiquarian compilation of the twelfth century largely mixed with invention, do not even profess to be actual poems of the Confessor, but the customs of his time collected by order of William the Conqueror.

them aright. It is altogether misleading to speak of them as codes, or as if they were intended to be a complete exposition of the customary law.

We pass on to the substance of Anglo-Saxon law, so far as capable of being dealt with in a summary view. There were sharp distinctions between different conditions of persons, noble, free, and slave. We may talk of "serfs" if we like, but the Anglo-Saxon "theow" was much more like a Roman slave than a medieval villein. Not only slaves could be bought and sold, but there was so much regular slave-trading that selling men beyond seas had to be specially forbidden. Slaves were more harshly punished than free men, and must have been largely at their owner's mercy, though there is reason to think that usage had a more advanced standard of humanity than was afforded by any positive rules. Manumission was not uncommon, and was specially favoured by the Church. The slave had opportunities (perhaps first secured under Alfred) for acquiring means of his own, and sometimes bought his freedom.

Among free men there were two kinds of difference. A man might be a lord having dependents, protecting them and in turn supported by them, and answerable in some measure for their conduct; or he might be a free man of small estate dependent on a lord. In the tenth century, if not before, every man who was not a lord himself was bound to have a lord on pain of being treated as unworthy of a free man's right; "lordless man" was to Anglo-Saxon ears much the same as "rogue and vagabond" to ours. This wide-spread relation of lord and man was one of the elements that in due time went to make up feudalism. It was not necessarily associated with any holding of land by the man from the lord, but the association was doubtless already common a long time before the Conquest, and there is every reason to think that the legally uniform class of dependent free men included many varieties of wealth and prosperity. Many were probably no worse off than substantial farmers, and many not much better than slaves.

The other legal difference between free men was their estimation for *wergild*, the "man's price" which a man's

kinsfolk were entitled to demand from his slayer, and which sometimes he might have to pay for his own offences; and this was the more important because the weight of a man's oath also varied with it. A *thegn* (which would be more closely represented by "gentilhomme" than by "nobleman") had a wergild six times as great as a *ceorl's*[1] or common man's, and his oath counted for six common oaths before the court.[2] All free men, noble or simple, looked to their kindred as their natural helpers and avengers; and one chief office of early criminal law was to regulate the blood-feud until there was a power strong enough to supersede it.

We collect from the general tenor of the Anglo-Saxon laws that the evils most frequently calling for remedy were manslaying, wounding, and cattle-stealing; it is obvious enough that the latter, when followed by pursuit in hot blood, was a natural and prolific source of the two former. The rules dealing with such wrongs or crimes (for archaic laws draw no firm line between public offence and private injury) present a strange contrast of crude ideas and minute specification, as it appears at first sight. Both are however really due to similar conditions. A society which is incapable of refined conceptions, but is advanced enough to require equal rules of some kind and to limit the ordinary power of its rulers, is likewise incapable of leaving any play for judicial discretion. Anglo-Saxon courts had not the means of apportioning punishment to guilt in the particular case, or assessing compensation according to the actual damage, any more than of deciding on the merits of conflicting claims according to the evidence. Thus the only way remaining open was to fix an equivalent in money or in kind for each particular injury: so much for life and so much for every limb and member of the human body. The same thing occurs with even greater profusion of detail in the other Germanic compilations of the Dark Ages. In the latter days of Anglo-Saxon mon-

[1] The modern forms of these words, *thane* and *churl*, have passed through so much change of meaning and application that they cannot be safely used for historical purposes.

[2] There were minor distinctions between ranks of free men which are now obscure, and were probably no less obscure in the thirteenth century: they seem to have been disregarded very soon after the Conquest.

archy treason was added to the rude catalogue of crimes, under continental influence ultimately derived from Roman law; but the sin of plotting against the sovereign was the more readily conceived as heinous above all others by reason of the ancient Germanic principle of faith between a lord and his men. This prominence of the personal relation explains why down to quite modern times the murder of a husband by his wife, of a master by his servant, and of an ecclesiastical superior by a clerk, secular or regular, owing him obedience, were specially classed as "petit treason" and distinguished from murder in general.[1]

Secret murder as opposed to open slaying was treated with special severity. This throws no light on our later criminal law; nor has it much to do with love of a fair fight, though this may have strengthened the feeling; rather it goes back to a time when witchcraft, and poisoning as presumably connected therewith, were believed to be unavoidable by ordinary caution, and regarded with a supernatural horror which is still easy to observe among barbarous people. With these exceptions, and a few later ones of offences reserved for the king's jurisdiction, crimes were not classified or distinguished in Anglo-Saxon custom save by the amount of public fine[2] and private composition required to redeem the wrong-doer's life in each case. Capital punishment and money payment, or rather liability to the blood-feud redeemable by money payment, and slavery for a thief who could not make the proper fine, were the only means of compulsion generally applicable, though false accusers and some other infamous persons were liable to corporal penalties. Imprisonment is not heard of as a substantive punishment; and it is needless to say that nothing like a system of penal discipline was known. We cannot doubt that a large number of offences, even notorious ones, went unpunished. The more skilled and subtle attacks on property, such as forgery and allied kinds of fraud, did not occur, not because men were more honest,

[1] Bl. Com. iv. 203.

[2] *Wite* was probably, in its origin, rather a fee to the court for arranging the composition than a punishment. But it is treated as penal from the earliest period of written laws. In the tenth century it could mean pain or torment; see C. D. 1222 *ad fin.*

but because fraudulent documents could not be invented or employed in a society which knew nothing of credit and did not use writing for any common business of life.

Far more significant for the future development of English law are the beginnings of the King's Peace. In later times this became a synonym for public order maintained by the king's general authority; nowadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the Queen's or the commonwealth's. But the king's justice, as we have seen, was at first not ordinary but exceptional, and his power was called to aid only when other means had failed. To be in the king's peace was to have a special protection, a local or personal privilege. Every free man was entitled to peace in his own house, the sanctity of the homestead being one of the most ancient and general principles of Teutonic law. The worth set on a man's peace, like that of his life, varied with his rank, and thus the king's peace was higher than any other man's. Fighting in the king's house was a capital offence from an early time. Gradually the privileges of the king's house were extended to the precincts of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also the king might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground. The more serious public offences were appropriated to the king's jurisdiction; the king's peace was used as a special sanction for the settlement of blood-feuds, and was proclaimed on various solemn occasions; it seems to have been specially prominent — may we say as a "frontier regulation"? — where English conquest and settlement were recent.[1] In the generation before the Conquest it was, to all appearance, extending fast. In this kind of development the first stage is a really exceptional right; the second is a right which has to be distinctly claimed, but is open to all who will claim it in the proper form; the third is the "common right" which the courts will take for granted. The

[1] See the customs of Chester, D. B. i. 262 b, extracted in Stubbs, Sel. Ch.

Normans found the king's peace nearing, if not touching, the second stage.

Except for a few peculiar provisions, there is nothing in Anglo-Saxon customs resembling our modern distinctions between wilful, negligent, and purely accidental injuries. Private vengeance does not stop to discriminate in such matters, and customary law which started from making terms with the avenger could not afford to take a more judicial view. This old harshness of the Germanic rules has left its traces in the Common Law down to quite recent times. A special provision in Alfred's laws recommends a man carrying a spear on his shoulder to keep the point level with the butt; if another runs on the point so carried, only simple compensation at most[1] will be payable. If the point has been borne higher (so that it would naturally come in a man's face), this carelessness may put the party to his oath to avoid a fine. If a dog worried or killed any one, the owner was answerable in a scale of fines rising after the first offence;[2] the indulgence of the modern law which requires knowledge of the dog's habits was unknown. But it may be doubted whether these rules applied to anything short of serious injury. Alfred's wise men show their practical sense by an explanatory caution which they add: the owner may not set up as an excuse that the dog forthwith ran away and was lost. This might otherwise have seemed an excellent defence according to the archaic notion that the animal or instrument which does damage carries the liability about with it, and the owner may free himself by abandoning it (*noxa caput sequitur*).[3]

We have spoken of money payments for convenience; but it does not seem likely that enough money was available, as a rule, to pay the more substantial wergilds and fines; and it must once have been the common practice for the pacified avenger to accept cattle, arms, or valuable ornaments, at a price agreed between the parties or settled by the court. The alternative of delivering cattle is expressly mentioned in some of the earlier laws.

[1] Ælf. The statement is rather obscure. [2] Ælf. 23.
[3] See Holmes, the Common Law, 7-12.

As for the law of property, it was rudimentary, and inextricably mixed up with precautions against theft and charges of theft. A prudent buyer of cattle had to secure himself against the possible claim of some former owner who might allege that the beasts had been stolen. The only way to do this was to take every step in public and with good witness. If he set out on a journey to a fair, he would let his neighbours know it. When he did business either far or near, he would buy only in open market and before credible persons, and, if the sale were at any distance from home, still more if he had done some trade on the way without having set out for the purpose, he would call the good men of his own township to witness when he came back driving his newly-gotten oxen, and not till then would he turn them out on the common pasture. These observances, probably approved by long-standing custom, are prescribed in a whole series of ordinances on pain of stringent forfeitures.[1] Even then a purchaser whose title was challenged had to produce his seller, or, if he could not do that, clear himself by oath. The seller might produce in turn the man from whom he had bought, and he again might do the like; but this process ("vouching to warranty" in the language of later medieval law) could not be carried more than three steps back, to the "fourth hand" including the buyer himself. All this has nothing to do with the proof of the contract in case of a dispute between the original parties to the sale; it is much more aimed at collusion between them, in fact at arrangements for the receipt and disposal of stolen goods. The witnesses to the sale are there not for the parties' sake, but as a check in the public interest. We are tempted at first sight to think of various modern enactments that require signature or other formalities as a condition of particular kinds of contracts being enforceable; but their provisions belong to a wholly different category.

Another archaic source of anxiety is that borrowed arms may be used in a fatal fight and bring the lender into trouble. The early notion would be that a weapon used for manslaying should bring home the liability with it to the owner, quite

[1] See especially Edg. iv. 6-11.

regardless of any fault; which would afterwards become a more or less rational presumption that he lent it for no good purpose. Then the risk of such weapons being forfeited continued even to modern times. Hence the armourer who takes a sword or spear to be repaired, and even a smith who takes charge of tools, must warrant their return free from blood-guiltiness, unless it has been agreed to the contrary.[1] We also find, with regard to the forfeiture of things which "move to death," that even in case of pure accident, such as a tree falling on a woodman, the kindred still have their rights. They may take away the tree if they will come for it within thirty days.[2]

There was not any law of contract at all, as we now understand it. The two principal kinds of transaction requiring the exchange or acceptance of promises to be performed in the future were marriage and the payment of wergild. Apart from the general sanctions of the Church, and the king's special authority where his peace had been declared, the only ways of adding any definite security to a promise were oath and giving of pledges. One or both of these were doubtless regularly used on solemn occasions like the settlement of a blood-feud; and we may guess that the oath, which at all events carried a spiritual sanction, was freely resorted to for various purposes. But business had hardly got beyond delivery against ready money between parties both present, and there was not much room for such confidence as that on which, for example, the existence of modern banking rests. How far the popular law took any notice of petty trading disputes, such as there were, we are not informed; it seems likely that for the most part they were left to be settled by special customs of traders, and possibly by special local tribunals in towns and markets. Merchants trafficking beyond seas, in any case, must have relied on the customs of their trade and order rather than the cumbrous formal justice of the time.

Anglo-Saxon landholding has been much discussed, but is still imperfectly understood, and our knowledge of it, so far from throwing any light on the later law, depends largely

[1] Ælf. 19. [2] Ælf. 13.

on what can be inferred from Anglo-Norman sources. It is certain that there were a considerable number of independent free men holding land of various amounts down to the time of the Conquest. In the eastern counties some such holdings, undoubtedly free, were very small indeed.[1] But many of the lesser free men were in practical subjection to a lord who was entitled to receive dues and services from them; he got a share of their labour in tilling his land, rents in money and kind, and so forth. In short they were already in much the same position as those who were called villeins in the twelfth and thirteenth centuries. Also some poor free men seem to have hired themselves out to work for others from an early time.[2] We know next to nothing of the rules under which free men, whether of greater or lesser substance, held "folk-land," that is, estates governed by the old customary law. Probably there was not much buying and selling of such land. There is no reason to suppose that alienation was easier than in other archaic societies, and some local customs found surviving long after the Conquest point to the conclusion that often the consent of the village as well as of the family was a necessary condition of a sale. Indeed it is not certain that folk-land, generally speaking, could be sold at all. There is equally no reason to think that ordinary free landholders could dispose of their land by will, or were in the habit of making wills for any purpose. Anglo-Saxon wills (or rather documents more like a modern will than a modern deed) exist, but they are the wills of great folk, such as were accustomed to witness the king's charters, had their own wills witnessed or confirmed by bishops and kings, and held charters of their own; and it is by no means clear that the lands dealt with in these wills were held as ordinary folk-land. In some cases it looks as if a special licence or consent had been required; we also hear of persistent attempts by the heirs to dispute even gifts to great churches.[3]

Soon after the conversion of the south of England to Christianity, English kings began to grant the lordship and

[1] Maitland, Domesday Book and Beyond, 106. [2] Ælf. 43.
[3] See C. D. 226 compared with 256.

revenues of lands, often of extensive districts, to the Church, or more accurately speaking to churches, by written charters framed in imitation of continental models. Land held under these grants by charter or "book," which in course of time acquired set forms and characters peculiar to England, was called *bookland*, and the king's bounty in this kind was in course of time extended to his lay magnates. The same extraordinary power of the king, exercised with the witness and advice[1] of his witan, which could confer a title to princely revenues, could also confer large disposing capacities unknown to the customary law; thus the fortunate holder of bookland might be and often was entitled not only to make a grant in his lifetime or to let it on such terms as he chose, but also to leave it by will. My own belief is that the land given by the Anglo-Saxon wills which are preserved was almost always bookland even when it is not so described. Indeed these wills are rather in the nature of postponed grants, as in Scotland a "trust disposition" had to be till quite lately, than a true last will and testament as we now understand it. They certainly had nothing to do with the Roman testament.[2]

Long before the Conquest it had become the ambition of every man of substance to hold bookland, and we may well think that this was on the way to become the normal form of land-ownership. But this process, whatever its results might have been, was broken off by the advent of Norman lords and Norman clerks with their own different set of ideas and forms.

The various customs of inheritance that are to be found even to this day in English copyholds, and to a limited extent in freehold land, and which are certainly of great antiquity, bear sufficient witness that at least as much variety was to be found before the Conquest. Probably the least usual of the typical customs was primogeniture; preference of the youngest son, ultimogeniture or junior-right as recent authors have called it, the "borough-English" of our post-

[1] A strictly accurate statement in few words is hardly possible. See the section "Book-land and Folk-land" in Maitland, Domesday Book and Beyond, p. 244 sqq.

[2] See P. & M., Hist. Eng. L., bk. II. c. vi. § 3.

Norman books, was common in some parts; preference of the youngest daughter, in default of sons, or even of the youngest among collateral heirs, was not unknown. But the prevailing type was equal division among sons, not among children including daughters on an equal footing as modern systems have it.[1] Here again the effect of the Norman Conquest was to arrest or divert the native lines of growth. In this country we now live under laws of succession derived in part from the military needs of Western Europe in the early Middle Ages, and in part from the cosmopolitan legislation of Justinian, the line between the application of the two systems being drawn in a manner which is accounted for by the peculiar history of our institutions and the relations between different jurisdictions in England, but cannot be explained on any rational principle. But the unlimited freedom of disposal by will which we enjoy under our modern law has reduced the anomalies of our intestate succession to a matter of only occasional inconvenience.

Small indeed, it is easy to perceive, is the portion of Anglo-Saxon customs which can be said to have survived in a recognizable form. This fact nevertheless remains compatible with a perfectly real and living continuity of spirit in our legal institutions.

[1] The discussion which would be necessary if we were here studying Germanic customs for their own sake, or as part of a comparative study of archaic customs in general, is deliberately left aside as irrelevant to the purpose in hand.

PART II.

FROM THE NORMAN CONQUEST TO THE EIGHTEENTH CENTURY

4. THE CENTRALIZATION OF NORMAN JUSTICE UNDER HENRY II[1]

By Alice Stopford (Mrs. John Richard) Green[2]

THE building up of his mighty empire was not the only task which filled the first years of Henry's reign. Side by side with this went on another work of peaceful internal administration which we can but dimly trace in the dearth of all written records, but which was ultimately to prove of far greater significance than the imperial schemes that in the eyes of his contemporaries took so much larger proportions and shone with so much brighter lustre.

The restoration of outward order had not been difficult, for the anarchy of Stephen's reign, terrible as it was, had only passed over the surface of the national life and had been vanquished by a single effort. But the new ruler of England had to begin his work of administration not only amid the temporary difficulties of a general disorganization, but amid the more permanent difficulties of a time of transition, when society was seeking to order itself anew in its passage from the mediæval to the modern world; and his victory over the most obvious and aggressive forms of disorder was the least part of his task. Through all the time of anarchy powerful forces had been steadily at work with which the king had now to reckon. A new temper and new aspirations had been kindled by the troubles of the last

[1] These passages are extracted from "Henry II" (Twelve English Statesmen), 1888, cc. III, IV, V, and IX (London: Macmillan & Co.). The authoress writes to the Committee: "I remember that Sir James Stephen spoke to me warmly of the book and said that I had not made a single legal error."

[2] *Other Publications:* Town Life in the Fifteenth Century, 1894; Oxford Studies, 1901; The Conquest of England, 1883 (ed.); Short History of the English People, 1888 (ed.); Historical Studies, 1903 (ed.).

years. The deposition of Stephen, the elections of Matilda and of Henry, had been so many formal declarations that the king ruled by virtue of a bargain made between him and his people, and that if he broke his contract he justly forfeited his authority. The routine of silent and submissive councils had been broken through, and the earliest signs of discussion and deliberation had discovered themselves; while the Church, exerting in its assemblies an authority which the late king had helplessly laid down, formed a new and effective centre of organized resistance to tyranny in the future. Even the rising towns had seized the moment when the central administration was paralysed to extend their own privileges, and to acquire large powers of self-government which were to prove the fruitful sources of liberty for the whole people. . . .

It was these new conditions of the national life which constituted the real problem of government — a problem far more slow and difficult to work out than the mere suppression of a turbulent baronage. In the rapid movement towards material prosperity, the energies of the people were in all directions breaking away from the channels and limits in which they had been so long confined. Rules which had been sufficient for the guidance of a simple society began to break down under the new fulness and complexity of the national life, and the simple decisions by which questions of property and public order had been solved in earlier times were no longer possible. Moreover, a new confusion and uncertainty had been brought into the law in the last hundred years by the effort to fuse together Norman and English custom. Norman landlord or Norman sheriff naturally knew little of English law or custom, and his tendency was always to enforce the feudal rules which he practised on his Norman estates. In course of time it came about that all questions of land-tenure and of the relations of classes were regulated by a kind of double system. The Englishman as well as the Norman became the "man" of his lord as in Norman law, and was bound by the duties which this involved. On the other hand, the Norman as well as the Englishman held his land subject to the customary burdens and

rights recognized by English law. Both races were thus made equal before the law, and no legal distinction was recognized between conqueror and conquered. There was, however, every element of confusion and perplexity in the theory and administration of the law itself, in the variety of systems which were contending for the mastery, and in the inefficiency of the courts in which they were applied. English law had grown up out of Teutonic custom, into which Roman tradition had been slowly filtering through the Dark Ages. Feudal law still bore traces of its double origin in the system of the Teutonic "comitatus" and of the Roman "beneficium." Forest law, which governed the vast extent of the king's domains, was bound neither by Norman forms nor by English traditions, but was framed absolutely at the king's will. Canon law had been developed out of customs and precedents which had served to regulate the first Christian communities, and which had been largely formed out of the civil law of Rome. There was a multitude of local customs which varied in every hundred and in every manor, and which were preserved by the jealousy that prevailed between one village and another, the strong sense of local life and jurisdiction, and the strict adherence to immemorial traditions.

These different codes of law were administered in various courts of divers origins. The tenant-in-chief of the king who was rich enough had his cause carried to the King's Court of barons, where he was tried by his peers. The poorer vassals, with the mass of the people, sought such justice as was to be had in the old English courts, the Shire Court held by the sheriff, and, where this survived, the Hundred Court summoned by the bailiff. The lowest orders of the peasant class, shut out from the royal courts, could only plead in questions of property in the manor courts of their lords. The governing bodies of the richer towns were winning the right to exercise absolute jurisdiction over the burghers within their own walls. The Forest courts were held by royal officers, who were themselves exempt from all jurisdiction save that of the king. And under one plea or another all men in the State were liable for certain causes

to be brought under the jurisdiction of the newly-established Church courts. This system of conflicting laws was an endless source of perplexity. The country was moreover divided into two nationalities, who imperfectly understood one another's customary rights; and it was further broken into various classes which stood in different relations to the law. Those who had sufficient property were not only deemed entirely trustworthy themselves, but were also considered answerable for the men under them; a second class of freeholders held property sufficient to serve as security for their good behaviour, but not sufficient to make them pledges for others; there was a third and lower class without property, for whose good conduct the law required the pledge of some superior. In a state of things so complicated, so uncertain and so shifting, it is hard to understand how justice can ever have been secured; nor, indeed, could any general order have been preserved, save for the fact that these early courts of law, having all sprung out of the same conditions of primitive life, and being all more or less influenced and so brought to some common likeness by the Roman law, did not differ very materially in their view of the relations between the subjects of the State, and fundamentally administered the same justice. Until this time too there had been but little legal business to bring before the courts. There was practically no commerce; there was little sale of land; questions of property were defined within very narrow limits; a mass of contracts, bills of exchange, and all the complicated transactions which trade brings with it, were only beginning to be known. As soon, however, as industry developed, and the needs of a growing society made themselves felt, the imperfections of the old order became intolerable. The rude methods and savage punishments of the law grew more and more burdensome as the number of trials increased; and the popular courts were found to be fast breaking down under the weight of their own ignorance and inefficiency.

The most important of these was the Shire Court. It still retained its old constitution; it preserved some tradition of a tribunal where the king was not the sole fountain of justice, and the memory of a law which was not the

"king's law." It administered the old customary English codes, and carried on its business by the old procedure. There came to it the lords of the manors with their stewards, the abbots and priors of the county with their officers, the legal men of the hundreds who were qualified by holding property or by social freedom, and from every township the parish priest, with the reeve and four men, the smiths, farmers, millers, carpenters, who had been chosen in the little community to represent their neighbours; and along with them stood the pledges, the witnesses, the finders of dead bodies, men suspected of crime. The court was, in fact, a great public meeting of the whole county; there was no rank or order which did not send some of its number to swell the confused crowd that stood round the sheriff. The criminal was generally put on his trial by accusation of an injured neighbour, who, accompanied by his friends, swore that he did not bring his charge for hatred, or for envy, or for unlawful lust of gain. The defendant claimed the testimony of his lord, and further proved his innocence by a simple or threefold compurgation — that is, by the oath of a certain number of freemen among his neighbours, whose property gave them the required value in the eye of the law, and who swore together as "compurgators" that they believed his oath of denial to be "clean and unperjured." The faith of the compurgator was measured by his landed property, and the value of the joint-oath which was required depended on a most intricate and baffling set of arithmetical calculations, and differed according to the kind of crime, the rank of the criminal, and the amount of property which was in dispute, besides other differences dependent on local customs. Witnesses might also be called from among neighbours who held property and were acquainted with the facts to which they would "dare" to swear. The final judgment was given by acclamation of the "suitors" of the court — that is, by the owners of property and the elected men of the hundreds or townships; in other words, by the public opinion of the neighbourhood. If the accused man were of bad character by common report, or if he could find no friends to swear in his behalf, "the oath burst," and there remained for him

only the ordeal or trial by battle, which he might accept or refuse at his own peril. In the simple ordeal he dipped his hand in boiling water to the wrist, or carried a bar of red-hot iron three paces. If in consequence of his lord's testimony being against him the triple ordeal was used, he had to plunge his arm in water up to the elbow, or to carry the iron for nine paces. If he were condemned to the ordeal by water, his death seems to have been certain, since sinking was the sign of innocence, and if the prisoner floated he was put to death as guilty. The other alternative, trial by battle, which had been introduced by the Normans, was extremely unpopular in England; it told hardly against men who were weak or untrained to arms, or against the man of humble birth, who was allowed against his armed opponent neither horse nor the arms of a knight, but simply a leathern jacket, a shield of leather or wood, and a stick without knots or points.

At the beginning of the reign of Henry II. the Shire courts seem to have been nearly as bad as they could be. Scarcely any attempt had been made, perhaps none had till now been greatly needed, to improve a system which had grown up in a dim and ruder past. The Norman kings, indeed, had introduced into England a new method of deciding doubtful questions of property by the "recognition" of sworn witness instead of by the English process of compurgation or ordeal. Twelve men, who must be freemen and hold property, were chosen from the neighbourhood, and as "jurors" were sworn to state truly what they knew about the question in dispute, and the matter was decided according to their witness or "recognition." If those who were summoned were unacquainted with the facts, they were dismissed and others called; if they knew the facts but differed in their statement, others were added to their number, till twelve at least were found whose testimony agreed together. These inquests on oath had been used by the Conqueror for fiscal purposes in the drawing up of Doomsday Book. From that time special "writs" from king or justiciar were occasionally granted, by which cases were withdrawn from the usual modes of trial in the local courts, and were decided

by the method of recognition, which undoubtedly provided a far better chance of justice to the suitor, replacing as it did the rude appeal to the ordeal or to battle by the sworn testimony of the chosen representatives, the good men and true, of the neighbourhood. But the custom was not yet governed by any positive and inviolable rules, and the action of the King's Court in this respect was imperfectly developed, uncertain, and irregular.

It is scarcely possible, indeed, to estimate the difficulties in the way of justice when Henry came to the throne. The wretched freeholders summoned to the Shire Court from farm and cattle, from mill or anvil or carpenter's bench, knew well the terrors of the journey through marsh and fen and forest, the dangers of flood and torrent, and perhaps of outlawed thief or murderer, the privations and hardships of the way; and the heavy fines which occur in the king's rolls for non-attendance show how anxiously great numbers of the suitors avoided joining in the troublesome and thankless business of the court. When they reached the place of trial a strange medley of business awaited them as questions arose of criminal jurisdiction, of feudal tenure, of English "sac and soc," of Norman franchises and Saxon liberties, with procedure sometimes of the one people, sometimes of the other. The days dragged painfully on, as, without any help from trained lawyers, the "suitors" sought to settle perplexed questions between opposing claims of national, provincial, ecclesiastical, and civic laws, or made arduous journeys to visit the scene of some murder or outrage, or sought for evidence on some difficult problem of fact. Evidence, indeed, was not easy to find when the question in dispute dated perhaps from some time before the civil war and the suppression of the sheriff's courts, for no written record was ever kept of the proceedings in court, and everything depended on the memory of witnesses. The difficulties of taking evidence by compurgation increased daily. A method which centuries before had been successfully applied to the local crimes of small and stationary communities bound together by the closest ties of kinship and of fellowship in possession of the soil, when every transaction was

inevitably known to the whole village or township, became useless when new social and industrial conditions had destroyed the older and simpler modes of life. The procedure of the courts was antiquated and no longer guided by consistent principles. Their modes of trial were so cumbrous, formal, and inflexible that it was scarcely possible to avoid some minute technical mistake which might invalidate the final decision.

The business of the larger courts, too, was for the most part carried on in French under sheriff, or bailiff, or lord of the manor. The Norman nobles did not know Latin, they were but gradually learning English; the bulk of the lesser clergy perhaps spoke Latin, but did not know Norman; the poorer people spoke only English; the clerks who from this time began to note down the proceedings of the king's judges in Latin must often have been puzzled by dialects of English strange to him. When each side in a trial claimed its own customary law, and neither side understood the speech of the other, the president of the court had every temptation to be despotic and corrupt, and the interpreter between him and his suitors became an important person who had much influence in deciding what mode of procedure was to be followed. The sheriff, often holding a hereditary post and fearing therefore no check to his despotism, added to the burden of the unhappy freeholders by a custom of summoning at his own fancy special courts, and laying heavy fines on those who did not attend them. Even when the law was fairly administered there was a growing number of cases in which the rigid forms of the court actually inflicted injustice, as questions constantly arose which lay far outside the limits of the old customary law of the Germanic tribes, or of the scanty knowledge of Roman law which had penetrated into other codes. The men of that day looked too often with utter hopelessness to the administration of justice; there was no peril so great in all the dangers that surrounded their lives as the peril of the law; there was no oppression so cruel as the oppression wrought by the harsh and rigid forms of the courts. From such calamities the miserable and despairing victims could look for no help

save from the miraculous aid of the saints; and society at that time, as indeed it has been known to do in later days, was for ever appealing from the iniquity of law to God, — to a God who protected murderers if they murdered Jews, and defended robbers if they plundered usurers, who was, indeed, above all law, and was supposed to distribute a violent and arbitrary justice, answering to the vulgar notion of an equity unknown on earth.

We catch a glimpse of a trial of the time in the story of a certain Ailward, whose neighbour had refused to pay a debt which he owed him. Ailward took the law into his own hands, and broke into the house of his debtor, who had gone to the tavern and had left his door fastened with the lock hanging down outside, and his children playing within. Ailward carried off as security for his debt the lock, a gimlet, and some tools, and a whetstone which hung from the roof. As he sauntered home, however, his furious neighbour overtook him, having heard from the children what had been done. He snatched the whetstone from Ailward's hand and dealt him a blow on the head with it, stabbed him in the arm with a knife, and then triumphantly carried him to the house which he had robbed, and there bound him as "an open thief" with the stolen goods upon him. A crowd gathered round, and an evil fellow, one Fulk, the apparitor, an underling of the sheriff employed to summon criminals to the court, remarked that as a thief could not legally be mutilated unless he had taken to the value of a shilling, it would be well to add a few articles to the list of stolen goods. Perhaps Ailward had won ill-fame as a creditor, or even, it may be, a money-lender in the village, for his neighbours clearly bore him little good-will. The crowd readily consented. A few odds and ends were gathered — a bundle of skins, gowns, linen, and an iron tool, — and were laid by Ailward's side; and the next day, with the bundle hung about his neck, he was taken before the sheriff and the knights, who were then holding a Shire Court. The matter was thought doubtful; judgment was delayed, and Ailward was made fast in Bedford jail for a month, till the next county court. There the luckless man sent for a priest of

the neighbourhood, and confessing his sins from his youth up, he was bidden to hope in the prayers of the blessed Virgin and of all the saints against the awful terrors of the law, and received a rod to scourge himself five times daily; while through the gloom shone the glimmer of hope that having been baptized on the vigil of Pentecost, water could not drown him nor fire burn him if he were sent to the ordeal. At last the month went by and he was again carried to the Shire Court, now at Leighton Buzzard. In vain he demanded single combat with Fulk, or the ordeal by fire; Fulk, who had been bribed with an ox, insisted on the ordeal of water, so that he should by no means escape. Another month passed in the jail of Bedford before he was given up to be examined by the ordeal. Whether he underwent it or whether he pleaded guilty when the judges met is uncertain, but however this might be, "he received the melancholy sentence of condemnation; and being taken to the place of punishment, his eyes were pulled out and he was mutilated, and his members were buried in the earth in the presence of a multitude of persons.". . .

Such were in brief outline some of the difficulties which made order and justice hard to win. Society was helpless to protect itself: news spread slowly, the communication of thought was difficult, common action was impossible. Amid all the shifting and half understood problems of mediæval times there was only one power to which men could look to protect them against lawlessness, and that was the power of the king. No external restraints were set upon his action; his will was without contradiction. The mediæval world with fervent faith believed that he was the very spring and source of justice. In an age when all about him was changing, and when there was no organized machinery for the administration of law, the king had himself to be judge, lawgiver, soldier, financier, and administrator; the great highways and rivers of the kingdom were in "his peace;" the greater towns were in his demesne; he was guardian of the poor and defender of the trader; he was finance minister in a society where economic conditions were rapidly changing; he represented a developed system of law as opposed to the

primitive customs of feud and private war; he was the only arbiter of questions that grew out of the new conflict of classes and interests; he alone could decree laws at his absolute will and pleasure, and could command the power to carry out his decrees; there was not even a professional lawyer who was not in his court and bound to his service.

Henry saw and used his opportunity. Even as a youth of twenty-one he assumed absolute control in his courts with a knowledge and capacity which made him fully able to meet trained lawyers, such as his chancellor, Thomas, or his justiciar, De Lucy. Cool, businesslike, and prompt, he set himself to meet the vast mass of arrears, the questions of jurisdiction and of disputed property, which had arisen even as far back as the time of Henry I., and had gone unsettled through the whole reign of Stephen, to the ruin and havoc of the land in question. He examined every charter that came before him; if any was imperfect he was ready to draw one up with his own hand; he watched every difficult point of law, noted every technical detail, laid down his own position with brief decision. In the uncertain and transitional state of the law the king's personal interference knew scarcely any limits, and Henry used his power freely. But his unswerving justice never faltered. Gilbert de Bailleul, in some claim to property, ventured to make light of the charter of Henry I., by which it was held. The king's wrath blazed up. "By the eyes of God," he cried, "if you can prove this charter false, it would be worth a thousand pounds to me! If," he went on, "the monks here could present such a charter to prove their possession of Clarendon, which I love above all places, there is no pretence by which I could refuse to give it up to them!" . . .

Henry began his work of reorganization by taking up the work which his grandfather had begun — that of replacing the mere arbitrary power of the sovereign by a uniform system of administration, and bringing into order the various conflicting authorities which had been handed down from ancient times, royal courts and manor courts, church courts, shire courts, hundred courts, forest courts, and local courts in special franchises, with all their inextricable confusion of

law and custom and procedure. Under Henry I. two courts, the *Exchequer* and the *Curia Regis*, had control of all the financial and judicial business of the kingdom. The Exchequer filled a far more important place in the national life than the Curia Regis, for the power of the king was simply measured by the state of the treasury, when wars began to be fought by mercenaries, and justice to be administered by paid officials. The court had to keep a careful watch over the provincial accounts, over the moneys received from the king's domains, and the fines from the local courts. It had to regulate changes in the mode of payment as the use of money gradually replaced the custom of payments in kind. It had to watch alterations in the ownership and cultivation of land, to modify the settlement of Doomsday Book so as to meet new conditions, and to make new distribution of taxes. There was no class of questions concerning property in the most remote way which might not be brought before its judges for decision. Twice a year the officers of the royal household, the Chancellor, Treasurer, two Chamberlains, Constable, and Marshal, with a few barons chosen from their knowledge of the law, sat with the Justiciar at their head, as "Barons of the Exchequer" in the palace at Westminster, round the table covered with its "chequered" cloth from which they took their name. In one chamber, the Exchequer of Account, the "Barons" received the reports of the sheriffs from every county, and fixed the sums to be levied. In a second chamber, the Exchequer of Receipt, the sheriff or tax-farmer paid in his dues and took his receipts. The accounts were carefully entered on the treasurer's roll, which was called from its shape the Great Roll of the Pipe, and which may still be seen in our Record Office; the chancellor kept a duplicate of this, known as the Roll of the Chancery; and an officer of the king registered in a third Roll matters of any special importance. Before the death of Henry I. the vast amount and the complexity of business in the Exchequer Court made it impossible that it should any longer be carried on wholly in London. The "Barons" began to travel as itinerant judges through the country; as the king's special officers they held courts in the provinces,

where difficult local questions were tried and decided on the spot. So important did the work of finance become that the study of the Exchequer is in effect the key to English history at this time. It was not from any philosophic love of good government, but because the license of outrage would have interrupted the returns of the revenue that Henry I. claimed the title of the "Lion of justice." It was in great measure from a wish to sweep the fees of the Church courts into the royal Hoard that the second Henry began the strife with Becket in the Constitutions of Clarendon, and the increase of revenue was the efficient cause of the great reforms of justice which form the glory of his reign. It was the fount of English law and English freedom.

The Curia Regis was composed of the same great officers of the household as those who sat in the Exchequer, and of a few men chosen by the king for their legal learning; but in this court they were not known as "Barons" but as "Justices," and their head was the Chief Justice. The Curia Regis dealt with legal business, with all causes in which the king's interest was concerned, with appeals from the local courts, and from vassals who were too strong to submit to their arbitration, with pleas from wealthy barons who had bought the privilege of laying their suit before the king, besides all the perplexed questions which lay far beyond the powers of the customary courts, and in which the equitable judgment of the king himself was required. In theory its powers were great, but in practice little business was actually brought to it in the time of Henry I.; the distance of the court from country places, and the expense of carrying a suit to it, would alone have proved an effectual hindrance to its usefulness, even if the rules by which it was guided had been much more complete and satisfactory than they actually were.

The routine of this system of administration, as well as the mass of business to be done, effectually interfered with arbitrary action on the king's part, and the regular and methodical work of the organized courts gave to the people a fair measure of protection against the tyranny or caprice of the sovereign. But the royal power which was given over to

justices and barons did not pass out of the hands of the king. He was still in theory the fount of all authority and law, and could, whenever he chose, resume the powers that he had granted. His control was never relaxed; and in later days we find that while judges on circuit who gave unjust judgment were summoned before the Curia Regis at Westminster, the judges of the Curia Regis itself were called for trial before the king himself in his council.

The reorganization of these courts was fast completed under Henry's great justiciar, De Lucy, and the chancellor Thomas. The next few years show an amount of work done in every department of government which is simply astonishing. The clerks of the Exchequer took up the accounts and began once more regular entries in the Pipe Roll; plans of taxation were devised to fill the empty hoard, and to check the misery and tyranny under which the tax-payers groaned. The king ordered a new coinage which should establish a uniform system of money over the whole land. As late as the reign of Henry I. the dues were paid in kind, and the sheriffs took their receipts for honey, fowls, eggs, corn, wax, wool, beer, oxen, dogs, or hawks. When, by Henry's orders, all payments were first made in coin to the Exchequer, the immediate convenience was great, but the state of the coinage made the change tell heavily against the crown. It was impossible to adulterate dues in kind; it was easy to debase the coin when they were paid in money, and that money received by weight, whether it were coin from the royal mints, or the local coinages that had continued from the time of the early English kingdoms, or debased money from the private mints of the barons. Roger of Salisbury, in fact, when placed at the head of the Exchequer, found a great difference between the weight and the actual value of the coin received. He fell back on a simple expedient; in many places there had been a provision as old at least as Doomsday, which enacted that the money weighed out for town-geld should if needful be tested by re-melting. The treasurer extended this to the whole system of the Exchequer. He ordered that all money brought to the Exchequer should itself be tested, and the difference between its weight and real value paid by the

sheriff who brought it. The burden thus fell on the country, for the sheriff would of course protect himself as far as he could by exacting the same tests on all sums paid to him. If the pound was worth but ten shillings in the market no doubt the sheriff only took it for ten shillings in his court. Practically each tax, each due, must have been at least doubled, and the sheriff himself was at the mercy of the Exchequer moneyers. There was but one way to remedy the evil, by securing the purity of the coin, and twice during his reign Henry made this his special care.

In the absence of records we can only dimly trace the work of legal reform which was carried out by Henry's legal officers; but it is plain that before 1164 certain great changes had already been fully established. A new and elaborate system of rules seems gradually to have been drawn up for the guidance of the justices who sat in the Curia Regis; and a new set of legal remedies in course of time made the chances of justice in this court greater than in any other court of the realm. The *Great Assize*, an edict whose date is uncertain, but which was probably issued during the first years of his reign, developed and set in full working order the imperfect system of "recognition" established by the Norman kings. Henceforth the man, whose right to his freehold was disputed, need but apply to the Curia Regis to issue an order that all proceedings in the local courts should be stopped until the "recognition" of twelve chosen men had decided who was the rightful owner according to the common knowledge of the district, and the barbarous foreign custom of settling the matter by combat was done away with. Under the new system the Curia Regis eventually became the recognized court of appeal for the whole kingdom. So great a mass of business was drawn under its control that the king and his regular ministers could no longer suffice for the work, and new judges had to be added to the former staff; and at last the positions of the two chief courts of the kingdom were reversed, and the King's Court took the foremost place in the amount and importance of its business.

The same system of trial by sworn witnesses was also gradually extended to the local courts. By the new-fashioned

royal system the legal men of hundreds and townships, the knights and freeholders, were ordered to search out the criminals of their district, and "present" them for trial at the Shire Court, — something after the fashion of the "grand jury" of to-day, save that in early times the jurors had themselves to bear witness, to declare what they knew of the prisoner's character, to say if stolen goods had been divided in a certain barn, to testify to a coat by a patch on the shoulder. By a slow series of changes which wholly reversed their duties, the "legal men" of the juries of "presentment" and of "recognition" were gradually transformed into the "jury" of to-day; and even now curious traces survive in our courts of the work done by the ancestors of the modern jury. In criminal cases in Scotland the oath still administered by the clerk to jurymen carries us back to an ancient time: "You fifteen swear by Almighty God, and as you shall answer to God at the great day of judgment, you will truth say and no truth conceal, in so far as you are to pass on this assize." The provincial administration was set in working order. New sheriffs took up again the administration of the shires, and judges from the King's Court travelled, as they had done in the time of Henry I., through the land. . . .

Henry, however, was at once met by a difficulty unknown to earlier days. The system which the Conqueror had established of separate courts for secular and ecclesiastical business had utterly broken down for purposes of justice. Until the reign of Stephen much of the business of the bishops was done in the courts of the hundred and the shire. The Church courts also had at first been guided by the customary law and traditions of the early English Church, which had grown up along with the secular laws and had a distinctly national character. So long, indeed, as the canon law remained somewhat vague, and the Church courts incomplete, they could work peaceably side by side with the lay courts; but with the development of ecclesiastical law in the middle of the twelfth century, it was inevitable that difficulties should spring up. The boundaries of civil and ecclesiastical law were wholly uncertain, the scientific study of law had hardly

begun, and there was much debatable ground which might be won by the most arrogant or the most skilful of the combatants. Every brawl of a few noisy lads in the Oxford streets or at the gates of some cathedral or monastic school was enough to kindle the strife as to the jurisdiction of Church or State which shook mediæval society to its foundation.

The Church courts not only had jurisdiction over the whole clerical order, but exercised wide powers even over the laity. To them alone belonged the right to enforce spiritual penalties, to deal with cases of oaths, promises, anything in which a man's faith was pledged; to decide as to the property of intestates, to pronounce in every case of inheritance whether the heir was legitimate, to declare the law as to wills and marriage. Administering as they did an enlightened system of law, they profited by the new prosperity of the country, and the judicial and pecuniary disputes which came to them had never been so abundant as now. Henry was keenly alive to the fact that the archdeacons' courts now levied every year by their fines more money than the whole revenue of the crown. Young archdeacons were sent abroad to be taught the Roman law, and returned to preside over the newly-established archdeacons' courts; clergy who sought high office were bound to study before all things, even before theology, the civil and canon law. The new rules, however, were as yet incomplete and imperfectly understood in England; the Church courts were without the power to put them in force; the procedure was hurried and irregular; the judges were often ill-trained, and unfit to deal with the mass of legal business which was suddenly thrown on them; the ecclesiastical authorities themselves shrank from defiling the priesthood by contact with all this legal and secular business, and kept the archdeacons in deacons' orders; the more religious clergy questioned whether for an archdeacon salvation were possible. In the eight years of Henry's rule one hundred murders had been committed by clerks who had escaped all punishment save the light sentences of fine and imprisonment inflicted by their own courts, and Henry bitterly complained that a reader or an acolyte might slay

a man, however illustrious, and suffer nothing save the loss of his orders.

Since the beginning of Henry's reign, too, there had been an enormous increase of appeals to Rome. Questions quite apart from faith or morals, and that mostly concerned property, were referred for decision to a foreign court. The great monasteries were exempted from episcopal control and placed directly under the Pope; they adopted the customs and laws which found favour at Rome; they upheld the system of appeals, in which their wealth and influence gave them formidable advantages. The English Church was no longer as in earlier times distinct from the rest of Christendom, but was brought directly under Roman influence. The clergy were more and more separated from their lay fellow citizens; their rights and duties were determined on different principles; they were governed by their own officers and judged by their own laws, and tried in their own courts; they looked for their supreme tribunal of appeal not to the King's Court, but to Rome; they became, in fact, practically freed from the common law.

No king, and Henry least of all, could watch unmoved the first great body which threatened to stand wholly outside the law of the land; and the ecclesiastical pretensions of the time were perhaps well matched by the pretensions of the State.[1] . . .

In February 1166 he drew up his long-delayed scheme. His plans were rapidly completed; by the 16th of March the new system was at work.

Such were the conditions under which appeared the famous Assize of Clarendon. For the first time in English history a code of laws was issued by the sole authority of the king, without any appeal to the sanction of binding and immutable "custom." Indeed, in all Europe there was no instance of national legislation which could be compared with it, for it was not till a hundred years later that the first code of laws since the time of the Carolingian Capitularies was drawn up in France. Its very name bears witness to the impression it

[1] Here follows the account of the conflict with Becket and of the latter's death. — Eds.

made in its own day. The word "law" was still reserved for certain solemn uses, for the unalterable code of Scripture or for the Roman law. Men questioned what to call this new decree, given at the king's will, and to be enforced just so long as he should choose, and their jealous conservatism took refuge in the word "assize," as later generations in the same difficulty fell back on such words as "provision," "statute," "ordinance."

The Constitutions of Clarendon two years before had lain down the principles which were to regulate the relations in England of Church and State. The Assize of Clarendon laid down the principles on which the administration of justice was to be carried out. Just as Henry had undertaken to bring Church courts and Church law under the king's control, so now he aimed at bringing all local and rival jurisdictions whatever into the same obedience. In form the new law was simple enough. It consisted of twenty-two articles which were drawn up for the use of the judges who were about to make their circuits of the provinces. The first articles described the manner in which criminals were to be "presented" before the justices or sheriff. The accusation was to be made by "juries," composed of twelve men of the hundred and four men of the township; the "presentment" of a criminal by a jury such as this practically implied that the man was held guilty by the public report of his own neighbourhood, and he was therefore forbidden such chance of escape as compurgation or the less dangerous forms of ordeal might have afforded, and was sent to the almost certain condemnation of the ordeal by water; if by some rare fortune he should escape from this alive he was banished from the kingdom as a man of evil reputation. All freemen were ordered to attend the courts held by the justices. The judges were given power to enter on all estates of the nobles, to see that the men of the manor were duly enrolled under the system of "frank-pledge," in groups of ten men bound to answer for one another as "pledges" for all purposes of police. Strict rules were made to prevent the possible escape of criminals. The sheriffs were ordered to aid one another in carrying the hue and cry after them from one country to

another; no "liberty" or "honour" might harbour a malefactor against the king's officers; sheriffs were to give to the justices in writing the names of all fugitives, so that they might be sought through all England; everywhere jails, in which doubtful strangers or suspected rogues might be shut up for safe keeping in case the "hue and cry" should be raised after them, were to be made or repaired with wood from the king's or the nearest landowner's domains; no man might entertain a stranger for whom he would not be answerable before the justices; the old English law was again repeated in the very words of ancient times, that none might take into his house a waif or wanderer for more than one night unless he or his horse were sick; and if he tarried longer he must be kept until he were redeemed by his lord or could give safe pledges; no religious house might receive any of the mean people into their body without good testimony as to character unless he were sick unto death; and heretics were to be treated as outlaws. These last indeed were not very plentiful in England, and the over-anxious legislators seem only to have had in view a little band of German preachers, who had converted one woman, and who had themselves at a late council at Oxford been branded, flogged, and driven out half-naked, so that there was by this time probably not one who had not perished in the cold.

Such was the series of regulations that opened the long course of reforms by which English law has been built up. Two judges were sent during the next spring and summer through the whole of England. The following year there was a survey of the forests, and in 1168 another circuit of the shires was made by the barons of the Exchequer. Year by year with unbroken regularity the terrible visitation of the country by the justices went on. The wealth of the luckless people poured into the king's treasury; the busy secretaries recorded in the Rolls a mass of profits unknown to the accounts of earlier days. The great barons who presided over the Shire courts found themselves practically robbed of power and influence. The ordinary courts fell into insignificance beside those summoned by the king's judges, thronged as they were with the crowd of rich and poor, trembling at

the penalty of a ruinous fine for non-attendance or full of a newly-kindled hope of justice. Important cases were more and more withdrawn from the sheriffs and given to the justices. They entered the estates of the nobles, even the franchises, liberties, and manors which had been freed from the old courts of the shire or hundred; they reviewed their decisions and interfered with their judgments. It is true that the system established in principle was but gradually carried into effect, and the people long suffered the tyranny of lords who maintained their own prisons. Half a century later we find sturdy barons setting up their tumbrils and gallows. In the reign of Edward I. there were still thirty-five private gallows in Berkshire alone, and when one of them was by chance or age broken down, and the people refused to set it up again, the baron could still make shift with the nearest oak. But as a system of government, feudalism was doomed from the day of Henry's Assize, and only dragged out a lingering existence till the legislation of Edward I. dealt it a final blow.

The duties of police were at that time performed by the whole population, and the judges' circuits brought home sharply to every man the part he was expected to play in the suppression of crime. Juries were fined if they had not "presented" a due amount of criminals; townships were fined if they had not properly pursued malefactors; villages were fined if a hut was burned down and the hue and cry was not raised, or if a criminal who had fled for refuge to their church escaped from it. A robber or murderer must be paid for by his "pledge," or if he had no pledge, a fine fell on his village or township; if a dead body were found and the slayer not produced, the hundred must pay for him, unless a legal form, called "proving his Englishry," could be gone through — a condition which was constantly impossible; the township was fined if the body had been buried before the coming of the coroner; abbot or knight or householder was heavily taxed for every crime of serf or hired servant under him, or even for the offences of any starving and worn-out pilgrim or traveller to whom he had given a three days' shelter. In the remotest regions of the country barons and

knights and freeholders were called to aid in carrying out the law. The "jurors" must be ready at the judges' summons wherever and whenever they were wanted. They must be prepared to answer fully for their district; they must expect to be called on all sorts of excuses to Westminster itself, and no hardships of the journey from the farthest corner of the land might keep them back. The "knights of the shire" were summoned as "recognitors" to give their testimony in all questions of property, public privilege, rights of trade, local liberties, exemption from taxes; if the king demanded an "aid" for the marriage of his daughter or the coming of age of his son, they assessed the amount to be paid; if he wanted to count an estate among the Royal Forests, it was they who decided whether the land was his by ancient right. They were employed too in all kinds of business for the Court; they might be sent to examine a criminal who had fled to the refuge of a church, or to see whether a sick man had appointed an attorney, or whether a litigant who pleaded illness was really in bed without his breeches. If in any case the verdict of the Shire Court was disputed, they were summoned to Westminster to repeat the record of the county. No people probably ever went through so severe a discipline or received so efficient a training in the practical work of carrying out the law, as was given to the English people in the hundred years that lay between the Assize of Clarendon in 1166 and the Parliament summoned by De Montfort in 1265, where knights from every shire elected in the county court were called to sit with the bishops and great barons in the common Parliament of the realm.

In the pitiless routine of their work, however, the barons of the Exchequer were at this early time scarcely regarded as judges administering justice so much as tax-gatherers for a needy treasury. Baron and churchman and burgher alike saw every question turn to a demand of money to swell the royal Hoard; jurors were fined for any trifling flaw in legal procedure; widows were fined for leave to marry, guardians for leave to receive their wards; if a peasant were kicked by his horse, if in fishing he fell from the side of his boat, or if in carrying home his eels or herrings he stumbled and was

crushed by the cart-wheel, his wretched children saw horse or boat or cart with its load of fish which in older days had been forfeited as "deodand" to the service of God, now carried off to the king's Hoard; if a miller was caught in the wheel of his mill the sheriff must see the price of it paid to the royal treasury. In the country districts where coin was perhaps scarcely ever seen, where wages were unknown, and such little traffic as went on was wholly a matter of barter, the peasants must often have been put to the greatest straits to find money for the fines. Year after year baron as well as peasant and farmer saw his waggons and horses, or his store of honey, eggs, loaves, beer, the fish from his pond or the fowls from his yard, claimed by the purveyors who provided for the judges and their followers, and paid for by such measures and such prices as seemed good to the greedy contractors. The people at large groaned under the heavy burden of fines and penalties and charges for the maintenance of an unaccustomed justice. When in the visitations of 1168 the judges had to collect, besides the ordinary dues, an "aid" for the marriage of the king's eldest daughter, the unhappy tax-payers, recognizing in their misery no distinctions, attributed all their sufferings to the new reform, and saw in their king not a ruler who desired righteous judgment, but one who only thirsted after gain. The one privilege which seemed worth fighting for or worth buying was the privilege of assessing their own fines and managing their own courts. Half a century later we see the prevailing terror at a visit of the judges to Cornwall, when all the people fled for refuge to the woods, and could hardly be compelled or persuaded to come back again. Yet later the people won a concession that in time of war no circuits should be held, so that the poor should not be utterly ruined.

Oppression and extortion had doubtless been well known before, when the sheriff carried on the administration of the law side by side with the lucrative business of "farming the shires;" but it was at least an irregular and uncertain oppression. The sheriff might himself at any moment share the fate of one of his own victims and a more merciful man stand in his place; in any case bribes were not unavailing,

and there was still an appeal to the king's justice. But against the new system there was no appeal; it was orderly, methodical, unrelenting; it was backed by the whole force of the kingdom; it overlooked nothing; it forgot nothing; it was comparatively incorruptible. The lesser courts, with their old clumsy procedure, were at a hopeless disadvantage before the professional judges, who could use all the new legal methods. If a man suffered under these there was none to plead his cause, for in all the country there was not a single trained lawyer save those in the king's service. However we who look back from the safe distance of seven hundred years may see with clearer vision the great work which was done by Henry's Assize, in its own day it was far from being a welcome institution to our unhappy forefathers. There was scarcely a class in the country which did not find itself aggrieved as the king waged war with the claims of "privilege" to stand above right and justice and truth. But all resistance of turbulent and discontented factions was vain. The great justiciars at the head of the legal administration, De Lucy and Glanville, steadily carried out the new code, and a body of lawyers was trained under them which formed a class wholly unknown elsewhere in Europe. Instead of arbitrary and conflicting decisions, varying in every hundred and every franchise according to the fashion of the district, the judges of the Exchequer or Curia Regis declared judgments which were governed by certain general principles. The traditions of the great administrators of Henry's Court were handed down through the troubled reigns of his sons; and the whole of the later Common law is practically based on the decisions of two judges whose work was finished within fifty years of Henry's death, and whose labours formed the materials from which in 1260 Bracton drew up the greatest work ever written on English law.

There was, in fact, in all Christendom no such system of government or of justice as that which Henry's reforms built up. The king became the fountain of law in a way till then unknown. The later jealousy of the royal power which grew up with the advance of industrial activity, with the growth of public opinion and of its means of expressing

itself, with the development of national experience and national self-dependence, had no place in Henry's days, and had indeed no reason for existence. The strife for the abolition of privileges which in the nineteenth century was waged by the people was in the twelfth century waged by the Crown. In that time, if in no other, the assertion of the supreme authority of the king meant the assertion of the supreme authority of a common law; and there was, in fact, no country in Europe where the whole body of the baronage and of the clergy was so early and so completely brought into bondage to the law of the land. Since all courts were royal courts, since all law was royal law, since no justice was known but his, and its conduct lay wholly in the hands of his trained servants, there was no reason for the king to look with jealousy on the authority exercised by the law over any of his officers or servants. It may possibly be due to this fact that in England alone, of all countries in the world, the police, the civil servants, the soldiers, are tried in the same courts and by the same code as any private citizen; and that in England and lands settled by English peoples alone the Common law still remains the ultimate and only appeal for every subject of the realm.

But the power which was taken from certain privileged classes and put in the hands of the king was in effect by Henry's Assize given back to the people at large. Foreigner as he was, Henry preserved to Englishmen an inheritance which had been handed down from an immemorial past, and which had elsewhere vanished away or was slipping fast into forgetfulness. According to the Roman system, which in the next century spread over Europe, all law and government proceeded directly from the king, and the subject had no right save that of implicit obedience; the system of representation and the idea of the jury had no place in it. Teutonic tradition, on the other hand, looked upon the nation as a commonwealth, and placed the ultimate authority in the will of the whole people; the law was the people's law — it was to be declared and carried out in the people's courts. At a very critical moment, when everything was shifting, uncertain, transitional, Henry's legislation established this tradi-

tion for England. By his Assize Englishmen were still to be tried in their ancient courts. Justice was to be administered by the ancient machinery of shire-moot and hundred-moot, by the legal men of hundred and township, by the lord and his steward. The shire-moot became the king's court in so far as its president was a king's judge and its procedure regulated by the king's decree; but it still remained the court of the people, to which the freemen gathered as their fathers had done to the folk-moot, and where judgment could only be pronounced by the verdict of the freeholders who sat in the court. The king's action indeed was determined by a curious medley of chance circumstances and rooted prejudices. The canon law was fast spreading over his foreign states, and wherever the canon law came in the civil law followed in its train. But in England local liberties were strong, the feudal system had never been completely established, insular prejudice against the foreigner and foreign ways was alert, the Church generally still held to national tradition, the king was at deadly feud with the Primate, and was quite resolved to have no customs favoured by him brought into the land; his own absolute power made it no humiliation to accept the maxim of English lawyers that "the king is under God and the law." So it happened that while all the other civilized nations quietly passed under the rule of the Roman code England alone stood outside it. From the twelfth century to the present day the groundwork of our law has been English, in spite of the ceaseless filtering-in of the conceptions and rules of the civil law of Rome. "Throughout the world at this moment there is no body of ten thousand Englishmen governed by a system of law which was not fashioned by themselves." . . .

In the Assize of Northampton, held in January 1176, the king confirmed and perfected the judicial legislation which he had begun ten years before in the Assize of Clarendon. The kingdom was divided into six circuits. The judges appointed to the circuits were given a more full independence than they had before, and were no longer joined with the sheriffs of the counties in their sessions; their powers were extended beyond criminal jurisdiction to questions of prop-

erty, of inheritance, of wardship, of forfeiture of crown lands, of advowsons to churches, and of the tenure of land. For the first time the name of Justitiarii Itinerantes was given in the Pipe Roll to these travelling justices; and the anxiety of the king to make the procedure of his courts perfectly regular, instead of depending on oral tradition, was shown by the law-books which his ministers began at this time to draw up. As a security against rebellion, a new oath of fealty was required from every man, whether earl or villein; fugitives and outlaws were to be more sharply sought after, and felons punished with harsher cruelty. "Thinking more of the king than of his sheep," the legate admitted Henry's right to bring the clergy before secular courts for crimes against forest law, and in various questions of lay fiefs; and agreed that murderers of clerks, who till then had been dealt with by the ecclesiastical courts, should bear the same punishment as murderers of laymen, and should be disinherited. Religious churchmen looked on with helpless irritation at Henry's first formal victory over the principles of Thomas; in the view of his own day he had "renewed the Assize of Clarendon, and ordered to be observed the execrable decrees for which the blessed martyr Thomas had borne exile for seven years, and been crowned with the crown of martyrdom."

During the next two years Henry was in perpetual movement through the land from Devon to Lincoln, and between March 1176 and August 1177 he summoned eighteen great councils, besides many others of less consequence. From 1178 to 1180 he paid his last long visit to England, and again with the old laborious zeal he began his round of journeys through the country. "The king inquired about the justices whom he had appointed, how they treated the men of the kingdom; and when he learned that the land and the subjects were too much burthened with the great number of justices, because there were eighteen, he elected five — two clerks and three laymen — all of his own household; and he ordered that they should bear all appeals of the kingdom and should do justice, and that they should not depart from the King's Court, but should remain there to hear appeals, so that if any question

should come to them they should present it to the audience of the king, and that it should be decided by him and by the wise men of the kingdom." The *Justices of the Bench*, as they were called, took precedence of all other judges. The influence of their work was soon felt. From this time written records began to be kept of the legal compromises made before the King's Court to render possible the transference of land. It seems that in 1181 the practice was for the first time adopted of entering on rolls all the business which came to the Kings' Court, the pleas of the Crown and common pleas between subjects. Unlike in form to the great Roll of the Pipe, in which the records of the Exchequer Court had long been kept, the Plea Rolls consisted of strips of parchment filed together by their tops, on which, in an uncertain and at first a blundering fashion, the clerks noted down their records of judicial proceedings. But practice soon brought about an orderly and mechanical method of work, and the system of procedure in the Bench rapidly attained a scientific perfection. Before long the name of the *Curia Regis* was exclusively applied to the new court of appeal.

The work of legal reform had now practically come to an end. Henry indeed still kept a jealous watch over his judges. Once more, on the retirement of De Lucy in 1179, he divided the kingdom into new circuits, and chose three bishops — Winchester, Ely, and Norwich — "as chief justiciars, hoping that if he had failed before, these at least he might find steadfast in righteousness, turning neither to the right nor to the left, not oppressing the poor, and not deciding the cause of the rich for bribes." In the next year he set Glanville finally at the head of the legal administration. After that he himself was called to other cares. But he had really finished his task in England. The mere system of routine which the wisdom of Henry I. had set to control the arbitrary power of the king had given place to a large and noble conception of government; and by the genius of Henry II. the law of the land was finally established as the supreme guardian of the old English liberties and the new administrative order.

5. EDWARD I, THE ENGLISH JUSTINIAN [1]

By Edward Jenks [2]

THE few years which followed the conquest of Wales have given Edward his title to immortal fame, a fame earned by that noblest of all royal virtues, a steadfast devotion to the happiness and prosperity of his subjects. Keeping a wary eye on the ominous prospects of the Scottish succession, never forgetting the possibility of a Welsh rising, taking a conspicuous part in the territorial and dynastic problems of the Continent, — the quarrels between France and Aragon in particular, — coquetting with successive Popes on the subject of the proposed Crusade, exacting from Philip of France a due fulfilment of the treaties of Paris and Amiens, his main strength was yet steadily spent in those great internal reforms which mark the change from feudal to industrial England, from the old divided England of the Barons' War to the united England of the end of the century, from the Middle Ages to modern history. In the winter of 1290, he lost his faithful and beloved wife, Eleanor of Castile; and the event seemed to close the chapter of his prosperity. From that time till his lonely death in 1307, the King was involved in unhappy quarrels — the interminable quarrel of the Scottish succession, the quarrel with France, the quarrel with his own nobles, the quarrel with the Church. In all these, the country never lost its faith in the King; Edward never sank in public esteem as his father and grandfather had sunk. He never lost the power to recall the affections of his subjects by a frank appeal to old memories. "Except in

[1] These passages are taken from "Edward Plantagenet (Edward I), The English Justinian; or The Making of the Common Law," 1902, pp. 200-227, 332-346 (London and New York: G. P. Putnam's Sons).

[2] A biographical note of this author is prefixed to Essay No. 2.

opinion, not disagreeing," might truly have been said, at any moment, of the King and his people. But that the firm trust of Englishmen in the nobleness of their ruler remained unshaken during those sixteen years of storm and stress, of taxation and war, of absence and seeming neglect, was surely due to the profound impression of justice, patience, honesty, wisdom, and self-denying toil, created by the two brilliant years of internal reform, whose course we now attempt to trace.

First in point of date comes the famous Statute of Merchants, or Acton Burnell. As we have formerly seen, the expansion of foreign commerce, brought about by the Crusades, had rendered the merchant a figure of new importance in the social system of the country. But he fitted badly into the established order of things. As often as not a "foreigner,"[1] he had no native town in England, he was a member of no clan or blood-feud group, of no fief or monastery. He was a lost unit in a society which barely recognised individualism in its humbler ranks; which had a profound distrust of strangers; which looked on commerce mainly as an opportunity of cheating, and commercial profit as something nearly akin to usury. The safety of the stranger merchant, at first secured by placing him under the "mainpast," or guarantee, of his host, subsequently strengthened by his own spontaneous association into gilds or brotherhoods, was finally recognised, as a matter of national policy, by the express words of the Great Charter.

But it was necessary to the welfare of the merchant, not only that he should be protected from bodily harm, but that he should be actively assisted in the enforcement of his rights. People were beginning to discover, that credit is the life-blood of commerce; and credit could not exist in a society which knew nothing of commercial honour, as we understand it, without an adequate machinery for the enforcement of commercial obligations. No man, in the England of the thirteenth century, would have thought a fraction the worse of

[1] The word "foreigner" has various shades of meaning in the records of the time. Often it merely means a person not a member of the speaker's immediate locality. But, in these pages, it will be used in its modern sense of a political alien.

himself for refusing to satisfy a commercial claim, however just, which could not be legally enforced against him. Scandalous as the position seems now to us, it had grown easily and naturally out of the history of the law of debt. The earliest "debts" did not arise out of voluntary transactions: they were bloodfines reluctantly offered by guilty men, robbers and murderers, to appease the just vengeance of the injured or their relatives. Quite naturally, these offenders resisted payment until the last possible moment. Nowhere are *a priori* conceptions more inadequate to explain facts, than in the discussions of legal morality. But a patient study of the history of legal ideas not only removes all difficulties: it leaves the student wondering at the simplicity of the explanation, so long sought in vain by the exalted methods of deductive speculation.

Thus it becomes clear, why the merchant of the thirteenth century, especially the foreign merchant, was helpless in the hands of his debtors. Three difficulties stood in his way. First, he could not, in all probability, appear as the ostensible plaintiff before a tribunal which did not recognise him as one of its proper "suitors" or constituents. He had to trust himself in the hands of a native agent, or "attorney," who might decamp with his money. Second, he would find his adversary resorting, perhaps with the secret goodwill of the tribunal, to every trick and delay that chicane could suggest — and no one who knows anything of legal history will believe that chicane is a modern vice — to postpone the evil day on which judgment should be pronounced against him. Finally, if the plaintiff were successful in procuring a judgment, he would find himself obstructed in enforcing it by a defective procedure which, once more, is intelligible only by a reference to the history of the action of debt. In the days when debts were, as we have said, mere alternatives of corporal vengeance, the man who could not satisfy them "paid with his body." In other words, if the avenger of blood did not get his money, he got his revenge, either in the form of imprisonment of his debtor, or even by exacting the extreme penalty. This is the simple explanation of the horrible system of debt-slavery, of which students of Roman history

learn so much — and so little. Apparently, before Edward's day, the right of the judgment creditor to seize the chattels of his debtor, through the hands of the sheriff, had become generally recognised. But the strongest instincts of feudalism were opposed to the suggestion that a debtor's land might be sold for payment of his debts, and a new tenant thus imposed upon his lord. And feudal instincts were, in this respect, as in so many others, powerfully supported by still older social instincts, surviving from an age in which land was not the property of the individual, but of the clan or kindred, and when to admit that the sacredness of the kin group might be disturbed by the intrusion of the creditor of one of its members, would have been regarded as little short of blasphemy.

But the rapid progress of industry, and the rapid decay of patriarchal and feudal institutions, in the twelfth and early thirteenth centuries, had really rendered this antiquated rule a relic of barbarism and a cloak of injustice. Now that the services of nearly all tenants, except those in the lowest ranks, had been commuted into money, now that the coheirs of a deceased landowner could obtain the assistance of the King's courts to effect a division of their inheritance, it was absurd to maintain the fiction of patriarchal and feudal connection. It was, clearly, the duty of the lawgiver to express in formal terms that revolution of social ideas which had actually taken place, and to carry the revolution to its legitimate issue.

This, in fact, is just what Edward did in his famous Statute (passed even before the death of Llywelyn at Orewin Bridge), at the manor of his Chancellor, Robert Burnell, Bishop of Bath and Wells, near Shrewsbury, on the 12th October, 1283. The so-called "Parliament of Acton Burnell" has no more claim to constitutional importance than the so-called Parliament House, which professes to be the very building in which it sat; for the body which best deserved the title of Parliament was then sitting at Shrewsbury, seven miles away, and the Statute was probably drawn up and promulgated, as it professes to be, by the King and his Council, *i. e.*, the small body of officials who accompanied

him on his journeys. But its legal validity has never been questioned, and its importance is beyond dispute. A merchant who doubts the honesty of his would-be debtor may insist upon his "recognising" or admitting his liability in a formal document, sealed in the presence of the mayor of a chartered borough, and entered upon a roll which remains in the official custody, while a "bill" or "obligation," sealed by the debtor and authenticated by the royal seal, is handed over to the creditor. If the debtor fails to pay, at the appointed time, he may not only be imprisoned, but his chattels and "burgage" tenements (*i. e.*, lands in the borough) may be sold, without any preliminary proceedings, by the mayor to satisfy the debt, or, if there is any difficulty in effecting the sale, the debtor's chattels and *all* his lands may be handed over at a reasonable valuation to the creditor, until, out of the issues, the debt is liquidated. Even the death of the debtor will not destroy the creditor's remedy against his lands, which will remain liable in the hands of his heir, against whom, however, there will be no personal remedy.[1]

No apology is needed for the space which has been given to the Statute of Merchants. Under the cover of its technical phrases, the King dealt a death-blow at the still surviving forces of patriarchalism and feudalism, and recognised the new principles of individual responsibility and commercial probity which were to be watchwords of the political and social future. Like a wise legislator, he had merely interpreted and guided the overwhelming drift of evolution, and distinguished between obstruction and progress. He saw that the future greatness of England lay, not with the feudal landowner, but with the despised merchant. His enactment is admirable in its simplicity and effectiveness. It was freely used, not only by merchants, but by every class of society, until improvements in the procedure of the courts had rendered it unnecessary. The still simpler machinery of "negotiable paper" (Bills of Exchange and Promissory Notes)

[1] Legal readers will realise that I have combined into one the original Statute of 1283 and the amending ordinance of 1285. But it would have been pedantic, in a general work, to have separated the two.

ultimately superseded the machinery of Edward's enactment; but, at least until Elizabeth's day, capitalists lent their money on "statutes," no less than on mortgages. And if "statutes" were abused by a Sir Giles Overreach, we must not forget, that an institution is to be judged by its uses, not by its abuses. One injustice Edward's advisers unquestionably did, in making the entire inheritance of a wealthy landowner responsible for the debts and follies of his eldest son. But this was the inevitable consequence of the policy which, before Edward ascended the throne, had forced the feudal custom of primogeniture, in all its naked simplicity, upon an unwilling nation.

Nothing but an excusable dislike of the dry details of legal history can explain the failure of the many able historians who have treated of the reign of Edward, to detect the close connection between the Statute of Merchants and the yet more famous Statute of Entails, which so soon followed it. On the King's return from his Welsh campaign, he summoned a great Parliament to meet at Westminster at Easter of the year 1285. It was a very different body from the small Council of ministers which had drawn up the Statute of Merchants. Though the precise details of its composition are, unhappily, obscure, it is obvious that the reactionary feudal element was strong enough to deal a severe, though temporary, check to the policy of the latter statute.[1] Nor is it at all difficult to understand the motives which produced such an outbreak. If the lands of an improvident baron or knight were liable to be seized by his creditors, what was to become of the great feudal families whose pride of lineage was only equalled by their recklessness and extravagance? The feudal landowners were quite shrewd enough to see, that a long family pedigree is cold comfort unless accompanied by a substantial rent-roll — nay, that it is practically impossible for the pedigree to be maintained without the estate. And so, banding all their forces together, they refused to pass

[1] Mr. Pearson in his admirable *England in the Middle Ages* (vol. ii., p. 337) suggests, that the Parlianient of Easter, 1285, consisted only of the King's officials. This is incredible in the face of the statement made by Walter of Hemingburgh, that "in that Parliament the King informed the *magnates* of his intention of visiting Gascony."

the long series of excellent minor reforms on which the King had set his heart, unless he first consented to the solemn promulgation of the legality of entails. It is impossible to look at the famous Statute of Westminster the Second with a trained eye, and not to see the inconsistency of its first chapter (the so-called Statute *De Donis*) with all its subsequent forty-nine clauses. The latter are the work of skilled officials, guided by a King of great ability and honesty, and aim at the minute reform of the machinery of an antiquated system. The former is a bold and defiant assertion of conservative prejudice, veiled by the King's advisers in specious language, which barely conceals the chagrin of the legislator in whose name it is produced. Broadly speaking, it authorised the creation of estates which should descend in unbroken succession down the line of inheritance prescribed in the original gift, so long as that line should last. The successive occupants of the land might pose as the owners, might draw the rents, and even cut down the timber; but instantly on the death of each, his heir would take possession of an unencumbered interest, unfettered by any liability for the debts of his ancestor, or by any disposition made by him during his lifetime. Even an attainder for treason or felony was not to work a forfeiture of the estate; for, immediately upon the attainder, the culprit became dead in law, if not in fact, and his heir succeeded, in defiance both of the Crown and the creditors of the deceased. As, by the rule of primogeniture, the great bulk of such inheritances would go to the eldest sons, another obvious result (in the days in which wills of land were not recognised) would be, to starve the younger members of a landowner's family for the benefit of the eldest. By a refinement of perversity, the estate, on failure of the issue of the first acquirer, was to revert, not to his collaterals or his creditors, but to the original donor, who thus reaped an unexpected windfall from the misfortunes of the purchaser's family. The whole chapter is a monument of colossal family pride and feudal arrogance. Left to its natural results, it would have converted the English aristocracy into a close corporation of stupid and unprogressive grandees, filled with the pride of pedigree, starving

on lands which they had neither the intelligence nor the legal power to develope, divided from their own kindred by feelings of injustice and oppression, and especially at daggers drawn with their expectant heirs, whose utmost neglect and disobedience they would be powerless to correct by threats of disherison. To suggest that Edward was a willing party to such an act of folly, is a monstrous calumny on his fair fame, and a gross outrage on the probabilities.

Happily, the Statute *De Donis* was not destined to endure. Though, like much of Edward's legislation, it has never been formally repealed,[1] it has, unlike much of that legislation, long been rendered a dead letter by the more cruel process of contemptuous evasion. In spite of the solemn provisions of the Statute, the principle laid down by it was defeated by the use of a legal fiction so indecently transparent, that it proves conclusively the unpopularity of the rule which it so successfully destroyed.[2] Before the judges, without whose connivance such an evasion would have been impossible, allowed themselves to sanction it, we may be quite sure that they had satisfied themselves of the feebleness of the force behind the Statute. Unfortunately, it is at present quite impossible to say at what date the convenient fiction of the

[1] An impious Parliament, moved thereto by an impious committee, laid profane hands on the Ark of the Covenant in the year 1887. But it only ventured to remove the merest trappings, leaving the substance untouched — and meaningless.

[2] If A, the owner of an entailed estate, wished to sell it to B, he got B to bring an action against him (A), asserting that the land belonged already to him (B), and that A was an interloper. Thereupon A attempted no defence on the merits, but merely pleaded that the estate had been entailed upon him, or one of his ancestors, by C, who had then guaranteed, or "warranted," its title. This process, technically known as "vouching to warranty," was repeated as often as was necessary to maintain a decent appearance of truth, but was finally assumed by an impecunious person (usually the crier of the court) who, for the modest fee of fourpence, was willing to take upon himself the responsibility of defending the case. A convenient adjournment allowed the fictitious claimant (B), to "imparl" (or talk) with the fictitious defendant (the crier), and, on the resumption of the trial, the latter failed to appear, having, in all probability, retired to spend his fourpence at the nearest alehouse. Thereupon, after solemn proclamation, he was pronounced in default, the claim of B was established by the judgement of the court (which, of course, no one could dispute), and the disappointed heirs of A were compensated, in theory, by a decree that the defaulting crier should give them lands of equal value. There were heavy fees all through this process, which may perhaps account for its success and complexity.

"Common Recovery" made good its footing in this connection. The classical instance occurred in the year 1472; but it is obvious, from the merely incidental way in which it is mentioned by the reporter, that the process was perfectly familiar at that time; and, as our knowledge of legal history increases, it may very well be discovered, that the Statute *De Donis* had even a shorter life than that usually attributed to it. At any rate, ever since the close of the fifteenth century, the unbreakable entail has ceased to exist, save in the few cases of land settled by Act of Parliament as the reward of public services, and — in the pages of the novelist.[1]

Only a very brief analysis can be attempted of the long and elaborately technical clauses which make up the rest of the great Statute of Westminster the Second. It was natural that an enactment avowedly based upon the evils brought to light by the Hundred Rolls, and the proceedings thereon, should contain a good deal about feudal abuses. The harsh proceedings of landlords who make use of the new legal procedure to extort their dues from their tenants, are checked; none but sworn bailiffs are to be employed in seizing goods for default of rent; and in such cases the tenants are to have full opportunity of testing the validity of the seizures in an independent court. The use of violence in the place of legal procedure is sternly prohibited. Further encroachments on the jurisdiction of the Crown are anticipated by the provision, that every judge who goes circuit is to be furnished by the Exchequer officials with a list of "franchises," lawfully claimable by subjects within the counties of his commission; and any tampering with the returns by which such lists are brought up to date is to be punished as treason. On the other hand, the Statute shews every disposition to protect the feudal landowners in the exercise of their admitted rights; and, in one particular case, we may well think that it assists them at the expense of a class far less able to make its claims heard. The 46th clause of the Statute expressly authorizes

[1] Honorable exception from the criticism implied in this last sentence must always be made for the classical case of George Eliot, who, in the pages of *Felix Holt*, shewed that she was quite capable of grasping the subtleties of medieval conveyancing.

the manorial lords, in continuance of the policy of the older Statute of Merton, to "approve," *i. e.*, bring under cultivation, any part of the common wastes which then formed such a valuable preserve for the humbler members of the villages. The established rights of the "commoners" are, of course, theoretically safeguarded; but there is no provision for the growth of population; and a lurid light is thrown on an otherwise obscure economic struggle, by the provision, that if hedges or dykes, erected in the course of approvement, are secretly destroyed, the adjoining townships are to be distrained, without proof of complicity, to make good the damage.

But Edward was not the man to reform his neighbour's household while he left his own in disorder; and one of the most conspicuous features of the Statute of Westminster the Second is its elaborate provision against abuses by royal officials. Not only are the circuits of the judges carefully regulated, to prevent, on the one hand, oppressive multiplication of public burdens by too frequent sessions, and on the other, delay and injustice arising from insufficient attendance, but the more glaring abuses of official power are treated with a frankness which must have convinced the culprits that the King, at least, had his eyes open to their misdeeds. Sheriffs and bailiffs who start bogus prosecutions, with the object of extorting money, are to suffer imprisonment. Petty officials of local tribunals, who connive with feudal landowners to withdraw suits from the circuit courts, in order that they may oppress the poor in private, are to make fine to the King, and to pay threefold damages to the party injured. Whilst the duty of service on juries is asserted, the obvious danger of persecution and extortion, by the officials charged with the preparation of the lists, is carefully guarded against. A very significant clause requires the sheriffs to give sealed receipts for all writs delivered to them for execution. The fees of the hierarchy of royal officials, from the Marshal and the Chamberlain, down to the porters, cyrographers, and clerks, are carefully regulated. And, finally, a most wholesome clause lays it down emphatically, that no royal official may accept a share of, or purchase any interest

in, property which is the subject-matter of dispute in the royal courts.

The Statute of Westminster the Second is, perhaps, mainly concerned with the conduct of the King's local representatives in the country districts; but an almost contemporary group of Exchequer Ordinances made strict and much-needed reforms in the machinery of the central government. The cherished abuse of all revenue officials, from the days of Falkes de Bréauté to the days of Marlborough and Stephen Fox, viz., the retention of heavy balances in their private pockets, was sternly, though, it is to be feared, ineffectually forbidden by Edward's rules. The employment of irresponsible private agents in the King's business is strictly prohibited. Alleged deductions on account of expenses are to be carefully scrutinised by independent surveyors. Oppressive exaction, even of the King's debts, is deprecated. And it is twice laid down, but, alas! ineffectually, that the special royal privileges of the Exchequer process, which were intended for the benefit of the King only, are not to be made use of by private persons.[1] Leaving, for the moment, the eloquent comment on these regulations furnished by the proceedings of the year 1290, we return to our analysis of the Statute of Westminster the Second.

The third and last great object of this Statute may be said to have been, to apply to ordinary litigants the same rules of justice and moderation which, as we have seen, the King had imposed on the feudal nobility and his own officials. The farther back we go in legal history, the more clear does it become, that the abuse of legal process, by litigants and officials alike, is no new thing, but, on the contrary, an ancient evil which steadily, if slowly, tends to diminish. Nor is there anything in this discovery that should surprise us. Legal procedure grew out of a gradual substitution of argument for violence, and it bears the marks of its origin at every turn.

[1] This wholesome rule proved entirely unable to withstand the opposition of two powerful interests: (1) of the Exchequer judges, to whom increased business meant increased fees, and (2) of wealthy litigants, who coveted the special privileges exercisable by a royal litigant, and were willing to pay for them. It was evaded, as every student of our legal history knows, by the use of transparent fictions.

The doing of "abstract justice" is, no doubt, an unwise ideal for any human tribunal to cherish. But long before the far more modest ideal of "substantial justice" arises in the minds of judges and legislators, the most exalted aim of courts of justice is to secure a "fair fight," of a kind which shall not disturb public order. And a subtle or wealthy litigant no more refrains from profiting by tricks or bribery, than a modern general refrains from exercising his skill or resources because he knows that his adversary is a fool. Early reforms in the administration of justice are really made in the interests of sport, rather than in the interests of what we call justice. Even now, the fascination of a great lawsuit, for the mass of men, lies in the excitement of the duel between plaintiff and defendant, or between Crown and prisoner, rather than in any desire to see justice reproved or wickedness punished. In early society, the Court Day is one of the few excitements in a monotonous existence; and unfair tricks and outrageous oppression are gradually prohibited, just as wide bats and "no balls" have been prohibited in cricket — because they spoil sport. The details of the Statute show that Edward's advisers thoroughly grasped this truth. They are far too technical to be set out here; but, broadly speaking, we may say, that they are aimed solely at preventing collusion, fraud, and delay, offences (as we should deem them) which are inconsistent with wholesome sport. The first obviously tends to deceive the spectators, and stands on the same footing as the "pulling" of a horse in the Derby. The second is always unpopular in a society which prefers the exercise of physical to mental force; and the third is obviously disappointing to people who have come a long way to see the performance, and are apt to lose the thread of the story if the intervals between the acts are too long. So the dowress, the life tenant, or other temporary occupant of land, who allows himself to be defeated in lawsuit by a collusive claimant, with a view to excluding his successor; the husband who surrenders his estate that it may not pay dower to his widow; the guardian who takes advantage of his ward's minority to allow a stranger to exercise rights which properly belong to

his ward; the man who warrants title to land and then refuses to defend it; the man who shams illness and lies in bed to delay proceedings, are put under heavy penalties; and their acts are not allowed to prejudice their intended victims.

Finally, the Statute contains, in its twenty-fourth chapter, a clause of which lawyers have long recognised the importance, but which lay historians are too apt to regard as mere technical jargon. Carefully concealed under the guise of an administrative regulation, the Statute lays it down, that the chancery officials, through whose hands must pass every royal writ, which was then, and still is, the normal beginning of every action in the royal courts, need no longer be guided by a strict adherence to precedent in the issue of these documents. It is sufficient if the remedy sought and the circumstances of the case are *like* those for which writs have previously been issued. In other words, principle, not precedent, is henceforth to guide the Chancellor and his officials in the issue of writs.

To a layman, impatient of the intricacies of legal history, such a direction may seem the most obvious piece of official platitude. In truth, it covered a daring attempt at completing, by a master stroke, a revolution which had been gradually proceeding during the twelfth and thirteenth centuries. Once more it is necessary to remind the reader, that the conception of the Crown, as the sole fountain of justice, is a very modern conception in legal history. The Crown in the later Middle Ages was but one of many competitors for the profitable business of judicature. The Church, the feudal nobles, the chartered boroughs, the merchant guilds, the shire and hundred moots, were all rivals, more or less formidable. And any premature attempt on the part of the Crown to claim universal and exclusive jurisdiction would assuredly have led to the fiercest opposition, even if it had not resulted in the dissolution of the State. Time was on the side of the Crown; but the King had to walk warily, and to be content for a long time with small things. Bit by bit, as chances offered, the royal officials filched the business of their rivals; and, as each claim was established, it was carefully enshrined

as a precedent in that Register of Writs, which was one of the most precious possessions of the royal chancery. If an intending litigant could bring his case within the terms of a registered writ, well and good. If not, the King's courts could do nothing for him. He might have the best case in the world from a moral, or even from a legal point of view. But his remedy, if any, lay elsewhere. With sorrowful hearts, for they disliked "turning away business," the chancery officials regretted that they could not supply the desired article. The officials knew that their path was beset with dangers. The bold assertion of Henry II., that no lawsuit touching the title to freehold could be commenced without a royal writ,[1] had played no mean part in stirring the baronial rising under John; and the claim had been solemnly renounced in the Great Charter.[2] Now, perhaps, we are in a position to understand something of the audacity of the *consimilis casus* clause of the Statute of Westminster the Second, which, if acted upon to its full extent, would have left it open to ingenious chancery officials to discover analogies of existing precedents in the case of every intending litigant. But its comparative failure is another signal proof, that sound legislation is little more than the official consecration of enlightened public opinion, and that "fancy" or premature reforms are mere waste of words. The opposition to the full use of the clause came, not merely from feudal and clerical tribunals, but from the King's own judges, who refused to recognise as valid writs which, in their view, departed too widely from precedent, no less than from the Parliaments of the fourteenth century, profoundly jealous of a power which, under the form of mere official documents, was really a power to declare the law of the land. The final victory of the royal jurisdiction was won, by the skilful use of fictions, by the rise of the Court of Chancery, and, finally, by the Reformation, which crushed the independence of the Church courts.

[1] Even Henry did not dare to say that it could only be *tried in a royal court*. But this was, of course, what he desired; and the barons knew it quite well.

[2] "The writ, which is called *præcipe*, shall no longer be issued to any one concerning any tenement, to the loss by any freeman of his jurisdiction."

It could not be achieved by a single clause in the Statute of Westminster the Second.

To the same year (1285), but to the autumn Parliament, belongs the credit of another great statute. The Statute of Westminster had been mainly concerned with the conduct of the ruling classes — the landowners and the royal officials. The Statute of Winchester is almost wholly occupied with the humbler ranks of the community. It is much shorter, far simpler, but even more comprehensive than its predecessor, and its purpose is clear as the day. It insists that every man, rich and poor alike, has active duties of citizenship to perform; that the good citizen is not merely to abstain from disorder and crime, sitting by with folded hands whilst others defy the law, but that he is bound to assist the forces of order and good government. Three simple but comprehensive duties are imposed upon every citizen by the Statute. He is to report every felon whose offence he may witness or hear of, and take an active part in pursuit of him. He must personally assist in maintaining the police of the country, by serving in the Watch,[1] and by helping to clear the highways from the growth of underwood which affords such a convenient refuge for thieves and murderers. He must, at least so long as his years permit, provide and maintain himself with arms regulated according to his means, and, twice a year, present himself at the View of Armour held in his Hundred, that the King may know the condition of his militia forces. The Statute of Winchester is deeply interesting; it contains just that surviving fragment of the old Saxon system of local autonomy which was adopted by the strong central government of the Plantagenet Kings. It is silent, of course, as to the strictly popular elements in the old system; and it is probable that these disappeared rapidly before the increasing vigour of the central government. The two Constables of the Hundred mark the beginning of a new era in the history of

[1] The Watch is to be kept every night from Ascension Day to Michaelmas. The writer has never been able to understand why the winter nights were left unguarded. Was it because in the winter there was little to steal, or because thieves were too lazy to turn out, or because the health of the Watch would have been injured by the cold weather?

English local government, in which local officials, though preserving a good deal of healthy independence, are brought into direct contact with the central administration. The genuineness of Edward's interest in the Statute is shewn by the frequent appointment, in the succeeding years, of "Conservators of the Peace," charged with enforcing the duties prescribed by the enactment; and this step seems to have been the direct forerunner of the great institution of the Justices of the Peace, which has a continuous history from the end of the fourteenth century.[1] Obedience to the Statute was ultimately enforced by the simple, but very effective expedient, of holding the local unit responsible as a whole for the neglect of any of its inhabitants.

But the wondrous activity of the year 1285 did not end with the Statutes of Westminster and Winchester. In the same year, Edward defined, by the so-called Statute of *Circumspecte Agatis*, which is, in truth, nothing more than an official regulation, addressed to his judges respecting their behaviour in the diocese of Norwich, but which was accepted as a general declaration of royal policy, his attitude on the delicate question of ecclesiastical jurisdiction. The King had already taken up a decided position on the equally delicate subject of the acquisition of lands by the Church, when, in 1279, by the first Statute of Mortmain, he had announced his intention of rigidly enforcing the policy of the Great Charter. No person, cleric or lay, was, without royal license, to vest lands by way of perpetual succession in a monastery or other body not subject to the ordinary chances of death, upon pain of forfeiture of the land in question. This policy, commenced in the natural dislike of the feudal nobles to a practice which deprived them of the incidental windfalls of wardships, marriages, fines on admission of new tenants, and the like, was warmly seconded by the King, who saw the grave public danger of allowing land which represented a liability to military service to get into the hands of clerics who claimed exemption from such duties, and whose tenacious grip would

[1] The "Conservators" were, like the later "Justices," local landowners of a certain estate. (See the case of Lawrence Basset, *Parl. Writs*, I, p. 389.)

effectually prevent its coming again into the market. For once, Edward and his barons were at one; and the Statute of 1279 was supplemented by certain useful clauses in the Statute of Westminster the Second. Moreover, this same enactment contained a salutary clause, compelling the clerical authority, which claimed a share in the goods of every man who died without making a will, to satisfy the debts of the deceased out of the assets coming to its hands. But the Statute *Circumspecte Agatis* makes no extreme claims. In all suits really spiritual, such as the enforcement of penances for deadly sin, the infliction of penalties for neglect of the fabric of a church or of a churchyard, the claim by a parson to tithes, mortuaries, oblations, or other customary dues, even claims to the proceeds of benefices (so long as the titles to the benefices themselves are not in dispute), and in actions for violence to a clerk, or for defamatory words, the King's judges are not to interfere by the issue of a Prohibition. On the other hand, the King provides the judges with a list of matters properly belonging to the royal jurisdiction, and the list, long as it is, amply establishes the position so frequently insisted upon in these pages, that the jurisdiction of the royal tribunals was, even in Edward's reign, a jurisdiction which was being slowly being built up, bit by bit, in the struggle of many rivals. A truly liberal regulation, variously attributed to the years 1286, 1290, and 1296, but probably belonging to the year 1290, provided for the contingency of a Prohibition being issued in a case in which the King's courts did not provide a remedy. In such a case, the King's official (the Chancellor or Chief Justice), having satisfied himself of the possibility of a failure of justice, is to write to the ecclesiastical judge, bidding him to proceed notwithstanding the Prohibition.

The last piece of legislation to be noticed, in this fruitful year (1285), is an Ordinance for the government of London, which seems to have been published just before its close. Evidently, Edward could not bring himself to forgive entirely the great city which had taken up arms against his father, and insulted his mother. He steadily refuses to recognise the Mayor as an essential feature of municipal existence. There

may be a Mayor, but if the city is in the King's hand there will be, instead, a Warden nominated by the King, who will care little for the views of the citizens. Taverns are only to be kept by fully qualified citizens, and are to be closed rigidly at curfew. No one is to teach fencing within the limits of the city. Each alderman is to hold frequent enquiries as to the presence of malefactors within his ward, and to send all whom he may discover, in safe custody, to the "Warden or Mayor." No roysterer or other serious disturber of the peace is to be let out on bail, without the express warrant of the "Warden or Mayor;" and no broker is to carry on business until he has been presented and sworn before the "Warden or Mayor" to exercise his craft honestly. Incidentally, the ordinance is of interest, as revealing the fact that London, even in 1285, was already a cosmopolitan city, which attracted wanderers from all lands, some of whom "nothing do but run up and down through the streets, more by night than by day, and are well attired in clothing and array, and have their food of delicate meats and costly."

The three glorious years, 1283-85, have only twice been rivalled for honourable activity in the annals of English statesmanship. Once in the sixteenth century, when the Reformation Parliament of Henry VIII. set itself, under the guidance of the King and his ministers, to the reconstruction of the national Church, and once in the nineteenth, when a spontaneous outburst of epoch-making legislation followed on the assembly of the first reformed Parliament, has the history of English law a parallel to offer. Had those three years been the utmost limits of Edward's reign, he must have come down to us as one of the greatest and wisest of rulers, who surveyed the body politic in all its members, and laid his healing hand on every sore. But when we reflect that those years were but a fraction of a long reign of thirty-five years, and of a public life which covered at least half a century; when we call to mind, that the man who put forth the Statutes of Acton Burnel, Rhuddlan, Westminster the Second, and Winchester, was the hero of the Barons' War, the Crusader, the framer of the Hundred Rolls and the guide of the Quo Warranto enquiry, the conqueror of Wales,

the arbiter of Scotland, the organiser of the coast guard, the unflinching opponent of Papal aggression, and the summoner of the Model Parliament; when we remember, that his name was as great abroad as at home, that he ranked as the equal of Philip of France, and the superior of the Kings of Aragon, Castile, and Sicily, and of the princes of the Netherlands; when, finally, we discover, that the mighty statesman was also the faithful and affectionate son and husband, the wise and patient father, the patron of merit, and the supporter of true piety; then we shall realise that few such monarchs, nay, few such men, have held up the pattern to poor humanity. It is easy to say that Edward draws the credit which of right belongs to his ministers. Doubtless, much of the wisdom of his legislation was due to the advice of his officials, who knew exactly the weak points in the ship of State. But there is also much reason to believe that, among Edward's troubles, were too often to be reckoned the follies of those who should have been his support and stay. Robert Burnel was a notorious profligate, even though he was Chancellor of England and Bishop of Bath and Wells. Antony Bek was a turbulent priest who, but for Edward's steady watchfulness, might have proved a second Becket. Ralph Hengham, Thomas of Weyland, and their fellow judges were, as we shall see, heroes of the greatest judicial scandal in English history. Adam of Stratton, one of the chief officials of the Exchequer, was a corrupt scoundrel. If, in spite of these notorious exceptions, Edward managed to attract able and upright servants, the credit is surely due to him. A King usually gets the ministers he deserves.

So we part from the brightest chapter in Edward's career. . . .

It would be a great mistake to suppose that Edward created, or intended to create, a Parliament in the sense in which we now understand the term. At the present day Parliament performs four great functions. It legislates, it ventilates grievances, it criticises the details of administration, it provides money. The last of these functions alone was assigned to it by Edward, at least so far as the elected members were concerned. The orthodox form of the sum-

mons to the shire and borough members, as settled by Edward's ministers, and consecrated by six hundred years of practice, invites them "to do" what shall be ordained in the premises. There can be no doubt, in the circumstances of the case, that the phrase "to do" (*ad faciendum*) was merely a polite form of the cruder expression "to grant money," and equally little doubt that, however long the phrase has been a mere fiction, it originally expressed a genuine truth. The clearest proof of this lies in the fact, that when the King really did desire the counsel of humble persons, he knew how to ask for it, as when he summoned an assembly of citizens in 1296 to advise him on the settlement of the borough of Berwick-on-Tweed. Not for nearly four hundred years did the elected members of Parliament make good their claim, except in times of revolution, to criticise the royal administration, or to cause the removal of the King's ministers.

As a matter of fact, the elected members were far more anxious to establish another right, and their anxiety was wise. In all probability they had not the knowledge necessary to make them useful critics of the royal administration. But they were an admirable machinery for the collection of popular grievances. The right of presenting petitions to a monarch is so useful to the ruler himself, that it is very rarely denied, even by Oriental despots. Nothing is so dangerous to the security of a throne as the existence of secret discontent, which the sufferers despair of being able to bring to the royal ear. Long before Parliament came into existence, the English kings received petitions from their subjects. But the fate of the petitions was precarious. First the king had to be found; and only students of history can realise the activity and elusiveness of a medieval king. When found, the king had to be approached, often through a crowd of courtiers and officials, who were none too anxious to help the suppliant. Then there was the weary waiting for a reply. All these difficulties disappeared, as by magic, with the institution of Parliament. The Parliament was summoned to meet the king. Its presence could not be ignored. The distant petitioner could entrust his plaint to the hands of his elected knight or burgess. The wages of the knight or bur-

gess could be stopped if he did not do his duty; for they were paid by his constituency, not by the royal treasury. Above all, the knights and burgesses soon found that they had a powerful weapon in their hands. They could refuse to grant taxes until the petitions which they had presented had been carefully considered and properly answered by the Crown. Thus the great constitutional principle, that redress of grievances precedes supply, came slowly to light in Edward's reign. Thus, also, we see the meaning of the careful apportionment in the Michaelmas Parliament of 1280, and so often afterwards, of the numerous petitions presented at the assembling of Parliament, among special officials or specially appointed committees, and the appearance of the Receiver of Petitions as a regular Parliamentary official. In fact, the merest glance through the records of Edward's Parliaments is sufficient to convince the student, that the main business of the session was the discussion and remedy of individual grievances, while specially difficult or specially "prerogative" lawsuits form the other great item of work. These latter, after a few years, constituted the sole contents of the *coram rege* Rolls of the King's Bench; while the private petitions which play so large a part in the records of Edward's Parliament disappeared from the rolls, and became the "private bills" of a later day. Thus the "public bills," which are so scanty on the rolls of Edward's time, — the bills or petitions promoted by the King's ministers, or by the magnates, or by the "community" or "communities" of the realm, — at last became the staple material of the Parliament Rolls, being engrossed in their final shape on the Statute Roll of the Kingdom. For that was the final work accomplished by Parliament. It fused the thousand diverse interests of shires and boroughs, clergy and laity, magnates and humble folk, into one national whole; and made possible the existence of national legislation.

And so we come, finally, to Edward's position as a legislator, and to the title which he has acquired, of "the English Justinian." Like most other popular titles, it covers a certain amount of truth. Justinian, reigning over an empire whose civilisation had been growing for a thousand years,

summed up the legal history of that civilisation in a series of works, which has become one of the priceless possessions of Western life. In the Digest, or Pandects, he summarised, by a ruthless process of excision and compression, the works of that famous body of Roman jurists which was the boast of the earlier Roman Empire. To this he added a Code, or collection of imperial statutes, the second edition of which has been accepted as an integral part of the *Corpus Juris Civilis*. These again he supplemented by an admirable little Primer of Law, or Institutes, founded on the similar treatise of a great Roman jurist, who had been dead three hundred years when Justinian ascended the throne. Finally, he himself contributed upwards of a hundred "Novels," or new statutes, to the legislative activity of the Byzantine Empire. With the authority of one who still believed himself to be the world's master, he forbade all criticism of his completed work, and all reference to other sources of authority. Within the covers of the *Corpus Juris* would be found, he insisted, an answer to every legal difficulty which could possibly arise to vex the minds of his subjects.

The work of Justinian was, in itself, a great work, and would, at all times, have commanded the respect of the world. But, owing to the special circumstances of its fate, it achieved a success such as has not been secured by more than a dozen other books in the world's history. It became, in fact, the secular Bible of Christendom, second only in authority and influence to the Sacred Scriptures. The age which produced it was a literary age, the ages which followed it were rude and ignorant. Even in its decay, the mighty Roman Empire contrasted forcibly with the crowd of petty princedoms into which it broke up. The rude barbarian princes of Europe listened with awe to the pages which spoke to them of a civilisation so far above their own. At first the *Corpus Juris* was known to them only through hasty and crude adaptations, made by the orders of the conquering chieftains of the Teutonic invasions; but, gradually, as Europe settled down after the storms of the Dark Ages, the pure text was received into the homes of the new learning, and ardent students of the precious volumes carried the fame of their wisdom from the

schools of Bologna, Pisa, and Padua, to the Courts of Europe. At first the Church had no word of blame for the new movement; for the Byzantine Empire, though schismatic according to later Western ideas, was a Christian Empire, and Justinian's Code accorded due honour to Bishop and Church. And, even after the Church, pursuing her new policy of isolation, had forbidden her priests to study the "secular" or "imperial" laws, and had set up a formidable rival in the Canon Law, the enthusiasm of the students of the Roman Law abated not a whit. In fact, the sincere flattery of imitation was accorded to Justinian's work by the Papal legislators, who compiled their *Corpus Juris Canonici* on that very model which the *Corpus Juris Civilis* had seemed to render inevitable. And, in drawing a sharp line between the professors of the Civil and the Canon Laws, the Papacy made one of its most fatal mistakes, by alienating from its service a body of men who, for the first time in the history of Western Christendom, made a serious inroad upon the intellectual monopoly of the Church.

As a very natural result, the nations of Western Europe, or rather their rulers, began, at the end of the Middle Ages, to look upon the *Corpus Juris* of Justinian, not merely as a monument of Roman greatness, but as a complete code of conduct for the guidance of secular affairs. Realising fully, that the barbarous local customs of their own peoples, and even the general maxims of feudalism, offered no satisfactory guides for the new world of commerce which was growing up around them, they turned more and more for the solution of new and complicated problems to the ever ready pages of the Digest and the Code. In some cases, as in Spain, the Roman Law spoke of a past which men were proud to contrast with the present. There, the compilation of the *Siete Partidas*, modelled on the seven years of the legal curriculum in the Roman Law schools, was the Christian's badge of defiance to the hated but impressive Saracen. In others, as in Southern France, the continuity between the city life of the Roman provinces, and the city life of Gascony and Aquitaine, was at least a cherished tradition; and it was natural that Southern France should be a *pays du droit écrit.*

But, that Germany and Scotland[1] should accept the *Corpus Juris* of Justinian is, apparently, so wild a freak of history as to deserve at least a passing wonder. And this wonder is increased by the discovery that England, so closely allied with Scotland and Germany in the course of history, so like them in civilisation, so near them in geographical position, at the critical moment, rejected the Roman Law, and went off on an entirely different course. And this critical moment is the reign, or at least the lifetime, of Edward Plantagenet.

The explanation is twofold. It lies partly in the notion which men then held of Law, partly in the circumstances of English history. It would be very easy to wander gradually into speculations as to the nature of Law, which would land us in a hopeless quagmire of confusion. "Law" is one of those familiar words which everybody thinks he understands, until he tries to explain them. But, briefly speaking, the notion of Law, in the thirteenth century, vibrated between three different conceptions. One was, that Law was a divine or, at least, a philosophical ideal, which could only be discovered by great wisdom and patient study. Men ought to conform their lives to a high ideal. And, as the Scriptures dealt mainly with principles and generalities, a system of Law was necessary to define details. The supporters of this view urged the adoption of the *Corpus Juris* as the required ideal. Nowhere else, they urged, was it possible to find such profound wisdom applied to the details of secular affairs. The revival of learning tended to give immense weight to the writings of the ancients; and Europe in the thirteenth century was far too uncritical to distinguish between the dates of Aristotle, Virgil, and the Roman jurist, Gaius. They were all "ancients," and that was enough.

But it is doubtful whether the *Corpus Juris* would ever have obtained its immense success, had it not itself ostensibly maintained a second conception of Law, which had always found favour with a certain very important, if limited, class

[1] It was, of course, long after the thirteenth century that Germany and Scotland received the Roman Law. But the fact is none the less striking on that account.

of persons. "The pleasure of the Prince has the force of Law," is one of the best-known maxims of the *Institutes;* and we can well imagine that the sentence would not be unacceptable from the lips of a courtier. As a fact, of course, the *Corpus Juris* of Justinian had been compiled in the days of a despotism the completest, though, it must be admitted, also the wisest, which the world has ever seen. In the system of the later Roman Empire, everything centred in the person of the Prince, and his will was final and absolute.

How near, how very near, England was to the adoption of a system based on the principles of the *Corpus Juris*, few but professed historians know. Two facts, small in themselves, but very significant, reveal the possibilities of the situation more clearly than pages of vague description. One is, that Edward for years maintained in his pay, as his trusted adviser, Francesco Accursi, himself a learned student and professor of the Roman Law, and the son of the still more famous Accursi, the author of the *Great Gloss*, and the contemporary and fellow townsman of that Azo to whom Bracton was indebted for so much of his language. The other is, that an anonymous, but highly popular law book, compiled in the late thirteenth century, figures the Law as issuing from the mouth of the king. Evidently, there were symptoms, in the thirteenth century, of a very powerful alliance between the philosophical and the military conceptions of Law.

The humble alternative of these two lofty notions is the view, that Law is nothing but the formal expression of the common sense of the average man, as evidenced by his daily practice. In other words, Law is the formal shape into which the customs of average men are translated by the processes of legislation and judicial decision. It may be said that the conduct of the average man is influenced unconsciously by the teachings of religion and philosophy, and, consciously, by the commands of authority. That may be so; and yet, just as it is true that the average man's conduct never precisely conforms either to the ideals of the philosopher or to the wishes of authority, so it is true, that custom always

differs substantially both from religious and philosophical teaching, and from the injunctions of the most minute arbitrary directions. But it is not true, as has been superficially argued, that a system of Law which, like the English, is based on custom, is merely licensed anarchy. On the contrary, it acts somewhat severely on all abnormal persons, whether they be, like thieves and murderers, mere laggards in the march of civilisation, or, on the other hand, men with advanced ideas, who make their fellow-men uncomfortable by too rapid progress. To use a very simple simile, drawn from the practice of the examiner, Law, on this principle, aims at reproducing the best works of the second class, leaving out of account the geniuses in the first rank, and the dullards in the third.

This conception of Law, it must be admitted, offers to the ruler of a country which adopts it a somewhat humble position. He cannot pose as the Heaven-sent deviser of an ideal system, which he imposes at the sword's point upon a stupid and ignorant people. But his task is, for all that, an important one, none the less important that it makes no superhuman demands upon the intellect. To put it briefly, he has to collect, to harmonise, and to formulate. It is only in quite recent years that we have known how these humble processes went on in England during the lifetime of Edward. For the first two he can hardly claim the credit; the last has won him the title of the English Justinian.

One of the essential conditions of Law is uniformity. But this condition did not exist in the England of the early twelfth century, when the royal justices first began those circuits of the shires which have been one of the most important features in the domestic history of the country for the last seven hundred years. These justices found that each county, almost each district, had its own local customs, differing, ever so slightly perhaps, but still differing, from the customs of its neighbours. As more and more cases came before the royal courts, as more and more juries delivered their verdicts in answer to royal enquiries, more and more clear did this truth become. But, on the other hand, more and more did the royal officials come to know of the customs

of the land. The clerkly skill of the Norman and the Angevin official made ever more and more plain the habits and practices of the people. Greater and greater grew the collection of Plea Rolls which accumulated in the King's Exchequer. Thus the materials for a Common Law were collected.

Then came a man with a great love of order and symmetry, a man capable of casting the work of the previous century into a compact and harmonious form. This man was Henry of Bratton, or, as we call him, "Bracton." No man could have been better fitted for the task. In spite of his borrowings from Azo, and his references to Digest and Institutes, he did not, perhaps, know very much of Roman Law. But he knew something of it, and, as a cathedral chancellor, he must also have known something of the Canon Law. But, above all, as an experienced royal justice, deeply learned in the practice of the royal courts, he had unique qualifications for his task. The vital point in his work is that, whilst occasionally borrowing the language and arrangement of the Roman Law, whilst courtly in his references to the King, and civil to his brother ecclesiastics, he draws the body and bones of his work from the records of the Bench and circuit courts. This fact, long suspected from internal evidence by intelligent students, has been finally established, within the last twenty years, by the discovery of the very materials used by Bracton in writing his great book. Having access, by virtue of his official position, to the Plea Rolls, he made from them a collection of some two thousand cases,[1] and from this collection he drew the rules which compose his book. For a century the work of assimilation had been going on throughout England, no doubt largely through the efforts of the justices themselves. A nation had been slowly born, with a consciousness of unity, and a willingness to give up minor differences for the sake of that unity. How much of the process was due to Bracton, how much to his predecessors, it is not possible to say, though, in many cases, we know

[1] The MS. containing these cases was discovered by Professor Vinogradoff in the British Museum in 1884, and has been lucidly edited by Professor Maitland, under the title of *Bracton's Notebook* (Cambridge Press, 1887).

the very names of the men to whom he attributes those decisions which have become part of English Law. But to him, at least, is due the credit of having cast into harmonious and enduring shape a huge mass of material which had been slowly accumulating. Still the different local customs lingered on, in the local courts of the manor, the borough, and the shire. But these were every day dwindling beside the vigorous growth of the royal courts; and for the royal courts there was now a Common Law, a law common to all the realm.

Bracton's book was given to the world only a few years before Edward ascended the throne. Edward's task was to give it free play. For the first time, English Law could be thought of as a whole, as a body which could grow and develop. Bracton's treatise had stated, not only the rules of conduct themselves, but the legal procedure by which they could be enforced. In so doing, it had revealed some anomalies and many imperfections. These it was the peculiar province of the King to remedy; for the courts which they affected were his courts. It is astonishing how much of Edward's celebrated legislation is concerned with matters of procedure. In the substance of the Law there were still moot points. These the King could settle, as he did in the case of *De Donis* (before noticed), where he had to take the reactionary side, and in the case of *Quia Emptores* (before noticed), where progress won a decided victory. But, perhaps unconsciously, he did the greatest thing for the future of English Law when he called into existence the National Parliament. For, better even than the judges on circuit, the elected members of Parliament knew the customs of the people, and, with the aid of their counsel and advice, future kings could formulate from time to time the rules of English Law. And thus provision was made for the perpetual continuance of that process of collection which had been begun by the King's justices, and which had to be done over and over again if Law was to keep abreast of national progress. Not until Edward is dead do we find in the statute book the honoured formula which describes the King as enacting "with the advice and consent of the lords spiritual and tem-

poral and the commons in Parliament assembled;"[1] but this consummation became clearly inevitable, from the day on which the Model Parliament assembled at Westminster in November, 1295. To explain all that it means it would be necessary to write the comparative history of the States of Western Europe, and to show how the history of England has been so different from the history of France, of Italy, of Germany, and of Spain. Briefly put, to close an already overlong chapter, it meant the creation of that national and political unity which, until quite modern days, was the highest achievement of European statesmanship; it meant the appearance on the world's horizon of that new star, which was to light the nations on their march to freedom. For the ideals and principles adopted by the English people under the rule of Edward, were not merely the ideals and principles which nerved the arm of the Puritan soldier, and raised the banner of defiance against Napoleon. They were the ideals and principles which, despite the excesses of the French Revolution, struck the fetters of tyranny from the limbs of Western Europe, and breathed the spirit of justice and freedom into the mighty Commonwealths of America and Australia.

[1] The first equivalent seems to be the preamble of the Statute of York in 1318. But the Statute of Carlisle came very near it.

6. ENGLISH LAW AND THE RENAISSANCE [1]

By Frederic William Maitland [2]

WERE we to recall to life the good Sir Robert Rede who endowed lectures in this university, we might reasonably hope that he would approve and admire the fruit that in these last years has been borne by his liberality. And then, as in private duty or private interest bound, I would have him speak thus: "Yes, it is marvellous and more than marvellous this triumph of the sciences that my modest rent-charge stimulates you annually to record; nor do I wonder less at what my lecturers have said of humane letters and the fine arts, of the history of all times and of my time, of Erasmus whom I remember, and that age of the Renaissance (as you call it) in which (so you say) I lived. But there is one matter, one science (for such we accounted it) of which they seem to have said little or nothing; and it happens to be a matter, a science, in which I used to take some interest and which I endeavoured to teach. You have not, I hope, forgotten that I was not only an English judge, but, what is more, a reader in English law." [1]

Six years ago a great master of history, whose untimely death we are deploring, worked the establishment of the Rede lectures into the picture that he drew for us of The Early Renaissance in England.[2] He brought Rede's name into contact with the names of Fisher and More. That, no doubt, is the right environment, and this pious founder's care for the humanities, for logic and for philosophy natural and

[1] The Rede Lecture for 1901 (Cambridge: University Press).

[2] A biographical note of this author is prefixed to Essay No. 1, *ante*, p. 7.

[1] Robert Rede was Autumn Reader at Lincoln's Inn in 1481, Lent Reader in 1485: *Black Book of Lincoln's Inn*, vol. i., pp. 71, 83.

[2] Creighton, *The Early Renaissance in England*, Camb. 1895.

moral was a memorable sign of the times. Nevertheless the fact remains that, had it not been for his last will and testament, we should hardly have known Sir Robert except as an English lawyer who throve so well in his profession that he became Chief Justice of the Common Bench. And the rest of the acts of Robert Rede — we might say — and the arguments that he urged and the judgments that he pronounced, are they not written in queer old French in the Year Books of Henry VII and Henry VIII? Those ancient law reports are not a place in which we look for humanism or the spirit of the Renaissance: rather we look there for an amazingly continuous persistence and development of medieval doctrine.

Perhaps we should hardly believe if we were told for the first time that in the reign of James I a man who was the contemporary of Shakespeare and Bacon, a very able man too and a learned, who left his mark deep in English history, said, not by way of paradox but in sober earnest, said repeatedly and advisedly, that a certain thoroughly medieval book written in decadent colonial French was "the most perfect and absolute work that ever was written in any human science." [3] Yet this was what Sir Edward Coke said of a small treatise written by Sir Thomas Littleton, who, though he did not die until 1481, was assuredly no child of the Renaissance.

I know that the names of Coke and Littleton when in conjunction are fearsome names or tiresome, and in common honesty I am bound to say that if you stay here you will be wearied. Still I feel that what is at fault is not my theme. A lecturer worthy of that theme would — I am sure of it — be able to convince you that there is some human interest, and especially an interest for English-speaking mankind, in a question which Coke's words suggest: — How was it and why was it that in an age when old creeds of many kinds were crumbling and all knowledge was being transfigured, in an age which had revolted against its predecessor and was fully conscious of the revolt, one body of doctrine and a

[3] Coke, Introductory Letter to Part 10 of the *Reports*, and Preface to *First Institute*.

body that concerns us all remained so intact that Coke could promulgate this prodigious sentence and challenge the whole world to contradict it?[4] I have not the power to tell and you to-day have not the time to hear that story as it should be told. A brief outline of what might be said is all that will be possible and more than will be tolerable.

Robert Rede died in January, 1519. Let us remember for a moment where we stand at that date. The Emperor Maximilian also was dying. Henry VIII was reigning in England, Francis I in France, Charles I in Spain, Leo X at Rome. But come we to jurisprudence. Is it beneath the historic muse to notice that young Mr. More, the judge's son, had lately lectured at Lincoln's Inn?[5] Perhaps so. At all events for a while we will speak of more resonant exploits. We could hardly (so I learn at second-hand) fix a better date than that of Rede's death for the second new birth of Roman law. More's friend Erasmus had turned his back on England and was by this time in correspondence with two accomplished jurists, the Italian Andrea Alciato and the German Ulrich Zäsi. They and the French scholar Guillaume Budé were publishing books which mark the beginning of a new era.[6] Humanism was renovating Roman law.

[4] Sohm, *Fränkisches Recht und römisches Recht*, 1880, p. 77: "... Thatsachen in Folge deren Renaissance an dem englischen Rechtsleben so gut wie spurlos vorüberging."

[5] Thomas More was Autumn Reader in 1511, Lent Reader in 1515: *Black Book of Lincoln's Inn*, vol. i., pp. 162, 175.

[6] Etienne Pasquier, *Recherches sur la France*, ix. 39 (cited by Dareste, *Essai sur François Hotman*, Paris, 1850, p. 17): "Le siècle de l'an mil cinq cens nous apporta une nouvelle estude de loix qui fut de faire un mariage de l'estude de droict avec les lettres humaines par un langage latin net et poly: et trouve trois premiers entrepreneurs de ce nouveau mesnage, Guillaume Budé, François, enfant de Paris, André Alciat, Italien Milanois, Udaric Zaze, Alleman né en la ville de Constance." Savigny, *Geschichte des römischen Rechts im Mittelalter*, ed. 2, vol. vi., p. 421: "Nun sind es zwei Männer, welche als Stifter und Führer der neuen Schule angesehen werden können: Alciat in Italien und Frankreich, Zasius in Deutschland. Die ersten Schriften, worin die neue Methode erscheint, fallen in das zweite Decennium des fünfzehnten [corr. sechzehnten] Jahrhunderts."

Andrea Alciato was born at Alzate near Milan in 1492, studied at Pavia and Bologna, in 1518 was called to teach at Avignon, went to Milan in 1520, to Bourges in 1528, was afterwards at Pavia, Bologna and Ferrara, died at Pavia in 1550 (Pertile, *Storia del diritto italiano*, ed. 2, vol. ii. (2), p. 428). Ulrich Zäsi was born in 1461, studied at Tübingen and at Freiburg where he became town-clerk and afterwards

The medieval commentators, the Balduses and Bartoluses, the people whom Hutten and Rabelais [7] could deride, were in like case with Peter Lombard, Duns Scotus and other men of the night. Back to the texts! was the cry, and let the light of literature and history play upon them.[8] The great Frenchmen who were to do the main part of the work and to make the school of Bourges illustrious were still young or unborn; Cujas was born in 1522; but already the advanced guard was on the march and the flourish of trumpets might be heard.[9] And then in 1520 — well, we know what hap-

professor of law, died in 1535. See Stintzing, *Ulrich Zasius*, Basel, 1857, where (pp. 162-216) the intercourse between Erasmus, Zäsi, Alciato and Budé is described. The early Italian humanists had looked on Jurisprudence with disdain and disgust. See Geiger, *Renaissance und Humanismus*, 1882, pp. 500-503; Voigt, *Die Wiederbelebung des Classischen Alterthums*, ed. 3, vol. ii., pp. 477-484. Gradually, so I understand, philologians such as Budé (d. 1540) began to discover that there was matter interesting to them in the Corpus Juris, and a few jurists turned towards the new classical learning. See Tilley, *Humanism under Francis I.*, in *English Historical Review*, vol. xv., pp. 456 ff. In 1520 Zäsi, writing to Alciato, said "All sciences have put off their dirty clothes: only jurisprudence remains in her rags." (Stintzing, *Ulrich Zasius*, p. 107.)

[7] Rabelais, *Pantagruel*, liv. ii., ch. x.: "Sottes et desraisonnables raisons et inepts opinions de Accurse, Balde, Bartole, de Castro, de Imola, Hippolytus, Panorme, Bertachin, Alexander, Curtius et ces autres vieux mastins, qui jamais n'entendirent la moindre loy des Pandectes, et n'estoient que gros veaulx de disme, ignorans de tout ce qu'est necessaire à l'intelligence des loix. Car (comme il est tout certain) ilz n'avoient cognoissance de langue ny grecque, ny latine, mais seulement de gothique et barbare. . . . Davantage, veu que les loix sont extirpées du milieu de philosophic morale et naturelle, comment l'entendront ces folz, qui ont par Dieu moins estudié en philosophie que ma mulle. Au regard des lettres d'humanité et cognoissance des antiquités et histoires ilz en estoient chargés comme un crapaud de plumes, et en usent comme un crucifix d'un pifre, dont toutesfois les droits sont tous pleins, et sans ce ne peuvent estre entenduz." W. F. Smith, *Rabelais*, vol. i., p. 257, translates the last sentence thus: "With regard to the cultivated literature and knowledge of antiquities and history, they were as much provided with those faculties as is a toad with feathers and have as much use for them as a drunken heretic has for a crucifix. . . ."

[8] Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i., p. 96: "Man wird sich bewusst, dass nicht in der überlieferten Schulweisheit das Wesen der Wissenschaft stecke; dass es auch hier gelte, dem Rufe des Humanismus 'zurück zu den Quellen!' zu folgen."

[9] The greatest names appear to be those of François Duaren or more correctly Le Douarin (1509-1559), Jacques Cujas (1522-1590), Hugues Doneau (Donellus, 1527-1592), François Baudouin (Balduinus, 1520-1573), François Hotman (1524-1591), Denis Godefroy (1549-1622), Jacques Godefroy (1587-1652). Besides these there is Charles Du Moulin (Molinaeus, 1500-1566) whose chief work, however, was done upon French customary law, and who in the study of Roman law represents a conservative tradition. (Esmein, *Histoire du droit français*, ed.

pened in 1520 at Wittenberg, but perhaps we do not often remember that when the German friar ceremoniously and contumeliously committed to the flames some venerated law-books — this, if an event in the history of religion, was also an event in the history of jurisprudence. A current of new life was thrilling through one Corpus Juris;[10] the other had been sore stricken, and, if it escaped from violent death, might perish yet more miserably of a disease that becomes dangerous at the moment when it is discovered.

A few years afterwards an enlightened young humanist, of high rank and marked ability, a man who might live to be pope of Rome or might live to be king of England, was saying much evil of the sort of law that Rede had administered and taught; was saying that a wise prince would banish this barbaric stuff and receive in its stead the civil law of the Romans. Such, so we learn from one of his friends, was the talk of Reginald Pole, and a little knowledge of what was happening in foreign countries is enough to teach us that such talk deserves attention.[11]

2, p. 776.) Dareste (*Essai sur François Hotman,* p. 2) marks the five years 1546-1551 as those in which "nos quatre grands docteurs du seizième siècle" (Hotman, Baudouin, Cujas, Doneau) entered on their careers.

[10] Viollet, *Droit civil français,* p. 25: "C'est le mouvement scientifique de la Renaissance qui, semblable à un courant, d'électricite, donne ainsi au vieux droit romain une vie nouvelle. Son autorité s'accroît par l'action d'une science, pleine de jeunesse et d'ardeur, d'une science qui, comme toutes les autres branches de l'activité humaine, s'épanouit et renaît." Flach, in *Nouvelle revue historique de droit,* vol. vii., p. 222: "En France Cujas porte à son apogée le renom de l'école nouvelle. Quelle autre préoccupation cette école pouvait-elle avoir que de faire revivre le véritable droit de la Rome ancienne, celui que la pratique avait touché de son souffle impur, celui qu'elle avait corrompu?"

[11] *Starkey's England,* Early English Text Society, 1878, pp. 192 ff.; and see *Letters and Papers, Henry VIII.,* vol. viii., pp. 81-84, and *Ibid.* vol. xii., pt. 1, pp. xxxii-xxxiv. Thomas Starkey was employed in the endeavour to win Reginald Pole to King Henry's side in the matter of the divorce from Catherine and the consequent breach with Rome. The negotiation failed, but Starkey took the opportunity of laying before Henry a dialogue which he (Starkey) had composed. The interlocutors in this dialogue were Pole and the well-known scholar Thomas Lupset, and Pole was represented as expounding his opinions touching political and ecclesiastical affairs. How far at all points Starkey fairly represented Pole's views may be doubted. Still we have respectable evidence that Pole had talked in the strain of the following passage, and at any rate Starkey thought that in King Henry's eyes he was befriending Pole by making him speak thus.

"Thys ys no dowte but that our law and ordur thereof ys over-

This was the time when Roman law was driving German law out of Germany or forcing it to conceal itself in humble forms and obscure corners.[12] If this was the age of the Renaissance and the age of the Reformation, it was also the age of the "Reception." I need not say that the Reception

[12] For a general view of the Reception in Germany with many references to other books, see Schröder, *Deutsche Rechtsgeschichte*, ed. 2, pp. 743 ff.; ed. 3, pp. 767 ff.

confuse. Hyt ys infynyte, and without ordur or end. Ther ys no stabyl grounde therin, nor sure stay; but euery one that can coloure reson makyth a stope to the best law that ys before tyme deuysyd. The suttylty of one sergeant schal enerte [enerve?] and destroy al the jugementys of many wyse men before tyme receyuyd. There is no stabyl ground in our commyn law to leyne vnto. The jugementys of yerys [*i. e.* the Year Books] be infynyte and ful of much controuersy; and, besyde that, of smal authoryte. The jugys are not bounden, as I vnderstond, to folow them as a rule, but aftur theyr owne lyberty they haue authoryte to juge, accordyng as they are instructyd by the sergeantys, and as the cyrcumstance of the cause doth them moue. And thys makyth jugementys and processe of our law to be wythout end and infynyte; thys causyth sutys to be long in decysyon. Therefor, to remedy thys mater groundly, hyt were necessary, in our law, to vse the same remedy that Justynyan dyd in the law of the Romaynys, to bryng thys infynyte processe to certayn endys, to cut away thys long lawys, and, by the wysdome of some polytyke and wyse men, instytute a few and bettur lawys and ordynancys. The statutys of kyngys, also, be ouermany, euen as the constytutyonys of the emperorys were. Wherefor I wold wysch that al thes lawys schold be brought into some smal nombur, and to be wryten also in our mother tong, or els put into the Latyn, to cause them that studye the cyuyle law of our reame fyrst to begyn of the Latyn tong, wherin they myght also afturward lerne many thyngys to helpe thys professyon. Thys ys one thyng necessary to the educatyon of the nobylyte, the wych only I wold schold be admyttyd to the study of thys law. Then they myght study also the lawys of the Romaynys, where they schold see al causys and controuersys decyded by rulys more conuenyent to the ordur of nature then they be in thys barbarouse tong and Old French, wych now seruyth to no purpos els. Thys, Mastur Lvpset, ys a grete blote in our pollycy, to see al our law and commyn dyscyplyne wryten in thys barbarouse langage, wych, aftur when the youth hath lernyd, seruyth them to no purpos at al; and, besyde that, to say the truth, many of the lawys themselfys be also barbarouse and tyrannycal, as you haue before hard. [Here follows an attack on primogeniture and entail.] The wych al by thys one remedy schold be amendyd and correct, yf we myght induce the hedys of our cuntrey to admyt the same: that ys, to receyue the cyuyle law of the Romaynys, the wych ys now the commyn law almost of al Chrystyan natyonys. The wych thyng vndowtydly schold be occasyon of infynyte gudness in the ordur of our reame, the wych I coud schow you manyfestely, but the thyng hyt selfe ys so open and playn, that hyt nedyth no declaratyon at al: for who ys so blynd that seth not the grete schame to our natyon, the grete infamy and rote that remeynyth in vs, to be gouernyd by the lawys gyuen to vs of such a barbarouse natyon as the Normannys be? Who ys so fer from rayson that consyderyth not the tyrannycal and barbarouse instytutionys, infynyte ways left here among vs, whych al schold be wypt

— the reception of Roman law — plays a large part in modern versions of German history, and by no means only in such as are written by lawyers. I need not say that it has been judged from many different points of view, that it has been connected by some with political, by others with relig-

away by the receyuyng of thys wych we cal the veray cyuyle law; wych ys vndowtydly the most auncyent and nobyl monument of the Romaynys prudence and pollycy, the wych be so wryte wyth such grauyte, that yf Nature schold herselfe prescrybe partycular meanys wherby mankynd schold obserue hyr lawys, I thynke sche wold admyt the same: specyally, yf they were, by a lytyl more wysedome, brought to a lytyl bettur ordur and frame, wych myght be sone downe and put in effect. And so ther aftur that, yf the nobylyte were brought vp in thys lawys vndoubtydly our cuntrey wold schortly be restoryd to as gud cyuylyte as there ys in any other natyon; ye, and peradventure much bettur also. For though thes lawys wych I haue so praysyd be commyn among them, yet, bycause the nobylyte ther commynly dothe not exercyse them in the studys thereof, they be al applyd to lucur and gayne, bycause the popular men wych are borne in pouerty only doth exercyse them for the most parte, wych ys a grete ruyne of al gud ordur and cyuylyte. Wherefor, Master Lvpste, yf we myght bryng thys ij. thyngys to effecte — that ys to say, to haue the cyuyle law of the Romaynys to be the commyn law here of Englond with vs; and, secondary, that the nobylyte in theyr youth schold study commynly therin — I thynk we schold not nede to seke partycular remedys for such mysordurys as we haue notyd before; for surely thys same publyke dyscyplyne schold redresse them lyghtly; ye, and many other mow, the wych we spake not yet of at al."

Lupset thereupon objects that, seeing we have so many years been governed by our own law, it will be hard to bring this reform to pass. Pole replies that the goodness of a prince would bring it to pass quickly: "the wych I pray God we may onys see."

The Pole of the Dialogue wished to make the power to entail lands a privilege of the nobility. A project of this kind had been in the air: perhaps in King Henry's mind. See *Letters and Papers, Henry VIII.*, vol. iv., pt. 2, p. 2693 (A. D. 1529): "Draft bill . . . proposing to enact that from 1 Jan. next all entails be annulled and all possessions be held in fee simple. . . . The Act is not to affect the estates of noblemen within the degree of baron." This is one of the proposals for restoring the king's feudal revenue which lead up to the Statute of Uses: an Act whose embryonic history has not yet been written, though Dr. Stubbs has thrown out useful hints. (*Seventeen Lectures*, ed. 3, p. 321.)

When Pole left England in 1532 he went to Avignon where Alciato had lately been lecturing and became for a short while a pupil of Giovanni Francesco Ripa (Zimmermann, *Kardinal Pole*, 1893, p. 51), who was both canonist and legist. Whether at any time Pole made a serious study of the civil law I do not know. In 1534 Pole and Starkey were together at Padua; Pole was studying theology, Starkey the civil law. Starkey in a letter says "Francis Curtius is dead, to the grief of those who follow the doctrine of Bartholus." Perhaps we may infer from this that Starkey was in the camp of the Anti-Bartolists (*Letters and Papers, Henry VIII.*, vol. vii., p. 331). In 1535 he says that he has been studying the civil law in order to form "a better judgment of the politic order and customs used in our country" (*Ibid.* vol. viii., p. 80).

ious and by yet others with economic changes. Nor need I say that of late years few writers have had a hearty good word for the Reception. We have all of us been nationalists of late. Cosmopolitanism can afford to await its turn.[13]

Then we observe that not long after Pole had been advocating a Reception, his cousin King Henry, whose word was law supreme in church and state, prohibited the academic study of one great and ancient body of law — the canon law[14] — and encouraged the study of another — the civil

[13] For a moderate defence of the Reception, see Windscheid, *Pandektenrecht*, ed. 7, vol. i., p. 23 ff. (§ 10). Ihering appeals from Nationality to Universality (cosmopolitanism); *Geist des römischen Rechts*, ed. 5, vol. i., p. 12: "So lange die Wissenschaft sich nicht entschliesst, dem Gedanken der Nationalität den der Universalität als gleichberechtigten zur Seite zu setzen, wird sie weder im Stande sein die Welt, in der sie selber lebt, zu begreifen, noch auch die geschehene Reception des römischen Rechts wissenschaftlich zu rechtfertigen." The following sentences may, I believe, be taken as typical of much that has been written of late years. Brunner, *Grundzüge der deutschen Rechtsgeschichte*, 1901, p. 231: "Allein was stets Tadel und Vorwurf hervorrufen wird, ist die Art, wie die Rezeption . . . durchgeführt wurde. Ein nationales Unglück war jenes engherzige Ignorieren des deutschen Rechts, jenes geistlose und rein äusserliche Aufpfropfen römischer Rechtssätze auf einheimische Verhältnisse, die Unkenntnis des Gegensatzes zwischen diesen und dem römischen Rechte, welche taub machte gegen die Wahrheit, dass kein Volk mit der Seele eines anderen zu denken vermag."

[14] Injunctions of 1535, *Stat. Acad. Cantab.* p. 134: "Quare volumus ut deinceps nulla legatur palam et publice lectio per academiam vestram totam in iure canonico sive pontificio nec aliquis cuiuscunque conditionis homo gradum aliquem in studio illius iuris pontificii suscipiat aut in eodem inposterum promoveatur quovis modo." See Mullinger, *Hist. Univ. Camb.* vol. i., p. 630; Cooper, *Annals of Cambridge* vol. i., p. 375; and for Oxford, Ellis, *Original Letters*, Ser. II., vol. ii., p. 60. In September 1535 Legh and Ap Ryce declare that the canon laws are "profligate out of this realm." (*Letters and Papers, Henry VIII.*, vol. ix., p. 138.)

Despite a doubt suggested by Stubbs (*Seventeen Lectures*, ed. 3, p. 368), I cannot believe that the slightest hint of a degree in canon law lurks at Cambridge in the title "Legum Doctor" (LL. D.): not even "a shadowy presentment of the double honour." See E. C. Clark, *Cambridge Legal Studies*, 1888, pp. 56 ff., where that title is well explained. On the continent a settled usage contrasted the *doctores legum* and the *doctores decretorum*. See e. g. Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i., p. 25: "In Italien hatten die Legisten und Decretisten verschiedene Schulen gebildet. In Deutschland waren sie zwar zu einer Facultät vereinigt, bildeten jedoch lange Zeit zwei getrennte Abtheilungen, von denen jede ihre eigenen akademischen Grade ertheilte. Neben einander erscheinen die *Doctores Legum* und *Doctores Decretorum*, bis seit dem Anfang des 16. Jahrhunderts diese Scheidung schwindet und die *Doctores utriusque iuris* immer häufiger und endlich zur Regel werden."

law — by the foundation of professorships at Oxford and Cambridge. We observe also that his choice of a man to fill the chair at Cambridge fell on one who was eminently qualified to represent in his own person that triad of the three R's — Renaissance, Reformation and Reception. We know Professor Thomas Smith as a humanist, an elegant scholar with advanced opinions about the pronunciation of Greek. We know the Reverend Thomas Smith as a decided, if cautious, protestant whose doings are of some interest to those who study the changeful history of ecclesiastical affairs. Then we know Dr. Thomas Smith as a doctor in law of the university of Padua, for with praiseworthy zeal when he was appointed professor at Cambridge he journeyed to the fountain-head for his Roman law and his legal degree.[15] Also he visited those French universities whence a new jurisprudence was beginning to spread. He returned to speak to us in two inaugural lectures of this new jurisprudence: to speak with enthusiasm of Alciatus and Zasius:[16] to speak hopefully of the future that lay before this conquering science — the future that lay before it in an England fortunately ruled by a pious, wise, learned and munificent Prince. Then in Edward VI's day Thomas Smith as a Master of Requests was doing justice in a court whose procedure was described as being "altogether according to the process of summary causes in the civil law" and at that moment this Court of Requests and other courts with a like procedure seemed to have time, reason and popularity upon their side.[17] Alto-

[15] See Mr. Pollard's life of Smith in *Dict. Nat. Biog.* Some important facts, especially about his ordination, were revealed by J. G. Nichols, in *Archaeologia*, xxxviii. 98-127.

[16] Smith says that when he first became a member of the senate at Cambridge he bought the Digest and Code and certain works of Alciatus, Zasius and Ferrarius. (See Mullinger, *History of the University of Cambridge*, vol. ii., p. 130.) Ferrarius is, I suppose, Arnaud Ferrier, the master of Cujas. Mr. Mullinger (p. 126) suggests that the Spaniard Ludovico Vives while resident at Oxford may have propagated dissatisfaction with the traditional teaching of Roman law.

[17] *Select Cases in the Court of Requests* (Selden Society), 1898, p. cxxiii. Mr. Leadam's introduction to this volume contains a great deal of new and valuable matter concerning this important court. The title of the "masters of requests" seems certainly to come hither from France. Just at this time there was a good deal of borrowing in these matters: witness the title of the "secretaries of state," which, it is said, spreads outwards from Spain to make the tour of the world.

gether, the Rev. Prof. Dr. Sir Thomas Smith, Knt., M. P., Dean of Carlisle, Provost of Eton, Ambassador to the Court of France and Secretary of State to Queen Elizabeth was a man of mark in an age of great events. Had some of those events been other than they were, we might now be saying of him that he played a prominent part in Renaissance, Reformation and Reception, and a part characteristic of that liberal and rational university of which he was professor, public orator and vice-chancellor.[18]

Some German historians, as you are aware, have tried

[18] Of Smith's two orations there is a copy in Camb. Univ. Libr. *Baker MSS.* xxxvii. 294, 414. Mr. Mullinger (*Hist. Univ. Cambr.*, vol. ii., p. 127) has given an excellent summary. The following passage is that in which the Professor approaches the question whether in England there is a career open to the civilian. He has been saying that we ought not to study merely for the sake of riches. "Tamen si qui sint qui hoc requirant, sunt archiva Londini, sunt pontificia fora, forum est praefecti quoque classis, in quibus proclamare licet et vocem vendere; est scriptura; singuli pontifices cancellarios suos habent et officiales et commissarios, qui propter civilis et pontificii iuris professionem in hunc locum accipiuntur." The orator proceeds to ask whether there is any youth who ungratefully thinks that proficiency in legal science will not find an adequate reward. "In quo regno aut in cuius regis imperio tam stulta illum opinio tenebit? In hoccine nobilissimi atque invictissimi nostri principis Henrici octavi regno, cuius magnificentia in bonas literas, studiumque in literatos, omnium omnis memoriae principum facta meritaque superavit, cuius ingentia in academias beneficia, licet nulla unquam tacebit posteritas, tamen omni celebratione mariora reperientur. Cum strenue laboraveris et periculum ingenii tui feceris, teque non lusisse operam sed dignum aliquo operae precio et honore ostenderis, cur dejices animum? Cur desperatione conflictabis? Cur de tanto fautore ingeniorum, tam insigni bonae indolis exploratore, tam potenti Rege, tam munifico, tam liberali et egregio amatore suorum demisse viliterque sentias?"

There follows much more flattery of the king as a patron of learning of every kind. "Iuris quidem civilis consulti facultas in hac republica cum ad multos usus pernecessaria est, tum a principe nostro nequaquam negligi aut levem haberi, vel hoc argumento esse potest, quod tam amplo planeque regio stipendio et meam hic apud vos mediocritatem et alium Oxonii disertum ac doctum virum ius hoc civile praelegere profiterique voluit." And the study of the civil law is the high road to diplomatic service. "Ius vero civile sic est commune ut cum ex Anglia discesseris, nobiles, ignobiles, docti, indocti, sacerdotes etiam ac monachi cum aliquod specimen eruditionis videri volunt exhibuisse, nihil fere aliud perstrepunt quam quod ex hoc iure civili et pontificio sit depromptum." The king has wisely employed civilians in his many legations. There follow compliments paid to Stephen Gardiner, Thomas Thirlby, William Paget, Thomas Wriothesley, and Thomas Legh. On the whole, the professor can hold out to his pupils the prospect of diplomatic employment, of masterships in the chancery ("sunt archiva Londini"), of practice in the ecclesiastical courts and the court of admiralty, and besides this they are to remember that the king is a great patron of learning. I do

to find or to fashion links that will in some direct and obvious manner connect the Reformation and the Reception. In one popular version of the tale protestantism finds a congenial ally in the individualism and capitalism of the pagan Digest.[19] In truth I take it that the story is complex. Many currents and cross-currents were flowing in that turbid age. It so happens that in this country we can connect with the heresiarchal name of Wyclif a proposal for the introduction of English law, as a substitute for Roman law, into the schools of Oxford and Cambridge.[20] On the other hand, the desire

not see any hint that knowledge of Roman law will help a man at the bar of the ordinary English courts.

For more of the attempt to put new life into the study of Roman law at Cambridge, see Mullinger, *op. cit.*, vol. ii., pp. 132 ff. Though Somerset desired to see a great civil law college which should be a nursery for diplomatists, the Edwardian or Protestant Reformation of the church was in one way very unfavourable to the study of the civil law. Bishoprics and deaneries were thenceforth reserved for divines, and thus what had been the prizes of his profession were placed beyond the jurist's reach. Dr. Nicholas Wotton (d. 1567), dean of Canterbury and York, may be regarded as one of the last specimens of an expiring race. Men who were not professionally learned, men like Sir Francis Bryan (d. 1550) and Sir Thomas Wyatt (d. 1542), had begun to compete with the doctors for diplomatic missions and appointments. Also the chancellorship of the realm had come within the ambition of the common lawyer, and (though Bishop Goodrich may be one instance to the contrary) the policy which would commit the great seal to the hands of a prelate was the policy which would resist or reverse ecclesiastical innovations. Even the mastership of the rolls, which had been held by doctors, of Padua and Bologna, fell to the common lawyers. Thomas Hannibal, master of the rolls (1523-1527), must, one would think, have been an Italian, as were the king's Latin secretaries Andrea Ammonio and Pietro Vannes.

[19] See *Janssen, Geschichte des deutschen Volkes,* vol. i., pp. 471-501, where the cry of "heathenry!" is raised against the civil law. Janssen's attempt to praise the canon law as radically Germanic while blaming the "absolutistic" tendencies of the civil law seems strange. Was not the canon law, with its pope, *qui omnia iura habet in scrinio pectoris sui,* absolutistic enough?

[20] Wyclif, *Tractatus de officio regis,* Wyclif Society, 1887, pp. 56, 193, 237, 250: "Leges regni Anglie excellunt leges imperiales cum sint pauce respectu earum, quia supra pauca principia relinquunt residuum epikerie [=ἐπιείκεια] sapientum. . . . Non credo quod plus viget in Romana civilitate subtilitas racionis sive iusticia quam in civilitate Anglicana. . . . Non pocius est homo clericus sive philosophus in quantum est doctor civilitatis Romane quam in quantum est iusticiarius iuris Anglicani. . . . Unde videtur quod si rex Anglie non permitteret canonistas vel civilistas ad hoc sustentari de suis elemosinis vel patrimonio crucifixi ut studeant tales leges . . . non dubium quin clerus foret utilior sibi et ad ecclesiasticam promocionem humilior ex noticia civilitatis proprie quam ex noticia civilitatis duplicis aliene." By "the patrimony of the crucified" Wyclif means ecclesiastical revenues, which

for a practical Reception of the civil law is ascribed to the future cardinal, who in his last days reconciled England for a moment, not with the Rome of the Digest, but with the Rome of the Decretals. And by the way we may notice that when the cardinal was here upon his reconciliatory errand he had for a while as his legal adviser one of the most learned lawyers of that age, the Spaniard Antonio Agustin. But we in England take little notice of this famous man, who, so foreigners assure us now-a-days, began the historical study of the canon law and knew more about the false Isidore than it was comfortable for him to know.[1] Our Dr. Smith was

some of the bishops have been using in the endowment of legal studies at the universities: e. g. Bishop Bateman at Cambridge.

Wyclif, *Select English Works*, ed. Arnold, vol. iii., p. 326: "It were more profit bope to body and soule þat oure curatis lerneden and tauȝten many of þe kyngis statutis, þan lawe of þe emperour. For oure peple is bounden to þe kyngis statutis and not to þe emperours lawe, but in as moche as it is enclosid in Goddis hestis. Þanne moche tresour and moch tyme of many hundrid clerkis in unyversite and oþere placis is foule wastid aboute bookis of þe emperours lawe and studie about hem. . . . It semeþ þat curatis schulden raþere lerne and teche þe kyngis statutis, and namely þe Grete Chartre, þan þe emperours lawe or myche part of the popis. For men in oure rewme ben bounden to obeche to þe kyng and his riȝtful lawes and not so to þe emperours; and þei myȝtten wonder wel be savyd, þouȝ many lawes of þe pope had nevere be spoken, in þis world ne þe toþere."

Wyclif, *Unprinted English Works*, Early English Text Society, 1880, p. 157: "Þe fyue and twentiþe errour: þei chesen newe lawis maad of synful men and worldly and couetyse prestis and clerkis . . . for now heþenne mennus lawis and world clerkis statutis ben red in vnyuersitees, and curatis lernen hem faste wiþ grete desire, studie and cost . . . *Ibid.* p. 184: . . . lawieris maken process bi sotilte and cauyllacions of lawe cyule, þat is moche he ene mennus lawe, and not accepten the forme of þe gospel, as ȝif þe gospel were no so good as paynymes lawe." It is interesting to see Janssen's denunciation of Roman law as Pagan thus forestalled by the great heretic, in whose eyes the Decretals were but little, if at all, better than the Digest.

[1] For Antonio Agustin (born 1517, bishop of Alife 1556, bishop of Lerida 1561, archbishop of Tarragona 1576, died 1586) see Schulte, *Geschichte der Quellen und Literatur des canonischen Rechts*, vol. iii., p. 723; Maasen, *Geschichte der Quellen des canonischen Rechts*, vol. i., pp. xix ff. His stay in England is attested in the *Venetian Calendars*, 1555-6, pp. 20, 24, 32, 34, 56, 166. See also *Ibid.*, 1556-7, p. 1335. See also the funeral oration by And. Schott suffixed to Ant. Augustini *De emendatione Gratiani dialogorum libri duo*, Par. 1607, p. 320: "Iulius tertius P. M. . . . adeo Antonium dilexit ut et intimis consiliis adhibuerit, legatumque summa cum auctoritate in Britanniam insulam opibus florentissimam miserit, cum Rex vere Catholicus Philippus secundus Mariam reginam, Catholicorum regum Ferdinandi et Isabellae neptem, duxit uxorem. . . . Anno 1555 revertit ex Anglia Romam Augustinus." Apparently he was sent, not merely in order that he might congratulate Philip and Mary, but also that "tanquam iurisconsultus legato adesset"

protestant enough; but his Oxford colleague Dr. John Story showed zeal in the cremation of protestants, helped Alva (so it is said) to establish the Inquisition in the Netherlands, was hanged as a traitor at Tyburn in 1571 and beatified as a martyr at Rome in 1886. Blessed John Story was zealous; but his permanent contribution to the jurisprudence of his native land was (so far as I am aware) an early precedent for the imprisonment of a disorderly member by the House of Commons, and a man may be disorderly without being a jurist.[22] Ulrich Zäsi went part of the way with Luther; but then stayed behind with Erasmus.[23] He had once compared the work that he was doing for the Corpus Juris with the work that Luther was doing for the Bible.[24] The great Frenchmen answered the religious question in different ways. One said "That has nothing to do with the praetor's edict." His rivals charged him with a triple apostasy.[25] Three or

(Schulte, *op. cit.*, p. 724). He is charged by modern historians with not having spoken plainly all that he knew about the origin of the Pseudo-Isidorian decretals. England may have contributed a little towards the explosion of the great forgery by means of books that were lent to the Magdeburg Centuriators by Queen Elizabeth and Abp. Parker. See *Foreign Calendar*, 1561-2, pp. 117-9.

[22] See Mr. Pollard's life of Story in *Dict. Nat. Biog.* See also Dyer's *Reports*, f. 300. On his arraignment for high treason Story ineffectually pleaded that he had become a subject of the king of Spain.

[23] See Stintzing, *Ulrich Zasius*, pp. 216 ff.

[24] Ranke, *History of the Reformation in Germany* (transl. Austin), vol. ii., pp. 97-8.

[25] The *Nihil hoc ad edictum praetoris!* is currently ascribed to Cujas, but the ultimate authority for the story I do not know. See Brissaud, *Histoire du droit français*, p. 355: "La science laïque déclarait par la bouche d'un de ses plus grands représentants qu'elle n'était plus l'humble servante de la théologie; elle affirmait sa sécularisation." It seems that Cujas ("wie beinahe alle Rechtsgelehrten seiner Zeit") at first sided with the Reformers, but that he afterwards, at least outwardly, made his peace with the Catholic church (Spangenberg, *Jacob Cujas und seine Zeitgenossen*, Leipz. 1822, p. 162; Haag, *La France protestante*, ed. 2, vol. iv., col. 957-970). Doneau was a Calvinist; driven from France by Catholics and from Heidelberg by Lutherans, he went to Leyden and ultimately to Altdorf. Hotman was a Calvinist, intimately connected with the church of Geneva. Baudouin was compelled to leave France for Geneva, whence he went to Strassburg and Heidelberg; but he quarrelled with Calvin and was accused of changing his religion six times. Charles Du Moulin also had been an exile at Tübingen. It is said that after a Calvinistic stage he became a Lutheran; on his death-bed he returned to Catholicism: such at least was the tale told by Catholics. (See Brodeau, *Le vie de Maistre Charles Du Molin*, Paris, 1654; Haag, *La France protestante*, ed. 2, vol. v., col. 783-789.) To say the least, he had been "ultra-gallican." (Schulte, *Geschichte der Quellen des*

four of them were stout huguenots, and we must not forget that Calvin and Beza had both been at Bourges and had both studied the civil law. Melanchthon also was a warm admirer of Roman jurisprudence.[26] It is reported that Elizabeth invited Francis Hotman to Oxford.[27] He was protestant enough, and fierce enough to exchange letters with a tiger.[28]

canonischen Rechts, vol. iv., p. 251.) Of Le Douarin also it is said "il était réformé de cœur" (*La France protestante*, ed. 2, vol. v., col. 508). "Die grosse Mehrzahl der hervorrogenden Juristen bekannte sich mit grösserer oder geringerer Entschiedenheit zur Partei der Hugenotten" (Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i., p. 372).

[26] Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i., p. 284.

[27] Elizabeth's invitation to Hotman is mentioned in the *Elogium* of him prefixed to his *Opera* (1599), p. viii, and in Dareste's essay (p. 5). His son John spent some time at Oxford. In 1583 John tells his father that at Oxford he has plenty of time for study "quamvis hic miris modis frigeat iuris civilis studium et mea hac in re opera nemini grata possit esse in Anglia" (*Hotomanorum Epistolae*, Amstd., 1620, p. 325). In 1584 John was consulted along with Alberigo Gentili by the English government in the Mendoza case (Holland, *Albericus Gentilis*, pp. 14, 15). There is nothing improbable in the story that Francis was offered a post at Oxford. He must have been well known to Cecil. In 1562 he was active in bringing Condé into touch with Elizabeth and so in promoting the expedition to Havre. Condé's envoy brought to Cecil a letter of introduction from Hotman (*Foreign Calendar*, 1561-2, p. 601). Baudouin also at this time was making himself useful to the English government. (See e. g. *Foreign Calendar*, 1558-9, p. 173; 1561-2, pp. 60, 367, 454, 481, 510.) It has been said that Queen Elizabeth spoke of Charles Du Moulin as her kinsman (Brodeau, *Vie de C. Du Molin*, p. 4). Whether in the pedigree of the Boleyns there is any ground for this story I do not know. See *La France protestante*, ed. 2, vol. v., col. 783. Sir Thomas Craig, who is an important figure in the history of Scotch law, sat at the feet of Baudouin, and Edward Henryson, who in 1566 became a lord of session, had been a professor at Bourges (*Dict. Nat. Biog.*).

[28] The *Epistre adressée au tygre de la France*, a violent invective against the Cardinal of Lorraine, still finds admirers among students of French prose. Apparently Hotman would have been the last man to preach a Reception of Roman law in England. Being keenly alive to the faults of Justinian's books, he resisted the further romanization of French law, demanded a national code, admired the English limited monarchy, and by his *Franco-Gallia* made himself in some sort the ancestor of the "Germanists." Some of these "elegant" French jurists were so much imbued with the historical spirit that in their hands the study of Roman law became the study of an ancient history. The following words cited and translated by Dareste from Baudouin (*François Hotman*, p. 19) have a wonderfully modern sound: "Ceux qui ont étudié le droit auraient pu trouver dans l'histoire la solution de bien des difficultés, et ceux qui ont écrit l'histoire auraient mieux fait d'étudier le développement des lois et des institutions, que de s'attacher à passer en revue les armées, à décrire les camps, à raconter les batailles, à compter les morts." "*Sine historia caecam esse iurisprudentiam*, disait Baudouin" (Brissaud, *Histoire du droit français*, p. 349).

He is best known to English law-students as the man who spoke light words of Littleton and thus attracted Coke's thunderbolt;[29] but if he thought badly of Littleton, he thought badly of Tribonian also, and would have been the last man to preach a Reception. Professor Alberigo Gentili of Oxford, he too was protestant enough and could rail at the canonists by the hour; but then he as an Italian had a bitter feud with the French humanizers, and stood up for the medieval gloss.[30]

Plainly the story is not simple and we must hurry past it. Still the perplexity of detail should not obscure the broad truth that there was pleasant reading in the Byzantine Code

[29] Coke, Introductory Letter to Part 10 of the *Reports*, and Preface to Coke upon Littleton (*First Institute*). The words of Hotman which moved Coke to wrath will be found in *De verbis feudalibus commentarius* (F. Hotmani *Opera*, ed. 1599, vol. ii., p. 913) s. v. *feodum*. Hotman remarks that the English use the word *fee* (longissime tamen a Langobardici iuris ratione et instituto) to signify "praedia omnia quae perpetuo iure tenentur." He then adds that Stephanus Pasquerius (the famous Étienne Pasquier) had given him Littleton's book: "ita incondite, absurde et inconcinne scriptum, ut facile appareat verissimum esse quod Polydorus Virgilius in Anglica Historia de iure Anglicano testatus est, stultitiam in eo libro cum malitia et calumniandi studio certare." To a foreign "feudist" Littleton's book would seem absurd enough, because in England the *feudum* had become the general form in which all land-ownership appeared. Brunner (*Deutsche Rechtsgeschichte*, vol. ii., p. 11) puts this well: "Wo jedes Grundeigentum sich in Lehn verwandelt, wird das Lehn, wie die Entwicklung des englischen Rechtes zeigt, schliesslich zum Begriff des Grundeigentums."

I have not found in Polydore Virgil's History anything about Littleton. There is a passage however in lib. ix. (ed. Basil. 1556, p. 154) in which he denounces the unjust laws imposed by William the Conqueror and (so he says) still observed in his own day: "Non possum hoc loco non memorare rem tametsi omnibus notam, admiratione tamen longe dignissimam, atque dictu incredibilem: eiusmodi namque leges quae ab omnibus intelligi deberent, erant, ut etiam nunc sunt, Normanica lingua scriptae, quam neque Galli nec Angli recte callebant." Among the badges of Norman iniquity is trial by jury, which Polydore cannot find in the laws of Alfred. This Italian historiographer may well be speaking what was felt by many Englishmen in Henry VIII's day when he holds up to scorn and detestation "illud terribile duodecim virorum iudicium." Fisher and More were tried by jury.

[30] For Gentili see Holland, *Inaugural Lecture*, 1874, and *Dict. Nat. Biog.* For his attack on canon law see *De nuptiis*, lib. i., c. 19. For his quarrel with the "elegant" Frenchmen, see *De iuris interpretibus dialogi sex*. The defenders of the new learning and the *mos Gallicus*, as it was called, threw at their adversaries the word "barbarian"; the retort of the conservative upholders of the *mos Italicus* was "mere grammarian." By expelling such men as the Gentilis, Italy forfeited her pre-eminence in the world of legal study. Nevertheless it is said that both in France and Germany the practical Roman law of the courts

for a king who wished to be monarch in church as well as state: pleasanter reading than could be found in our ancient English law-books. Surely Erastianism is a bad name for the theory that King Henry approved: Marsilianism seems better, but Byzantinism seems best.[31] A time had come when, medieval spectacles being discarded, men could see with the naked eye what stood in the Code and Novels of Constantinople. In 1558 on the eve of an explosive Reformation "the Protestants of Scotland," craving "remedy against the tyranny of the estate ecclesiastical," demanded that the controversy should be judged by the New Testament, the ancient fathers "and the godly approved laws of Justinian the

was for a long time the law of the "Bartolist" tradition. Esmein (*Histoire du droit français*, ed. 2, p. 776) says: "Cujas exerça sur le développement des théories de droit romain suivies en France une action beaucoup moins puissante que Du Moulin, et la filiation du romaniste Du Moulin n'est pas niable; par la forme comme par le fond, c'est le dernier des grands Bartolistes."

[31] Thomas Starkey, when he was trying to win over Reginald Pole to Henry's side, wrote thus: "Thes thyngs I thynke schal be somewhat in your mynd confermyd by the redyng of Marsilius, whome I take, though he were in style rude, yet to be of grete iugement, and wel to set out thys mater, both by the authoryte of scripture and good reysonys groundyd in phylosophy, and of thys I pray you send me your iugement." (*Starkey's England*, Early Engl. Text Soc. 1878, p. xxv.) Chapuis (the imperial ambassador at Henry's court) to Charles V, 3 Jan. 1534 (*Letters and Papers of Henry VIII.*, vol. vii., p. 6): "The little pamphlet composed by the Council, which I lately sent to your Majesty, is only a preamble and prologue of others more important which are now being printed. One is called *Defensorium Pacis*, written in favour of the emperor Loys of Bavaria against apostolic authority. Formerly no one dared read it for fear of being burnt, but now it is translated into English so that all the people may see and understand it." William Marshall to Thomas Cromwell (*Ibid.*, p. 178): "Whereas you promised to lend me £20 towards the printing of *Defensor Pacis*, which has been translated this twelve-month, but kept from the press for lack of money, in trust of your offer I have begun to print it. I have made an end of the Gift of Constantine and of Erasmus upon the Creed." The "Gift of Constantine" must be the famous treatise of Laurentius Valla. The translation of Marsilius appeared on 27 July, 1535 (*Dict. Nat. Biog.* s. n. William Marshall). In October twenty-four copies had been distributed among the Carthusians in London (*Letters and Papers*, vol. ix., p. 171). In 1536 Marshall complained that the book had not sold, though it was the best book in English against the usurped power of the bishop of Rome (*Ibid.*, vol. xi., p. 542). As to Byzantinism, if it be an accident it is a memorable accident that the strongest statement of King Henry's divinely instituted headship of the church occurs in a statute which enables unordained doctors of the civil (not canon) law to exercise that plenitude of ecclesiastical jurisdiction which God has committed to the king (*Stat.* 37 Hen. VIII., c. 17).

emperor."[32] University-bred jurists, even such as came from an oldish school, were very serviceable to King Henry in the days of the great divorce case and the subsequent quarrel with the papacy. Tunstall, Gardiner, Bonner, Sampson and Clerk, to say nothing of the Leghs and Laytons, were doctors of law and took their fees in bishoprics and deaneries.[33] Certainly they were more conspicuous and probably they

[32] *Foreign Calendar*, 1558-9, p. 8. This seems to mean that the normal and rightful relation of church to state is that which is to be discovered in Justinian's books. If so, "the Protestants of Scotland" soon afterwards changed their opinions under the teaching of Geneva and claimed for "the estate ecclesiastical" a truly medieval independence.

[33] The following facts are taken from the *Dictionary of National Biography*. Cuthbert Tunstall (afterwards bishop of Durham) "graduated LL. D. at Padua." Stephen Gardiner (afterwards bishop of Winchester) of Trinity Hall, Cambridge, "proceeded doctor of the civil law in 1520 and of the canon law in the following year. . . . In 1524 he was appointed one of Sir Robert Rede's lecturers in the University." Edmund Bonner of Broadgate Hall, Oxford, "in 1519 he took on two successive days (12 and 13 June) the degrees of bachelor of civil and of canon law. . . . On 12 July, 1525, he was admitted doctor of civil law." Thomas Thirlby (afterwards bishop of Ely) of Trinity Hall, Cambridge, "graduated bachelor of the civil law in 1521 . . . and proceeded doctor of the civil law in 1528 and doctor of the canon law in 1530." Richard Sampson (afterwards bishop of Lichfield) of Trinity Hall, Cambridge, "proceeded B. C. L. in 1505. Then he went for six years to Paris and Sens and returning proceeded D. C. L. in 1513." John Clerk (afterwards bishop of Bath and Wells, Master of the Rolls), "B. A. of Cambridge 1499 and M. A. 1502, studied law and received the doctor's degree at Bologna." Richard Layton (afterwards dean of York) "was educated at Cambridge, where he proceeded B. C. L. in 1522 and afterwards LL. D." Thomas Legh of King's College (?), Cambridge, "proceeded B. C. L. in 1527 and D. C. L. in 1531." Instances of legal degrees obtained in foreign universities are not very uncommon. John Taylor, Master of the Rolls in 1527, "graduated doctor of law at some foreign university, being incorporated at Cambridge in 1520 and at Oxford in 1522." James Denton, dean of Lichfield, proceeded B. A. in 1489 and M. A. in 1492 at Cambridge. "He subsequently studied canon law at Valencia in which faculty he became a doctor of the university there." (For an earlier instance, that of Thomas Alcock of Bologna, see *Grace Book A*, Luard Memorial, p. 209. There are other instances in Boase, *Register of the University of Oxford;* consult index under Padua, Bologna, Paris, Orleans, Bourges, Louvain.)

That wonderful divorce cause, which shook the world, created a large demand for the sort of knowledge that the university-bred jurist was supposed to possess, especially as a great effort was made to obtain from foreign doctors and universities opinions favourable to the king. The famous Cambridge "Grecian" Richard Croke was employed in ransacking Italian libraries for the works of Greek theologians and in taking counsel with Hebrew rabbis. In Italy, France and Spain, as well as in England, almost every canonist of distinction, from the celebrated Philip Decius downwards, must have made a little money out of that law suit, for the emperor also wanted opinions.

were much abler men than those who were sitting in the courts of the common law. With the one exception of Anthony Fitzherbert, the judges of Henry's reign are not prominent in our legal history, and we have little reason for attributing deep knowledge of any sort of law to such chancellors as Audley, Wriothesley and Rich. I doubt our common lawyers easily accommodated themselves to ecclesiastical changes. Some years after Elizabeth's accession the number of barristers who were known to the government as "papists" was surprisingly large and it included the great Plowden.[34] But we must go back to our main theme.

A Reception there was not to be, nor dare I say that a Reception was what our Regius Professor or his royal patron desired. As to Smith himself, it is fairly evident that some time afterwards, when he had resigned his chair and was Elizabeth's ambassador at the French court, he was well content to contrast the public law of England with that of "France, Italy, Spain, Germany and all other countries which" to use his words "do follow the civil law of the Romans compiled by Justinian into his Pandects and Code."[35] The little treatise on the Commonwealth of England which

[34] See the remarkable paper printed in *Calendar of Inner Temple Records*, vol. i., p. 470; also Mr. Inderwick's preface pp. 1 ff. In 1570 Lincoln's Inn had not been exacting the oath of supremacy: *Black Book*, vol. i., pp. 369-372. See also the lives of Edmund Plowden, William Rastell and Anthony Browne (the judge) in *Dict. Nat. Biog.*: and for Browne see also *Spanish Calendar*, 1558-67, pp. 369, 640.

[35] Smith, *Commonwealth of England*, ed. 1601, p. 147: "I haue declared summarily as it were in a chart or map, or as Aristotle termeth it *ὡς ἐν τύπῳ* the forme and maner of gouernment of England, and the policy thereof, and set before your eyes the principall points wherin it doth differ from the policy or gouernment at this time vsed in France, Italy, Spaine, Germanie, and all other Countries, which doe follow the ciuill law of the Romaines, compiled by Iustinian into his pandects and code: not in that sort as Plato made his commonwealth, or Xenophon his kingdome of Persia, nor as Sir Thomas More his Vtopia, beeing fained commonwealths, such as neuer was nor neuer shall be, vaine imaginations, phantasies of Philosophers to occupie the time, and to exercise their wits: but so as England standeth, & is gouerned at this day the xxviij. of March, Anno 1565, in the vij. yeare of the raigne and administration thereof by the most vertuous & noble Queene Elizabeth, daughter to King Henry the eight, and in the one and fiftieth yeare of mine age, when I was Ambassadour for her Maiestie, in the Court of Fraunce, the Scepter whereof at that time the noble Prince and of great hope Charles Maximilian did holde, hauing then raigned foure yeares."

he wrote at Toulouse in 1565 — a remarkable feat, for he had no English books at hand [36] — became a classic in the next century, and certainly did not underrate those traditional, medieval, Germanic and parliamentary elements which were still to be found in English life and law under the fifth and last of the Tudors. Nevertheless I think that a well-equipped lecturer might persuade a leisurely audience to perceive that in the second quarter of the sixteenth century the continuity of English legal history was seriously threatened.[37]

[36] Smith to Haddon, 6 Ap. 1565, in G. Haddoni *Orationes*, Lond. 1567, pp. 302-7: "nostrarum legum ne unum quidem librum mecum attuli hic nec habebam iure consultos quos consulerem." He has been telling how he wrote *The Commonwealth of England*.

[37] From the time of Bracton to the present day Englishmen have often allowed themselves phrases which exaggerate the practical prevalence of Roman law on the continent of Europe. Smith, for instance, who had been in many parts of northern France and was a learned and observant man, must have known that (to use Voltaire's phrase) he often changed law when he changed horses and that the Estates General had lately been demanding a unification of the divergent customs (Viollet, *Histoire du droit civil français*, p. 202; Planiol, *Droit civil*, 1900, vol. i., p. 16). Germans, who know what an attempt to administer Roman law really means, habitually speak of French law as distinctively un-Roman. Thus Rudolph Sohm (*Fränkisches Recht und römisches Recht*, Weimar, 1880, p. 76): "die Gesetzbücher Napoleons I. zeigen, dass noch heute wenigstens das Privatrecht und Processrecht Frankreichs ein Abkömmling nicht des römischen, noch des italienischen, sondern des fränkischen Rechtes ist." So Planiol (*op. cit.*, vol. i., p. 26): "Deux courants se sont trouvés en présence lors de l'unification du droit français: l'esprit romain et les traditions coutumières. Ce sont ces dernières qui l'ont emporté. Le Code a été rédigé à Paris, en plein pays coutumier; les conseillers d'État appartenaient en majorité aux provinces septentrionales; le parlement de Paris avait eu dans l'ancien droit un rôle prépondérant. Il n'y a donc rien d'étonnant à voir l'esprit des coutumes prédominer dans le Code; le contraire eût été un non-sens historique." Until the other day it was, I believe, a common remark that the large part of Germany which stood under the French code either in a translated or untranslated form — and this part contained about one-sixth of the Empire's population — was the part of Germany in which the law was least Roman and most Germanic. The division of France into two great districts was not equal: before the acquisition of Elsass from Germany "les pays de droit écrit comprenaient à peine les deux cinquièmes de la France" (Planiol, *op. cit.*, vol. i., p. 11). See the usful map in Brissaud, *Histoire du droit français*, p. 152. Even in the south there was much customary law. A famous sentence in the custumal of Bordeaux placed "the written law" below "natural reason" (Viollet, *op. cit.*, p. 150). Still it is not to be denied that a slow process of romanization — very different from the catastrophic Reception in Germany — went on steadily for some five or six centuries; and a system which as a whole seems very un-Roman to a student of what became "the common law" of Germany may rightly seem Roman

Unquestionably our medieval law was open to humanistic attacks. It was couched partly in bad Latin, partly in worse French. For the business Latin of the middle age there is much to be said. It is a pleasant picture that which we have of Thomas More puzzling the omniscient foreigner by the question "An averia carucae capta in withernamio sunt irreplegiblia."[38] He asked a practical question in the only Latin in which that question could have been asked without distortion. Smith's acute glance saw that *withernamium* must have something to do with the German *wiedernehmen;* for among his other pursuits our professor had interested himself in the study of English words.[39] But this business Latin was a pure and elegant language when compared with what served our lawyers as French. Pole and Smith might well call it barbarous; that it was fast becoming English was its one redeeming feature. You are likely to know what I must not call the classical passage: it comes from the seventeenth century. In all the *Epistolae Obscurorum Virorum* there is nothing better than the report which tells how one of Sir Robert Rede's successors was assaulted by a prisoner "que puis son condemnation ject un brickbat a le dit justice que narrowly mist."[40] It is as instructive as it is

to an Englishman. Francis Bacon knew that France could not be compendiously described as a country governed by the civil law. In his speech on the Union of Laws (Spedding, *Life and Letters,* vol. iii., p. 337) he accurately distinguishes "Gascoigne, Languedock, Provence, Dolphinie" which are "governed by the letter or text of the civil law" from "the Isle of France, Tourayne, Berry, Anjou and the rest, and most of all Brittain and Normandy," which are "governed by customs which amount unto a municipal law, and use the civil law but only for grounds and to decide new and rare cases." English readers should at least know the doctrine, strongly advocated in modern Germany, that the private law which was developed in England by a French-speaking court was just one more French *coutume;* Sohm, *Fränkisches Recht und römisches Recht,* p. 69: "Die Vorgeschichte des englischen Rechts von heute hat nicht in England, sondern in Nordfrankreich ihre Heimath . . . Stolz kann die Lex Salica auf die zahlreichen und mächtigen Rechte blicken, welche sie erzeugt hat."

[38] Blackstone, *Commentaries,* vol. iii., p. 149; J. H[oddesdon], *Tho. Mori Vita,* Lond. 1652, p. 26.

[39] Smith, *Commonwealth,* ed. 1601, p. 141: "*withernam* . . . is in plaine Dutch and in our olde Saxon language *wyther nempt.*"

[40] Pollock, *First Book of Jurisprudence,* p. 283, from Dyer's *Reports,* 188 *b,* in the notes added in ed. 1688: "Richardson, ch. Just. de C. Banc. al Assises at Salisbury in Summer 1631. fuit assault per prisoner la condemne pur felony que puis son condemnation ject un Brickbat

surprising that this jargon should have been written in a country where Frenchmen had long been regarded as hereditary foes. This prepares us for the remark that taught law is tough law. But when "Dunce" had been set in Bocardo (and it was a doctor of the civil law who set him there[41]), why should the old law-books be spared? They also were barbarous; they also were sufficiently papistical.

Turning to a more serious aspect of affairs, it would not I think be difficult to show that the pathway for a Reception was prepared. Not difficult but perhaps wearisome. At this point it is impossible for us to forget that the year 1485, if important to students of English history for other reasons, is lamentably important for this reason, that there Dr. Stubbs laid down his pen. In his power of marshalling legal details so as to bring to view some living principle or some phase of national development he has had no rival and no second among Englishmen. Howbeit, we may think of the subjected church and the humbled baronage, of the parliament which exists to register the royal edicts, of the English *Lex Regia* which gives the force of statutes to the king's proclamations,[42] of the undeniable faults of the common law, of its dilatory methods, of bribed and perjured juries, of the new courts which grow out of the King's Council and

a le dit Justice que narrowly mist, & pur ceo immediately fuit indictment drawn per Noy envers le prisoner, & son dexter manus ampute & fix al Gibbet sur que luy mesme immediatment hange in presence de Court." In France the Ordonnance of Villers-Cotterets (1539) decreed that the judgments of the French courts should be recorded no longer in Latin but in French. "L'utilité de cette innovation . . . se comprend assez d'elle-même. On dit qu'un motif d'une autre nature, l'intérêt des belles-lettres, ne contribua pas moins à y décider le roi [François I], choqué du latin barbare qu'employaient les tribunaux. Un arrêt rendu en ces termes: *Dicta curia debotavit et debotat dictum Colinum de sua demanda*, fut, dit on, ce qui entraîna la suppression du latin judiciaire." Henri Martin, *Histoire de France*, vol viii., pp. 272-3; see also Christie, *Étienne Dolet*, ed. 2, p. 424.

[41] Ellis, *Original Letters*, Ser. II., vol. ii., p. 61, Dr. Layton to Cromwell: "We have sett Dunce in Bocardo and have utterly banished him Oxforde for ever, with all his blynd glosses, and is now made a common servant to evere man, fast nailede up upon posts in all common howses of easement."

[42] *Stat.* 31 Hen. VIII., cap. 8. Already in 1535 Cromwell reports with joy an opinion obtained from the judges to the effect that in a certain event the king might issue a proclamation which would be "as effective as any statute" (*Letters and Papers, Henry VIII.*, vol. viii., p. 411).

adopt a summary procedure devised by legists and decretists. Might not the Council and the Star Chamber and the Court of Requests — courts not tied and bound by ancient formalism, — do the romanizing work that was done in Germany by the Imperial Chamber Court, the *Reichskammergericht*? [43] This was the time when King Henry's nephew James V was establishing a new court in Scotland, a College of Justice, and Scotland was to be the scene of a Reception.[44]

It seems fairly certain that, besides all that he effected, Henry had at times large projects in his mind: a project for a great college of law (possibly a College of Justice in

[43] The story (with which we are familiar in England) of the evolution of various councils and courts from an ancient *Curia Regis* seems to have a close parallel in French history: so close that imitation on one side or the other may at times be suspected. After the *parlement* with its various chambers (which answer to our courts of common law) has been established, the royal council interferes with judicial matters in divers ways, and sections of the council become tribunals which compete with the *parlement*. (See *e. g.* Esmein, *Histoire du droit français*, ed. 2, pp. 469 ff., and the pedigree of courts and councils in Lavisse et Rambaud, *Histoire générale*, vol. iv., p. 143; also the pedigree in N. Valois, *Le conseil du roi* (1888), p. 11; and Brissaud, *Histoire du droit français*, pp. 816 ff.) In Germany the doctors of civil law made their way first into councils and then into courts. "Die fremdrechtlich geschulten Juristen wurden in Deutschland anfänglich nur in Verwaltungssachen verwendet. Zur Rechtsprechung gelangten sie dadurch, dass die Verwaltung diese an sich zog, und zwar zuerst am Hofe des Königs" (Brunner, *Grundzüge der deutschen Rechtsgeschichte*, 1901, p. 227). In the England of Henry VIII's day there seems no little danger that *die fremdrechtlich geschulten Juristen*, of whom there are a good many in the king's service, will gain the upper hand in the new courts that have emerged from the council, and will proceed from *Verwaltung* to *Rechtsprechung*. There came a time when Dr. Tunstall (who got his law at Padua) was presiding over the Council of the North and Dr. Roland Lee over the Council of the Marches. In 1538 Dr. Lee, who was endeavouring to bring Wales to order, said in a letter to Cromwell, "If we should do nothing but as the common law will, these things so far out of order will never be redressed" (*Dict. Nat. Biog.*, vol. xxxii., p. 375).

In 1534 there was a project for the erection of yet another new court. See *Letters and Papers, Henry VIII.*, vol. vii., p. 603: "Draft act of parliament for the more rigid enforcement of previous statutes, appointing a new court, to consist of six discreet men, of whom three at least shall be outer barristers in the Inns of Court, who shall be called justices or conservators of the common weal and sit together in the White Hall at Westminster or elsewhere, with power to discuss all matters relating to the common weal and to call before them all persons who have violated any act of parliament made since the beginning of Henry VIII.'s reign." If only three of these judges need be barristers, what are the rest to be?

[44] *Acts of the Parliament of Scotland*, vol. ii., p. 335.

the Scotch sense), a project for the reformation of the Inns of Court, which happily were not rich enough to deserve dissolution,[45] also perhaps a project for a civil code as well as the better known project for a code ecclesiastical. In Edward VI's day our Regius and German Professor of Divinity, Dr. Martin Butzer, had heard, so it seems, that such a scheme had been taken in hand, and he moved in circles that were well informed. He urged the young Josiah to go forward in the good work; he denounced the barbarism of English law and (to use Bentham's word) its incognoscibility.[46] The new ecclesiastical code, as is generally known,

[45] See the two papers that are printed by Waterhous, *Fortescutus Restitutus*, 1663, pp. 539, 543. In one of these Thomas Denton, Nicholas Bacon and Robert Cary are answering an inquiry addressed to them by Henry VIII touching the plan of legal education pursued in the Inns of Court. In this there are some phrases that tell of the revival of learning. The writers thank Almighty God for giving them a king "endued and adorned himself with all kindes and sortes of good learning as well divine as prophane" and one who "purposeth to set forward and as it were to revive the study and perfect knowledge thereof [*i. e.* of good learning], of long time detested and almost trodden under foot." They remark also that many good and gentle wits have perished "chiefly for that most of them in their tender years, indifferent to receive both good and bad, were so rooted and seasoned, as it were, in barbarous authors, very enemies to good learning, that hard it was, yea almost impossible, to reduce them to goodness."

The other paper contains a project for the king's College of Law submitted by the same three writers. This looks like an attempt to obtain a royally endowed school of English law, and it is curious to observe that, not English, but good French is to take the place of bad French. "The inner barristers shall plead in Latine, and the other barristers reason in French; and either of them shall do what they can to banish the corruption of both tongues." One learned in French is "to teach the true pronuntiation of the French tongue." One of excellent knowledge in the Latin and Greek tongues is to read "some orator or book of rhetoric, or else some other author which treateth of the government of a commonwealth, openly to all the company." Students of this college are to be sent abroad to accompany ambassadors, and two students are to act as historiographers of the realm. Nothing is said of the civil law. On the whole, this seems to be a conservative proposal emanating from English barristers for bettering the education of the common lawyer, and thus rendering unnecessary such a Reception as Pole had proposed. We do not know that it represents Henry's thoughts. It was "a civil law college" that Somerset wished to establish at Cambridge by a fusion of Trinity Hall and Clare. (See Mullinger, *Hist. Univ. Camb.*, vol. ii., pp. 134-137.)

[46] Bucerus, *De regno Christi*, lib. ii., cap. 56 (*Scripta Anglica*, Basil. 1577, p. 148): "Passim enim queri bonos viros audio, leges regni huius decorum [*corr.* de rerum] proprietatibus et commutationibus, de successionibus in bonis atque aliis huius generis civilibus contractibus et commerciis, esse perobscuras atque implicatas: adeoque etiam lingua perscriptas quadam obsoleta ut a nemine queant intelligi, qui non et eam

was never enacted; but we know equally well that the draft is in print. Its admired Latinity is ascribed to Prof. Smith's immediate successor, Dr. Walter Haddon. I take it that now-a-days few English clergymen wish that they were living — or should I not say dying? — under Dr. Haddon's pretty phrases.[47] Codification was in the air. Both in France and in Germany the cry for a new Justinian was being raised, and perhaps we may say that only because a new Justinian was not forthcoming, men endeavoured to make the best that they could of the old.[48] How bad that best would be Francis Hotman foretold.

linguam didicerit et earum legum intelligentiam multo fuerit studio assecutus: indeque fieri ut plerique eorum qui eas leges aliquo modo habent cognitas, iurisque magis quam iusticiae sunt consulti, his ipsis legibus abutantur pro hominum decipulis retibusque pecuniarum. Quo regni non tolerando incommodo permotum aiunt praestantissimum principem S. M. T. patrem ut corrigendis, elucidandisque his legibus certos pridem homines deputarit. Cum autem isti legum designati instauratores, vel mole operis absterriti, vel aliis impediti abstractique negociis, huic malo adhuc nullum attulerint remedium, abusioque et perversio legum indies magis invalescere dicatur, eo certe id erit S. M. T. et maturius et pertinacius elaborandum quo leges illae quam rectissime ac planissime extent explicatae . . . Quid autem interest nullae existant leges, aut quae existunt sint civibus ignoratae?"

Butzer, as this treatise shows, had some knowledge of the civil law, at least in the matter of divorce. He seems to think that a code for England might be so simple an affair that it could be put into rhyme and be sung by children. (See Mullinger, *Hist. Univ. Camb.*, vol. ii., p. 238.)

[47] Cardwell, *The Reformation of the Ecclesiastical Laws*, Oxf. 1850. See p. xxvi, where Foxe the martyrologist (1571) testifies to the beauty of Haddon's Latin, and then says: "Atque equidem lubens optarim, si quid votis meis proficerem, ut consimili exemplo, nec dissimili etiam oratione ac stylo, prosiliat nunc aliquis, qui in vernaculis nostris legibus perpoliendis idem efficiat, quod in ecclesiasticis istis praestitit clarissimae memoriae his Haddonus." On the question as to the intended fate of heretics (including both Roman Catholics and Lutherans) under the *Reformatio Legum*, see Hallam, *Const. Hist.*, ed. 1832, vol. i., p. 139; Maitland, *Canon Law in England*, p. 178.

[48] Commines attributes to Louis XI. (*circ. an.* 1479) a project of reducing to uniformity all the customs of France. Francis Bacon more than once, when urging his schemes of law reform, referred to Louis's abortive project (Spedding, *Life and Letters*, vi. 66; vii. 362). Commines's story is not rejected by modern historians of French law. The official redaction of the various "general customs" (customs of provinces) was commanded in 1453 by the ordinance of Montils-les-Tours. Little, however, was done in this matter until the reigns of Charles VIII and Louis XII. Many customs were redacted about the year 1510: that of Orleans in 1509; that of Paris in 1510. This might be described as a measure of codification: "elle fit, des coutumes, de véritables *lois écrites*" or, as we might say, statute law. (Esmein, *Histoire du droit français*, 746 ff.; Viollet, *Histoire du droit français*, 142 ff.; Planiol,

And then we see that in 1535, the year in which More was done to death, the Year Books come to an end: in other words, the great stream of law reports that has been flowing for near two centuries and a half, ever since the days of Edward I, becomes discontinuous and then runs dry. The exact significance of this ominous event has never yet been duly explored; but ominous it surely is.[49] Some words that

Droit civil, i. 12, 16). Then the Estates General at Orleans in 1560 in effect demanded a general code: "Nous voulons une foy, une loy, un roy" said the prolocutor of the clergy. (Dareste, *Hotman*, p. 20.) Both Du Moulin and Hotman recommended codification and apparently thought that the task would not be difficult. (Viollet, *op. cit.*, p. 209; Dareste, *op. cit.*, p. 21.) Then as to Germany: — "An die Klagen über die Verwirrung, in welche das Recht durch die scholastische Wissenschaft gerathen ist, knüpft sich seit dem Anfange des 16. Jahrhunderts regelmässig das Verlangen, der Kaiser möge als ein neuer Justinian das gemeine Recht des Reichs zur Einfachheit und Klarheit gesetzlich reformiren. . . . . Das Verlangen nach einer Codification des gemeinen Rechts zieht sich durch das ganze 16. Jahrhundert." (Stintzing, *Geschichte der deutschen Rechtswissenschaft*, vol. i., pp. 58-9.) In 1532 after a prolonged effort the Empire actually came by a criminal code, the so-called Carolina (Constitutio Carolina Criminalis; die peinliche Halsgerichtsordnung Karls V.), but its operation was confined by a clause which sanctioned the ever increasing particularism of the various states by saving their ancient customs. (*Ibid.*, pp. 621 ff.) Within some of these states or "territories" there was in the sixteenth century a good deal of comprehensive legislation, amounting in some cases to the publication of what we might call codes. A *Landrecht* (to be contrasted with *Reichsrecht*) was issued by the prince. His legislative action was not always hampered by any assembly of Estates; he desired uniformity within his territory; and the jurists who fashioned his law-book were free to romanize as much as they pleased. The Würtemberg Landrecht of 1555 issued by Duke Christopher, a prince well known to Queen Elizabeth, is one of the chief instances (Stintzing, *op. cit.*, vol. i., pp. 537 ff.; Schröder, *Deutsche Rechtsgeschichte*, ed. 3, pp. 886 ff.). The transmission of the cry for codification from Hotman to Leibnitz, and then to the enlightened monarchy of the eighteenth century is traced by Baron, *Franz Hotmans Antitribonian*, Bern, 1888. In Scotland also the Regent Morton (d. 1581) entertained a project of codification. A commission was appointed to prepare a uniform and compendious order of the laws. It seems to be a question among Scotch lawyers how far the book known as *Balfour's Practicks* represents the work of the commissioners. See *Dict. Nat. Biog.*, vol. xv., p. 317; vol. iii., p. 53.

[49] The cessation of the Year Books in 1535 at the moment when the Henrician Terror is at its height is dramatically appropriate. A great deal, however, has yet to be done before the relevant facts will be fully known. Mr. C. C. Soule's *Year-Book Bibliography*, printed in *Harvard Law Review*, vol. xiv., p. 557, is of high importance. If by "the Year Books" we mean a series of books that have been printed, then the Year Books become intermittent some time before they cease. The first eleven years of Henry VIII are unrepresented, and there are gaps between years 14 and 18 and between 19 and 26. It remains to be seen whether there are MSS. more complete than the printed series. Then

once fell from Edmund Burke occur to us: "To put an end to reports is to put an end to the law of England.[50] Then in 1547 just after King Henry's death a wail went up from "divers students of the common laws." The common laws, they said, were being set aside in favour of "the law civil" insomuch that the old courts had hardly any business.[51] Ten

we have on our hands the question raised by what Plowden says in the Preface to his *Commentaries* touching the existence of official reporters. Plowden says that he began to study the law in 30 Hen. VIII, and that he had heard say that in ancient times there were four reporters paid by the king. His words make it clear that the official reporters, if they ever existed, came to an end some considerable time before 30 Hen. VIII. The question whether they ever existed cannot be raised here. Mr. Pike's investigations have not, so I think, tended to bear out the tale that Plowden had heard; and if the king paid stipends to the reporters, some proof of this should be forthcoming among the financial records. The evidence of Francis Bacon is of later date and looks like a mere repetition of what Plowden said (Bacon, *Amendment of the Law;* Spedding, *Life and Letters,* vol. v., p. 86).

But, be all this as it may, the fact seems clear that the ancient practice of law reporting passed through a grave crisis in the sixteenth century. We know the reign of Edward IV and even that of Edward II better than we know that of Edward VI. The zeal with which Tottell from 1553 onwards was printing old reports makes the dearth of modern reports the more apparent. Then Plowden expressly says that he reported "for my private instruction only," and Dyer's Reports (which comprise some cases too early to have been reported by him) were posthumously published. The total mass of matter from the first half of the century that we obtain under the names of Broke, Benloe, Dalison, Keilwey, Moore and Anderson is by no means large, and in many cases its quality will not bear comparison with that of the Year Books of Edward IV. (J. W. Wallace, *The Reporters,* ed. 4, Boston, 1882, is an invaluable guide; see also V. V. Veeder, *The English Reports,* in *Harvard Law Review,* vol. xv., p. 1.)

[50] Burke, *Report from Committee appointed to inspect the Lords' Journals:* "To give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England."

[51] *Acts of the Privy Council,* 1547-1550, pp. 48-50. Petition of divers students of the common laws to the Lord Protector and the Privy Council: "Pleasith it your honorable Lordships to call to your remembrance that whereas the Imperial Crowne of this realme of Inglande and the hole estate of the same have been alwayes from the beginning a Reame Imperial, having a lawe of itself called the Commen Lawes of the realme of Inglande, by which Lawe the Kinges of the same have as Imperial Governours thereof ruled and governed the people and subjectes in suche sorte as the like thereof hath nat been seen in any other. . . . So it is, if it like your good Lordships, that now of late this Commen Lawes of this realme, partely by Injunctions, aswel before verdictes, jugementes and execucions as after, and partly by writtes of Sub Pena issuing owte of the Kinges Courte of Chauncery, hath nat been only stayed of their directe course, but also many times altrid and violated by reason of Decrees made in the saide Courte of Chauncery, most grounded upon the lawe civile and apon matter depending in the conscience and discrecion of the hearers thereof, who being Civilians

years later, at the end of Mary's reign, we read that the judges had nothing to do but "to look about them," and that for the few practitioners in Westminster Hall there was

and nat lerned in the Comen Lawes, setting aside the saide Commen Lawes, determyne the waighty causes of this realme according either to the saide Lawe Civile or to their owne conscience; which Lawe Civile is to the subjectes of this realme unknowne, and they nat bounden ne inheritable to the same lawe, and which Jugementes and Decrees grownded apon conscience ar nat grounded ne made apon any rule certeine or lawe written. . . . And for a more amplyfyeng and inlarging of the jurisdiction of the saide Courte of Chauncery and derogacion of the saide Comen Lawes there is of late a Commission made contrary to the saide Commen Lawes unto certaine persones, the more part whereof be Civilians nat learned in the saide Lawes of this realme, autorising them to heare and determyne all matters and cawses exhibited into the saide Courte of Chauncery, by occasion whereof the matters there do daily more and more increase, insomuch as very fewe matters be now depending at the Comen Lawes. . . . And by reason thereof there hath of late growne such a discourage unto the studentes of the saide Commen Lawes, and the saide Commen Lawes have been of late so little estemed and had in experience, that fewe have or do regarde to take paynes of the profownde and sincere knolege of the same Lawe, by reason whereof there ar now very few, and it is to be doubted that within fewe yeares there shall nat be sufficient of lerned men within this realme to serve the king in that facultie. It therfore may please your honorable Lordships to make suche speady reformacion in the premisses as unto your Lordships shall seem moste mete and convenient."

This petition led to the disgrace and punishment of the chancellor, the Earl of Southampton (Wriothesley), for having issued a commission without warrant and without consulting his fellow-executors of King Henry's will. With Somerset's motives for thrusting Southampton aside we are not concerned. (See Pollard, *England under the Protector Somerset*, pp. 31-33.) That he had any desire to protect the common lawyers we must not assume; but the petition itself deserves attention. The commissioners to whom Southampton had delegated judicial powers were Robert Southwell (master of the rolls), John Tregonwell, John Oliver, and Anthony Bellasyse (masters of chancery). Tregonwell, Oliver and Bellasyse were all doctors of the civil law (*Dict. Nat. Biog.*).

In 1536 during the Pilgrimage of Grace one of the demands of the catholic insurgents was "that the common laws may have place as was used at the beginning of the reign and that no injunctions be granted unless the matter has been determined in chancery." This comes at the end of a long reactionary programme, which desires the restoration of the monasteries, of the papal supremacy and so forth: also the repeal of the statute "That no man shall not will his lands" [Statute of Uses]. The heretical bishops [Cranmer and his like] are to be burnt: Cromwell is "to have condign punishment." Also "a man is to be saved by his book," *i. e.* there is to be no infringement of the benefit of clergy. The heresies to be suppressed are those of "Luther, Wyclif, Husse, Malangton, Elicampadus [Oecolampadius], Bucerus, Confessa Germaniae [Augsburg Confession], Apologia Malanctons, the works of Tyndall, of Barnys, of Marshall, Raskell [Rastell, the printer of law books], Seynt Germayne [author of Doctor and Student] and such other heresies of Anibaptist." As I understand the protest against injunctions,

"elbow room enough."[52] In criminal causes that were of any political importance an examination by two or three doctors of the civil law threatened to become a normal part of our procedure.[53] In short, I am persuaded that in the middle years of the sixteenth century and of the Tudor age the life of our ancient law was by no means lusty.

And now we may ask what opposing force, what conservative principle was there in England? National character, the genius of a people, is a wonder-working spirit which stands at the beck and call of every historian. But before we invoke it on the present occasion we might prudently ask our books whether in the sixteenth century the bulk of our German cousins inherited an innate bias towards what they would have called a Welsh jurisprudence. There seems to be plentiful evidence that the learned *doctores iuris* who counselled the German princes and obtained seats in the courts were cordially detested by the multitude. In modern times they often have to bear much blame for that terrible revolt which we know as the Peasants' War.[54] No doubt there were

it means that the chancery may interfere with an action at common law, only if that action is opening a question already decided in the chancery. It will be seen that in 1536 the cause of "the common laws" finds itself in very queer company: illiterate, monkish and papistical company, which apparently has made a man of "Anibaptist." (For this important manifesto, see *Letters and Papers, Henry VIII.*, vol. xi., pp. 506-507.)

[52] Stow, *Annals*, ed. 1615, p. 631: "This yeere (1557) in Michaelmas terme men might have seene in Westminster hall at the Kinges bench barre not two men of law before the iustices; there was but one named Fostar, who looked about and had nothing to doe, the iudges looking about them. In the common place [Court of Common Pleas] no moe sergeants but one, which was sergeant Bouloise [Bendlowes?], who looked about him, there was elbow roome enough, which made the lawyers complaine of their iniuries in that terme." In 1536 John Rastell the lawyer and printer of law books complains to Cromwell that in both capacities he is in a bad way: he used to print from two to three hundred reams every year but now prints not a hundred reams in two years; he used to make forty marks a year by the law and now does not make forty shillings (Ellis, *Original Letters*, Ser. III., vol. ii., p. 309). On such stories as these little stress is laid; but until the judicial records of the Tudor reigns are statistically examined, scraps of information may be useful.

[53] For an instance see the examination of a servant of the Abbot of Sawley by Drs. Layton, Legh and Petre (*Letters and Papers, Henry VIII.*, vol. xii., pt. 1, p. 231).

[54] As to the evil done to the peasants in Germany by the Reception of Roman law, see Egelhaaf, *Deutsche Geschichte* (*Zeitalter der Reformation*), vol. i., pp. 544 ff.; Lamprecht, *Deutsche Geschichte*, vol. v., pp.

many differences between England and Germany, between England and France, between England and Scotland.[55] Let

99 ff. Dr. Brunner (*Grundzüge der deutschen Rechtsgeschichte,* 1901, p. 216) has lately said that Roman jurisprudence "auch wenn sie nicht geradezu bauernfeindlich war, doch kein Verständnis besass für die Mannigfaltigkeit der bäuerlichen Besitzformen des deutschen Rechtes." One of the revolutionary programmes proposed an exclusion of all doctors of civil or canon law from the courts and councils of the princes. See Egelhaaf, *op. cit.,* pp. 499, 598. The following is a pretty little tale: — "So geschah es wirklich einmal zu Frauenfeld im Thurgau, wo die Schöffen einen Doctor aus Constanz, der sich für die Entscheidung eines Erbschaftsstreites auf Bartolus und Baldus berufen wollte, zur Thüre hinauswarfen mit den Worten: 'Hört ihr, Doctor, wir Eidgenossen fragen nicht nach dem Bartele und Baldele. Wir haben sonderbare Landbräuche und Rechte. Naus mit euch, Doctor, naus mit euch!' Und habe, heisst es in dem Berichte weiter, der gute Doctor müssen abtreten, und sie Amtleute haben sich einer Urtel verglichen, den Doctor wieder eingefordert und ein Urtel geben wider den Bartele und Baldele und wider den Doctor von Constanz." (Janssen, *Geschichte des deutschen Volkes,* vol. i., p. 490.) It is a serious question what would have become of our English copyholders if in the sixteenth century Roman law had been received. The practical jurisprudence of this age seems to have been kinder to the French than to the German peasant; perhaps because it was less Roman in France than in Germany. See E. Levasseur in Lavisse et Rambaud, *Histoire générale,* vol. iv., p. 188: "Des jurisconsultes commencèrent à considérer l'inféodation comme une aliénation et le colon censitaire comme le véritable propriétaire de la terre sur laquelle le seigneur n'aurait possédé qu'un droit *éminent.*" The true Romanist, I take it, can know but one *dominium,* and is likely to give that one to the lord.

[55] As regards Germany, the theoretical continuance of the Roman empire is not to be forgotten, but its influence on the practical Reception of Roman law may be overrated. In the age of the Reception Roman law came to the aid, not of imperialism, but of particularism. Then it is true that English law was inoculated in the thirteenth century when Bracton copied from Azo of Bologna. The effect of this is well stated by Dr. Brunner in the inaugural address delivered by him as rector of the University of Berlin (*Der Antheil des deutschen Rechtes an der Entwicklung der Universitäten,* Berlin, 1896, p. 15): "In England und Frankreich, wo die Aufnahme römischer Rechtsgedanken früher erfolgte, hat diese nach Art einer prophylactischen Impfung gewirkt und das mit ihnen gesättigte nationale Recht widerstandsfähig gemacht gegen zerstörende Infectionen." As to the Roman law in Bracton, I may be allowed to refer to *Bracton and Azo,* Selden Society, 1895: in the introduction to that volume I have ventured to controvert some sentences that were written by Sir H. Maine. Bracton became important for a second time in the sixteenth century when (1569) his book was printed, for it helped Coke to arrange his ideas, as any one may see who looks at the margin of Coke's books. The medieval chancery has often been accused of romanizing. Its procedure was suggested by a summary procedure that had been devised by decretists and legists: the general aim of that scheme was the utmost simplicity and rapidity. (Contrast this summary procedure as revealed by *Select Cases in Chancery,* ed. Baildon, and *Select Cases in the Court of Requests,* ed. Leadam, with the solemn procedure of the civil law exemplified by *Select Cases in the Court of Admiralty,* ed. Marsden:

us notice one difference which, if I am not mistaken, marked off England from the rest of the world. Medieval England had schools of national law.

The importance of certain law schools will be readily conceded, even to one who is in some sort officially bound to believe that law schools may be important. A history of civilization would be miserably imperfect if it took no account of the first new birth of Roman law in the Bologna of Irnerius. Indeed there are who think that no later movement, — not the Renaissance, not the Reformation — draws a stronger line across the annals of mankind than that which is drawn about the year 1100 when a human science won a place beside theology. I suppose that the importance of the school of Bourges would also be conceded. It may be worth our while to remark that the school of Bologna had a precursor in the school of Pavia, and that the law which was the main subject of study in the Pavia of the eleventh century was not Roman law but Lombard law: a body of barbaric statutes that stood on one level with the Anglo-Saxon laws of the same age. This I say, not in order that I may remind you what sort of law it was

these three books are published by the Selden Society.) On the other hand, no proof has been given that in the middle age the chancery introduced any substantive law of Roman origin. At a later time when it began to steal work (suits for legacies and the like) from the ecclesiastical courts, it naturally borrowed the rules by which those matters had theretofore been governed.

A full history of the Reception in Scotland seems to be a desideratum. But see Goudy, *Fate of Roman Law* (Inaugural Lecture), 1894; also J. M. Irvine, *Roman Law* in *Green's Encyclopœdia of the Law of Scotland.* Whether at any time the Reception in Scotland ran the length that it ran in Germany may be doubted; but the influence exercised by English example since 1603 would deserve the historian's consideration. Even if this influence went no further than the establishment of the habit of finding "authority" in decided cases, it would be of great importance. Where such a habit is established in practice and sanctioned by theory, any return to the pure text, such as that which was preached in Germany by "the historical school," would be impossible. Also it may be suggested that the Roman law which played upon the law of Scotland in the seventeenth and eighteenth centuries was not always very Roman, but was strongly dashed with "Natural Law." For instance, if in Scotland the firm of partners is a "legal person," this is not due to the influence of Roman law as it is now understood by famous expositors, or as it was understood in the middle ages. Also (to take another example) it seems impossible to get the Scotch "trust" out of Roman law by any fair process. The suggestion that it is "a contract made up of the two nominate contracts of deposit and mandate" seems a desperate effort to romanize what is not Roman.

that Archbishop Lanfranc studied when as a young man he was a shining light in the school of Pavia, but because this body of Lombard law, having once become the subject of systematic study, showed a remarkable vitality in its struggle with Roman jurisprudence. Those Italian doctors of the middle age who claimed for their science the fealty of all mankind might have been forced to admit that all was not well at home. They might call this Lombard law *ius asininum* and the law of brute beasts, but it lingered on, and indeed I read that it was not utterly driven from the kingdom of Naples until Joseph Bonaparte published the French code. Law schools make tough law.[56]

Very rarely do we see elsewhere the academic teaching of any law that is not Roman: imperially or papally Roman. As a matter of course the universities had the two legal faculties, unless, as at Paris, the Pope excluded the legists from an ecclesiastical preserve. The voice of John Wyclif pleading that English law was the law that should be taught in English universities was a voice that for centuries cried in the wilderness. It was 1679 before French law obtained admission into the French universities.[57] It was 1709 before Georg Beyer, a pandectist at Wittenberg, set a precedent for lectures on German law in a German university.[58]

[56] Pertile, *Storia del diritto italiano*, ed. 2, vol. ii. (2), p. 69: "Laonde può dirsi che l' abrogazione definitiva ed espressa della legislazione longobardica nel regno di Napoli non abbia avuto luogo se non al principio del nostro secolo, sotto Giuseppe Bonaparte, al momento in cui vennero publicati colà i codici francesi." On p. 65 will be found some of the opprobrious phrases that the civilians applied to Lombard law: "nec meretur ius Lombardorum lex appellari sed faex": "non sine ratione dominus Andreas de Isernia vocat leges illas ius asininum."

[57] Esmein, *Histoire du droit français*, ed. 2, p. 757: "C'est seulement en 1679 que l'enseignement du droit français reçut une place bien modeste dans les universités." Viollet, *Histoire du droit civil français*, p. 217: "Lorsqu'en 1679, Louis XIV. érigea à la faculté de Paris une chaire de droit français et une chaire de droit romain, le premier professeur de droit français, Fr. de Launay, commenta les *Institutes* de Loisel, qui prirent ainsi une situation quasi-officielle à côté des *Institutes* de Justinien." Brissaud, *Histoire du droit français*, p. 237: "Le latin avait été jusque-là la langue de l'école. Le premier professeur en droit français à Paris, de Launay, fit son cours en langue français."

[58] Siegel, *Deutsche Rechtsgeschichte*, ed. 3, p. 152: "Den ersten und zugleich entscheidenden Schritt in dieser Richtung that Georg Beyer, welcher . . . zunächst durch einen Zufall veranlasst wurde, and der Wittenberger Universität, wohin er als Pandektist berufen worden war, 1707 eine Vorlesung über das *ius germanicum* anzukündigen und zu halten."

It was 1758 before Blackstone began his ever famous course at Oxford. The chair that I cannot fill was not established until the transatlantic Cambridge was setting an example to her elderly mother.[59] But then, throughout the later middle age English law had been academically taught.

No English institutions are more distinctively English than the Inns of Court; of none is the origin more obscure. We are only now coming into possession of the documents whence their history must be gathered, and apparently we shall never know much of their first days.[60] Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in course of time evolved a scheme of legal education: an academic scheme of the medieval sort, oral and disputatious. For good and ill that was a big achievement: a big achievement in the history of

[59] Thayer, *The Teaching of English Law at Universities* in *Harvard Law Review*, vol. ix., p. 171: "Blackstone's example was immediately followed here. . . . In 1779 . . . a chair of law was founded in Virginia at William and Mary College . . . and in the same year Isaac Royall of Massachusetts, then a resident in London, made his will, giving property to Harvard College for establishing there that professorship of law which still bears his name." The Royall professorship was actually founded in 1815 (*Officers and Graduates of Harvard*, 1900, p. 24). At Cambridge (England) the Downing professorship was founded in 1800.

[60] See *Records of the Honorable Society of Lincoln's Inn*, 1896 ff.; *Calendar of the Records of the Inner Temple*, 1896. The records of Gray's Inn are, so I understand, to be published. See also Philip A. Smith, *History of Education for the English Bar*, 1860; Joseph Walton, *Early History of Legal Studies in England*, 1900, read at a meeting of the American Bar Association in 1899. In foreign countries there were gilds or fraternities of lawyers. Thus in Paris the *avocats* and *procureurs* about the middle of the fourteenth century formed a fraternity of St. Nicholas: "dont le chef porte le bâton ou bannière (de là le nom de bâtonnier)": Brissaud, *Histoire du droit français*, p. 898. But, though a certain care for the education of apprentices was a natural function of the medieval craft-gild, I cannot find that elsewhere than in England fraternities of legal practitioners took upon themselves to educate students and to give what in effect were degrees, and degrees which admitted to practice in the courts. R. Delachenal, *Histoire des avocats au parlement de Paris* (Paris, 1885), says that, though not proved, it is probable that already in the fourteenth and fifteenth centuries the *avocat* had to be either *licencié en lois* or *licencié en décret:* in other words, a legal degree given by an university was necessary for the intending practitioner. As regards the England of the same age two interesting questions might be asked. Was there any considerable number of doctors or bachelors of law who were not clergymen? Had the English judge or the English barrister usually been at an university? I am inclined to think that a negative answer should be given to the first question and perhaps to the second also. Apparently Littleton (to take one example) is not claimed by Oxford or Cambridge.

some undiscovered continents. We may well doubt whether aught else could have saved English law in the age of the Renaissance. What is distinctive of medieval England is not parliament, for we may everywhere see assemblies of Estates, nor trial by jury, for this was but slowly suppressed in France. But the Inns of Court and the Year Books that were read therein, we shall hardly find their like elsewhere. At all events let us notice that where Littleton and Fortescue lectured, there Robert Rede lectures, Thomas More lectures, Edward Coke lectures, Francis Bacon lectures, and highly technical were the lectures that Francis Bacon gave. Now it would, so I think, be difficult to conceive any scheme better suited to harden and toughen a traditional body of law than one which, while books were still uncommon, compelled every lawyer to take part in legal education and every distinguished lawyer to read public lectures. That was what I meant when I made bold to say that Robert Rede was not only an English judge but "what is more" a reader in English law.

Deus bone! exclaimed Professor Smith in his inaugural lecture, and what excited the learned doctor to this outcry was the skill in disputation shown by the students of English law in their schools at London. He was endeavouring to persuade his hearers that in many ways the study of law would improve their minds. If, he urged, these young men, cut off as they are from all the humanities, can reason thus over their "barbaric and semi-gallic laws," what might not you, you cultivated scholars do if you studied the Digest and Alciatus and Zasius? And then the professor expressed a hope that he might be able to spend his vacation in the Inns of Court.[61] His heart was in the right place: in a school

[61] Smith, *Inaugural Oration*, MS. Baker, xxxvii. 409 (Camb. Univ. Lib.): ". . . At vero nostrates, et Londinenses iurisconsulti, quibuscum disputare, cum ruri sim et extra academiam, non illibenter soleo, qui barbaras tantum et semigallicas nostras leges inspexerint, homines ab omnibus suis humanioribus disciplinis et hac academiae nostrae instructione semotissimi, etiam cum quid e philosophia, theologiave depromptum in quaestione ponatur, Deus bone! quam apte, quamque explicate singula resumunt, quanta cum facilitate et copia, quantaque cum gratia et venustate, vel confirmant sua, vel refellunt aliena! Certe nec dialecticae vim multum in eis desideres, nec eloquentiae splendorem. Eorum oratio est Anglicana quidem, sed non sordida, non inquinata, non trivi-

of living law. Even for the purposes of purely scientific observation the live dog may be better than the dead lion.

When the middle of the century is past the signs that English law has a new lease of life become many. The medieval books poured from the press, new books were written, the decisions of the courts were more diligently reported, the lawyers were boasting of the independence and extreme antiquity of their system.[62] We were having a little Renaissance of our own: or a gothic revival if you please. The

alis, gravis nonnunquam et copiosa, saepe urbana et faceta, non destituta similitudinum et exemplorum copia, lenis et aequabilis, et pleno velut alveo fluens, nusquam impedita. Quae res tantam mihi eorum hominum admirationem concitavit, ut aliquandiu vehementer optarim, secessionem aliquam ab ista academia facere et Londinum concedere, ut eos in suis ipsis scholis ac circulis disputantes audirem, quod an sim facturus aliquando, cum feriae longae, et quasi solenne iusticium, nostris praelectionibus indicatur, haud equidem pro certo affirmaverim."

[62] Soule, *Year Book Bibliography*, in *Harvard Law Review*, vol. xiv., p. 564: "In 1553 the field of Year-Book publication was entered by Richard Tottell, who for thirty-eight years occupied it so fully as to admit no rival. There are about 225 known editions of separate Years or groups of Years which bear his imprint or can be surely attributed to his press. . : . He is pre-eminently *the* publisher of Year Books, and he so completely put them "in print" and so cheapened their price that he evidently made them a popular and profitable literature."

In 1550 an English lawyer's library of printed books might apparently have comprised (besides some Statutes and Year Books) Littleton's Tenures, The Old Tenures, Statham's Abridgement, Fitzherbert's Abridgement, Liber Intrationum, The Old Natura Brevium, perhaps a Registrum Brevium (if that book, printed in 1531, was published before 1553), Institutions or principal grounds, etc. [1544], Carta feodi simplicis, [Phaer's] New book of presidentes, Diversite de courts, Novae Narrationes, Articuli ad novas narrationes, Modus tenendi curiam baronis, Modus tenendi unum hundredum, Fitzherbert's Justice of the Peace, Perkins's Profitable Book, Britton, Doctor and Student. A great part of what was put into print was of medieval origin and had been current in manuscript. In 1600 the following might have been added: Glanvill, Bracton, Fitzherbert's Natura Brevium, Broke's Abridgement, Broke's New Cases, Rastell's Entries, Staundford's Prerogative and Pleas of the Crown, Crompton's Justice of the Peace, Crompton's Authority of Courts, West's Symbolæography, Theloall's Digest, Smith's Commonwealth, Lambard's Archaionomia and Eirenarcha, Fulbecke's Direction or Preparative to the Study of the Law [1600], Plowden's Commentaries, Dyer's Reports and the first volume of Coke's Reports [1600]. This represents a great advance. Already Fulbecke in his curious book (which was reprinted as still useful in 1829) attempts a review of English legal literature: a critical estimate of Dyer, Plowden, Staundford, Perkins and other writers. Lambard's revelation of the Anglo-Saxon laws was not unimportant, for a basis was thus laid for national boasts; and, but for the publication of Glanvill, Bracton and Britton, the work that was done by Coke would have been impossible.

Were any books about Roman law printed in England before 1600, except a few of Gentili's?

Court of Requests in which Prof. Smith and Prof. Haddon had done justice was being tried for its life. Its official defender was, we observe, Italian by blood and Parisian by degree: Dr. Adelmare, known to Englishmen as Sir Julius Caesar.[63] That wonderful Edward Coke was loose. The medieval tradition was more than safe in his hands. You may think it pleasant to turn from this masterful, masterless man to his great rival. It is not very safe to say what Thomas More did not know, less safe to say what was unknown to Francis Bacon, but I cannot discover that either of these scholars, these philosophers, these statesmen, these law reformers, these schemers of ideal republics, these chancellors of the realm, these law lecturers, had more than a bowing acquaintance with Roman law.

If Reginald Pole's dream had come true, if there had been a Reception — well, I have not the power to guess and you have not the time to hear what would have happened; but I think that we should have had to rewrite a great deal of history. For example, in the seventeenth century there might have been a struggle between king and parliament, but it would hardly have been that struggle for the medieval, the Lancastrian, constitution in which Coke and Selden and Prynne and other ardent searchers of mouldering records won their right to be known to school-boys. In 1610 when the conflict was growing warm a book was burnt by the common hangman: it was written by an able man in whom Cambridge should take some pride, Dr. Cowell, our Regius Professor, and seemed to confirm the suspicion that Roman law and absolute monarchy went hand in hand.[64]

The profit and loss account would be a long affair. I must make no attempt to state it. If there was the danger of barbarism and stupidity on the one side, there was the danger of pedantry on the other: the pedantry that endeavours to

[63] See Mr. Leadam's Introduction to *Select Pleas in the Court of Requests* (Seld. Soc.) and *Dict. Nat. Biog.* s. n. Cæsar, Sir Julius.

[64] See Gardiner, *Hist. England*, 1603-1642, vol. ii., pp. 66-68; E. C. Clark, *Cambridge Legal Studies*, pp. 74-75. Cowell's *Institutiones* (less known than the *Interpreter*) are an attempt, "in the main very able," so Dr. Clark says, to bring English materials under Roman rubrics. It is a book which might have played a part in a Reception; but it came too late.

appropriate the law of another race and galvanizes a dead Corpus Juris into a semblance of life. Since the first of January 1900 the attempt to administer law out of Justinian's books has been abandoned in Germany. The so-called "Roman-Dutch" law of certain outlying parts of the British Empire now stands alone,[65] and few, I imagine, would foretell for it a brilliant future, unless it passes into the hand of the codifier and frankly ceases to be nominally Roman. Let us observe, however, that much had been at stake in the little England of the sixteenth century.

In 1606 Coke was settling the first charter of Virginia.[66] In 1619 elected "burgesses" from the various "hundreds" of Virginia were assembling, and the first-born child of the mother of parliaments saw the light.[67] Maryland was granted to Lord Baltimore with view of frankpledge and all that to view of frankpledge doth belong, to have and to hold in free and common socage as of the castle of Windsor in the county of Berks, yielding yearly therefor two Indian arrows of those parts on the Tuesday in Easter week.[68] The port and

[65] There can now be few, if any, countries outside the British Empire in which a rule of law is enforced because it is (or is deemed to be) a rule of Roman law. See *Galliers* v. *Rycroft* [1901] A. C. 130, for a recent discussion before the Judicial Committee (on an appeal from Natal) of the import of a passage in the Digest. Are there many lands in which so much respect would be paid by a tribunal and for practical purposes to a response of Papinian's? I think not.

[66] Macdonald, *Select Charters*, 1899, p. 1: "The first draft of the charter . . . was probably drawn by Sir John Popham . . . but the final form was the work of Sir Edward Coke, attorney general, and Sir John Dodderidge, solicitor general."

[67] Doyle, *The English in America*, vol. i., p. 211: "On the 30th of July, 1619, the first Assembly met in the little church at Jamestown. A full report of its proceedings still exists in the English Record Office (*Colonial Papers*, July 30, 1619)." An abstract is printed in *Calendar of State Papers, Colonial*, 1574-1660, p. 22.

[68] Charter of Maryland, 1632, Macdonald, *Select Charters*, p. 53. In 1620 the grant to the Council of New England (*Ibid.*, p. 23) referred to the manor of East Greenwich and reserved by way of rent a fifth part of the ore of gold and silver. The grant of Carolina (*Ibid.*, p. 121) reserved a rent of twenty marks and a fourth of the ore. The grant of New Netherlands to the duke of York (*Ibid.*, p. 136) reserved a rent of forty beaver skins, if demanded. The grant of Pennsylvania to William Penn speaks of the Castle of Windsor and reserves two beaver skins and a fifth of the gold and silver ore (*Ibid.*, p. 185). Georgia was holden as of the honour of Hampton Court in the county of Middlesex at a rent of four shillings for every hundred acres that should be settled (*Ibid.*, p. 242).

island of Bombay in one hemisphere,[69] and in another Prince Rupert's land stretching no one knew how far into the frozen north were detached members of the manor of East Greenwich in the county of Kent.[70] Nearly twenty-five hundred copies of Blackstone's Commentaries were absorbed by the colonies on the Atlantic seaboard before they declared their independence. James Kent, aged fifteen, found a copy, and (to use his own words) was inspired with awe;[71] John Marshall found a copy in his father's library;[72] and the common law went straight to the Pacific.[73]

[69] Charter of 1669 printed among *Charters granted to the East India Company* (no date or publisher's name): "to be holden of us, our heirs and successors as of the manor of East Greenwich in the county of Kent, in free and common soccage and not in capite nor by knight's service, yielding and paying therefor to us, our heirs and successors at the Custom House, London, the rent or sum of ten pounds of lawful money of England in gold on the thirtieth day of September yearly for ever."

[70] Charter of 1670 incorporating the Hudson's Bay Company, printed by Beckles Wilson, *The Great Company*, vol. ii., pp. 318, 327: "yielding and paying yearly to us . . . two elks and two black beavers, whensoever and as often as we our heirs and successors shall happen to enter into the said countries, territories and regions hereby granted."

[71] Thayer, *The Teaching of English Law at Universities* in *Harvard Law Review*, vol. ix., p. 170: "'I retired to a country village,' Chancellor Kent tells us in speaking of the breaking up of Yale College by the war, where he was a student in 1779, 'and, finding Blackstone's Commentaries, I read the four volumes. . . . The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer.' . . . 'There is abundant evidence,' if we may rely upon the authority of Dr. Hammond, whose language I quote, 'of the immediate absorption of nearly twenty-five hundred copies of the Commentaries in the thirteen colonies before the Declaration of Independence.'"

[72] Thayer, *John Marshall*, 1901, p. 6: "When Marshall was about eighteen years old he began to study Blackstone. . . . He seems to have found a copy of Blackstone in his father's house. . . . Just now the first American edition was out (Philadelphia, 1771-2), in which the list of subscribers, headed by the name of 'John Adams, barrister at law, Boston,' and also that of 'Captain Thomas Marshall, Clerk of Dunmore County.'"

[73] It may be interesting to notice that in 1856, and perhaps even in 1871, Sir H. Maine believed that the Code of Louisiana ("of all republications of Roman law the one which appears to us the clearest, the fullest, the most philosophical and the best adapted to the exigencies of modern society") had a grand destiny before it in the United States. "Now it is this code, and not the Common Law of England which the newest American States are taking for the substratum of their laws. . . . The Roman law is, therefore, fast becoming the lingua franca of universal jurisprudence." (Maine, *Roman Law and Legal Education*, 1856, reprinted in *Village Communities*, ed. 3, pp. 360-1.) Nowadays this hope or fear of a Reception of Roman law in the United States seems, so I am given to understand, quite unfounded. See e. g.

A hundred legislatures — little more or less — are now building on that foundation: on the rock that was not submerged. We will not say this boastfully. Far from it. Standing at the beginning of a century and in the first year of Edward VII, thinking of the wide lands which call him king, thinking of our complex and loosely-knit British Commonwealth, we cannot look into the future without serious misgivings. If unity of law — such unity as there has been — disappears, much else that we treasure will disappear also, and (to speak frankly) unity of law is precarious. The power of the parliament of the United Kingdom to legislate for the colonies is fast receding into the ghostly company of legal fictions. Men of our race have been litigious; the great Ihering admired our litigiousness;[74] it is one of our more amiable traits; but it seems to me idle to believe that distant parts of the earth will supply a tribunal at Westminster with enough work to secure uniformity. The so-called common law of one colony will swerve from that of another, and both from that of England. Some colonies will have codes.[75] If English lawyers do not read Australian reports (and they cannot read everything), Australian lawyers will not much longer read English reports.

Still the case is not yet desperate. Heroic things can be done by a nation which means to do them: as witness the

J. F. Dillon, *Laws and Jurisprudence of England and America*, 1894, p. 155: "the common law [in distinction from the Roman or civil law] is the basis of the laws of every State and Territory of the Union, with comparatively unimportant and gradually waning exceptions."

[74] Ihering, *Der Kampf um's Recht*, ed. 10, pp. 45, 69: "Ich habe bereits oben das Beispiel des kampflustigen Engländers angeführt, und ich kann hier nur wiederholen, was ich dort gesagt: in dem Gulden, um den er hartnäckig streitet, steckt die politische Entwicklung Englands. Einem Volke, bei dem es allgemeine Uebung ist, dass Jeder auch im Kleinen und Kleinsten sein Recht tapfer behauptet, wird Niemand wagen, das Höchste, was es hat, zu entreissen, und es ist daher kein Zufall, dass dasselbe Volk des Alterthums, welches im Innern die höchste politische Entwicklung und nach Aussen hin die grösste Kraftentfaltung aufzuweisen hat, das römische, zugleich das ausgebildetste Privatrecht besass."

[75] Thus in particular Queensland in 1899 enacted a criminal code of 707 sections. See *Journal of the Society of Comparative Legislation*, New Ser., vol. vi., pp. 555-560: "The precedents utilised in framing the Code were the [in England abortive] draft English codes of 1879 and 1880, the Italian Penal Code of 1888, and the Penal Code of the State of New York." See also Ilbert, *Legislative Methods*, p. 155.

mighty effort of science and forbearance which in our own time has unified the law of Germany, and, having handed over the Corpus Juris to the historians, has in some sort undone the work of the Reception.[76] Some venerable bodies may understand the needs of the time, or, if I may borrow a famous phrase, "the vocation of our age for jurisprudence and legislation." Our parliament may endeavour to put out work which will be a model for the British world. It can still set an example where it can no longer dictate, and at least it might clear away the rubbish that collects round every body of law. To make law that is worthy of acceptance by free communities that are not bound to accept it, this would be no mean ambition. *Nihil aptius, nihil efficacius ad plures provincias sub uno imperio retinendas et fovendas.*[77] But it is hardly to parliament that our hopes must turn in the first instance. Certain ancient and honourable societies, proud of a past that is unique in the history of the world, may become fully conscious of the heavy weight of responsibility that was

[76] Some information in English about the new German code will be found in articles by Mr. E. Schuster, *Law Quarterly Review*, vol. xii., p. 17, and *Journal of the Society of Comparative Legislation*, Old Series, vol. i., p. 191. Despite the careful exclusion of almost all words derived from the Latin (except *Hypothek*, which happens to be Greek), the new law book may look Roman to an Englishman; but then it does not look Roman to Germans. The following sentences are taken from a speech delivered in the Reichstag (Mugdan, *Materialien zum bürgerlichen Gesetzbuch*, vol. i., pp. 876-7): "In dieser Beziehung ist vor Allem der Vorwurf gegen den Entwurf erhoben, er enthalte materiell kein deutsches Recht. . . . Selten ist ein Vorwurf unbegründeter gewesen. . . . Das Sachenrecht ist von A bis Z durchaus deutsches Recht. . . . Was dann den Begriff des Besitzes betrifft, von der ganzen römischen Besitztheorie ist nichts übrig geblieben. . . . Der allgemeine Theil des Obligationenrechtes ist natürlich römischen Ursprunges. . . . Kommen wir aber zu den einzelnen speziellen Rechtsgeschäften, so treffen wir auch da sofort wieder deutsches Recht. . . . Auch das Familienrecht ist durchaus deutschrechtlich. . . . Dann ist das Erbrecht durch und durch deutschrechtlichen Ursprunges. . . . " The supposition that codification means romanization is baseless; it may mean deromanization. But the great lesson to be learnt by Englishmen from the German Code is that a democratically elected assembly, which is for many purposes divided into bitterly contending fractions, can be induced to show a wonderful forbearance when uniformity of law is to be attained.

[77] Molinaeus (Charles Du Moulin), *Oratio de concordia et unione consuetudinum Franciae*, in *Opera* (1681), vol. ii., p. 691: "Mihi quoque videtur nihil aptius, nihil efficacius ad plures provincias sub eodem imperio retinendas et fovendas, nec fortius nec honestius vinculum quam communio et conformitas eorundem morum legumve utilium et aequabilium."

assumed when English law schools saved, but isolated, English law in the days of the Reception. In that case, the glory of Bourges, the glory of Bologna, the glory of Harvard may yet be theirs.[78]

[78] The name of Harvard is here mentioned without prejudice to the just claims of any other American university; but the *Harvard Law Review*, edited by a committee of students, is a journal of which any school might be proud.

7. ROMAN LAW INFLUENCE IN CHANCERY, CHURCH COURTS, ADMIRALTY, AND LAW MERCHANT [1]

By Thomas Edward Scrutton [2]

1. *Roman Law in Coke*

SIR E. COKE in his *Institutes*, (themselves Roman in name), takes a decided position as to the authority of the Civil law. He says: "Our common laws are aptly and properly called the laws of England, because they are appropriated to this kingdom of England . . . and have no dependency upon any forreine law whatever, no, not upon the Civil or Canon law other than in cases allowed by the Laws of England . . . therefore foreign precedents are not to be objected against us, because we are not subject to foreign laws" [3] — and again "it is worthy of consideration how the laws of England are not derived from any foreign law, either canon or civil or other, but a special law appropriated to this kingdom." [4] And in a side-note he remarks: "*Nota differentiam . . . inter malum in se* against the Common law, and *malum prohibitum* by the Civil or Canon law, *whereof the judges of the Common law in these cases take no notice.*" [5] Sir Edward Coke indeed had not a high opinion of the Civil

[1] These extracts are taken from a treatise on "The Influence of the Roman Law on the Law of England," Part II, cc. VI, X, XI, XII, XIII, XIV, and Conclusion (1885, Cambridge, University Press, being the Yorke Prize Essay for 1884).

[2] B. A. Trinity College (Cambridge) 1881; M. A. London University; four times Yorke Prize Essayist; LL. B. Cambridge; Barrister of the Middle Temple 1882; at one time Professor of Constitutional Law and History in University College, London.

Other Publications: Law of Copyright, 1883; Law of Charter Parties and Bills of Lading, 1886; Merchant Shipping Act, 1894.

[3] Coke, ii. 98. [4] iii. 100. [5] iii. 153.

law. In his *Proœmium* to the Second *Institute*, he observes: "Upon the text of the Civil law there be so many glosses and interpretations, and again upon those so many commentaries, and all these written by doctors of equal degree and authority, and therein so many diversities of opinion as they do rather increase than resolve doubts and uncertainties, and the professors of that noble science say that it is like a sea of waves;" and with this he contrasts the certainty of the Common law; "*Statio bene fida peritis.*"

This opinion does not hinder him from occasionally referring to the Civil law, though not with great accuracy. He comments with approval on Littleton's statement that the English law is contrary to the Civil law in which *partus sequitur ventrem*, saying, "true it is, for by that law" (stating the law), "both of which cases are contrarie to the Law of England."[1] He makes the curious assertion that, "in prohibiting the lineal ascent in inheritance, the Common law is assisted with the law of the Twelve Tables,"[2] which seems entirely inaccurate. He notes the differences in the laws as to guardianship, already alluded to,[3] and says that the law of England is contrary to the Civil law, which "*est quasi agnum lupo committere ad devorandum;*" yet he cites the very rule of the Civil law, "*qui sentit commodum debet et onus sentire*," in support of the position that the owners of private chapels should repair them.[4] Lord Macclesfield strongly disapproved of the English rule, deeming it "to have prevailed in barbarous times, and a cruel and barbarous presumption."[5]

Coke cites very largely from Bracton, and some of the passages are those directly derived from Roman sources;[6] as far as I can find, he only expressly refers to the *Corpus*

[1] i. 122, b, 123.
[2] i. 11, a.
[3] i. 88, b. Blackstone, i. 461.
[4] Coke, ii. 489.
[5] 2 P. Wms. 264, 9 Mod. 142. Hargreaves' notes, 63.
[6] e. g. Bracton's Roman def. of *actio* (Coke, ii. 39, Br. 98, b); the division of actions into real, personal, mixed (C. ii. 21, 286; Br. f. 101, b); on monsters (C. i. 7, b; Br. f. 5); *de ventro inspiciendo* (C. i. 8, b; Br. ff. 69-71); on treasure trove (C. iii. 132; Br. f. 10, 119, b); also cf. C. i. 36, a. with Br. ff. 33, b, 34.

Juris twice.[1] The rule as to the half-blood, which has been attributed to a misunderstanding of the Civil law, he treats as settled.[2] He states rather curiously and inaccurately that coparcenery was called in the ancient books of law "*familia herciscunda*,"[3] which was a tenure; and compares the Common Civil and Canon laws on kinship, saying, "thus much of the Civil and Canon laws is necessary to the knowledge of the Common law on this point." He of course notices the discrepancy between the Common law and the "laws of Holy Church, or Canon law," as to legitimation by subsequent marriage. Speaking of banishment he remarks, "if the husband by act of Parliament have judgment to be exiled for a time, *which some call a relegation*, that is no civil death;"[4] this is clearly the Roman "*relegatio*" or exile, which involved no loss of *status*. He refers to the agreement of the Civil and Common laws in forbidding distress on beasts of the plough,[5] and cites Seneca as to their agreement in the punishment of rape. He uses the phraseology of peremptory and dilatory exceptions,[6] though bargain and sale, (in the *Institutes* a *consensual* contract), is described as a *real* one.[7] The respite of a pregnant woman under sentence till she is delivered, for which Bracton had cited Roman law, is restated,[8] but some of Bracton's Roman incorporations are not so fortunate, as where Coke says "We remember not that we have read in any book of the legitimation or adoption of an heir, but only in Bracton,[9] and that to little purpose." Coke ascribes the introduction of the rack to the Civil law,[10] as the rack or brake allowed in many cases by the Civil law, whereas all tortures and torments of parties accused were directly against the Common law of England."[11]

In his Fourth *Institute* Coke states to what extent the Civil

[1] C. ii. 658: *Dig.* 48, 19, 18, where he misquotes *meretur* for *patitur:* the quotation is characteristically used to resist a claim of jurisdiction by the Ecclesiastical Courts. Coke also says of the *Regiam Majestatem*, "so called because it beginneth *as Justinian's Institutes do*, with these words," which is incorrect, as the words are *Imperatoriam Majestatem*.
[2] C. i. 14, a, 191, a. note. [3] C. i. 164, b. [4] C. i. 133, a.
[5] C. ii. 132. [6] C. ii. 426. [7] C. ii. 672. [8] C. iii. 17. [9] Br. f. 63, b.
[10] C. iii. 35, cf. Step. *Hist. C. L.* i. 222.
[11] Cf. also, C. i. 41, a; Br. f. 311. C. i. 47, b. on *traditio*. C. i. 55, a, on *possessio precaria*. C. ii. 198, 441, on liability of heirs. C. ii. 591, on *ultimum supplicium*, cf. *Dig.* 48, 19. C. ii. 391; *melior est conditio*

and Canon law had force in England. It is the *lex et consuetudo parliamenti*, he says, that all weighty matters in Parliament be determined by the course of the Parliament, and "not by the Civil law, nor yet by the Common laws of this realm."[1] The Court of Admiralty is always spoken of as "proceeding according to the Civil Law,"[2] though Coke gives no reasons for such a procedure. The Court of Chivalry before the Constable and Marshal "proceeds according to the customs and usages of that Court, and, in cases omitted, according to the Civil law, *secundum leges armorum*."[3] In a case as to ambassadors, the Committee of the Privy Council heard the "counsel learned in the Civil and Common laws;"[4] and Coke says of one of their decisions "and this also agreeth with the Civil law."[4] As to the Ecclesiastical Courts, "which proceed not by the rules of the Common Law," Coke writes with some acerbity, "that the King's laws of this realm do bound the jurisdiction of Ecclesiastical Courts."[5] The Convocation proceed according to "*legem divinam et canones strictae ecclesiae*," the ecclesiastical courts generally by "the laws of Christ."[6] As to the authority of this law in England, Coke is very decided: "all canons and constitutions made against the laws of the realm are made void:" "all canons which are against the prerogative of the king, the Common law, or custom of the realm are of no force."[7]

I have only noticed two cases in which the English Common law, as stated by Coke, appears to have been modified by the Civil law otherwise than through Bracton. These are, first, the law as to discontinuance,[8] or the alienation made by

possidentis. C. ii. 360, 573, et Br. *passim* "*nihil est tam conveniens naturali aequitati unumquodque dissolvi eo ligamine, quo ligatum est.*" C. iii. 2, *Crimen laesae majestatis*. C. iii. 168, *Crimen falsi*. Coke also cites Bracton's definition of theft.

[1] C. iv. 14. [2] C. iv. 134: Duck, ii. 8, 3, 24.

[3] C. iv. 125; Hargreaves' note to i. 74, a, b. Duck, ii. 8, 3, 12-22. "*Causas ex Jure Civili Romanorum et consuetudinibus armorum et non ex Jure Municipali Anglorum esse dijudicandas.*"

[4] C. iv. 153. [5] C. iv. 321, 322.

[6] C. ii. 487: cf. Duck, ii. 8, 3, 26, *et seq. De his omnibus in hoc foro jus dicitur ex Jure Civili, cui porro accessit Jus Canonicum. Ex quibus omnibus constituitur Lex quam nostrates appellant Ecclesiasticam . . . Lex Civile in hoc foro Lex terrae appellatur.*

[7] C. ii. 647, 652. [8] C. i. 325, a; i. 272.

tenant en autre droit, by which the remainderman is driven to an action; the rules as to this bear some analogy to the civilian doctrines of *usurpatio possessionis*, and Coke himself in one place uses the term "usurpations" in connexion with discontinuances.[1] Secondly, the Roman law as to *collatio bonorum*,[2] by which emancipated children, wishing to share in intestacy, must bring their property into the stock to be divided, seems to have suggested the custom of London as to "*hotchpot*," and part of the subsequent Statute of Distributions,[3] and Coke expressly says, "this is that in effect which the civilians call *collatio bonorum*."[4]

A study of Coke's *Institutes* suggests that the Common lawyers of the time expressly repudiated the Civil law as an authority in the King's courts, or even as the parent of the existing Common law. Coke occasionally notes the agreement or disagreement of the two laws, but with such inaccuracy as to show that his own knowledge of the Civil law was slight. The working out of an Equitable Jurisdiction, and the decisions of the Ecclesiastical and Admiralty Courts were building up systems largely of Civilian origin; but in the Common law, the influence of Roman law has rather retrograded than advanced since the time of Bracton. . . .

Summary of Roman Law in Text-writers

We have thus dealt with the position with regard to the Roman Law occupied by leading text-writers and authorities from the time of Bracton. Glanvil is comparatively free from any Roman influence. Bracton has incorporated into his book substantial portions of Roman matter, which are reproduced by *Fleta*, and in a less intelligent way by *Britton*. These Roman incorporations are cited without comment by Staunford, and are used by Cowell to show the similarity of the two laws. Coke also cites them, without any allusion to their Roman character, while he claims no authority in the realm for the Roman Law and is indeed a vigorous advocate

[1] C. ii. 272.
[2] *Dig.* 37, 6. *Cod.* 6, 20. Hunter, *R. L.* p. 663.
[3] 22 and 23 Car. II. c. 10 § 5. [4] C. i. 177, a.

of the supremacy of the Courts of Common Law. Hale clearly states the relative position of Common, Civil, and Canon Laws, defining the limits of the two latter, and the source of their authority. Lastly Blackstone, following Hale, recognizes the Roman origin of parts of our Law, including the passages in Bracton, and while he recognizes it, adopts them.

Perception of the Roman elements in Bracton leads to a discussion as to his authority in the law, which results in his being generally accepted as binding, if no contrary decisions or customs can be produced. And while the English Courts recognize no authority in the Roman Law, as such, they are yet ready to listen to citations from it in all cases where English authorities cannot be found in point, or where the principles of the English and Roman Laws appear to be similar. Thus in *Acton v. Blundell* (1843),[1] where the question was as to rights in a subterranean water course, the *Digest* was fully cited and commented on by counsel, Maule, J. intervening with the remark, "it appears to me that what Marcellus says is against you." Tindal, C. J., in delivering judgment, said "The Roman Law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion to which we have come, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe. The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants."

The authority of Roman Law in the Common Law Courts cannot be put higher than this, or be better expressed than in these words.

2. Roman Law in the Chancery

While the judges of the Common Law Courts after the fourteenth century recognized no authority in the Civil Law,

[1] 12 M. and W. 324, 353; see Warren's *Law Studies*, 732, note, for an account of the inner history of the case by one of the counsel engaged.

and the English people were led by the financial exactions of the Papal Court, and the controversies of the Reformation, to regard with suspicion and dislike everything savouring of Rome, three important courts in the kingdom were largely influenced by the Civil Law, if their procedure was not entirely derived from it. These were the Court of Chancery, the Court of Admiralty, and the Ecclesiastical Courts.[1] The Court of the Constable and Marshal also proceeded according to the Civil Law:[2] "*causas ex jure civili Romanorum et consuetudinibus armorum, et non ex jure municipali Anglorum esse dijudicandas,*" and Duck also states that the Universities of Oxford and Cambridge proceeded according to the civil law: "*dijudicant per jus civile et secundum juris civilis formam.*"[3] But these latter are of small importance.

The Court of Chancery originates in the position of the king as the fountain of justice.[4] To him petitions were addressed by suppliants who conceived themselves wronged by the Common Law, or who found no remedy for the injury they complained of. Difficult and novel points arising in the Common Law Courts were also reserved by the judges for the consideration of the king in Council. As the Chancellor was always in attendance on the king, the petitions for royal grace and favour were entrusted to him, first for custody, and ultimately for hearing. Under Edward III. the Chancellor's tribunal assumed a definite and separate character, and petitions for grace began to be directly addressed to him instead of coming indirectly into his hands. From 1358, such transactions were recognized as his proper province, and the powerful and complicated machinery of his Equitable Jurisdiction began to grow.

There were reasons why its growth should be on Roman lines. Several lay Chancellors had been appointed in the reign of Edward III., probably in consequence of the petition of the Parliament that, as ecclesiastics were not amenable to the laws, only lay persons might in future be appointed Chancellor.[5] But every Chancellor from 1380 to 1488 was a

[1] *Sub.* C. xii. Eccl. Courts; C. xiii. Admiralty Courts.
[2] Duck, ii. 8, 3, 12, 22. [3] Duck, ii. 8, 3, 30.
[4] Stubbs, i. 603, 604 note. ii. 268.
[5] Spence, i. 340. R. Parning, 1341. Thorpe, Knivet, 1372.

clerk; until the end of Wolsey's Chancellorship in 1530 only a few lay holders of the office are found, and up to that year 160 Ecclesiastics had held the office.[1] In this clerical preponderance, the advantages of the Civil law, familiar to the Chancellors by their early training, and as the system in use in the ecclesiastical Courts, are obvious.

But the laws of Rome had a further foothold in the Chancery. There were 12, afterwards 6, Clerks *de prima forma*[2] and Masters of the Chancery, who "are assistants in the Court to show what is the Equity of the Civil law, and what is Conscience."[3] Down to the time of Lord Bacon some of the Masters learned in the Civil law sat upon the Bench with the Chancellor to advise him, if necessary. The author of the "Treatise on the Masters" states that "the greater part have always been chosen men skilful in the Civil and Canon laws," in order that the decisions of the Chancellor may accord with "Equity, *jus gentium*, and the laws of other nations," seeing that a number of matters came before the Chancellor "which were to be expedited not in course of common law, but in course of civil or canon law."[4] And though the Chancellors became laymen and decided without reference to the Masters, their system was still largely clerical and Roman. Under Charles I. it was ordered that half the masters in Chancery should always be Civil lawyers, and that no others should serve the king as Masters of Request. Duck,[5] writing in 1678 says: "*Judicia apud Anglos, in Curiis quae non ex mero jure Anglicano, sed ex aequo et bono exercentur, cum jure civili Romanorum plurimum conveniunt; quarum suprema Cancellaria prima est. . . . Cancellarii autem feres omnes fuerunt Episcopi aut Clerici, plerumque legum Romanarum periti usque ad Henricum VIII. quo D.*

[1] Spence, i. 340-7, 356 note.

[2] Apparently a term of Roman origin. (Hargreaves, *Law Tracts* (1787), p. 296.) The conferring of the office by placing a cap on the head is compared by the author of this Tract, (probably a master in Chancery, writing about 1600), to the conferring of the freedom of a Roman city by putting on a cap, or to "capping" a doctor at the Universities (p. 294). But the custom is not *traced* to these sources, as Spence says, i. 360.

[3] Sir T. Smith, *Commonwealth of England*, ed. 1663, p. 121. Spence, i. 360, note.

[4] Hargreaves, pp. 309, 313. [5] ii. 8, 3; 10-11.

Richius primus juris Municipalis Apprenticius Cancellarii munus obtinuit: post quem etiam alios episcopos juris Romani peritos, sed plerosque juris municipalis consultos, reges nostri ad hoc munus admoverunt. In hac etiam curia assessores seu Magistri plerumque fuerunt juris Civiles Doctores, et Clericos hujus Curiae antiquitus habuisse eximiam juris civilis scientiam, clarissimum est ex libro Registri Brevium Originalium. . . . In Curia etiam . . . fere omnes fuerunt antiquitus Episcopi Praelative, in legibus Romanis vel utroque juri versati Magistri . . . plerumque Juris Civilis Professores, quibus ex jurisdictione ejus Curiae potestas judicandi ex aequo et bono demandata est. Ad omnes enim curias in quibus non merum et Consuetudinarium jus, sed aequitas spectanda est, nullius gentis leges tam accommodatae sunt, quam jus Civile Romanorum, quod amplissimas continet regulas de Contractibus, Testamentis, Delictis, Judiciis et omnibus humanis actionibus."

The general character of the Jurisdiction of the Court of Chancery may be gathered from a speech of James I. in the Star Chamber in which he said: "Where the rigour of the law in many cases will undo a subject, there the Chancery tempers the law with equity, and so mixes mercy with justice:"[1] and the "Doctor and Student" of the reign of Henry VIII., reads: "Conscience never resisteth the law nor addeth to it, but only when the law is directly in itself against the Law of God or of reason . . . in other things *Aequitas sequitur legem.*"[2]

This Equitable Jurisdiction has been compared with the Jurisdiction of the *Praetors*, both being used as a means of alleviating the rigour of the older law.[3] Both Equity and the *Jus Praetorium* tend to become as rigid as the systems they originally modified; both are supported by fictions, in the one case of a pre-existing state of nature or Golden age, of whose laws fragments survive and are embodied in the *Praetor's* Edict, in the other of a King, whose Conscience

[1] Cited Spence, i. 409 note.
[2] Probably derived from "*Jus praetorium jus civile subsequitur.*" Spence i. 409.
[3] Maine, *Ancient Law*, p. 68.

supplied the inadequacies of his laws. The systems admit of comparison, but there is no trace of causal connexion. It is true that the *Praetor* framed the *formula*, and the Chancellor and Clerks of the Chancery issued the writs. But the *Praetor* administered both his own edict and the *Jus Civile*, and could thus enforce his own innovations, while the Common law judges could and did reject new writs, which seemed to them not in accordance with the Common law. And further, while the *Praetor* by embodying *exceptiones* in his *Formula* could influence the defence to actions, the Chancellor had no control over the defences raised in the Common Law Courts to the writs he issued. The tribunals were separate; the judges different. The influence of the Chancery on the Common law was therefore far slower in operation and weaker than the Praetorian changes in the *Jus Civile;* while the clerical character of the Chancery, and its innovations on the Common law, raised a spirit of hostility which hindered its influence.

English Equity however, invented and administered by Clerical Chancellors, derived much of its form and matter from Roman sources. I have neither the time nor the knowledge to enable me to give at all an adequate account of this Roman element, but the question has been discussed by Spence,[1] and I avail myself of his results. Sir H. Maine,[2] without going at length into the subject, thinks that the earlier Chancery judges followed the Canon law, a later generation the Civil law, and that the Chancellors of the eighteenth century availed themselves largely of the Romano-Dutch Treatises on ethics and jurisprudence, compiled by the publicists of the Low Countries.

One of the most important branches of Equitable Jurisdiction related to Uses and Trusts.[3] *Fideicommissa* had been introduced by the Romans to evade the strict rules as to legacies and successions: the person, to whose good faith the fulfilment of the testator's wishes was entrusted, was at first only bound in honour. Augustus took the first steps towards enforcing trusts by law, and finally created a *Praetor Fidei-*

[1] *Equitable Jurisdiction of Court of Chancery*, Vol. i.
[2] *Ancient Law*, p. 44, 45.
[3] Spence, i. 435-517.

commissarius to whom the duty was assigned of giving legal effect to *fideicommissa.*

The English system in its origin only applied to trusts created during life; for lands were not devisable, and personal estate was not of sufficient importance to call for any special legislation. Conveyances of lands to *A*, that he might pay their fruits to *B*, were introduced, probably to allow the clergy to avoid the Statute of Mortmain, and this device was adopted by the laity, especially during the wars of the Roses to avoid forfeiture for treason, and for other purposes. These "Uses" the Chancery would enforce as binding on the conscience, and the bequests of uses of land which it supported, and which enabled testators to evade the feudal rule of the indevisability of land, were akin to the Roman *fideicommissa.* Both systems were thus introduced to evade the strict law. The jurisdiction of Chancery over Uses dates from the reign of Henry V.; and when in the reign of Henry VIII., the Statute of Uses gave the legal ownership to the man who already had the Use, the Chancellors regained their jurisdiction and created Trusts by the device of enforcing "a use of an use," which was not affected by the Statute. In this however there was no trace of Roman influence and, as Mr. Spence acknowledges, the details of the system of Uses and Trusts were entirely constructed by the Clerical Chancellors without help from the Roman system.[1] We can only say that probably the general conception of Uses and Trusts and the assumption of Jurisdiction over them were assisted by the acquaintance of the Clerical Chancellors with the Roman *fideicommissa.*

The system of Mortgages[2] was much affected by the doctrines of the Civil law, acting through the Court of Chancery, and a mortgage now is "a security founded on the common law, and perfected by a judicious and wise application of the principles of redemption of the Civil law."[3] The strictness of the Common law viewed the Mortgage in the light of a conditional grant of land by the mortgagor to the mortgagee,

[1] Spence, i. 460 note; Butler's note to Co. *Lit.* i. 290 b.
[2] Butler's notes to Co. *Lit.* i. 205 a., 290 b. Spence, i. 601. Coote on *Mortgages,* 4th edit. pp. 1, 14. Warren, *Law Studies,* p. 521.
[3] Coote, p. 1.

the condition being that the land should revert to the grantor on payment by a certain day of the money lent. If not, the land was discharged from the condition and became absolutely vested in the mortgagee. But the Civil law regarded the debt intended to be secured, and not the land, as the principal; payment of the principal debt at any time would therefore release the accessory security on the land: the creditor, if not in possession of the land, could only sell it under a decree from the *Praetor*, and tender of the amount due before the decree of sale released the land. This construction, more lenient to mortgagors, was, under Charles I., adopted by the Chancery, who allowed an "equity of redemption" to the mortgagee within a reasonable time, though after the day on which, according to the Common law, the land would be forfeited for non-payment. To maintain their jurisdiction against both the Common law judges and the debtors themselves, the Chancellors held void any conditions in the loan by which the borrower lost his "equity of redemption." And this is similar to if not derived from a constitution of the Emperor Constantine, which expressly rendered such stipulations void.[1] We can thus trace the altered view of Mortgages, the necessity for foreclosure, and the protection of the equity of redemption, as established in the Court of Chancery, to the Civil law.

In the construction of legacies and documents, the Chancellors have availed themselves freely of Roman rules.[2] The Chancery had no original jurisdiction in testamentary matters, and therefore felt bound to adopt the rules of the Ecclesiastical Courts, which were those of the Civil law. In *Hurst v. Beach*[3] the Vice-Chancellor directed the opinion of civilians to be taken as to the admissibility of evidence in a case as to legacies, and on the practice of the Ecclesiastical Courts. In *Hooley v. Hatton*,[4] where the question was whether two legacies to the same person in a will and codicil were cumulative or substitutive, the case was argued with citations from the Civil law; and Lord Thurlow, in his judg-

[1] *Cod.* 8, 34, 3.
[2] Spence, i. 518, 523, 566.
[3] 5 Mad. 351, 357, 360.
[4] Cited in *Ridges v. Morrison*, 1 Brown. *Ch. C.* 389.

ment, said: "No argument can be drawn in the present case from internal evidence; we must therefore refer to the rules of the Civil law." Similarly in interpreting the language of alleged trusts, the rules of the civil law are referred to.[1] Remains of the Roman doctrine of *beneficium inventoris* are traced in the time of Charles I., when an executor who had not exhibited an inventory was charged with a legacy after 20 years.[2] In the case of legacies for public uses Lord Thurlow said that the cases "had proceeded upon notions adopted from the Roman and Civil laws, which are very favourable to charities, that legacies given to public uses not ascertained shall be applied to some proper object."[3] And the same is true of charitable trusts.[4] But these rules were sometimes applied with more zeal than discretion, as when Sir R. Arden, M. R., afterwards Lord Alvanley, entirely misunderstood the meaning of *exceptio doli*.[5] But Mr. Spence's remark that "probably the same law as to legacies has continued in England from the time of Agricola to the present day"[6] shows too great a faith in the persistence of a highly developed system of law through centuries of barbarism.

The jurisdiction of the Chancery over Infants[7] is very similar to that exercised over guardians by the Roman *Praetor*, but Mr. Spence is not able to say more than that the *Corpus Juris* "has been occasionally consulted, if not resorted to as an authority" on the subject. We have already noticed Lord Macclesfield's preference for the Civil law rule as to the persons who should be guardians as compared to that of the Common law.[5] The Chancery jurisdiction over idiots and lunatics is also similar to that of the *Praetor* and may very possibly have been derived from it.[9]

The English Law of Partnership is derived from three sources, the Common Law, the *Lex Mercatoria*, and the Roman Law.[10] Of the *Lex Mercatoria* we need only say here

[1] *Knight v. Knight*, 3 Beav. 161, 172.
[2] Spence, i. 585, citing Tothill, 183: 15 Car. I., which appears a wrong reference.
[3] *White v. White*, 1 Br. *Ch. C.* 15. [4] Spence, i. 587.
[5] *Kennett v. Abbott* (1799), 4 Ves. 808.
[6] Spence, i. 523 note. [7] Spence, i. 606-615.
[8] *V. supra*, p. 130. [9] Spence, i. 618-620.
[10] Collier on *Partnership*, Lond. 1840, p. 1.

that it appears in itself to have been at least partly based on the Roman law.[1] Mr. Justice Story has made an elaborate and detailed investigation of the relations of the Common to the Roman law, and finds great similarity between them.[2] Both laws recognize the difference between a partnership and a community of interest,[3] and provide that no new partner can be introduced without the concurrence of the original partners.[4] But the Common law has refused to follow the Roman law in holding invalid an agreement that the personal representative of a partner should succeed him in the partnership. Both laws require a partnership to be in good faith and for a lawful purpose;[5] and that all partners must contribute something, whether property or skill, to the common stock.[6] Both require community in profits among the partners and, to a more limited extent, community in losses.[7] In the absence of express agreement both laws require an equal division of profits.[8] The Common law formerly went beyond the Roman law in making persons who share the profits of a trade liable to operation of law, to third parties as partners,[9] but this rule was overthrown in *Cox v. Hickman*.[10] Both laws recognize a division into universal, general, and special partnerships, though the chief Common law division is into public and private partnerships.[11] Both regulate the duration of partnership by the consent of the partners, but the Roman law went further than the English, and prohibited partnerships extending beyond the life of the parties.[12] No particular forms for the constitution of a partnership were required by either law.[13] By the Roman law, the mere partnership relation conferred less extensive powers of disposition of the partnership property than are given by the Common law.[14] A Roman partner could not bind the firm by debts, nor alienate more than his share of the partnership property. But in the absence of express stipulation and with some limitations

[1] Spence, i. 665.
[2] Story on *Partnership*, Boston, 1881, 7th ed.
[3] Story, §§ 3, 4. [4] *Ibid.* § 5. [5] § 6. [6] § 15.
[7] § 20. [8] §§ 24, 25. [9] § 37.
[10] 18 *C. B.* 617. 8 *H. L. C.* 268.
[11] Story §§ 72-76.
[12] Story §§ 85, 196. [13] § 86. [14] § 95.

each partner of an English partnership may be taken, by outsiders, as having an equal and complete power of administration over the whole of the partnership affairs.[1] Both laws admit a discharge of a debt to or by one partner to be good for or against the whole firm.[2] In the Common law, within the scope of the partnership, the majority have a right to govern, but in the Roman law the express or implied assent of all the partners is required.[3] Both laws make partners liable to each other for negligence or fraud, and require a withdrawal from the partnership to be in good faith.[4] Both laws consider a partnership for no certain period as dissoluble at the will of any partner;[5] but the Roman law went further than the Common law in requiring that the dissolution should not take place at an unseasonable time.[6] Both laws allow the Court to dissolve the partnership in case of positive or meditated abuse of it by a partner, or when its objects are no longer attainable, as in the case of a partner's insanity.[7] By both laws, the assignment of his interest by one partner, contrary to the will of the others, dissolves the partnership.[8] Both laws dissolve the partnership by death;[9] and many of the provisions in both laws for taking an account and winding up a partnership are similar, though the English sale is more convenient than the Roman division.[10] Whilst English partners are liable to third parties *in solido*, by the Roman law they were only liable *pro parte*.

This enumeration shows a sufficient agreement between the two systems to justify the assertion that while the method of the introduction of so much Roman law in early times is not clear, in later times most of its leading principles have become incorporated into the Common law of Partnership.[11]

Mr. Spence and Lord Justice Fry[12] agree that the Equitable Jurisdiction to enforce Specific Performance is not derived from the Roman law, which only gave damages for breach of contract, and adhered to the maxim; "*nemo potest*

[1] § 103. [2] § 116.
[3] § 125: noted by Blackstone, i. 484.
[4] §§ 135, 170, 176. [5] §§ 268, 269. [6] §§ 275, 276. [7] §§ 288, 292.
[8] § 307. [9] § 317. [10] § 352. [11] Spence, i. 665.
[12] Fry on *Specific Performance*, 2nd edit. Lond. 1881, pp. 3-8. Spence, i. 645.

praecise cogi ad factum." [1] Spence considers the jurisdiction a "clerical invention" and Fry doubts whether to attribute it to the Canon law, which said "*Studiose agendum est ut ea quae promittuntur opere compleantur,*" [2] or to "the plain principles of morality and common sense of the Judges who founded and enlarged the equitable jurisdiction."

Besides the chief heads of its jurisdiction, the leading principles on which the Chancery administers justice show traces of clerical and Roman influence. The term "Conscience," [3] which is so involved in the decisions of the Court, though itself of clerical invention, is like the Praetorian notion of *bona fides;* but as to *mala fides* the English law has departed from the Roman principle, *lata culpa plane dolo comparabitur,* by holding that, "Gross negligence may be evidence of *mala fides,* but it is not the same thing." [4] The jurisdiction of the Chancery, in fraud, to cancel and deliver up deeds is analogous to the Praetorian *restitutio in integrum,* and *actio de dolo.* [5] Both *Praetor* and Chancellor had a power to relieve against Accident, grounded in the Roman law on *naturalis justitia.* [6] So the jurisdiction to relieve against Mistake, and the distinction between mistake of law, and of fact, both in the Common law and Chancery, appear of Roman origin; though under Edward IV. the Roman maxim, "*nec stultis solere succurri sed errantibus,*" was met by a clerical Chancellor with "*Deus est procurator fatuorum,*" [7] and the "fool" was relieved. The injunctions of the Chancery are comparable to Praetorian Interdicts; [8] its jurisdiction in discovery to the *actio ad exhibendum,* and possibly to the early and obsolete *actio interrogatoria.* [9] The procedure for perpetuating evidence by examining witnesses *de bene esse* had also a parallel in Roman procedure.[10]

[1] Pothier, *Des obligations,* i. 2, 2, 2.
[2] Decret. Greg. IX. i. 35, 3.
[3] Spence, i. 411. cf. *aequitas sequitur legem.*
[4] Ld. Denman in *Goodman v. Harvey,* 4 Ad. & E. 876. See also 1 Hare, 71. Spence, i. 425 note.
[5] Spence, i. 622. [6] *Ibid.* i. 628. *Dig.* 27, 1, 13, 7.
[7] *Dig.* 22, 6, 9. Cary's *Rep.* (ed. 1650), p. 17. Spence, i. 632, 637. Both editions of Cary that I have seen have the odd reading *est procurator futurus.*
[8] Spence, i. 669. [9] Spence, i. 228, 678.
[10] *Dig.* ix. 2, 40. Spence, i. 681.

Without proceeding to a more detailed examination enough has been said to show that though usually the details of the Equitable Jurisdiction were worked out by the Chancellors on English lines, the subjects of jurisdiction and the powers of the Court were largely derived from the functions of the *Praetor*, and that this was due in the main to the influence of the early Clerical Chancellors.

At present however the Courts of Chancery and Common law stand towards the Civil or any other law in no different relation. As Blackstone has said,[1] "In matters of positive right, both Courts must submit to and follow ancient and invariable maxims . . . where they exercise a concurrent jurisdiction they both follow the law of the proper tribunal: in matters originally of ecclesiastical cognizance, they both equally adopt the Canon and Imperial law, according to the nature of the subject." But the nature of the subjects which come before the Chancery is more likely to call for its recourse to the Canon or Civil law, than those which are discussed in the Common Law Courts, and therefore Blackstone recognizes in 1763 that in the Chancery "the proceedings are to this day in a course much conformed to the Civil law."[2]

3. *Roman Law in the Ecclesiastical Courts*

Of the Ecclesiastical Courts, Hale says:[3] "the rule by which they proceed is the Canon law, but not in its full latitude, and only so far as it stands uncorrected, either by contrary acts of Parliament, or by the common law and custom of England: when the canon law is silent, the civil law is taken in as a director, especially in points of exposition and determination touching wills and legacies." Their jurisdiction may be treated of under two heads: (1) that relating solely to the internal life and worship of the Church of England; (2) that affecting the whole realm, such as the testamentary and matrimonial jurisdiction.

The first head may be shortly dealt with. The separation

[1] Bl. iii. 436.
[2] Bl. i. 20.
[3] *Hist. C. L.* 28.

of the civil and clerical courts under William I., ensured for the latter a peculiarly Roman and canonical law and procedure; the Conqueror's law provided, "*secundum canones et episcopales leges rectum Deo et Episcopo suo faciat*,"[1] and the procedure was that of the Roman Consistory. This tended to create a feeling of hostility on the part of the Courts of Common law and the English people towards Courts not ruled by the Common law of England.

The present ecclesiastical law consists of three portions:[2] I. Statutes, and enactments made in pursuance of, or ratified by, statutes. II. Certain portions of the Canon law, and certain constitutions and canons issued by competent authorities. III. The Ecclesiastical Common law; ecclesiastical usages, not embodied in writing, except in some judicial decisions, but recognized as binding and supposed to be known by the Courts.

The Canon law as such is a body of Roman ecclesiastical law; but only such parts of it as are contained in the provincial constitutions,[3] and in the general usages of the church, and are recognized in the Courts of this realm, are binding in England.[4] No canon contrary to the Common or Statute law or to the Prerogative is of any force; and no canons made since the reign of Henry VIII., and not sanctioned by Parliament, are binding on the laity: nor are canons binding made before that reign, unless adopted by the English church.[5]

The position of Ecclesiastical law in England has been well described by Tindal, L. C. J. as follows;[6] "The question depends upon the Common law of England, of which the Ecclesiastical law forms a part. . . . The law by which the spiritual Courts of this kingdom have from the earliest times been governed and regulated, is not the general Canon

[1] Stubbs, *S. C.* p. 85.

[2] Brice, *Public Worship*, London, 1875, pp. 1-10. Phillimore *On Ecclesiastical Law*, London, 1873: i. pp. 12-19. Coote, *Ecclesiastical Practice*, London, 1847.

[3] Collected in Lyndwood's *Provinciale seu Constitutiones Angliae*, Paris, 1505; Oxford, 1679.

[4] *Martin v. Mackonochie, L. R.* 2 Adm. and Eccl. 116, 153.

[5] *Bishop of Exeter v. Marshall, L. R.* 3 H. L. 17, 47, 55.

[6] *R. v. Millis* (1844), 10 Cl. and Fin. 534, 671, 678, 680.

law of Europe, imported as a body of law into this kingdom, and governing those courts *proprio vigore*, but instead thereof an Ecclesiastical law, of which the general Canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislation of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical law. . . . That the Canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law." So also Sir John Nicholl:[1] "Indeed the whole Canon law rests for its authority in this country upon received usage; it is not binding here *proprio vigore*." The Canon law of itself is not therefore part of English law [This statement, however, should be compared with the views of Dr. Stubbs, in Essay No. 8, *post*, and of Professor Maitland, in his volume on the Canon Law, there cited. — EDS.], nor does the Civil law appear to enter into this branch of the Ecclesiastical Jurisdiction.

The Ecclesiastical Courts had jurisdiction affecting the subjects of the realm in three matters: — I. *Pecuniary*, in tithes, dilapidations &c., to which we need not further refer. II. *Matrimonial causes;* validity of marriage, legitimacy, divorce, &c. III. *Testamentary causes*, and the administration of the estates of Intestates.

Matrimonial Jurisdiction

The Judicature Act, 1873,[2] transferred to the newly created Probate, Admiralty and Divorce Division of the High Court of Justice *inter alia*, all matters within the exclusive cognizance of the Court for Divorce and Matrimonial Causes, and applied to that Division all the rules, orders and procedure of that Court. The Court for Divorce and Matrimonial Causes was created by an Act of 1857,[3] by which all causes and matters matrimonial, which should be pending in any Ecclesiastical Court in England were transferred to that

[1] 3 Phill. *Rep.* 67, 78-79.
[2] 36 and 37 Vic. c. 66 §§ 34, 70, 74. 38 and 39 Vic. c. 77 §§ 18, 21.
[3] 20 and 21 Vic. c. 85 § 4, 6, 22.

Court, which was to possess all jurisdiction on the subject exercisable by any ecclesiastical court, and to proceed and act and give relief on principles and rules which in the opinion of the Court should be as nearly as might be conformable to the principles and rules, on which the Ecclesiastical Courts had heretofore acted and given relief. This law of the Ecclesiastical Courts in the matter of marriage had been based on the Canon law, though its authority was much restricted, and depended on its having been received and admitted by Parliament, or upon immemorial usage and custom.[1] This jurisdiction devolved upon the Clerical Courts from the conception of marriage as a religious sacrament and tie, the nature, validity, and dissolution of which were matters of clerical cognizance. The procedure was "regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law."[2] A well known instance of this is the way in which the law of England dealt with the Roman doctrine of *legitimatio ante nuptias*. But generally the greater part of the English law on matrimonial causes is derived from the Civil or Canon law.

Testamentary Jurisdiction

The Testamentary jurisdiction was also in the hands of clerical judges.[3] The present Procedure and Practice of the Probate Division of the High Court of Justice are the same, (except as altered by rules under the Judicature Acts), as those in force in the Court of Probate before 1875.[4] This Court was created by the Act of 1857,[5] by which the jurisdiction of all ecclesiastical Courts having power to grant probate of wills was transferred to it, and its practice, except as subsequently provided by rules and orders, was to be according to the then practice in the Prerogative Court of Canterbury.[6] Thus the present jurisdiction of the Probate

[1] Shelford *On Marriage*. London, 1841: pp. 17-21.
[2] Blackstone, iii. 100.
[3] Coote's *Probate Practice*, 8th edit. London, 1878.
[4] 38 and 39 Vic. c. 77 §§ 18, 21. 36 and 37 Vic. c. 66 §§ 23.
[5] 20 and 21 Vic. c. 77 § 3. [6] *Ibid.* § 29, 30.

Division is founded on this Ecclesiastical law; but as to the origin of the Ecclesiastical Jurisdiction there is considerable doubt.

Wills were probably introduced by the clergy from Roman sources, and from early times the clerical courts had jurisdiction over suits as to the validity of wills, or in what is known as "*probatio solemnis per testes.*"[1] But whether this jurisdiction dates from the separation of the Courts by the Conqueror, or was assumed by the English Church at a later period, there is no evidence to show. Lyndwood[2] expressly says '*cujus regis temporibus hoc ordinatum sit non reperio,*" but the jurisdiction certainly existed at the time of Glanvil,[3] and the absence of evidence appears to show that, when assumed, it was not opposed by the common lawyers. As to the other branch of testamentary jurisdiction, the power of granting probate of a will in common form to an executor, and also as to the power of granting letters of administration of the goods of an intestate to his next of kin, we have more evidence.[4] The latter was, even in the time of Glanvil, in the hands of the king's courts, the next of kin having a right to succeed, subject to the claims of the lord, without any clerical intervention.[5] In the reign of Stephen, the jurisdiction over ecclesiastical persons and the distribution of their goods was placed in the hands of the Bishop, but this did not affect the laity.[6] Mr. Coote attributes clerical control over wills to the study of the Civil law by the clergy after the teaching of Vacarius, although their attempts to obtain that control were resisted by the barons.[7] In 1191, the clergy in Normandy, who had previously been granted, as in England, the control of clerical wills and intestacies, received the control of all wills and intestacies. Magna Charta contains the provision[8] "*Si aliquis liber homo intestatus decessit, catalla sua per manus propinquorum et amicorum suorum per visum ecclesiae distribuantur, salvis cuicunque debitis, quae defunctus ei debebat.*"

[1] Bl. Com. iii. 95. Coote's *Eccl. Practice*, pp. 22-86.
[2] Lyndwood, *Provinciale*, 3, 13, f. 176 (ed. 1679).
[3] Gl. vii. 8. [4] Coote, p. 22. [5] Gl. vii. 6, 7.
[6] Coote, p. 27. Stubbs, *S. C.* p. 114.
[7] *Ibid.* p. 31. [8] § 27. Stubbs, *S. C.* p. 292.

But this clause is omitted, not only, as Coote observes, in the Charter of 1225, but also, which he does not notice, in the reissues of the Charter in 1216, and 1217. He suggests that the omission is due to the hostility of the barons, but, if so, it is curious that the Articles which the Barons themselves put forward in 1215 should run,[1] "*Si aliquis liber homo intestatus decesserit, bona sua per manum proximorum parentum suorum et amicorum, et per visum ecclesiae, distribuantur;*"[2] unless this was a concession to the church by the barons to secure its coöperation in the coming struggle. The clergy were anxious to obtain control of intestacy that they might devote a share of the intestate's estate to pious purposes; the lords preferred to confiscate the property. The clergy protested "*Item mortuo laico intestato, dominus rex et caeteri domini feudorum bona defuncti sibi applicantes non permittunt de ipsis debita solvi, nec residuum in usus liberorum et priximorum suorum et alios pios usus per loci ordinarium cujus interest, aliqua converti;*"[3] thus the lords neither paid the debts, nor recognized the pious uses. The statute of Westminster charged the payment of the debts of the intestate on that third of the property which the Ordinary destined to pious uses, instead of, as in previous practice, on the *rationabiles partes* of the widow and children.[4] A statute of 1357[5] commanded the Ordinaries to appoint "*de plus proscheins et plus amis de mort intestat, pur administrer ses biens . . . et recoverer come executoures les dettes dues au dit mort . . . et soient accountables aux ordinairs si avant come executioures sont en cas de testament.*" The Ordinary thus appointed one of the next of kin as administrator to distribute the effects in such proportions as the church following the system of the civil law should direct, and the Act also gave power to bring actions concerning the intestacy in the King's Courts, as well as in the Courts of the Ordinary, thus making the system more secure.

[1] Article 16. *Ibid.* p. 283.
[2] *Note*, that the clause as to payment of just debts is omitted.
[3] *Gravamina* and Articles of 1257, § 25. Coote, p. 39.
[4] Coote, pp. 44-47, (A. D. 1285).
[5] 31 Edw. III. c. 11. Coote, p. 58.

The Prerogative Court of the Archbishop, which dealt with wills and intestacies was established by Archbishop Stafford in 1443, who transferred the jurisdiction of the Court of Arches over those matters to the New Court, presided over by a Commissary.[1] The first Commissary was Alexander Provert, Bachelor of Canon law.

But the Ordinary's power in intestacy became useless after the Reformation, owing to the refusal of the Common Law Courts to enforce the directions of the Ordinary, or the Ecclesiastical bonds for due performance of their duties which he took from administrators.[2] This unsatisfactory state of things resulted in the Statute of Distributions, which gave the Ordinaries and ecclesiastical judges, "having power to commit administrations of the goods of persons dying intestate," power to take bonds for the due administration of the estate, which should be enforceable in Courts of the law.[3]

We have thus traced, as far as the lack of evidence allows, the process by which the Clerical Courts acquired the jurisdiction over all matters connected with wills and testaments. This jurisdiction, once obtained, was exercised on the lines of the Canon and Civil laws: as Hale says,[4] "where the Canon law is silent, the Civil law is taken in as a director, especially in points of exposition and determination touching wills and legacies," and these "directions of the Civil law" have been adopted by the Chancery in cases involving the construction of documents and wills.

The original jurisdiction of the Ecclesiastical Courts in cases *laesionis fidei*, over contracts not enforceable by the King's courts, and its influence on the works of Glanvil and Bracton have already been referred to.

4. *Roman Law in the Admiralty*

The early history of the "Court of Admiralty proceeding according to the Civil law," as Coke terms it, is closely con-

[1] Coote, p. 81.
[2] Coote, p. 55.
[3] 22 and 23 Ch. II. c. 10, made perpetual by 1 Jac. II. c. 17 § 18.
[4] Hale, *Common Law*, p. 28.

nected with the history of the Law Merchant, which will form the subject of our next section. From very early times merchants and mariners regulated their dealings by a set of customs and rules known as the Law Merchant, Law Marine, or Customs of the Sea. In the Domesday Book of Ipswich,[1] it is recorded that "the pleas yoven to the law maryne, that is to wyte, for straunge marynerys passaunt, and for hem that abydene not but her tyde, shuldene be pleted from tyde to tyde;" and it is probable that similar courts existed in all seaport towns, and places where merchants resorted. This Law Merchant and Customs of the Sea came into prominence in the countries bordering on the Mediterranean; lands which had been under Roman rule continued to obey a modified version of the Roman laws, (which the Roman jurists themselves had borrowed from the Rhodian code,) adapted and altered to meet the new developments of commerce and civilization.[2] And by the middle of the thirteenth century a number of written codes of Maritime law came into existence in most of the principal centres of mercantile activity. The *Consolato del Mare* represents the customs observed at Barcelona; the Laws of Oleron, the usages of Bordeaux and the Isle of Oleron; the Laws of Wisbuy, the rules of the Hanse Towns. The Italian version of the *Consolato* speaks of its contents thus:[3] "these are the good constitutions and customs which belong to the sea, the which wise men passing through the world have delivered to our ancestors."

The early history of the Customs of the Sea, and of the Admiralty Court in England may be gathered from a memorandum of 1339, entitled "*Fasciculus de Superioritate Maris*,"[4] which recites that the Justiciaries of the King were to be consulted as to the proper mode of revising and continuing the form of proceeding instituted by the King's grandfather and

[1] Cited from a MS of 1289, in Twiss, *Black Book of Admiralty*, ii. 23.
[2] Pardessus, *Collection des Lois Maritimes*, Paris, 1828, cited in Twiss, iv. Pref. 129. Godolphin's *View of the Admiral's Jurisdiction*, London, 1661, p. 13. Zouch, *Jurisdiction of the Admiralty of England asserted by R. Zouch, D. C. L., late Judge of the Admiralty Court*, p. 88: (written before 1663, published 1686). Malynes' *Lex Mercatoria*, p. 87, 1st edit. 1622; 3rd edit. 1685.
[3] Cited in Zouch, p. 88. The original Spanish version (Twiss, iv.), has not the clause.
[4] On a roll of 12 Edw. III.; cited in Twiss, i. Pref. pp. 32, 57.

his Council, for the purpose of maintaining the ancient supremacy of the Crown over the Sea of England, and the right of the Admiral's office over it, with a view to correct, interpret, declare, and uphold the laws and statutes made by the Kings of England, his ancestors, in order to maintain peace and justice amongst the people of every nation passing through the sea of England, and to punish delinquents, "which laws and statutes were by the Lord Richard, formerly King of England, on his return from the Holy Land, corrected, interpreted and declared, and were published in the Island of Oleron, and were named in the French tongue, 'la ley Olyroun.'" There is no doubt that Richard I., on his return from Palestine did not visit the Isle of Oleron, and all that can be meant is therefore, that the Laws of Oleron, whose origin we have seen, were promulgated in England by Richard.[1] This account receives confirmation from the contents of the famous "Black Book of the Admiralty," which, having disappeared for many years, was at length found at the bottom of a chest of private papers in a cellar. It contains: (1) instructions for the Admiral's administrative duties in time of war; the first article of which is:[2] "when one is made Admirall," he must first ordain deputies, "some of the most loyall wise and discreet persons in the Maritime law (*la loy maryne et anciens coustumes de la mer*)," (2) articles of war for the King's navy, and (3) an account of the Admiral's jurisdiction in 34 articles, of which the first 24 are identical with the most ancient version of the Rolls of Oleron, and the rest are peculiar to the English Admiralty, and probably the result of the conference of 1339. Another article in this part:[3] "Item any contract made between merchant and merchant beyond the sea, or within the flood marke, shall be tried before the Admiral, and nowhere else by the ordinance of the said King Edward I. and his lords," appears to furnish the origin of the Admiral's jurisdiction in civil suits, which probably were more often settled informally by the merchants in the seaport towns "*selon la ley merchant.*"

The Admiral took his oath to make summary and full process "*selon la ley marine et anciennes coustumes de la mer.*"[4]

[1] Twiss, i. Pref. 58. [2] Twiss, i. 3. [3] Twiss, i. 69. [4] Twiss, i. 169.

A subsequent treatise on procedure, entitled the *Ordo Judiciorum*, is Roman in character and terminology, and bears traces of being written by a civilian of the School of Bologna.[1] Indeed, as many of the judges in the Court of Admiralty, the deputies of the Lord High Admiral, were clerics, the procedure at any rate, if not also the rules of the Court, was likely to become Roman in character. The inquiry of 1339, already alluded to, was entrusted to three clerics, the Official of the Court of Canterbury, the Dean of *St. Maria in Arcubus*, and a Canon of St. Paul's.[2] By an Act of 1403, "*les dites admiralles usent leur leys seulement par la ley d'Oleron et ancienne ley de la mer, et par la ley d'Angleterre, et ne mye par custume, no par nule autre manere*,'[3] while in 1406 under the Admiralties of the Beauforts, the jurisdiction of the Admiralty Court was much increased.[4] It is not therefore wonderful that under Edward VI. the answer was made to a French envoy[5] "that the English Ordinances for Marine affairs were no others than *the Civil Laws, and certain ancient additions of the realm.*" The Black Book itself has an express reference to the Roman Law: "It is ordained and established for a custom of the sea that when it happens that they make jettison from a ship, *it is well written at Rome* that all the merchandise contained in the ship ought to contribute pound per pound,"[7] and many other clauses are indirectly taken from the same source.

The foundations of Admiralty Law are thus to be found in: (1) the Civil Law, (*a*) as embodied in the Law Merchant, especially in the Laws of Oleron; (*b*) as introduced by subsequent clerical judges, mainly in procedure; (2) in subsequent written and customary rules, adopted in view of the developments of commerce. This view is borne out by the accounts which text writers give of the nature of the Law.

Thus Sergeant Callis says (in 1622) "I acknowledge that the king ruleth on the sea by the Laws Imperial, as by the

[1] Twiss, i. 178. The title is Sir T. Twiss' invention.
[2] Twiss, ii. Pref. 42.
[3] 5 Hen. IV. c. 7; 2 Hen. V. c. 6.
[4] Spelman, *Glossarium, sub voce* Admirallus, ed. 1687, p. 16.
[5] Zouch, 89.
[6] Twiss, i. 127.
[7] *Lex Rhodia de jactu, Dig.* 14, 2, 1. Twiss has a wrong reference.

Roll of Oleron and other; but that is only in the case of shipping and for merchants and mariners;"[1] on which Zouch remarks:[2] "I suppose no man will deny that the Civil and Imperial laws, the Roll of Oleron and others . . . are of force in the Admiralty of England," and again,[3] "the kingdom of England is not destitute of Special laws for the regulating of sea businesses, which are distinct from the Common laws of the realm, as namely, the Civil laws and others of which the books of Common law take notice by the names of *Ley Merchant* and *Ley Mariner*" . . . "Businesses done at sea are to be determined according to the Civil law, and equity thereof, as also, according to the customs and usages of the sea . . . for instruments made beyond the sea have usually clauses relating to Civil law and to the Law of the Sea."[4]

This work of Zouch's was written in reassertion of the privileges of the Court of Admiralty in opposition to the encroachments of the Courts of Common law,[5] who secured for their jurisdiction cases which properly fell within the cognizance of the Admiralty, by the fiction that the contract sued on was made in Cheapside, whereas, as the Civilians gravely remarked, a ship could not come to Cheapside because there was no water. The Common Law Courts also prohibited the Admiralty from trying certain classes of cases; on which Zouch says:[6] "It may be thought reasonable that such contracts being grounded upon the Civil law, the law amongst Merchants, and other maritime laws, the suits arising about the same should rather be determined in those courts, where the proceedings and judgments are according to those laws, than in other Courts, which take no notice thereof."

So Selden had said[7] "*Juris civilis usus ab antiquis saeculis etiam nunc retinetur in foro maritimo, seu Curia Admiralitatis*," and Duck:[8] "*Jus autem dicit Admiralitas ex Jure Civili Romanorum, et ejus Curia consuetudinibus.*"[9] Godolphin, writing in 1661, says "all maritime affairs are regulated

[1] Reading on the *Statute of Sewers*. 1st ed. 1622. Ed. 1686, p. 42.
[2] Zouch, p. 95. [3] *Ibid.* p. 89. [4] *Ibid.* p. 118.
[5] Coke, iv. 134; see also i. f. 11 b. "Civil Law in certain cases, not only in Courts Ecclesiastical, but in the Admiralty, in which is observed la ley Olyroun, 5 Rich. I."
[6] p. 103. [7] *ad Fletam*, viii.
[8] (1676) ii. 8, 3, 24. [9] Godolphin, p. 40.

chiefly by the Imperial laws, the Rhodian laws, the Laws of Oleron, or by certain peculiar municipal laws and constitutions, appropriated to certain cities bordering on the sea, or by those maritime customs . . . between merchants and mariners." . . . "The Court of Admiralty proceeds according to the known laws of the land and the ancient established Sea laws of England with the customs thereof, so far as they contradict not the laws and statutes of the realm." [1] . . . "A great part of this Fabric is laid on a foundation of Civil law . . . a law allowed, received, and owned as the law of the Admiralty of England" [2] . . . though "It is most true that the Civil law in England is not the law of the Land, but the law of the Sea . . . *a* law, though not *the* law of England, not the Land law, but the Sea law of England." [3]

Hale in 1676, with his usual strong feeling against the Civil law, sums this up thus; [4] "The Admiralty Court is not bottomed upon the authority of the Civil law, but hath both its power and jurisdiction by the law and custom of the realm in such matters as are proper for its cognizance. This appears by their process . . . and also by those customs and law maritimes whereby many of their proceedings are directed, and which are not in many things conformable to the Civil law . . . also the Civil law is allowed to be the rule of their proceedings, only so far as the same is not contradicted by the Statutes of this realm, or by those maritime laws and customs, which in some points have obtained in derogation of the Civil laws."

This opinion of Lord Hale's, though apparently inconsistent with the *dicta* previously cited is not, I think, so in reality; for all that he alleges is that the Civil law is only law in England by the authority of the English Crown, and that in many points it has been altered and modified by later decisions and enactments; and both of these propositions are recognized by previous writers.

Blackstone says of the [5] "maritime Courts before the Lord High Admiral," that "their proceedings are according to the

[1] Godolphin, Pref. [2] *Ibid*, p. 123. [3] *Ibid*, p. 127.
[4] Hale, *Common Law*, p. 40.
[5] Bl. iv. 68.

method of the Civil law, like those of the Ecclesiastical Courts." . . . [1] "The proceedings of the Courts of Admiralty bear much resemblance to those of the Civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires, both the Rhodian laws, and the laws of Oleron: for the law of England doth not acknowledge or pay any deference to the Civil law considered as such, but merely permits its use in such cases where it judges its determination equitable, and therefore blends it in the present instance with other marine laws; the whole being corrected, altered and amended by acts of parliament, and common usage; so that out of this composition, a body of jurisprudence is enacted, which owes its authority only to its reception here by consent of the Crown and people."

On the criminal jurisdiction of the Court of Admiralty, Blackstone alludes to the disuse of its old procedure:[2] — "but as this Court proceeded without jury in a manner much conformed to the Civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England;" and as, owing to the requirements of two witnesses, gross offenders might escape, therefore "marine felonies are now tried by commissioners *oyer et terminer* according to the law of the land."

The procedure and practice of the Court of Admiralty was transferred by the Judicature Acts to the Probate, Admiralty and Divorce Division of the High Court of Justice, except as altered by subsequent Orders under the Act. This Division thus unites the three branches of English law in which the Civil law had most direct and acknowledged influence, the Testamentary and Matrimonial Clerical Jurisdictions, and the Jurisdiction of the Admiralty, which, as we have seen, was partly built up by clerical judges.

On the subject matter of Admiralty law, we may say more in the next section. The procedure *in rem* against a ship, analogous to "*Noxa caput sequitur*," the institution of average (*Contributio*), Bottomry (*pecunia trajectitia vel nauticum foenus*), and probably charter parties, all bear traces of Roman origin.

[1] Bl. iii. 108. [2] Bl. iv. 268.

5. *Roman Law in the Law Merchant*

From the earliest times a summary mode of procedure appears to have existed, in which a kind of rough and ready justice was exercised in mercantile disputes according to the usages of commerce. As early as Bracton we find recognition of this; the solemn order of attachments need not be observed in such cases "*propter privilegium et favorem mercatorum;*"[1] and a summons with less than 15 days' notice may be adjudged lawful, "*propter personas qui celerem debent habere justitiam, sicut sunt mercatores, quibus exhibetur justitia pepoudrous.*"[2] This "Court of Pipowder" is also mentioned in the Domesday of Ipswich, where besides the "pleas yoven to the lawe maryne," there are also "pleas between straunge folk that men clepeth *pypoudrus*, shuldene be pleted from day to day."[3] The Court of Pipowders in 1478 was a Court that sat from hour to hour administering justice to dealers in time of fair;[4] according to Coke, it was to secure "speedy justice done for advancement of trade," and there might be such a Court by custom without either fair or market.[5]

Malynes, in his curious and interesting work on the *Lex Mercatoria*, speaks of "the law Merchant, that is according to the customs of merchants . . . which concerning traffic and commerce are permanent and constant."[6] Coke states that[7] "the merchant strangers have a speedy recovery for their debts and other duties, *per legem mercatoriam*, which is a part of the Common Law." The Court of the Mayor of the Staple, he says,[8] "is guided by the Law Merchant . . . merchant strangers may sue before him according to the law merchant or at the Common law. . . . This Court is the Court in the Staple Market, and it was oftentimes kept at Calais, and sometimes at Bruges, Antwerp and Middlebro',

[1] Br. f. 444.
[2] Br. f. 334: so called because justice was done while the dust was still on the foot, or before it could be shaken off.
[3] Black Book of Admiralty, ed. Twiss. Rolls Series, ii. 23.
[4] 17 Edw. IV. c. 2.
[5] Coke, iv. 272.
[6] Pub. 1622, 3rd Edit. 1686; pp. 2, 3.
[7] Coke, ii. 58; see i. 11, b.
[8] Coke, iv. 237, 238.

therefore it was necessary that this Court should be governed by Law Merchant." Fortescue also mentions that in certain Courts, "where matters proceed by Lawe Merchaunt, contracts or bargains among merchants in another realm are proved by witnesses" [1] (because 12 men of a neighbouring county cannot be obtained).

Zouch goes into the matter more at length.[2] Sir John Davies, he says, owns the Law Merchant as a law distinct from the Common law of England in a MS. Tract, where he affirms "that both the Common Law and Statute Laws of England take notice of the Law Merchant, and do leave the Causes of Merchants to be decided by the rules of that law, . . . which is part of the Law of Nature and Nations," "whereby it is manifest," continues Zouch, "that the cases concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general Laws of Nature and nations. Sir J. Davies saith further, 'That until he understood the difference between the Law Merchant, and the Common law of England, he did not a little marvel what should be the cause that in the Books of the Common law of England there are to be found so few cases concerning merchants and ships, but now the reason was apparent, for that the Common law did leave those cases to be ruled by another law, the Law Merchant, which is a branch of the Law of Nations.'"

Again Zouch says: [3] "For the advantage of those who use navigation and trade by the sea, the Law Merchant and laws of the Sea [4] admit of divers things not agreeable to the Common law of the realm," and he cites instances and continues: "It is not hereby intended that the Courts of Common law cannot or do not take notice of the Law Merchant in merchants' cases, but that other things likewise considered, it might be thought reasonable to allow them the choice of that Court where the Law Merchant is more respected, than to confine them to other Courts, where another law is more predominant. Besides there may be danger of doubt thereof, because those things are not approved of for proofs at the

[1] *De Laudibus*, p. 74, ed. 1616: Selden on Fortescue, *ibid.*
[2] Zouch, p. 89. See Godolphin, p. 128.
[3] p. 128.
[4] i. e. the written laws of Oleron, etc.

Common law, which are held sufficient in the Admiralty among the merchants."

Blackstone defines very clearly the position of the Law Merchant in his time;[1] "for as the transactions of foreign trade are carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of; and in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries, and that often even in matters relating to domestic trade, as for instance in the drawing, acceptance and transfer of inland bills of Exchange." And again: "thus in mercantile questions, such as bills of exchange and the like; in all marine causes relating to freight, average, demurrage, bottomry, insurances, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regularly adhered to."[2]

Now this Law Merchant, thus recognized by the laws of England, drew part of its matter from the Civil law. Being "part of the law of nations," in that it was composed of the customs of merchants of all nations, it included a number of usages which were relics of the Civil law, continuing the practice of the coasts of the Mediterranean. Again, the written laws of the sea, the *Consolato* and the laws of Oleron, which formed part of the Law Merchant, and the latter of which was expressly embodied in the laws of England, were based on the Civil law, with such additions as were necessary to meet the needs of the time. Thus Duck is justified in speaking of the "*Curia Mercatorum, in qua lites de contractibus mercatorum ex aequo et bono secundum jus civile Romanorum terminandae sunt.*"[3] Indeed even at that time the Civil law was recognized as an authority, where usage was uncertain. Malynes records a case with which he was personally acquainted, where an unfortunate merchant unintentionally guaranteed the solvency of another, and "the opinion of merchants was demanded, whereon there was grand diver-

[1] Bl. i. 273. [2] Bl. iv. 67. [3] ii. 8, 3, 25.

sity, so that the Civil law was to decide the same," and it was decided by the *Digest*.[1]

This *Lex Mercatoria* had therefore a Roman foundation; and the importance of this will be seen when we remember that Lord Mansfield, the father of modern Mercantile law,[2] during the 32 years in which he was Lord Chief Justice of the King's Bench,[3] constructed his system of Commercial law by moulding the findings of his special juries as to the usages of merchants (which had often a Roman origin) on principles frequently derived from the Civil law and the law of nations. One among Junius' bitter attacks on him expressly alludes to this feature of his:[4] "In contempt or ignorance of the Common law of England, you have made it your study to introduce into the Court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme;" a charge for which, says Lord Campbell,[5] "there is not the slightest colour of pretence. He did not consider the Common law of England . . . a perfect code adapted to the expanded, diversified, and novel requirements of a civilised and commercial nation . . . but in no instance did he ever attempt to *substitute* Roman rules and maxims for those of the Common law. He made ample use of the compilations of Justinian, but only for a supply of *principles* to guide him upon questions unsettled by prior decisions in England; deriving also similar assistance from the law of nations, and the modern Continental codes." The nature of his work was well described by Buller, J. in his celebrated judgment in *Lickbarrow v. Mason*,[6] where he says concerning bills of lading: "thus the matter stood till within these 30 years; since that time the Commercial law of this country has taken a very different turn from what it did before. . . . Before that period we find that in Courts of law

[1] p. 69.

[2] Park on *Insurance*, Lond. 1787, 7th edit., Int. pp. 43-48. Lowndes on *Insurance*, Int. p. 27; Campbell's *Lives*, Vol. ii.

[3] 1756-1788.

[4] Cited in Campbell, ii. 437.

[5] *Ibid.* p. 438, 439.

[6] 1787, 2 *T. R.* 63, 73; see also Lowndes on *General Average*, Pref. 3rd edit. p. 45.

all the evidence in mercantile cases was thrown together: they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles . . . not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged and explained till we have been lost in admiration at the strength and stretch of the human understanding. And I should be sorry to find myself under a necessity of differing from Lord Mansfield, who may truly be said to be the founder of the Commercial law of this country." An example of Lord Mansfield's use of the Civil law will be seen in his exposition of the nature of the equitable action for money had and received, which can be traced, passage by passage, to the *Corpus Juris:*[1] and many of these usages of the merchants, which he thus harmonized, had their origin in the Roman law though their details were of modern growth.

Thus the law of General Average, as developed by the Courts, appears to rest upon a Roman foundation. Mr. McLachlan even assigns a Roman origin to the name, deriving it from *actio ex aversione,*[2] though this origin is challenged by Mr. Lowndes and seems rather fanciful. The Rhodian law:[3] "*Si levandae navis gratia, jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est,*" really contains the whole principle of general average, though it restricts the example to Jettison. The *Corpus Juris* expanded it to cover other cases, such as cutting away the mast, "*removendi communis periculi causa.*" But these laws fell into desuetude, though the practice of contribution may have survived in the Mediterranean. Some slight reference to it appears in the laws of Oleron, but the old Sea laws only recognize two cases of average, jettison and cutting away

[1] *Moses v. McFerlane,* 2 Burr. 1005. 1 W. Bl. 219; see this set out in Warren's *Law Studies,* pp. 1353, 1354 from Evans' translation of Pothier *des Obligations,* ii. 379, 380.

[2] McLachlan's Arnould on *Insurance,* 5th ed., pp. 882-885. Lowndes, *General Average,* 3rd edit., pp. 270-272.

[3] *Dig.* 14, 2, 1. See Lowndes, Int. pp. 45, 46. *Ibid.* p. 256.

a mast. The first express definition of "*commune avarie*" appears in the *Guidon de la Mer*, about 1560:[1] and a fuller one is found in the French *Ordonnance* of 1681. In 1801 a Court of Common law first recognizes and discusses the right to recover at Common law general average contributions.[2] Lawrence, J. defines a general average loss as "all loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo," and this "must be borne proportionably by all who are interested."[3] Since then the law on the subject, probably founded on the Rhodian and Roman law, and expanded by mercantile usage in all countries, is still undergoing development in the Courts;[4] though in the last reported case, the Master of the Rolls rejected the idea that the law of England should be brought into consonance with the laws of all other countries; "no English Court has any mission to adapt the law of England to the laws of other countries; it has only authority to declare what the law of England is."[5] But the law of England on these points was originally the Law Merchant, the same in all commercial countries; and the agreement of all foreign countries in a rule of the Law Merchant would then have been evidence of its being part of the law of England, or rather of a Code which the English Courts would recognize and enforce.

Lord Mansfield's greatest work was done in the development of the law of Insurance; and here, though he gave form and coherence to the Law Merchant, it does not seem that that law can be traced to Roman sources. Its Roman origin has indeed been suggested; Zouch, for example, says:[6] "Policies of Insurance are grounded upon the Civil law . . . which as Malynes affirms were taken up in this kingdom from the laws of Oleron:" but the most recent authorities hold

[1] Lowndes, 275.

[2] *Birkley v. Presgrave*, 1 East, 228. Lowndes, pp. 1, 276; Int. p. 48.

[3] *cf.* the Ordonnance; *les despenses extraordinaires faites, et le dommage souffert, pour le bien et le salut commun des marchandises et du vaisseau sont avaries grosses et communes.*

[4] *cf. Atwood v. Sellar*, 5 Q. B. D. 286, *Wright v. Marwood*, 7 Q. B. D. 62, *Svendsen v. Wallace*, 11 Q. B. D. 616, 13 Q. B. D. 69. 10 App. C. 404.

[5] 13 Q. B. D. 73. [6] p. 102.

that, though there is almost an entire lack of evidence concerning it till the publication of the *Guidon* (circa 1560), it probably originated about 1200 A. D. with the Italians, and was introduced into England by Lombard merchants.[1] Under Queen Elizabeth a special Court was constituted to try London Policies of Insurance, and it is noteworthy that it was to consist of the Judge of the Admiralty, the Recorder of London, *two Doctors of the Civil Law*, two common lawyers, and eight merchants.[2] The Court fell into disuse, but its composition shows the view that Insurance was part of the subject-matter of the Law Merchant, which in its turn was connected with the Civil law. Apart from this, there is no trace of Roman influence in the English law of Insurance.

The Roman *pecunia trajectitia*[3] was a loan of money with which merchandise was bought and shipped, being at the risk of the lender till the goods reached their destination. The interest on the loan was originally unlimited but was restricted by Justinian to 12 per cent.[4] And though the Roman law fell into oblivion, the institution appears to have survived in the Bottomry and Respondentia of the Law Merchant. By a Bottomry Bond,[5] the master under stress of necessity borrows money for the prosecution of his voyage on the security of the ship, to be repaid with maritime interest if the ship arrives in safety; Respondentia is a similar loan on the security of the cargo, its repayment being also dependent on safe arrival. Neither of these is quite the same as *Pecunia Trajectitia*, which was rather an original venture by a merchant dependent on the safe arrival of the ship, than a loan to the master, made under necessity, to enable a voyage already begun to be prosecuted. But Malynes expressly calls Bottomry, *pecunia trajectitia*, while he also alludes to a transaction precisely similar to the Roman one, as "a deliverance of money of the nature of *Usura Maritima*."[6] The "darkness of an earlier age"[7] prevents us from tracing

[1] Park on *Insurance*, Int. pp. 10-19. Lowndes on *Insurance*, Lond. 1881, Int. pp. 19-21.
[2] Park, Int. p. 40. 43 Eliz. c. 12.
[3] *Dig.* 22, 2, 1-5.
[4] *Cod.* 4, 32, 26.
[5] McLachlan, *Merchant Shipping*, 3rd ed. pp. 51-65.
[6] p. 122. [7] McLachlan, p. 65.

what connexion the later institution has with the Roman one, but it seems probable that the latter survived, and was modified and adapted into the Bottomry of to-day.

The Admiralty Court endeavoured to introduce the Civilian doctrine of a tacit hypothec of, or maritime lien upon, the ship herself for repairs or the supply of necessaries without any express Bottomry bond. Lord Stowell said:[1] "In most of those countries governed by the Civil law, repairs and necessaries form a lien upon the ship herself. In our country the same doctrine had for a long time been held by the Maritime Courts, but after a long contest, it was finally overthrown by the Courts of Common law, and by the House of Lords in the reign of Charles II.:" and Lord Holt also, no opponent of the Civil law, held that:[2] "By the Maritime law every contract of the master implies a hypothecation, but by the Common law it is not so, unless it be so expressly agreed."

Zouch suggests that Charterparties are derived, through the Roman, from the Rhodian law;[3] "*Si quis navem conduxerit, instrumenta consignata sunto*," and Malynes, who cites other Rhodian rules as in force in the Law Merchant, also says that charterparties of his time (1622) commonly declared that they were in all things made according to the laws of Oleron;[4] the provision as to the forfeiture of double earnest by the Master, "if he repent," is clearly Roman. But in this, as in most other heads of the Law Merchant, we can only speculate whether Roman customs, developed by Mediterranean nations, have furnished the groundwork on which the Courts and the merchants of England have built their Mercantile law. The law of Bills of Exchange, which owes most of its material to the Law Merchant, appears entirely free from Roman influence, the usages of merchants which it embodies being of much later origin. We must therefore rest content with pointing to the Law Merchant, as a probable source of Roman influence on the English law, while the lack of evidence does not allow us to estimate the amount of that influence.

[1] *Zodiac* (1825). 1 Haggard, *Adm.* 325.
[2] *Justin v. Ballam* (1702). 1 Salk. 34. 2 Lord Raymond, 805.
[3] p. 102.
[4] pp. 98, 99.

The position of the Law Merchant, or of "the general maritime law," in this country has been under discussion in a series of cases, other than *Svendsen v. Wallace*,[1] down to 1882. In 1801 Lord Stowell, discussing the powers of the master to give Bottomry Bonds, referred repeatedly to "the general maritime law," saying in one place:[2] "a very modern regulation of our own private law . . . has put an end to our practice of ransoming . . . but I am speaking of the general maritime law and practice, not superseded by private and positive regulation;" and again: "Adverting to the authority of the maritime law, as it has been for some years practised in this Court . . . adverting also to the position of what I may call the *Lex Mercatoria*."[3] In the *Hamburg*[4] (1864), also on the conflict of laws as to bottomry, Dr. Lushington announced his intention of "governing his judgment by reference to the ordinary maritime law . . . no specific law being alleged as the governing law" . . . "I must take the law which ought to apply to this case to be the maritime law as administered in England," while the Privy Council on appeal[5] "entirely agree with the learned Judge that the case is to be decided by the general maritime Law as administered in England." This expression was criticized by Willes, J., in a case in 1865,[6] where the "general maritime law, as regulating all maritime transactions between persons of different nationalities at sea," was suggested as one of the laws by which the decision should be governed; he said:[7] "We can understand this term in the sense of the general maritime law as administered in English Courts, *that being in truth nothing more than English law*, though dealt out in somewhat different measures in the Common law and Chancery Courts and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country, which by the hypothesis, does not recognize its alleged rule, we were not informed what may be its authority, its limits, or its sanc-

[1] 13 Q. B. D. 69.
[2] *The Gratitudine*. 3 W. Rob. 240, 259.
[3] *Ibid.* p. 271. [4] Br. and Lush, 259. [5] *Ibid.* 272.
[6] *Lloyd v. Guibert, L. R.* 1 Q. B. 115, 119.
[7] *L. R.* 1 Q. B. p. 123.

tion." . . . "It would be difficult to maintain that there is any general in the sense of universal law, binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto" . . . and further on he speaks of "the general maritime law as administered in England, or (to avoid periphrasis) the law of England."[1] This series of cases came before the Court of Appeal in 1882, in a case[2] which Sir R. Phillimore had decided by "the general maritime law as administered in England;"[3] and in reversing his decision Brett, L. J. said:[4] "what is the law which is administered in an English Court of Admiralty, whether English law, or that which is called the Common maritime law, which is not the law of England alone, but the law of all maritime countries. . . . The law which is administered in the English Court of Admiralty is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament, or by reiterated decisions and traditions and principles, has adopted as the English maritime law."

It is not inconsistent with these decisions that the Law Merchant is recognized whenever a special jury "finds" a custom of merchants, which is acted on by the Courts; for the law of England recognizes such customs because they comply with rules it has previously laid down, and decides that they were law as complying with its rules, and not from any merit of the Law Merchant. But in this way the usages of merchants still influence the law of England. . . .

6. *Conclusion*

This inadequate sketch of the influence of the Roman Law on the Law of England has now reached its close. We have seen that English law in its earliest stages is almost entirely Teutonic, and that those who claim for it descent from the laws and customs of the Roman occupation are unable to support their case by any satisfactory evidence. The most plausible of these theories is that which refers manorial insti-

[1] *L. R.* 1 Q. B. p. 125.
[2] *Gaetano e. Maria, L. R.* 7 P. D. 1, 137.
[3] *Ibid.* p. 4. [4] *Ibid.* p. 143.

tutions to a mingled Roman and South German origin, and even this at present lacks any certain foundation. The introduction of wills and charters comes from clerical and Roman sources, but except in this respect we cannot say that the influence of the Civil Law has in any way affected the Law of England until the coming of Vacarius.

The latter half of the twelfth century revives the study of Justinianean law throughout Europe, and England also shares in the revival. The Ecclesiastical Courts rule themselves by the Roman Law, and from their proceedings Roman influences affect the work of Glanvil. Bracton's great treatise contains much Roman matter and terminology, but his knowledge of the civil law was only that of every clerical judge, (and they were many), of his century. The full extent of their influence can only, even imperfectly, be traced by a detailed study of the Year-Books, a task far beyond our present powers; but it is clear that the revival was followed by a reaction. The Roman Law became not only a subject of distrust, owing to the conflicts between King and Pope; it even dropped into oblivion. With Coke, Hale, and Blackstone, while there is knowledge of the Law of Rome, there is also a clear definition of its position, as of no force in England, unless as adopted by the English law, or in particular courts where its authority was recognized by English jurisprudence. In those courts we have traced its history; in the Ecclesiastical Courts in their jurisdiction over marriages and succession at death, in the Admiralty Courts, proceeding according to the Civil Law and the Law of the Sea, and in the influence of the Law Merchant on both the Admiralty and the Common Law; and we have referred though briefly to some of the points in which the Common Law itself has been affected by the Law of Rome.[1]

That the history of Roman Law in England has yet to be written, no one is more conscious than the author of this Essay; he can only hope for an indulgence, proportioned to the difficulties of the task, in the attempt to gather together some of the materials for such a history.

[1] [Compare the Essays in Volume II under Ecclesiastical Courts, Equity, and Commercial Law; and Maitland's Bracton and Azo (Selden Society).— Eds.]

8. THE HISTORY OF THE CANON LAW IN ENGLAND[1]

By William Stubbs[2]

I

IT requires no small amount of moral courage to approach a subject of legal history without being either a lawyer or a philosopher. A lawyer, no doubt, would make short work of it, and pronounce a definitive judgment, without misgiving, on any subject, historical or other, human or divine, on which he had evidence before him; and a philosopher would systematise to his own satisfaction any accumulation of details that could possibly be referred to the categories of cause and effect. The student of history has not, ex officio, any such privilege of infallibility; the highest point to which he can rise is the entire conviction of his own ignorance and incapacity before the vast material of his investigation; the highest approach to infallibility is the willingness to learn and correct his own mistakes. If he wishes to learn something of a subject, his best policy is to write a book upon it, or to deliver two public statutory

[1] This essay is taken from "Lectures on the Study of Mediæval and Modern History," 1887, pp. 335-381 (Oxford, Clarendon Press). These two lectures were delivered on April 19 and 20, 1882.

[2] 1825-1901. A. B., Christ Church College, Oxford; Fellow of Trinity College, 1847; Regius Professor of History at Oxford, 1866; Curator of the Bodleian Library, 1869; Canon of St. Paul's, 1879; Bishop of Chester, 1884; Bishop of Oxford, 1889.

Other Publications: Select Charters of English Constitutional History, 1870; Constitutional History of England, 1874-1878; Councils and Ecclesiastical Documents relating to Great Britain and Ireland (with Mr. Haddan), 1869-1878; Documents Illustrative of English History, 1874; Historical Introductions to the Rolls Series, 1902.

With the essay here printed should be compared Professor Maitland's volume on "Canon Law in England" (1898), and Mr. Holdsworth's chapter on the Ecclesiastical Courts, in his "History of English Law," reprinted in Volume II of the present Essays.

lectures. Here then you have my motive; wanting to know something of the history of Canonical Jurisprudence, I undertake to lecture upon it. I shall be wiser, that is, more convinced of my own ignorance, before I have done.

If I were a philosopher I should begin thus: The legal history of a nation or institution must be the history of the successive stages by which it develops or adopts laws, according to the stages of its social, or moral, or political, or religious development; or thus: As a nation develops in civilisation, or foreign policy, or in specialised ambitions, or in consciousness of nationality, or in peculiar constitutional identity, it has to develop new branches or systems of law, or to borrow them ready-made from nations whose polity is in advance of its own, who have made themselves representative nations in the particular branch of sociology in which it desires to regulate itself. Hence, in England, on the original superstructure of ancient popular law is superinduced, in the age of the Conquest, the jus honorarium of the royal courts; and, when the royal courts have become the courts of common law, on their rigour is superinduced the moderating influence of Equity and Appeal: on the conversion of the nation to Christianity a religious discipline is a necessity, and on that religious discipline, as the framework of the Church is built up, there is based a canonical jurisprudence; if the nation is in close communication with foreign churches or a great Catholic religion, it naturally adopts, from them or it, its religious legislation; if not in such close intercourse, it develops a system of its own, and, when the intercourse becomes closer, modifies its own until it is more or less in harmony with that of the nations round it, always retaining more or less of its own home growth. Or again, still as the philosopher, I might say: Religion, Law and Morality cover the area of human action with rules and sanctions, and, with different origins, motives, and machinery, regulate regions of common energy, a number of acts that fall within reach of each or all. The fact that they spring from different sources necessitates the formation of distinct systems; the fact that they cover the same ground accounts for the possibility of conflicting operation; the fact

that, whilst they overlap one another, their proper areas nowhere coincide, necessitates some sort of definition and limitation of the scope and system of each, which definition and limitation must be supplied either by a concordat between them or by the subordination of one to the other. And once more: within the region of religious activity itself there are provinces which demand varying degrees of distinctness in definition and graduation of discipline; there are matters of doctrine, of discipline proper, of property and of judicature; there are legislation, jurisdiction, administration; there are functions for the theologian, the casuist, the canonist, and the civilian; questions of doctrine for the theologian, of morals for the casuist, of discipline for the canonist, of procedure for the civil lawyer.

Well, philosophical or not, these considerations seem to give us a clue to the method of our investigation, and suggest a division into two heads: first, the tracing of the growth of the ecclesiastical law, including both the material and the scientific study; and secondly, the history of its working in competition with and in general relations to the other systems of law. In such a cursory attempt to examine these heads as is possible in such a lecture as this, it is necessary to limit the field of survey as much as possible. I shall therefore restrict myself chiefly to the history of ecclesiastical jurisprudence in England, taking liberty, where it is necessary, to go beyond, but not attempting any general treatment. I have, you will observe, coupled together four topics under two heads; I propose to take the two heads separately, but to discuss the two topics that fall under each conjointly.

The first head is the growth of ecclesiastical law, and its two branches are the materials and the study. The materials arrange themselves thus: the New Testament contains not only all doctrine necessary to salvation, but all necessary moral teaching, and as much social teaching as was needed for the age in which it was propounded, and for the society which in the first instance was embodied under apostolic government. But in the very nature of things, and you must here recollect that I am trying to look at the subject

rather as a philosopher than as a divine, Christianity, as a growing religion, was certain to require an expansion, in expanding circumstances, of the principles which were clearly enough stated in the Gospel, but the application of which had to be regulated by some other process than the will of the individual. The moral teaching had to be expanded authoritatively, the dogmatic teaching had to be fenced by definitions, the administrative machinery had to be framed with some attempt at uniformity, so that, whilst the Christian society remained a simple voluntary society with no power of enforcing its own precepts by material sanctions, it should have a common jurisprudence recognised by the conscience of its members and by their general consent. Hence from the days of the apostles there were councils, and canons, and constitutions, and books of discipline; at first the canons, councils, and books of discipline covered all the ground of which I have spoken — doctrine, discipline, and administration, although some councils may be more famous for their decisions on one point than on another. Not perhaps to speak of the Apostolic Constitutions, take the council of Nicea for an example, and remember that we owe to it not only a formulated creed, but directions about consecration of bishops and ordination of priests, and likewise rules for the treatment of the lapsed and apostates, and the prohibition of usury. The legislation of Constantine added a new element which worked itself into all these three; giving a coercive and material force to rules which had been hitherto matters of conscience and consensus; the church was empowered to enforce her doctrinal decisions, her rules of discipline, and her frame of administration; and that so completely that from this date the ecclesiastical administration in Christian countries under the empire became so wedded to the secular administration as to be at times almost indistinguishable from it except on close investigation. From this date then our materials begin to sort themselves: the doctrinal definitions are embodied in the Creeds, and need not be pursued further than the fourth, or, at the outside, the sixth general council: but the canons of discipline and administration are worked into great detail for a long period

and in many countries. And here I must take a new point: the coercive authority given to the churches in matters of morals becomes henceforth a branch of jurisdiction, but there still remain branches of moral discipline which depend on voluntary obedience, in which a powerful offender, or a man who does not choose to confess, may defy law and order. For the latter were invented what may be called manuals of casuistry, the Penitentials; for the jurisdiction proper there remained the canons of the councils, now possessing cogent authority, and the laws of the empire, now framed on a strict conformity between church and state.

Here then we reach the historical materials on which is based the later canon law; and almost at the same time the date at which the conversion of England began. In the middle of the sixth century Dionysius Exiguus, a Roman abbot, compiled the collection of canons which was the germ and model of all later collections. Nearly at the same time, both in the Eastern Church under John the Faster, and in the extreme West under the Irish and other Celtic missionaries, began the compilation of Penitentials; and in the same century the emperor Justinian completed the great body of the civil law. Thus you get the three conjoint systems of jurisprudence: not distinct in fact from each other; overlapping everywhere, and even containing much common matter, but distinct in basis. Take the Penitential first: that was in reality a list of sins and their penances; sins so ticketed and valued as to please even the most abstract philosopher; permutated and combined to mathematical precision. This sort of literature, belonging especially to ages and nations brought into close contact with heathen abominations, was very important in the last converted countries of East and West; Archbishop Theodore of Canterbury, the Venerable Bede, Egbert of York, and among the Celts Columbanus, Cummian, Vinniaus, and Adamnan, founded the penitential system here: from them the Frank and German churches adopted their rules, and by and by, when Anglo-Saxon literature was borrowing from the Continent, our scholars translated back with interest the developed systems which their predecessors had sent abroad. These

rules of penance continue to be elaborated in England to the time of the Conquest; and bear some analogy to the early laws of the Anglo-Saxon kings, which consist so largely of definitions of crimes and penalties. It is to be remembered, however, that the Penitentials were private compilations, the authority of which depended on the estimation or dignity of their authors, and not on any legislative sanction; but, notwithstanding that, there is sufficient harmony amongst them to show that they incorporate the rules on which the episcopal jurisdiction pure and simple generally proceeded; they were a sort of customary church law for their own province. But over and above these there were the canons, or authorised church law; and of these also there was a series of important collections. I am unable to say how far the collection of Dionysius Exiguus was received in England and Ireland at first: but from the beginning of the Church History of United England, a series of new canons began to be added to the early collections: Theodore himself added the decisions of Roman and Byzantine councils to the resolutions of his own national synods: a great and important succession of Anglo-Saxon councils issued canons which were received with great respect in all the Western churches, as we know from S. Boniface's letters and the remains of the canons themselves. From Ireland likewise proceed a great collection of canons — the famous Collatio Hibernica, which, beginning with the edicts of S. Patrick, went on to embody the results of ecclesiastical legislation in West and East, and, by the time of Dunstan, whose copy of it we possess in the Bodleian, had added by successive accretions all that was thought worth preserving even in the capitularies of the Frank kings. The Anglo-Saxon Church possessed no such comprehensive collection of its own; but abroad the codification of church law proceeded rapidly. I have seen in the National Library at Paris some invaluable MS. collections earlier than the date of the forged decretals; and the forged decretals themselves were probably not the work of one man or one generation. Not however to tread again this well-trodden path, pass on to the collectors of genuine or less suspected canons:

of whom the most important is Burchard of Worms. He, at the beginning of the eleventh century, got together and arranged systematically all the materials he could find: borrowing authoritative determinations from the penitentials, the canons of councils, articles of the civil law as known to him by the Theodosian code, and the capitularies of the emperors. A century later, Bishop Ivo of Chartres produced the Pannormia, a similar collection, improved on that of Burchard by the use of the Digest and Code of Justinian. Ivo was a contemporary of Henry I of England, and his date carries us past the Norman Conquest and the Hildebrandine period.

We must revert to the third element of church law, the religious laws of the kings. Of these the history in England is straightforward enough. The Anglo-Saxon sovereigns, acting in the closest union with their bishops, made ecclesiastical laws which clothed the spiritual enactments with coercive authority, and sometimes seemed to ignore the lines which separate the two legislatures; such sacred laws of Alfred, Canute, and Ethelred only affect our subject so far as they operated on the common law of the country in such matters as tithes, observance of holy days, and the like; they do not become by themselves a part of the later church law. On the Continent there is this difference: — the Theodosian code had to a great extent won its way over Western Europe; it enters into the codes of the barbarians, into the law of the Pays du droit écrit, and into the canon law of France; the capitularies of Charles the Great and his successors, even to a greater extent than the Anglo-Saxon laws, combine ecclesiastical with secular dooms; and such of them as are accepted find their way into the Church law. But, over and above this infiltration, comes the necessary requirement of developing jurisprudence. The New Testament, the canons of the General Councils, the Penitentials, the Decretals, did not invent new systems of procedure. Where the Roman courts existed they became the model of the Church courts, and where they did not the ecclesiastical procedure followed the lines of the national and customary tribunals. Hence, wherever the Theodosian code spread, it carried the Roman

procedure as a part of church administration; where, as in England, only faint scintillæ of the civil law were to be found, the Church courts must have proceeded on much the same rules as the popular courts. And this is a matter to be seriously noted as we reach the critical point of the Norman Conquest. It is true we know very little about ecclesiastical procedure before this date, and what we do know is not very clear; we may however affirm pretty confidently that there was, over and above the strictly private discipline of the Confessional, a system of church judicature with properly designated judges, and a recognised though not well-defined area of subject-matter in persons and things. To put it very briefly, sacred persons and sacred things, men in orders, monks and nuns, sacred places, churches and churchyards, sacred property, lands, books and the furniture of churches, were under the special protection, and, as protection implied jurisdiction, under the jurisdiction of the bishops, who likewise had authority in matrimonial and like causes. There was a territorial episcopate, and the bishops exercised their judicial powers with the help of archdeacons and deans. But, it would appear, these judicial matters were transacted in the ordinary gemots of the hundred and the shire. Just as the court baron, court leet, and court customary of a manor are held together, so the court spiritual and the hundred or county court were held together; and the proceedings were probably in strict analogy. Just as suretyship was the rule in the hundred court, it was in the bishop's court; so also compurgation and ordeal, the law of witness, and the claim of the mundborh over the person of the litigant. I am not prepared to say that through intercourse with the French Church some portions of the Roman procedure may not already have crept in, but, so far as I can see, I am inclined to the belief that, whilst there was a customary canonical law and a substantially canonical judicature, the character of the procedure was customary and primitive, and differed in nothing materially from the lay procedure. The bishop declared the ecclesiastical law as the ealdorman did the secular, the assessors determined the point on which evidence or oaths were to be taken, and the suitors

were technically the judges. Of course all this is stated subject to correction: but this I suppose to be the case at the Conquest, and more or less the case until the close of the reign of Henry I, for the changes introduced by the Conqueror were not instantaneous in their effects.

And we come now to the consideration of the effects of the Conquest on this branch of our constitutional system. Here we have to remember two things: first, that the Norman Conquest coincided in time with the Hildebrandine revival; and secondly, that the Conqueror carried through his most important measures of change by the work of Norman ecclesiastics, many of them lawyers rather than theologians; of whom Lanfranc, the representative of a family of Lombard lawyers, was the chief. These two points enable us at once to estimate the importance of the act by which William separated the work of the bishops' courts from the work of the sheriffs' courts, and promised the assistance of the royal or secular justice in carrying into effect the sentences of the episcopal laws. In the first place he had substituted for the native bishops, used to national law and customary procedure, foreign bishops learned in the Hildebrandine jurisprudence and the Roman procedure; and in the second he had liberated the Church judicature from its association with the popular judicature. But, you will observe, much still remained to be done; for not yet had either Ivo or Gratian collected the Decretum, nor had Irnerius and the Bolognese lawyers begun to lecture on the Pandects; there was not as yet a recognised canon law or a complete civil law procedure.

One immediate result more I will notice, the breaking up of the dioceses into archdeaconries; for up to this time the bishops had done most of their own work. Dunstan had sat at the south door of Canterbury Cathedral and had administered supreme justice; and one archdeacon, generally in deacon's orders, had been a sufficient eye for the bishop where he could not be personally present. The Norman bishops wanted more than one eye, and, almost immediately after the Conqueror's legislative separation of the courts, we find that the archidiaconal service is formed on the plan

of that of the sheriffs; the larger dioceses, such as Lincoln and London, being broken up into many archdeaconries; and the smaller ones, such as Norwich, following the example. There was a vast increase in ecclesiastical litigation, great profits and fees to be made out of it; a craving for canonical jurisprudence and reformed judicature analogous to the development of constitutional machinery; and with it the accompanying evils of the ill-trained judges and an ill-understood system of law. This continued to be the case throughout the twelfth century, and very conspicuously so in the earlier part of it. The archdeacons were worldly, mercenary, and unjust; the law was uncertain and unauthoritative; the procedure was hurried and irregular. The evils were not confined to England, although they were here intensified by the fact of the novelty of the system.

On this condition of things a new light arose in the middle of the century; the resuscitation of the jurisprudence of Justinian and the codification of the canons by Gratian. The one supplied the necessary procedure, the other the necessary law. I place them together, because their operation reaches England nearly at the same time; more minutely, the civil law revival precedes the canon law revival by about forty years. I must say also that, when I speak of the civil law as remodelling procedure, I do not mean that it introduced any sudden changes, but that it supplied principles and precedents for the due development of the older Roman procedure, which had become as much a matter of custom as that of the popular jurisprudence was. The real founder of the medieval canon law jurisprudence in England was Theobald, Archbishop of Canterbury, who was consecrated in 1139 and ruled the Church until 1161; he is best known popularly as the rival of Henry of Blois, Bishop of Winchester, and as the patron of Thomas Becket; but his real importance is irrespective of personal matters. He saw the mischief which the maladministration of the archdeacons was doing, and instituted a nearer official of greater authority and more direct responsibility. John of Salisbury, the philosopher and historian, was, as secretary to Archbishop Theobald, the ancestor of the diocesan chancellors, officials

and vicar-generals, who begin to execute with more regularity and intelligence the law of the Church. Henry of Blois when legate had, as we are told, greatly encouraged the practice of appeals; and an immense proportion of John of Salisbury's letters, written in the name of Theobald, are concerned with questions of appeal, on the rights of advowsons, and other branches of clerical discipline. But that was not all. In the year 1149 Theobald brought from Lombardy and settled at Oxford as a teacher Master Vacarius, who had given himself to the study of the Code and Digest, and drawn up handbooks of procedure sufficient to settle all the quarrels of the law schools. Stephen, the reigning king, set himself stedfastly against this new teaching and expelled Vacarius; he had on his side the unintelligent dislike of foreign manners, the prudent conservatism of the elder prelates, and the personal jealousies of his brother Henry, whose opponent in political matters Theobald was. Accordingly the civil law was for the time banished. In the year 1151 Gratian completed the Decretum, the concordance of the canon laws; and they shortly found their way to England, where however they were scarcely more warmly received than the civil laws had been, but were not directly banished. It is curious that both Prynne and Selden, not to mention Coke, have confounded the teaching of Vacarius with the attempt to introduce canon law. It is certain that what Vacarius taught was the Corpus Juris of Justinian; but the two systems are thus closely joined together both in time and in essential character. And from this time dates in England that extremely close connexion between the two systems which is recognised in the 'Utriusque juris doctoratus' and in the fact that every great canonist throughout the middle ages in England was also a great civilian.

The first result perhaps of these novelties, so far as English law is concerned, was the improvement in legal education. Although Bologna and Pavia could not be suffered to come to England, England might go to Bologna; and a stream of young archdeacons, at the age at which in England a boy is articled to an attorney, poured forth to the Italian

law schools. Many and varied were their experiences; but invariably they get into debt and write home for money; some of them fall in love and become the quasi-husbands of Italian ladies; some get a bad character for learning the Italian art of poisoning; some are killed in frays with the natives; some remain abroad and become professors; all more or less illustrate the scholastic question which John of Salisbury propounds, Is it possible for an archdeacon to be saved? There are some few exceptions, but they seem to be generally of the men who stuck to theology and went for their education no further than Paris. The scrapes of the archdeacons however I have spoken of before; they are a really amusing feature of the epistolary correspondence of the time. I pass on to something more important.

Great as the advantages might be of an improved code of laws and system of procedure, neither the canon law nor the civil law was accepted here; they were rejected not only by the stubborn obscurantism of Stephen, but by the bright and sagacious intellect of Henry II. Now, considering the close political connexion between Theobald and the Plantagenet party, it is not at all impossible that Henry II may have been among the pupils of Vacarius: certainly he was more of a lawyer than mere empirical education could make him, and, as certainly, he was awake to the difficulties to which too ready acceptance of the reformed jurisprudence would expose him. How great a lawyer he was I need not tell you; how directly his difficulties were owing to the new doctrines of the canon lawyers we know from the history of Becket. I will only mention two points that illustrate his permanent relation to the subject: first, his Assize of Darrein Presentment removed all questions of advowsons and presentations from the ecclesiastical courts where they were the source of constant appeals to Rome; and secondly, by the Constitutions of Clarendon he did his best to limit the powers of the ecclesiastical lawyers in criminal matters and in all points touching secular interests. Against this must be set the fact that to his days must be fixed the final sliding of testamentary jurisdiction into the hands of the bishops, which was by the legislation of the next century permanently

left there, in a way which, however accordant with the policy of the papacy, was an exception to the rule of the rest of Christendom. Henry, although not by any known assize or constitution, must have restrained the ecclesiastical judicature from interfering in secular matters, except in the two points of matrimony, which was closely connected with a sacramental theory, and of testamentary business. These two, however, furnished matter sufficiently remunerative for a school of church lawyers; and the more distinctly ecclesiastical jurisdiction over spiritual things and persons provided much more. A thoroughly learned class of civil and canon lawyers is required over and above the thoroughly learned class of common law and (to anticipate a little) chancery lawyers of the royal courts.

Here then we begin to mark signs of increasing divergence. The common lawyers of England, the men who tread in the steps of Glanville, who are closely allied with the baronage and with the customary theories of prerogative, are opposed to the introduction of either branch of the Roman law. Glanville, anticipating the decision of the Statute of Merton on the question of legitimisation of children by the subsequent marriage of their parents, speaks of the 'canones legesque Romanorum' with the same tone of aversion. The ecclesiastics who followed the common law were as adverse to the Roman law as were the knights and barons who learned secular jurisprudence in the discharge of executive office: and very rarely do we find a great judge of the courts of Westminster taken from the ranks of canonists or civilians. Yet the educational influence of these two great systems was making itself felt very early indeed. Not only does Glanville, in the preface to his manual, cite from the Institutes the language in which he addresses his master, but large importations from the civil law procedure must have come in as the jurisprudence developed; and Bracton, who wrote a century after Glanville, makes direct citations from the compilations of Justinian. If I were not afraid of the lawyers, I should venture to say that the whole theory of Appeals and the whole subject of Equity are strange to the national growth of the common law, and, although widely

differing in details, far more akin to the civil law, the practice of which in ecclesiastical causes was steadily before men's eyes whilst they were developing the new systems. But I dare not venture to say this without more authority.

As we proceed, however, we are struck more and more with the prominence of the scientific element in legal education. The great compilations are not received as having any authority in England, but they are the sole legal teaching which is to be obtained in the schools where Englishmen go to learn law. The common law judges may not be canonists or civilians, but the statesmen, in many cases at least, are; certainly archbishops Langton and Boniface and Peckham and Winchelsey. And even of the common lawyers it must be affirmed that their teaching, such as they had, was not merely empirical, not the mere knowledge of customs and the few statutes that were as yet incorporated in the common law code; but scientific, that is, learned from the writings of jurists who treated not merely of the letter or the case, but of the spirit and reason of legislation. Glanville's is indeed but a book of procedure, but Bracton, Fleta, and Britton are jurists, and whilst they illustrate and explain the common law, bring to the interpretation an intelligence and authority that look to something far higher than precedent. We see how long the old doctrine of the authority that is in the mouth of the judge stands out against the new doctrine that is in the letter of the law. Like the 'decretum,' like the 'responsa prudentum' of the Pandects, the work of Bracton is a scientific rather than an authoritative text-book. But I am anticipating what I ought to put in proper order somewhat later.

Whilst the study of these foreign systems was becoming increasingly important and increasingly common, the popular dislike of foreign law was not in the least diminished. I must here couple the two Roman systems together, for to all purposes of domestic litigation they were inseparable: the 'canones legesque Romanorum' were classed together and worked together, mainly because it was only on ecclesiastical questions that the civil law touched Englishmen at all, but also because without the machinery of the civil law

the canon law could not be worked; if you take any well-drawn case of litigation in the middle ages, such as that of the monks of Canterbury against the archbishops, you will find that its citations from the Code and Digest are at least as numerous as from the Decretum. Moreover the accretions of the Decretum, the Extravagants as they were called, that is the authoritative sentences of the Popes which were not yet codified, were many of them conveyed in answers to English bishops, or brought at once to England by the clergy with the same avidity that lawyers now read the terminal reports in the Law Journal. The famous decision which Glanville quotes about legitimation is embodied in what then was an Extravagant of Alexander III, delivered to the bishop of Exeter in 1172, founded no doubt on a Novel of Justinian but not till now distinctly made a part of church law. And this point further illustrates what I was saying: for it is the point on which the great dictum of the council of Merton turns in 1236. The English hatred of the foreigners was in that year fanned to white heat by the importation of the king's half-brothers and the new queen's uncles: it was an unlucky moment for Grosseteste and the bishops to press that the English law of bastardy should be altered to suit the canon and civil law of Rome. The murmurs were already rising that William of Valence was going to change the constitution. Notwithstanding the influence of Grosseteste, the king and the barons declared 'Nolumus leges Angliae mutari.' That is a well-known story; but it is perhaps not equally well known that the king had just a year before issued an order which stands in close parallelism with the banishment of Vacarius. By a letter to the Lord Mayor of London, dated Dec. 11, 1234, he had directed that no one should be allowed to hold law schools in the city of London or teach the Laws. What laws were these? Coke thought that the king referred to Magna Carta and the Carta de Forestis; but Selden, and Prynne after him, pointed out that this was inconceivable; and that doubtless the Laws were the canon laws. I think that under the term Leges both civil and canon law were intended, but certainly at the moment the danger from the

canon law was greater. In the year 1230 Gregory IX had approved of the five books of Decretals codified by Raymund of Pennafort from the Extravagants of the recent Popes and added to the Decretum of Gratian. In 1235 Matthew Paris tells us the Pope was urging the adoption of them throughout Christendom. But they were not received in England, although they continued to be the code by which English causes were decided at Rome, and began to be an integral part of the education of English canonists. And here again we have to distinguish between the scientific or implicit and the explicit authority of these books. Great as the influence of Justinian's code has been, there are very few countries in Europe where it has been received as more than a treasury of jurisprudence; the 'Siete partidas' of Alfonso the Wise was a book of jurisprudence, not a code of law; the independence of the Gallican Church turns, as a historical question, on the non-reception of Roman decrees, the acceptance of the council of Basel, and the non-reception of portions of the Tridentine canons, the incidental working of which must, notwithstanding, have been irresistible and undeniable. So in England neither the civil law nor the canon law was ever received as authoritative, except educationally, and as furnishing scientific confirmation for empiric argument; or, in other words, where expressly or accidentally it agrees with the law of the land. Nay, the scientific treatment itself serves to confuse men's minds as to the real value of the text; and in both laws the opinions of the glossers are often cited as of equal authority with the letter of the law or canon.

But this same date 1236 brings me to another point; the beginning of the Codex receptus of Canon Law in England; in spite of the Council of Merton and the closing of the law schools of London. Since the Conquest most of the archbishops had held provincial synods and issued provincial canons; but many of these were acts of a temporary character only, and, even when they received support and confirmation from the kings, seldom amounted to more than the enforcement of discipline which had previously been authorised by papal or conciliar decrees. These canons are

extant in the pages of the annalist, but remain rather among the Responsa Prudentum than as materials for a code. Just, however, as the statute law of England begins with the reign of Henry III, so does the codification of the national canon law. Archbishop Langton's Constitutions may be set first, but next in order, and even of greater authority, come the Constitutions of the legate Otho, which were passed in a national council of 1237. After these come Constitutions of the successive archbishops, especially Boniface of Savoy and Peckham, which were drawn up in a very aggressive spirit; Boniface taking advantage of Henry III's weakness to urge every claim that the English law had not yet cut down, and Peckham going beyond him in asserting the right of the Church against even the statutable enactments of the state. Between Boniface and Peckham in the year 1268 come the Constitutions of Othobon, which were confirmed by Peckham at Lambeth in 1281, and which, with those of Otho, were the first codified and glossed portions of the national church law. In the reign of Edward III, John of Ayton, canon of Lincoln, an Oxford jurist it is said, collected the canons adopted since Langton's time and largely annotated the Constitutions of Otho and Othobon. Contemporaneously with this accumulation of national materials, the Corpus Juris of the Church of Rome was increasing; Boniface VIII added the sixth book to the five of Gregory IX, and John XXII added the Clementines in 1318; and his own decisions, with those of the succeeding popes, were from time to time added as Extravagants unsystematised. The seventh book of the Decretals was drawn up under Sixtus V as late as 1588; so that practically it lies outside our comparative view. Of course very much of the spirit of both the sixth book and the Clementines found its way into England, but the statute law was increasing in vigour, the kings were increasing in vigilance, and after the pontificate of Clement V the hold of the papacy on the nation was relaxing. Occasionally we find an archbishop like Stratford using the papal authority and asserting high ecclesiastical claims against the king, but the age of the Statutes of Præmunire and Provisors was come, and

no wholesale importation of foreign law was possible. Not to multiply details, I will summarily state that in the reign of Henry V, William Lyndwood, the Dean of the Arches, collected, arranged, and annotated the accepted Constitutions of the Church of England in his Provinciale, which, with the collections of John of Ayton generally found in the same volume, became the authoritative canon law of the realm. It of course was proper in the first instance to the province of Canterbury, but in 1462 the Convocation of York accepted the Constitutions of the southern province as authoritative wherever they did not differ from those of York, and from the earlier date the compilation was received as the treasury of law and practice. Nor were any very material additions made to it before the Reformation; for although the Church of England was deeply involved in the transactions of the Council of Basel, and might, if the matter had been broached as distinctly as it was in France, have formally accepted its canons, no such incorporation of those canons ever took place here as was accomplished in the Pragmatic Sanction of Bourges in 1438.

Still, authoritative as Lyndwood's code undoubtedly was, it was rather as the work of an expert than as a body of statutes that it had its chief force. The study of the canon law was a scientific and professional, not merely mechanical study; and just as much was the study of the civil law also. I think that I am right in repeating that it was mainly as a branch of church law that the civil law was studied at all; but I do not mean that it was so exclusively. In the infancy of international law and the administration of both admiralty and martial law, the English jurists had to go beyond their insular practice, and to no other source could they apply themselves; hence the association which to the present day has subsisted between the curiously unconnected departments of maritime and matrimonial jurisdiction. It is really owing to the distinction between scientifically and empirically trained lawyers. Of the indirect influence of scientific jurisprudence on the common law and chancery I have spoken already.

England has then for at least two centuries before the

Reformation a body of law and a body of judges, for ecclesiastical and allied questions, quite apart from the law and judicial staff of the secular courts; and, with the growth of the Universities, she begins to have educational machinery for training her lawyers. In this department of work, however, the scientific study has a long start and advantage over the empirical. The common law has to be learned by practising in the courts, or by attending on their sessions. The apprentices and serjeants of the Inns of Court learn their work in London; their study is in the year books and the statute book, a valuable and even curiously interesting accumulation of material, but thoroughly insular, or less than that, simply English. The canonists and civilians have also their house in London, the 'Hospitium dominorum advocatorum de arcubus,' but they are scarcely less at home at Rome and Avignon. The canonist and civilian learn the legal language of entire Christendom; the London lawyer sticks to his Norman-French. The Norman-French of Westminster is unintelligible beyond the Channel and beyond the border. Scotland, the sister kingdom, is toiling without a common law system at all until, in the sixteenth century, James V introduces the law of Justinian as her treasury of common law, and thus gains University training and foreign experience for her lawyers: but England has an ancient system and is content with her own superiority; her common law is of native growth, strengthening with the strength of her people; she sees the nations that have accepted the civil law sinking under absolutism; as distinctly as ever 'non vult leges Angliæ mutari.' But she has ceased to banish the skilled jurist. Oxford and Cambridge have their schools of both the faculties. The civil law at Oxford had its schools from the fourteenth century in Cat Street, on the north of S. Mary's, in Schidyard Street, and in the great civil law school in S. Edward's parish where Archbishop Warham learned law. The canon law school was in the neighbourhood of S. Edward's church also, and was rebuilt in 1489 by subscription of the canonists. Wood enumerates no less than seven distinct sets of Scholæ Legum, the majority being for civil law. In the colleges legal study has its proper

endowments. At Merton the study of the canon law is by the founder's statutes permitted to four or five of his scholars, that of the civil law is allowed to the canonists as subsidiary to their proper study, *pro utilitate ecclesiastici regiminis*. At Oriel five or six fellows, with consent of the seniors, might read the canon law, and by dispensation of the provost, the civil law also. At Exeter, one of Stapledon's fellows was to study Scripture or the Canon Law. We learn from Mr. Mullinger's invaluable book on Cambridge, that at Gonville Hall, founded about seventy years after Merton, each fellow was allowed to study canon law for two years. It might be possible to trace in the successive foundations vestiges of the old subsisting and often revived jealousy of the studies; for Merton was founded at a time when, as Roger Bacon tells us, the civil law was looked on with jealousy as a mere professional or money-making study, whilst before the foundation of Gonville Hall the conflict between John XXII and Lewis of Bavaria had made the political tendencies of these studies more important and obvious. At Trinity Hall, which was nearly of the same date as Gonville, ten civilians and seven canonists were seventeen out of the twenty statutory fellows. At New College, out of seventy there were to be ten civilians and ten canonists, but these were reduced by Waynflete to two civilians and four canonists. At All Souls, sixteen out of forty were to be lawyers; at King's College, Cambridge, out of seventy, two civilians and four canonists; while at Catharine Hall both the canon and civil law were excluded. These variations depend no doubt on the special intentions of the founders to promote scientific study, or to insure the worldly advancement of their pupils, and, to some extent, on the varying relations between theology and law of which I must speak in the next lecture. It is however clear, at the lowest estimate, that abundant encouragement and opportunities for the study could be found in both the seats of learning. Closely allied as the canon and civil laws were, they composed two faculties; with regular schemes of lectures, fees, and exercises; the doctor of the civil law had to prove his knowledge of the Digest and the Institutes; the doctor of

the canon law must have worked three years at the Digest and three at the Decretals, and studied theology also for two years. It is, you observe, not the national church law, but the universal or scientific material, on which he is employed. In a great number of cases the degrees were taken at the same time; but as the era of the Reformation approaches, the canonists become more numerous than the civilians at Cambridge, and probably at Oxford also. But these points belong to a view of the subject on which I cannot pretend to enter now; and indeed it is in the conflict of laws rather than the conflict of studies that the present interest of the subject lies. In the next lecture I shall have to recur for some points to the ground which I have attempted to cover in this, for the struggles and jealousies of the rival and allied systems of jurisprudence do not date from the Reformation only. Here, however, I stop now, having in a cursory way traced the history of the materials of the canonical jurisprudence so far down. We shall have to begin by looking at the later history from the theological as well as from the legal side, and to follow it through the Reformation period, steering clear, as much as possible, of questions of modern controversy.

II

IN the first of these two public lectures I attempted to give a sketch of the growth of the Canon Law; its origin and materials, its introduction into England and the limits of authority which it attained here, its relation to the civil law of Rome, and the distinction between the scientific study of the Decretals in the Universities and the professional use of the Provinciale in the Ecclesiastical Courts. The second branch of the subject, as I proposed to treat it in opening the lecture, is the history of its working in competition with and in general relations to other systems of law: a branch of the discussion which compels us at once to go back to the very root of the subject. Canon law as a code, and the civil law of Rome as a treasury of procedure, working to-

gether in the hands of ecclesiastical lawyers, may be for the moment looked at together; and the first aspect which our subject then takes is the attitude of the system towards theology on the one side and to the national, or, as lawyers would perhaps call it, municipal law on the other. From the Conquest to the Reformation canon law, proceeding by civilian method and being able to call on the municipal executive to put its sentences in force, is a strong link between theology and national discipline; but a link with so much intricate workmanship employed upon it as to be offensive in many ways both to theology and to the common law. The theologian saw the great commandments of God, and the statutes of the Church, and the voice of conscience, lowered by being made dependent for their cogency on an elaborate system of human invention which fettered freedom of action, and in some respects freedom of thought also; which reduced moral obligations to a system of penances, pecuniary commutations, monitions, and excommunications, and which made use of the sacraments of the Church as the mere means and appliances of a coercion to external good behaviour, which ought to be a free-will offering and the instinctive product of a sincere heart. Do not think that I am exaggerating the attitude of repulsion in which the pure theologian and the pure moralist stood to the ecclesiastical lawyer who was making money out of the practice of the Courts Christian. You remember how John of Salisbury had doubted whether an archdeacon could be saved: Roger Bacon declares that the study of the civil law, attracting the clever men among the clergy, threw the study of theology into a second place, and secularised the clerical character, making the priest as much a layman as the common lawyer; while Richard of Bury, the author of the Philobiblion, and Holcot the great scholastic, declared, the one that the civilian, although he gained the friendship of the world, was an enemy of God; the other, that under existing relations the handmaid Hagar, despising the true wife, was in apt analogy to the contempt under which neglected theology sank in the estimation of the world as compared with the law. It is true that these remarks have a primary reference to the civil law, but, as

I showed, the civil law was learned chiefly as the executive of the canon law, and it was by its relations to the canon law that it became practical and remunerative. I need not go into much detail about this, but, if I am speaking to any who attended my lectures on Ockham and Marsilius, they will remember how not only those great writers, but a crowd of minor ones, attack the canon law and its professors as the great enemies, not only of civil government but of vital religion: an exaggeration no doubt, but founded on a true principle. 'Who,' says John of Salisbury, himself a canonist, 'ever rises pricked at heart from the reading of the laws, or even of the canons?'[1] The practice of these studies stood to theology, stood to religion itself, in the relation in which the casuistry of the confessional stood to true moral teaching.

When however we turn, as we must do, to consider the attitude of the national law and the national lawyers, we see more distinctly how incompatible were the systems which, for four hundred years, from the Conquest to the Reformation, stood side by side, with rival bodies of administrators and rival or conflicting processes. Look first at the area of matters with which the canon law assumed to deal: it claimed jurisdiction over everything that had to do with the souls of men, and I think there is scarcely a region of social obligation into which, so defined, it would not claim to enter. It claimed authority over the clergy, in matters civil and criminal, in doctrine and practice, in morals and in manners, education and dress, in church and out. It claimed authority over all suits in which clergymen were parties, or in which ecclesiastical property was involved; I say, mark you, claimed, rather than exercised, for some of these are the points in which the struggle with the national law arises. It claimed authority over the belief and morals of the laity, in the most comprehensive way. The whole of the matrimonial jurisdiction, the whole of the testamentary jurisdiction was, we know, specially regarded as a branch of canon law; but by its jurisdiction for correction of life, 'pro salute animae,' it entered into every

[1] Joh. Salisb. i. 196, epist. 138.

man's house; attempted to regulate his servants, to secure his attendance at church, to make him pay his debts, to make his observe his oaths, to make him by spiritual censures, which by the alliance with the State had coercive force, by the dread of a writ of *capias excommunicatum*, to keep all the weightier matters of the law, not only judgment, mercy, and truth, but faith, hope, and charity also. Now the common law of the land was quite competent to deal first with ecclesiastical property, temporalities, advowsons, and the right to tithes; the canon law dealt with the qualifications of presentees and the exaction of tithes: the common law was competent to deal with matters of debt or theft; the canon law claimed to deal with matters of credit or dishonesty in legal and moral as in spiritual obligations: the common law dealt with dower, the canon law with matrimony; the common law with succession to property, the canon law with legitimacy. So over great regions of property law, and over the whole domain of moral delinquency, the medieval world had two sets of courts at which they might sue, and two sets of lawyers to keep alive with fees and retainers. The canonists affirm that a suit may be brought in the ecclesiastical court for every matter which is not cognisable in the courts of secular law, and for a great many matters which are so cognisable. There is surely an ample claim. I do not want to go into detail, but I will just point out one particular; the commissary of the Bishop of London entertained suits exactly analogous to those of the trades unions of the present day, turning on the question how far it is a breach of oath for the sworn member of a guild to impart the art and mysteries of his guild to outsiders.

Here then you see the elements of a pretty conflict; between the jurists as a matter of scientific or empiric lore, between the practising lawyers a conflict for practice and for profits; and you can see how degrading the practical part of the profession was to the theological student, or to the parish priest. Over and above this, there was the natural jealousy of the crown and the parliament. If the canon law had restricted itself to really spiritual questions, matters of belief or of morals for which the national code

had no provision, it is not likely that the kings would have been jealous of papal or archiepiscopal enactments, or would have stood on their rights when the exact line was occasionally overstepped. But the extravagance of ecclesiastical claims provoked them to opposition and justified it. When the archbishops of Henry III's reign claimed exclusive jurisdiction in suits of advowsons, the right to exact personal tithes, and to try all questions of credit granted 'fide interposita,' even so gentle a worm as the king turned again; and we find among his letters, and still more among those of his son, constant cautions to the primates and their convocations not to attempt anything to the prejudice of the crown and customs of the land, as well as innumerable prohibitions to ecclesiastical judges against their trying other civil suits than those which touch testamentary or matrimonial matters. Edward II had to prohibit the employment of imperial notaries. In the spiritual matters proper, the kings seldom interfered; only where a political motive was suspected, or where a servant of the crown was attacked, or where the spiritual judge had clearly gone beyond his discretion. The Church history of the thirteenth and fourteenth centuries is full of cautions and prohibitions, and of struggles between the officers who had thus to interfere with one another; and the definitions of the 'Articuli Cleri' under Edward II which prescribed the points on which prohibitions were to be granted, and the Statute of Præmunire under Edward III, which forbade the multiplication of appeals to Rome, did little to ameliorate relations. When however heresy became a matter of litigation, the two systems deliberately worked together; and, although there were many hitches, during the whole of the Lancastrian period there was more definite co-operation and less conflict. The common law was really becoming more a matter of scientific treatment, and the greatest judges were men who had had scientific education on both sides. Sometimes there was, as was natural, a little inconsistency and awkwardness; the bowsprit got mixed up with the rudder; as when Morton, at once archbishop and chancellor, allowed his judgment on a fraudulent executor to be modified by the reflexion that

he would be 'damnée in hell.' But this may have been exceptional.

It must not however be supposed that the fault in this rivalry was altogether to be ascribed to the canonists. The English-trained lawyer was as infallible in that age as in this; and when we find him, and his brethren in the parliament, constantly hampering the legitimate work of the church, we see that there were two sides to the question; when in the fourteenth century the Commons petition that the clergy may not make in their convocation canons to bind the laity, it is rather a relief to find that the canons in question relate to tithe of underwood: but when in 1446 we find the clergy remonstrating that the professional lawyers 'pretended privilege, by what right,' they say, 'we know not, to interpret acts of parliament and explain the mind of the legislature, and by thus practising upon the statutes sometimes ground their opinion on mysterious and unintelligible reasons, and so wrest the laws contrary to the meaning and intention of parliament;' or petitioning that the judges who showed such strong bias should no longer issue prohibitions, but, when questions arose concerning the limits and jurisdiction of the rival courts, indifferent persons should be pitched upon to judge them; or the lawyers, on the other hand, striking at the root of all ecclesiastical jurisdiction as if it were a transgression of the Statute of Præmunire, — well, when we look at these things, we shall see that there were questions unsettled even before the Council of Trent, and hear opinions and complaints that sound like echoes beforehand of voices with which in these days our ears are too familiar.

I must, however, now proceed to the Reformation, and endeavour to determine, as strongly and as clearly as I can, the bearing of that most critical era on our subject. Henry VIII had, as early as 1515, seen a struggle between the secular and ecclesiastical jurisdictions in Standish's case, in the course of which he is said to have expressed himself as determined to endure no division of sovereignty in his own realm. Whether that was really said or merely put into his mouth afterwards, I cannot say; but certainly no scheme

of change in the relation between Church and State was set on foot for nearly seventeen years. Then the business of the divorce at Rome, and the discontent of the king with the half-hearted support of the clergy at home, completed his disgust, and he set out in the course of radical change. Having in 1531 compelled the clergy by the threat of præmunire to recognise him as supreme head 'quantum per Christi legem licet," he induced the Commons in 1532 to present a petition or remonstrance against the whole theory and practice of the canon law. They attacked the power of the clergy to make canons in convocation, they protested against the exaction of fees and mortuaries, and deliberately impugned the honesty and purity of the episcopal courts in all their branches and with reference both to jurisdiction and to procedure. This petition had two results; the parliament passed bills to limit the benefit of clergy and forbid feoffments to the use of churches. An earlier session in 1529 had attempted to deal with probate and mortuaries; this, by the Statute of Citations, cut down the power of the Archbishop of Canterbury to entertain suits from other dioceses except by appeal or on request, and so struck at the root of the universal jurisdiction enjoyed by the Court of Arches and its advocates. The same term — the second result of the king's policy — the Convocation was compelled to surrender its right of meeting and legislating, and to consent to a revision of the canon law to be carried into execution by a mixed body of clergy and laity whom the king should appoint. This last concession sealed the fate of the old scientific study of the canon law, which as we have seen, was a distinctly popish study; and, if it had not been accompanied by a limiting clause, allowing the old canons, so far as they were not opposed to the law of the land, to stand until the revision was published, there would have been an entire abolition of ecclesiastical jurisdiction of any kind. In 1535 Cromwell, as the king's vicegerent, visited the two Universities, and in both issued injunctions, that both the old scholastic teaching of the Sentences should cease, and that the teaching in the Decretals and the conferring of degrees in canon law should be abolished. What

the exact legal force of Cromwell's injunctions was has never been determined; but in these points they were obeyed: the Universities ceased to teach the systematic theology of the Schools and the systematic jurisprudence of the Decretals; and the ancient degrees of bachelor and doctor of the canon law are known, except during the reign of Mary, no more. How did this affect the civil law? you ask: well, just as it might be expected; the scientific study was abolished, the old canons were in abeyance, but the courts continued to practise, the civil law procedure was as lively as ever; and students who intended to practise as advocates took degrees in civil law instead of in both. Oxford dropped the canon law degree altogether; Cambridge, by adopting a more general form, retained a shadowy presentment of the double honour.

And now we come again to an Act which shows the continuity of the inherent rivalry between two systems which, for the sake of mutual profit, had so long worked together. In 1541 a bill was introduced into parliament which enabled married D. C. L.'s to exercise ecclesiastical jurisdiction as chancellors and commissaries; it did not pass in that year, being withdrawn on the request of Convocation, but was reintroduced and passed in 1545. So long as the two degrees were granted together, the D. C. L.'s were, as doctors of decrees, bound by the canon which forbade a married man to act as an ecclesiastical judge; but now the right of the D. C. L. simple, both to marry and to act as a judge, was secured: as the civil doctors of Bologna had done in the thirteenth century, their successors in England now married; before this they were probably, as a rule, in minor orders.

I must pass over the more important of Henry VIII's other acts, especially the Statutes of Appeals and Submission, except just to recall the fact that in the preamble to the former of those Acts passed in 1533 he had expressed himself confident that the realm of England would, as it always had done, provide a sufficient number of spiritual men to decide spiritual questions, and of secular men to decide secular questions, under his own supreme authority

and to the exclusion of any foreign jurisdiction. The other matters in which those statutes affected ecclesiastical jurisdiction lie somewhat deeper than our present speculations.

We are not however to suppose that, when the king practically abolished the canon law, he intended to hand the clergy over to the common lawyers. The procedure was, as we have seen, still kept in the hands of the civilians; but the theologians were a body of men whose functions had been to some extent usurped by the canonists, and who now for some years, under Tudor and Puritan and Laudian influences, were to come to the front. The theologians or divines divided with the canonico-civilians the authority of the ecclesiastical jurisdiction: the character of a bishop in itself was that of a divine, not of a lawyer, and we might almost say that whilst questions of application of law and procedure belonged to the lawyer, the interpretation was claimed for the divine. In cases of heresy, for instance, the theologians formulated the definition, whilst the canonists and civilians examined the teaching of the accused and determined how far he had contravened the definition. So in the question of Henry's divorce, the divines had been called on to define 'Can the pope dispense with a marriage with a deceased brother's wife?' the canonists had to determine whether the marriage between Arthur and Katharine was such a marriage as precluded the dispensation. This rule of combining theologians with canonists or civilians for commissions on ecclesiastical suits continued long after the Reformation, and ought never to have been disused.

These measures of change, sufficiently drastic one would think, had in this department satisfied Henry VIII; the scheme for revising the canon law hung fire; the powers granted to the king in 1534 were renewed for three years in 1536, and again for his life in 1544, but nothing was done in the matter during the remainder of the reign. But what had sufficed Henry VIII did not suffice Somerset or Northumberland, or the poor boy-king who succeeded him. The second statute of the first year of Edward VI went as near as possible to extinguish the episcopate; there were still to be bishops, but they were to be nominated by the king with-

out any form of election; they were as a matter of fact appointed during good behaviour; and their jurisdiction was henceforth to be exercised in the king's name. In him all ecclesiastical authority was vested, they were to be his ministers, their writs were to be issued in his name, their seals were to bear the royal arms; and it was only to such of them as he pleased that even such authority was to be intrusted. It was proposed, though not passed, that a Court of Chancery should be erected for ecclesiastical causes. The revision of the canon law was to be urged on, and the Universities were to be further purged from the old leaven. All this was done: in vain the Protestant bishops pleaded in the House of Lords that their position was intolerable and their dignity a mere mockery, that the moral discipline of clergy and people was entirely broken down; no act for rehabilitating them was got through parliament; the dominant interests were opposed to it. The injunctions sent to the Universities prescribed some renewal of studies; the poor canonists of course were left out in the cold, although not treated as if they were illegal or irregular: the civilians were authorised to read the Institutes, and the D. C. L., when he had reached that dignity, was exhorted to devote himself more zealously to the study of the king's laws, both temporal and ecclesiastical. And work was to be found for him: bills were introduced to lodge ecclesiastical jurisdiction in the hands of students of the Universities, who were admitted by the archbishop. By these, however, all special privileges of the advocates were endangered and the bills dropped after passing most stages: four bills on this point were before the parliament of 1550. But again the revision of the canons was dragging behind. The king's power of nominating revisers was asserted by an act of 1550 to last for three years, and an abortive attempt was made in the session of 1552 to renew or enlarge it; but whether it was that Cranmer found it impossible to obtain skilled assistants, or that the division of parties prevented a joint effort, it was not until near the end of the reign that the project was carried on: in 1551 and 1552 Edward issued two commissions of thirty-two, composed of equal numbers of bishops, divines,

civilians, and common lawyers; the number thirty-two was reduced to eight; practically the work was done by Peter Martyr, the Oxford Professor of Divinity, under Cranmer's eye, and the result was the compilation known as the *Reformatio Legum;* a curious congeries of old and new material which really pleased no party; showing too much respect for antiquity and divine ordinance to please the Puritan, and too little to satisfy the men who had guided the Reformation under Henry VIII and those who were to do so under Elizabeth.

The legislation and policy of Mary were directed to uproot everything that Edward VI had originated; his bishops appointed 'quamdiu se bene gesserint,' were dispossessed without a struggle; his laws were repealed, many of them never to be revived; his advisers, where they would not comply, were exiled or burned: but the efforts to reinstate the old system were not successful; the monastic property could not be restored; the ranks of the lower clergy, reduced to a fraction by the abolition of chauntries and private masses, could not be recruited; and all the restored fabric hung on the life of a woman and a few worn-out old men. For the moment the canon lawyers lifted up their heads, and a few civilians took the doctorate of decrees at Oxford and Cambridge; but the complete extinction of reactionary forces, on Mary's death, showed that the Papal system, with all that was dangerous to national life contained in it, was, so far as England was concerned, practically extinct: six years of blood and fire, of tears and prayers, of cruel jealousies and heartbreaking divisions, wrought this; and Elizabeth for some years after her accession had before her a task, not certainly easy, but not encumbered with insuperable difficulties.

The subject which we are treating now contracts its limits; for to attempt anything like circumstantial discussion of the legal history of a period into which ecclesiastical quarrels so largely enter, would be to lose oneself at once in a wilderness of controversy. I must content myself with a few generalisations and a few significant facts. The Elizabethan settlement in Church and State was a compromise, satisfactory

to no party, and very unsatisfactory indeed to the constitutional lawyer or historian; but, possibly, the best arrangement compatible with circumstances. She began her reign, of course, by a reversal of her sister's legislation; but she did not restore the Edwardian system; she did not revive the Act of Henry VIII which had asserted the king's headship of the Church, or the Act of Edward which deprived the bishops of all original jurisdiction: the doctrine of the headship was opposed both by the Puritans and by the Catholic party; the abolition of all the high functions of the episcopate which was aimed at by Edward's advisers was a measure which contemporary history was showing to be dangerous. But, whilst she minimised the definition of authority, she retained the virtual exercise of it: her explanation of her supreme governorship might have satisfied every one but the most Tridentine papist, but she re-enacted the most stringent part of her father's act of supremacy; and, whilst she allowed the continuance of the church jurisdiction, she kept all control over the religious discipline of clergy and laity under the hands of the Court of High Commission. The Court of High Commission, consisting of a large number of lawyers and laymen and a small number of bishops and divines, stands to the Church in much the same relation as the Court of Star Chamber stands to the Courts of Common Law, and the Court of Requests to Chancery, a legal but most unconstitutional relation, and one which, however long it might be tolerated, was sure in the long run to endanger the whole fabric. As for legislation, Elizabeth acted, as we know, on a high principle of supremacy; such measures of church discipline as required coercive authority she allowed the parliaments to pass, but she forbade any interference whatever where that authority was not necessary. As for the ecclesiastical legislation in Convocation, she exercised her veto, i. e. she granted or withheld the consent which would make it valid, according to her own views of high policy. The rulers of the Church, who were not free from the same humiliating bondage of adulation that influenced all around the great queen, tolerated a system which gave them the substance of power, although in an unpopular and unhistorical

shape. Their legislative authority was paralysed, but they could exercise a real authority as the queen's advisers; and the jurisdiction, which they had difficulties in enforcing through their own courts, they could enforce as members of the High Commission Court. But the ecclesiastical law — how did it fare under the circumstances? In the first place the forms of the courts were maintained, and were enough to sustain the civilians who worked in them; the Prerogative Court and the consistory courts lived on the testamentary and matrimonial jurisdiction; and before the spiritual courts were tried the smaller cases of discipline which were not important enough for the High Commission Court. Doctors' Commons, which had dwelt before in Paternoster Row or at the Queen's Head, under the auspices of Dr. Henry Harvey, built itself a new home, with hall and library and plate and privileges for importing wine. Knowledge of canon and civil law was in parliament, as in 1585, regarded as a special qualification for service in the House of Commons on committees. In the parliaments of 1559 and 1563 were introduced bills to make a University degree necessary for ecclesiastical judges. And the canon law, as drawn up by Lyndwood, and the civilian procedure, subsisted, for the revision which had been completed by Edward's commissioners did not approve itself to Elizabeth or her advisers, and after an abortive attempt to carry it through the parliament of 1559, took its place on the shelf of broken projects. Even the Court of High Commission, novel as its functions were and unfettered as it was in the exercise of them, condescended to borrow from the canonical jurisprudence some of its most offensive details, its *ex officio* oath and the censures by which it would enforce its sentences.

It was a strange composite system, perhaps the only one possible consistently with the retention of historic continuity, but obviously and most certainly tolerable only for a time. What was the attitude of theologians, of common lawyers, and of canonists towards this critically-balanced structure? To the true theologians, whether Catholic or Puritan, the whole was repulsive: we see this in the half-hearted, almost despairing adhesion of Archbishop Parker, and in the strong

and justifiable protests of the Puritans; and I mention them with respect here, because this opposition to unconstitutional tyranny is the only point in which I have any sympathy with them; their tenets I hold to be untenable, and their methods of promoting them by calumny, detraction, and coarse ribaldry I think entirely detestable; but I do think they were right in denouncing the Court of High Commission and all its works. Even conservative churchmen like Hooker, in their defence of the ecclesiastical system, are hampered by the consciousness that much of what existed was indefensible. The bishops saw their position as bishops ignored, and the Puritans saw the power which they thought should be exercised by their own ministers exercised through a royal commission: the bishops however had the power and endured the ignominy, the Puritans suffered and waited for their turn to persecute.

The lawyers were not all of one mind; Coke the great lawyer was himself of two minds; he liked the crown better than the episcopate, but he loved the common law better than the crown; and his inconsistency produces some curious results on his teaching. This leads us to two or three facts. From 1587 to 1591 the famous Cawdrey's case drew its grievous length along. The High Commission had deprived Cawdrey for nonconformity; the question arose, had the Commission under the terms of the Act of the queen's first year exceeded its authority? The resolution finally adopted by all the judges, and recorded and approved by Coke, affirmed that the ecclesiastical prerogative of the crown was such that the powers of a commission issued by it were not limited by that statute, but covered the whole range of ecclesiastical jurisdiction; and therefore the sentence was good. The judgment in Cawdrey's case, full of bad law and worse history, is often referred to even now by lawyers with a respect which it does not merit; here it is useful as showing to what lengths the common lawyers under Elizabeth would go in support of the authority of the crown over things ecclesiastical. It stimulated the Puritans in and out of the Church to bitterer action, and disabled the hands of the bishops who, like Andrewes, would rather have taken the

responsibility of their own acts. Twenty years later Coke himself declared against the constitutional character of the Court of High Commission, and, by refusing to act upon it, paved the way for its downfall. But Coke was then in opposition to the king's advisers, and made it his account to be an independent judge. But I am anticipating.

The change of Elizabeth for James I was a critical event in English Church history. James's dealings with the Church are not among the strongest, but are perhaps among the least reprehensible parts of his administration. He willingly confirmed the canons of 1604, which make a substantive addition to the canonical lore of the clergy. He failed to secure co-operation between the House of Commons and the Convocation, or between the bishops and the Puritan divines. But this is no wonder. A House of Commons which could listen to Sir Herbert Crofts declaring that the Church had declined ever since doctors began to wear boots; or could expel Mr. Sheppard, M. P. for Shaftesbury, for explaining that 'dies Sabbati' meant not the Sabaoth as they called it, but Saturday, and suggesting that as David danced before the ark, the legality of dancing was a question on which the bishops might decide before it was altogether forbidden, — such a House of Commons was not likely to impress men like Hooker or Andrewes with respect, or King James either. It is clear I think that, if the Puritan party had been well represented at the Hampton Court Conference, James would have seen justice done to them; but he saw their intolerance and their frivolity, and the balance remained unredressed. One of their minor complaints, against the issuing of ecclesiastical sentences by lay chancellors, touches directly on our subject: their idea was to give all the disciplinary power to the clergy, but to their own clergy: the prelates of the time chose to maintain the *status quo* which left the power where it was. On this point the civilians were peremptory. Some of the prelates, either wishful to promote their sons or willing to lodge Church discipline in clerical hands, appointed clergymen to be chancellors. The doctors took umbrage at this, petitioned King Charles I in 1625, and obtained from him

an order to remove the intruding officials and to substitute qualified civilians.

Another interesting point arises at James's accession. In the hurry of his first parliament the Act of Mary which repealed the 1 Edw. VI. c. 2, by which the *conge d'eslire* and the independent jurisdiction of the bishops were abolished, was itself repealed; and the lawyers, or some of them, held that the Edwardian law was revived, that the whole episcopate was intrusive, and the whole of the Church courts illegal. This was long in controversy, and it was only in 1637 that the judges finally resolved that the law of Edward, as contravening a law of Henry VIII which had been formally re-enacted, was not revived by the repeal of the Marian statute. If that resolution had not been accepted, the whole existing fabric of the Church must, so far as secular interests were concerned, have fallen to the ground.

But the opening of James I's reign is important for a third critical question. In 1605 Archbishop Bancroft presented from Convocation a series of articles against the proceedings of the common law judges in issuing prohibitions and claiming the exclusive right to interpret acts of parliament touching the Church. The long argument on this subject, which is to Coke's Second Institute what Cawdrey's case is to the Reports, is of considerably greater weight; no doubt there was much to be said on both sides, and the voice of the Convocation of 1605 was in harmony with that of 1559 and 1446, where the claims of the theologians to interpret acts that touched theology were fairly stated; but Coke embellishes the report with words that have an amusing cogency even in the present day; 'for judges expounding of statutes that concern the ecclesiastical government or proceedings, it belongeth unto the temporal judges, and we think they have been expounded as much to the clergy's advantage as either the letter or intention of laws would or could allow of: and when they have been expounded to their liking then they could approve of it, but if the exposition be not for their purpose then they will say as now they do that it appertaineth not unto us to determine of them.' Anyhow the judges agreed that they were the proper interpreters of

the acts of parliament; and as the whole liturgy, and indeed the Bible also, might be brought under those terms, there was practically no limit to their assumption of infallibility; for the common law judges could not, like theologians, afford to leave any question unsolved.

Well, Coke was right as to the bishops, as was proved in 1612, when the common lawyers allowed bishops King and Neill to burn two heretics under a common law writ, for which Coke's authority might be pleaded, although all the earlier legislation against heretical pravity had been abrogated. The invulnerability of the common law which had maintained the High Commission in Cawdrey's case, now treated the issue of the writ 'de heretico comburendo' as a matter of its own, and brought equal shame on theology and jurisprudence. The heretics who were burned were men whom the Puritans did not care to defend; they would have burned them as willingly as they would have done the bishops.

And here let me say by the way, great as the horrors of religious persecution are, they cannot be properly estimated without some consideration of the value set upon human life both at the period in which they occur, and at other times: I believe that I could show that all the executions for religious causes in England, by all sides and during all time, are not so many as were the sentences of death passed in one year of the reign of George III for one single sort of crime, the forging of bank-notes.

But I must pass on, leaving the Laudian period altogether out of sight: and indeed it is not, for our purpose, so important as the earlier portion: Laud and Charles were, neither of them, men who were satisfied with such things as the High Commission Court, and the sinking of ecclesiastical discipline in the state administration; but they did not make their way to any better system, and supported that which was to them for the time the only possible system. With the opening of the struggle in 1641 the Court of High Commission fell to the ground, and at the Restoration its abolition was confirmed by the first parliament of Charles II.

During the Elizabethan and Jacobean period the study of

church law had not been neglected; for it had shared the benefit of the great historical and antiquarian revival of which Parker was the first leader, to which Spelman belonged, and which reached its climax in Selden and Prynne. Both of these eminent writers studied canon law from antagonistic grounds: Selden regarded it as a philosopher ardent for liberty; Prynne as an enthusiast, who had his own persecution to avenge and the thesis of royal prerogative to defend with all the zeal and learning of a convert. Selden was a real jurist; Prynne an indefatigable searcher of records. But, when at the Restoration the removal of the incubus of the High Commission, and the political education which the Caroline divines had gone through, enabled them to restore the old ecclesiastical jurisdiction with some hope of honest and successful issue, the canonists and civilians showed that life was still in them. The old black-letter Lyndwood was taken down from the shelf, rebound, and annotated. Dr. Sharrock in 1664 abridged the Provincial for the use of students, and in 1679 the Oxford edition, which rapidly displaced the black-letter, was published with all Lyndwood's commentaries and Ayton's work on the Constitutions. The study of the civil law needed no revival; it had been kept up by the antiquaries and admiralty in the worst times; and, in the Universities, the faculty fellowships secured at least a languid succession of law degrees. The D. C. L. of Oxford too had achieved the dignity which now belongs to the honorary degrees at Commemoration; and in 1649, at what Antony Wood calls the Fairfaxian Creation, both Fairfax and Cromwell were made doctors of the civil law. According to Wood, in 1659 Nicolas Staughton, of Exeter College, was admitted doctor both of civil and canon law; and it is not impossible that there were other attempts to revive the canon law doctorate as an adjunct to the degree in civil law. Cambridge had always retained the shadow of the double degree, for the Leges or LL. to which she admits her doctors are a possible survival of the 'Utrumque Jus' of the old University system; and in 1669, Richard Pearson, brother of Bishop Pearson the commentator on the Creed, claimed to be admitted in distinct terms to both faculties.

The Archbishop of Canterbury also, under the Dispensation Act, has the unquestioned right to make a doctor of canon law, although I am not sure that it has ever been exercised. But at Oxford the designation of the degree had latterly come to be restricted to civil law; and when in 1715, or thereabouts, Mr. Charles Browne of Balliol College applied to the Vice-Chancellor, Dr. Gardiner, for leave to proceed as bachelor and doctor of the canon law, he was told that he could not be prevented from doing so if he wished it, but that it would give the University a great deal of trouble; and the poor man died before he achieved the object of his ambition.

These notes are, however, of little importance, except as illustrating the revival of the ancient study, and the attention which the ecclesiastical questions of the day were calling to ancient practice. In point of fact, the whole of the second and last act of the Stewart dynasty was full of ecclesiastical questionings and excitements, which, though they did not directly touch our subject, stimulated the studies most closely connected with it. The struggle under James II, the position of the Nonjurors, the relation of Convocation to Parliament, the Whistonian and Bangorian controversies, all drew in lively partisans to the investigation of legal and ecclesiastical problems. The names of Hody, Kennet, Atterbury, Wake, and Gibson, all leading Oxford men, and men of deep research and minute if not accurate reading, are conspicuous in this regard; and, as for constitutional purposes it may be said that the very dust of their writings is gold, it would be ungrateful indeed to speak of their earnestness in the main object as misplaced. Gibson stands out more distinctly than any of the others as a great canonist, and his Codex or Collection of English Church Statutes is still the standard work and treasury of all sorts of such lore. There were too Johnson, Wilkins, and many other honest and subordinate workers on the theological as well as on the legal side. But the history of this department of law draws quickly to an end. The Hanoverian policy with regard to the Church and Convocation fell on all politico-ecclesiastical life as a blight. The Nonjurors were left out of the pale of the recognised laity, the common lawyers edged the theologians out of the

court of delegates, the Convocations were silenced, and the bishops, almost as much as in Elizabeth's time, made their position in the House of Lords the fulcrum of all the force they ventured to exercise. Except for testamentary causes, and rare occasions of matrimonial and slanderous causes, the Church jurisdiction ceased to exist, and so continued dormant until in our times, in 1849 and in 1850, the Gorham case roused the attention of both lawyers and clergymen to the fact that without knowing it they had let the centre of ecclesiastical gravity become seriously misplaced. Into this region of discussion, for many reasons, I must not attempt now to make my way.

A few years after the Gorham controversy, a change or series of changes set in from another quarter: the matrimonial jurisdiction was remodelled when the facilities for divorce were increased, and the whole testamentary jurisdiction was withdrawn from the nominal superintendence of the archbishops. The Courts, the profits and privileges of which had so long maintained the close corporation of Doctors' Commons, and had caused the study of canon law in some at least of its branches to be languidly pursued, were radically and fundamentally changed; and, although it was difficult at once to improvise new forms and rules of procedure to take the place of the ancient forms and those which had grown out of them, these forms also were doomed. In the still more recent remodelling of the whole judicial system further changes have forced themselves in; and where the lawyers could find it their policy to acquiesce in the consolidation of the common law and chancery, they could without the slightest reluctance throw the ecclesiastical and admiralty law into the same cauldron. Out of that cauldron arises a new supreme judicature, which requires, every two or three years, to be amended and strengthened. It is supposed that thereby justice is quickened and law made so cheap, that any man, poor or rich, may ruin himself with a light heart. It yet remains to be seen whether this amended system, easier and less intricate than the old, supplies as good material for training or provides as sound schools of lawyers. It is no doubt philosophically more capable of perfection. The lore

of Coke and Selden, like the lore of Eldon and Stowell, is for the present at a discount. Of course looking on all this with a historical eye, one is apt to be a little disconsolate; but time will avenge them, and the neo-legal jurisprudence will soon have an array of reports and decisions that will outweigh, physically at least, the Year-books and Institutes. As for the ecclesiastical law, which by its very nature, if it loses continuity, loses identity, in the present changing aspect of the world's politics, I for my part do not intend to prophesy. No one can investigate the letter and working of the canon law without being struck by the marvellous mixture of lofty and eternal principles of right, with arbitrary and disingenuous evasions of obligation: it reads as if the jurists, finding that the Church could not be ruled by the true principles, were determined to rule by special pleadings and artful circumventions. For the future the theologians must look to the true principles, and let the canonists and civilians pass with their evasions and circumventions into the twilight of archæology. Whether that will be so or not, or how soon, we may some of us live to see.

9. THE DEVELOPMENT OF THE LAW MERCHANT AND ITS COURTS[1]

By William Searle Holdsworth[2]

In this chapter we shall consider certain courts which administer a body of law outside the jurisdiction of the Courts of Common Law and the Courts of Equity. These courts fall into four groups: — (1) The Courts which administer the Law Merchant; (2) The Court of the Constable and the Marshal; (3) The Courts of the Forest; (4) The Ecclesiastical Courts. Some of these courts, and some of the bodies of law which they have created, still continue to be outside the ordinary jurisdiction of the courts of law and equity. Others have practically ceased to exist. Others have been absorbed into their system. At an early stage of their history the Council and the Chancery had an intimate relation with many of these courts. This connection with the Council has been maintained, and even strengthened. It was to the Judicial Committee of the Privy Council that appeals were, and in some cases still are brought from such of those courts of a special jurisdiction which still remain.

(1) The Courts which administer the Law Merchant.

The Law Merchant of primitive times comprised both the maritime and the commercial law of modern codes. From the earliest period in their history an intimate relationship has subsisted between them. Both applied peculiarly to the

[1] This passage is extracted from "A History of English Law," 1903, volume I, c. vii, pp. 300-337 (London: Methuen & Co.).

With this Essay compare those in Volume II under Commercial Law.

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Other Publications: Law of Succession, 1899.

merchants, who, whether alien or subject, formed in the Middle Ages a class very distinct from the rest of the community. Both laws grew up in a similar manner from the customary observances of a distinct class. Both laws were administered in either the same or in similar courts, which were distinct from the ordinary courts. Both laws differed from the common law. Both had an international character.[1]

(*a*) Maritime Law.

We find that the maritime laws of the Middle Ages were contained in certain bodies of local customs, which, like all customary law, showed a tendency to expand as they grew older. These bodies of custom took their name from some one port. They were adopted by other ports, and one or other of them ruled the coasting trade of the whole of mediæval Europe.[2]

The body of customs adopted by England, and inserted at a later date into the Black Book of the Admiralty,[3] were the judgments of Oleron. They originated in the laws of the commune of Oleron. They were adopted by the seaport towns of Normandy and Brittany. They were transplanted to Damme, Bruges, and to England.[4] A copy of Edward's II.'s reign, representing an early version, is to be found in the archives of the city of London,[5] and in the Red Book of Bristol.[6] Such was the repute of these laws of Oleron that mariners of other countries came there to obtain the judgment of its court.[7]

The body of customary sea laws in force in the Mediterranean was known as the Consolato del Mare. It is probably of Catalan origin.[8] It was probably drawn up in the 15th century for the use of the Consuls of the sea at Barcelona,

[1] "The maritime law is not the law of a particular country, but the general law of nations," Ld. Mansfield, Luke v. Lyde (1759) 2 Burr. 887. "The law of merchants is jus gentium and the judges are bound to take notice of it," Mogadara v. Holt (1691), Shower 318.

[2] Black Book of the Admiralty (R. S.) ii xxxix seqq.

[3] This was a collection of documents compiled for the use of the Court of Admiralty not earlier than Henry VI.'s reign. See Black Book R. S. iii x; and for its contents i xxviii seqq.

[4] Black Book of the Admiralty i lxiii. Cp. R. P. iii 498 (4 Hy. IV. n. 47).

[5] Ibid lxvii. [6] L. Q. R. xvii 234.

[7] Black Book of the Admiralty, ii. xxxvii. [8] Ibid iii xxxiv.

from older collections of the customs of seaport towns within the kingdom of Aragon,[1] just as the Black Book was drawn up from the laws of Oleron for the use of the court of Admiralty in England. Before they had thus been reduced to writing they had been introduced into the Mediterranean ports, as the laws of Oleron had been introduced into the ports of the Atlantic and the North Sea. "They were introduced from Barcelona first of all into Valencia, then into the island of Majorca, then into Sicily, then into Roussillon, all of which countries were under the sceptre of the kings of Aragon before any version of them was printed at Barcelona. Within half a century after they were printed in the Book of the Consulate of the Sea at Barcelona, they were translated into the languages of Castile and of Italy. They were further translated into French before the conclusion of the 16th century, into Latin some time in the 17th century, into Dutch at the beginning of the 18th century, and into German in the course of the same century."[2]

From the Baltic we have two codes of sea laws. One comes from Lubeck;[3] another from Wisby.[4] While Lubeck exercised a preponderating influence upon trade within the Baltic, Wisby exercised a similar influence upon the trade of the Baltic with foreign ports. The famous collection of the maritime laws of Wisby are compiled from three sources. The first is a Baltic source, and the earliest laws to be attributed to that source come from Lubeck. The second is a Flemish source and represents a Flemish version of the laws of Oleron. The third is a Dutch source, and represents the laws observed in the city of Amsterdam.[5]

Other towns possessed bodies of sea laws of their own. We possess the laws of Amalphi[6] and of Trani. It is clear from[7] the Domesday of Ipswich that that town possessed a court in which pleas relating to maritime matters were pleaded from tide to tide.[8] But these three codes — the laws of Oleron,

[1] Black Book of the Admiralty iii xxxv.
[2] Ibid iii lxxiii.
[3] Ibid iv xxiii.
[4] Ibid iv xxi, xxii.
[5] Ibid iv xxvii, seqq.
[6] Ibid ii 23. [7] Ibid iv xv, xvi. [8] Ibid iv vii-xv.

the Consolato del Mare, and the maritime laws of Wisby, became the leading maritime codes of Europe. In fact these codes, "form as it were a continuous chain of maritime law, extending from the easternmost parts of the Baltic sea, through the North sea, and along the coast of the Atlantic to the Straits of Gibraltar, and thence to the furthest eastern shores of the Mediterranean." [1]

(*b*) Commercial law.

Similarly in mercantile matters we find that various towns have their codes of customs by which mercantile transactions are governed. As we might expect, the towns which possessed laws dealing with maritime matters were the towns to which some sort of mercantile laws were a necessity. Oleron,[2] Barcelona,[3] and Wisby [4] all possessed such bodies of law. In England we have the White Book of London,[5] the Red Book of Bristol,[6] and the Domesday of Ipswich.[7] Just as the various seaport towns imitated the customs of some one port, so the various towns modelled their charters and their laws upon certain of the more famous towns in England, such as London, Bristol, Oxford, or Winchester.[8] In the Carta Mercatoria and the Statute of the Staple we get special codes of rules adapted to foreign merchants.[9] The body of rules so used by the chief trading towns of Europe is known to the Middle Ages as the Law Merchant. It is, in fact, the private international law of the period.

It is clear that both the maritime and the commercial law of the Middle Ages grew up amid similar surroundings, governed the relations of persons engaged in similar pursuits, was enforced in similar tribunals. It is not therefore surprising that, from that time to this, the relations between them have always been of the closest.[10] Even in England,

[1] Black Book of the Admiralty iv xxvi, xxvii. [2] Ibid ii 254 seqq.
[3] Ibid iii lxix-lxxii. [4] Ibid iv 265, 386.
[5] Munimenta Gildhallæ, R. S., vol. iii.
[6] L. Q. R. xvii 246. [7] Black Book of the Admiralty ii 16-207.
[8] For a table illustrating this affiliation of mediæval boroughs see Gross, The Gild Merchant, i App. E. [9] Below.
[10] At this period they are usually classed together. Select Pleas of the Admiralty (S. S.) i xix, in 1313 justices to settle piracy claims are to proceed "secundum legem et consuetudinem dicti regni et similiter legem mercatoriam." Ibid xxii, in 1320 a similar direction to arbitrators between England and Flanders in a case of spoil. Ibid xxiv, complaint

where they have come to be applied in different courts, it has been impossible to ignore their close connection. Both, as we have seen, have appeared to English judges to be rather a species of jus gentium than the law of a particular state. In spite of the efforts of the Courts of Common Law, the attempt to separate them has produced much inconvenience[1] and has only partially succeeded. "It was," says Sir Travers Twiss, "the practice of the consuls of the sea, before pronouncing their decision to consult the Prudhomes of the sea and the Prudhomes of the merchants. . . . In the High Court of Admiralty of England it is the practice for the judge to be assisted by two of the Elder Brethren of the Trinity House of Deptford-le-Stroud, whilst the registrar of the court, at a subsequent stage of the proceedings, has the assistance of two merchants."[2]

Such, then, was the nature of the Law Merchant. We must now consider the history of the tribunals which administered it. Their history will fall into three periods:— (i) The period when the Law Merchant, maritime and commercial, is administered in local courts. (ii) The rise of the Court of Admiralty and its jurisdiction. (iii) The decay of the special courts administering the commercial part of the Law Merchant and its absorption into the common law system.

(i) The period when the Law Merchant, maritime and commercial, is administered in local courts.

that a ship of Placentia had been spoiled by one of Bristol; the case was heard by a jury of mariners and merchants "prout de jure et secundum legem mercatoriam foret faciendum." In the 17th century Malynes, when he wrote his Lex Mercatoria, found it necessary to devote a large part of treatise to the sea laws. In the preface he says, "And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the Lex Mercatoria is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth." Cp. ibid 87. "For without navigation commerce is of small account." At p. 303, when considering the courts peculiar to merchants, he deals first with the Admiralty court.

[1] In 1833 a select committee recommended an extension of the jurisdiction of the Admiralty so as to enable it to "exercise concurrent jurisdiction in questions of title to ships generally, and of freight, and possibly of some other mercantile matters, with a power of impannelling a jury of merchants, if the judge think fit or either of the parties require it," Williams and Bruce, Admiralty Practice (Ed. 1886) 13 n. k.

[2] Black Book of the Admiralty iii lxxx.

Up to the reign of Edward III. the Law Merchant in both its branches is administered by local courts.

Maritime Courts.

The courts which have jurisdiction in maritime matters are for the most part the courts of seaport towns. The admiral is not an official who holds a court with a fixed jurisdiction. He is an official who rules a fleet, having incidentally certain disciplinary powers over those under his command. These powers "probably enabled the admiral to deal with depredations committed by the ships immediately under his command; but it does not appear to have included a power to hold a court administering justice generally in maritime cases." [1]

In the earlier part of the Middle Ages we meet with many seaport towns which had, in the language of later law, an Admiralty jurisdiction. The Domesday of Ipswich tells us that, "the pleas yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene ben pleted from tyde to tyde." [2] Padstow and Lostwithiel possessed similar courts which sat at tide time on the seashore. Yarmouth possessed a court of like nature.[3] The court at Newcastle dates from Henry I.'s reign.[4] It would appear from the Red Book of Bristol that a court sitting at a seaport was one of the recognised tribunals of the Law Merchant.[5] The Book itself contains rules upon maritime matters.[6] When the court of Admiralty was established many towns, jealous probably of their ancient rights, got by royal charter exemption from its jurisdiction.[7] Though their privileges were recognised by the

[1] Select Pleas of the Admiralty (S. S.) i xli. It was a court "for military action not for civil jurisdiction," Spelman (Works, Ed. 1727), Admiralty Jurisdiction, 221. The sheriff also had some authority by royal writ at this period. Cp. Selden, Mare Clausum, ii c. 14.

[2] Black Book of the Admiralty ii 23.

[3] Select Pleas of the Admiralty i xiii, xiv.

[4] Stubbs, Sel. Ch. 112. "Inter burgensem et mercatorem si placitum oriatur, finiatur ante tertiam refluxionem maris."

[5] L. Q. R. xvii 246. It is said that the lex mercatoria attaches to markets, and markets are held in five places "in civitatibus, nundinis, *portubus super mare,* villis mercatoriis, et burgis." [6] Ibid 249.

[7] Select Pleas of the Admiralty (S. S.) i xiv. 15 Rich. II. c. 3 recites that the jurisdiction of the Admiral prejudices "many Lords, Cities and Boroughs through the realm."

legislature,[1] they were jealously watched by the crown and by the court of Admiralty. In 1570 Elizabeth found it necessary to complain of the encroachments made by the mayor's court of the city of London upon the Admiral's jurisdiction.[2] We find that at different periods in the 15th and 16th centuries the jurisdiction of Tynemouth, Scarborough, Chester, King's Lynn, Harwich, Dartmouth and Chester are either called in question by, or successfully asserted against, the court of Admiralty.[3] All these local Admiralty jurisdictions were swept away in 1835 by the Municipal Corporations Act.[4] The only local jurisdiction left is one which is possibly older than them all, the jurisdiction of the Cinque Ports. "It presents the type and original of all our Admiralty and maritime courts."[5]

From the earliest times the Cinque Ports had the right to hold pleas, and the right to wreck. They were always exempt from the jurisdiction of the Admiralty. Owing probably to the antiquity of their jurisdiction, this exception is not expressly given in their Charters. When in 1856 the general civil jurisdiction of the Lord Warden of the Cinque Ports was abolished, his Admiralty jurisdiction was saved.[6] In 1869, when Admiralty jurisdiction was given to the new county courts, it was provided that appeals in Admiralty cases from the county courts within the jurisdiction of the Lord Warden should lie to him.[7] Their jurisdiction is not touched by the Judicature Act of 1873, and still survives.[8]

The Admiralty jurisdiction, thus exercised by the local courts, was supervised and controlled by the crown. The crown was for many reasons specially interested in Admiralty cases. Foreign affairs were peculiarly within its province. The Courts of Common Law had no adequate machinery for

[1] 2 Henry V. St. 1 c. 6; 32 Henry VIII. c. 14; 5 Eliza. c. 5 § 42; 27 Eliza. c. 11.

[2] Select Pleas of the Admiralty (S. S.) ii xii, xiii. Cf. Legge v. More, ibid i 83 (1539). [3] Ibid ii xix-xxi. [4] 5, 6 Will. IV. c. 76.

[5] Select Pleas of the Admiralty (S. S.) ii xxi. Cp. Lord Warden of the Cinque Ports v. the King (1831) 2 Hagg., Admir. 438, 443, 444.

[6] 18, 19 Vict. c. 48 § 10. [7] 31, 32 Vict. c. 71 § 33.

[8] 46, 47 Vict. c. 18 § 13 (Municipal Corporations Act 1883); 57, 58 Vict. c. 60 § 571 (Merchant Shipping Act 1894). The regular place for the sitting of the court was the isle of St. James's Church, Dover. For convenience the judge now often sits at the Royal Courts of Justice.

supervising the actions or the transgressions of foreigners. Such matters frequently gave rise to diplomatic questions in the shape of expensive claims for compensation. In fact we shall see that it was largely owing to the necessity the crown was under of protecting itself against such claims that the creation of the court of Admiralty was due.

In this period the crown supervises the doings of the local courts in the following ways.

Writs are sometimes sent to the mayors and bailiffs of the seaport towns directing them to proceed.[1] If they did not obey the writ they were attached for contempt. Sometimes special commissions are issued to the king's justices or others to try cases of spoil or piracy.[2] It was very often impossible for a foreigner, who had been spoiled of his goods, to get justice from an English jury.[3] Such persons often petitioned the Council. The petition in such cases was often referred to the Chancellor;[4] but it was sometimes heard by the Council, and writs were issued according to the result of the trial.[5] In 1353 we hear of such a case being tried by the Admiral and the Council.[6] This is, as we shall see, just before the first mention of the Admiral's court.

[1] 1315 writ to mayor and bailiffs of Rye to inquire into a ship spoiled by pirates in Orwell haven, the goods of which had been taken to Rye; neglect to send the pirates before the king as ordered; writ to the constable of Dover Castle to arrest the mayor and bailiffs (Select Pleas of the Admiralty (S. S.) i xx). 1323 writ to sheriff of Gloucester to arrest a ship with the help of the mayor of Bristol, and to try the case in the mayor of Bristol's court (ibid xxiv). 1328 writ to the sheriff of Southampton to arrest French goods (ibid xxvi). 1352 writ to the mayor of Southampton to arrest certain pirates and bring them before the Council (ibid xxxix). 1349 Pilk v. Venore, case removed from Bristol court into the Chancery; the Bristol court applied the law of Oleron (ibid ii xliii).

[2] 1308 Edward II. issued a commission to certain "auditores" to inquire of spoils alleged to have been committed by Frenchmen upon Englishmen (Select Pleas of the Admiralty (S. S.) i xviii). 1338 commission to certain persons to inquire as to ships of the Count of Guelders which had been spoiled (ibid xxvii). 1339 commission to Stonore and two others to try a case of piracy committed by English upon Spanish, Portuguese, and Catalan merchants in Southampton water (ibid xxix). [3] Ibid xxiii.

[4] Ibid xxv. 1325 a petition by one whose ship had been robbed at sea by the men of Yarmouth. 1327 in a case of piracy of English upon Frenchmen.

[5] Ibid xxxviii, a case of 1343; xxxix a case of 1352; 1347 the Council orders restitution of goods taken by pirates, and, in default, the arrest of those to whom the good had come. [6] Ibid xl.

The Courts of Common Law sometimes, but rarely interfered in such matters.[1] They had in fact no jurisdiction over contracts made or torts committed abroad.[2]

With respect to crimes committed out of the bodies of counties, the question how far the Common Law Courts had jurisdiction is perhaps more doubtful. Hale asserts that they did possess such jurisdiction before 1365. He cites eight cases of the reigns of Edward I., II., and III.[3] These cases do not however completely prove Hale's position, as Cockburn, C. J., points out in *Reg. v. Keyn*.[4] It is not, however, improbable that, at a period when the court of Admiralty did not exist, the ordinary courts did sometimes exercise such jurisdiction. Criminal cases are still tried by a jury,[5] and in cases of piracy the commissioners are sometimes directed to proceed "secundum legem et consuetudinem regni nostri." Generally, however, the procedure is "secundum legem mercatoriam," or, "maritimam."[6] The maritime law is clearly a law apart from the common law and practically identified with the law of the merchants.

[1] It would appear that in 1296 (case cited by Selden iii 1895) the Common Pleas declined to recognise the jurisdiction of the Admiral and asserted that it had general jurisdiction. The court said it could try a murder committed at sea as well as on the land when the murderer came to land. The MS. from which Selden cites has disappeared (Select Pleas of the Admiralty i xvii, xviii). 1322 action to recover damages for spoil at sea in the King's Bench (ibid xxiii). 1323 a case before the Bristol court moved by certiorari into the King's Bench (ibid xxiv).

[2] At the end of the 14th century it would appear that there was no remedy for breach of charter party made abroad, Copyn v. Snoke (ibid. ii lix). In 1280 it was decided that the Common Law Courts had no jurisdiction over torts committed abroad (ibid ii xliii, xliv).

[3] Hale, *2* P. C. 12-15.

[4] (1876) L. R. *2* Ex Div. 163-167. "It appears that of these eight cases four were in the nature of a civil remedy, and, as it would seem were properly within the jurisdiction of the Court of King's Bench; four were cases of piracy, which may have been dealt with on the principle that piracy is triable anywhere and everywhere. Moreover as to two of the latter cases, it is doubtful whether the offence was not committed within the body of a country, and therefore triable at common law."

[5] Ibid i xxi, xxii, xxiv; Black Book of the Admiralty i 45, 49, 83.

[6] Ibid i xvi. In 1377 a case of piracy is tried at common law "secundum legem et consuetudinem regni ac legem maritimam." There is a proviso that this is not to be an encroachment on the Admiral's rights, ibid i xlviii.

Commercial Courts.

The courts which administer the commercial law of the period necessarily present features very similar to the courts which administer the maritime law. The law merchant applied both to the domestic trader and to the foreign merchant.[1] Both formed in a sense a separate class. But, as we might expect, the separation is far more clearly marked in the latter than in the former case.

The courts which administer this branch of the Law Merchant are chiefly the courts of fairs, the courts of the more important towns, and the courts of the Staple.

In the fairs of the Middle Ages much of the internal and foreign trade of the country was conducted. The right to hold a fair meant the right to hold a court of pie powder for the fair.[2] A statute of 1477[3] recites that in this court, "it hath been all times accustomed, that every person coming to the said fairs, should have lawful remedy of all manner of contracts, trespasses, covenants, debts, and other deeds made or done within any of the same fairs, during the time of the said fair, and within the jurisdiction of the same, and to be tried by the merchants being of the same fair." Later cases confined the jurisdiction of the fair strictly within these bounds.[4] Sometimes these courts were held by the mayor of

[1] The term merchant at this period was not confined to large traders. It embraced all who traded. The distinction between the craftsman and the merchant is later, Gross, Gild Merchant, i 107 and n. 2.

[2] The style of such court is, Curia Domini Regis pedis pulverisati tenta apud civitatem X, coram majore et duobus convicibus secundum consuetudines civitatis a tempore cujus etc., ac sec'. privilegia et libertates concessa et confirmata (or if a franchise fair, coram A. B. senescallo feriæ). Bracton f. 334 a speaks of persons, qui celeram habere debent justitiam, sicut sunt mercatores quibus exhibetur justitia pepoudrus; Coke, 4th Instit. 272; Rastell's Entries f. 168 b, 169.

[3] 17 Ed. IV. c. 2 § 3.

[4] Howel v. Johns (1600) 1 Cro. 773. Error of a judgment in the court of the fair of Gloucester, in an action on the case for words. The error assigned was that the words were spoken before the market began. Judgment reversed, "they cannot meddle with any matter in that court, but with what happens in the market the same day. They also held that this was not an action proper for that court; for it is only for matters of contracts, and for matters arising within the market, and by occasion of the market, as batteries or disturbances happening therein. But if the words were by occasion in the same market it might peradventure be otherwise." Cp. Goodson v. Duffield (1612) Cro. Jac. 313; Hall v. Pyndar (1556) Dyer 132 b, pl. 80, and cases cited in the margin.

a corporate town.[1] Sometimes they belonged to a lord. Of the latter class was the fair of St. Ives.[2] We can see that merchants from all parts of England, and even from abroad, attended this fair. In the pleadings of the court of this fair we have mention of the communitates of Stamford, Nottingham, Leicester, Huntingdon, Godmanchester, Bury St. Edmunds, Wiggenhall, and Ypres. These fairs were not peculiar to England. "By means of them almost all foreign trade was for centuries conducted. In the fairs of Champagne . . . Besançon and Lyons in France . . . Antwerp in the Low Countries, and not least in the fairs of Winchester and Stourbridge in England, goods were bought and sold; orders were given and taken; outstanding payments were made there; and there obligations to be discharged at future fairs were contracted. To these gatherings, which lasted for several days, flocked merchants from all parts of Europe. The dealings of the merchants necessitated the use of simple rules; no technical jurisprudence peculiar to any country would have been satisfactory to traders coming from many different countries."[3] The customs of different places may have slightly varied;[4] but the law, in its broad lines, as laid down by the merchants in these courts, was necessarily of the international character which has always been its chief characteristic.

The towns had in many cases the right, either by charter or by prescription, to hold various courts, of pie powder and otherwise, in which the Law Merchant was administered, in addition to many other kinds of jurisdiction, civil and criminal. The Domesday of Ipswich distinguishes many different kinds of pleas. Those which concern the Law Merchant are clearly distinct from the others.[5] The Red

[1] For the curious right of the Cinque Ports to hold a fair at Yarmouth see Arch. Cantiana xxiii 161-183.

[2] Select Pleas in Manorial Courts (S. S.) 130.

[3] Smith, Mercantile Law (Ed. 1890) Introd. lxix, lxx.

[4] The Carta Mercatoria (Munimenta Gildhallæ (R. S.) ii pt. i 206, 207) implies this, "Et si forsan supra contractu hujusmodi contentio oriatur, fiat inde probatio vel inquisitio, secundum usus et consuetudines feriarum et villarum mercatoriariarum ubi dictum contractum fieri contigerit et iniri."

[5] Black Book of the Admiralty (R. S.) ii 23. "The plees be twixe straunge folk that man clepeth pypoudrus," "The pleas in tyme of fayre be twixe straunge and passant," "The pleas yoven to the law maryne."

Book of Bristol describes the differences existing between the Law Merchant and the common law, and treats generally of the law and procedure of merchant courts.[1] Similarly the White Book of London describes the special usages which prevail where the merchants are concerned.[2] Many other towns also, as we can see from the reports, had the right to hold courts for the merchants.[3] Some of these courts still exist. The Lord Mayor's court in London,[4] the Tolzey court, and a branch of it sitting in time of fair as a Pie Powder Court, at Bristol,[5] the Liverpool court of passage,[6] are examples of survivals from a time when the Law Merchant was generally administered in local courts.

The merchants not only had special courts and a special law, they were also differentiated from the rest of the community by a special organization. In the charters of the towns there is frequent mention of the Guild Merchant. This was an association of traders within the town, and, in some cases, of traders living outside its precincts, for the better management of trade.[7] It sometimes arbitrated upon mercantile disputes.[8] But as a rule it did not exercise a regular jurisdiction. Its chief function was that of a trades union of a rigidly protective character.[9] It was only those who

[1] L. Q. R. xvii 246. [2] Munimenta Gildhallæ (R. S.) iii f. 191 b.
[3] Above. [4] Coke, 4th Instit. 247; Bl. Comm. iii 80.
[5] L. Q. R. xvii 237 n. 3.
[6] Regulated by 56, 57 Vict. c. 37. Other instances are the Derby Court of Record; Exeter Provost Court; Kingston-upon-Hull Court; Newark Court of Record; Northampton Borough Court; Norwich Guildhall Court; Peterborough Court of Common Pleas; Preston Court of Pleas; Romsey Court of Pleas; Southwark Court of Record; Worcester City Court of Pleas.
[7] Gross, Gild Merchant, i chap. iii. "The words, 'so that no one who is not of the Gild may trade in the said town except with the consent of the burgesses,' which frequently accompanied the grant of a Gild Merchant, express the essence of this institution" (p. 43).
[8] L. Q. R. xvii 238.
[9] Gross, Gild Merchant, i 43-50. As to the distinction between Gild and Borough see ibid chap. v. This distinction tended to become obliterated in the 14th century (p. 76). With other privileges that of having a Gild Merchant helped on the idea of municipal incorporation (p. 105). "The judicial authority of the Gild Merchant was at first very limited, its officers forming a tribunal of arbitration, at which the brethren were expected to appear before carrying their quarrels into the ordinary courts. The functions of these officers were inquisitorial rather than judicial. But in some places their powers appear to have been gradually enlarged during the 13th century so as to embrace jurisdiction in pleas relating to trade" (p. 65).

belonged to the Guild Merchant who could trade freely within the town. Its conduct was sometimes so oppressive that trade was driven from the town.[1] In fact all the various privileges, jurisdictional and administrative, which the towns possessed could be, and often were used in a manner adverse to the commercial interests of the country. The foreign merchant was hampered at every turn by the privileges of the chartered towns. They were averse to allowing him any privileges except those which they had specially bargained to give to him.[2] "The Great Charter provides that merchants may freely enter and dwell in and leave the realm; but the same Great Charter confirms all the ancient liberties and customs of London and the other boroughs, and thus takes away with one hand what it gives with the other. The burghers have a very strong opinion that their liberties and customs are infringed if a foreign merchant dwells within their walls for more than forty days, if he hires a house, if he fails to take up his abode with some responsible burgher, if he sells in secret, if he sells to foreigners, if he sells in detail."[3]

The crown, on the other hand, was for many reasons interested in supporting the foreign merchant. The crown was able to take a broader view of the commercial interests of the country than any set of burghers. Its intelligence was also quickened by the fact that it was easier to negotiate a supply from the alien merchant in return for protection, than to deal with a Parliament.[4] For these reasons the needs of the crown gave to the alien merchant a defined position — in some respects superior to that of the native merchant — and the protection of a separate set of courts.

In 1303 the Carta Mercatoria[5] gave to certain foreign merchants, in return for certain customs duties, exemption from certain municipal dues, freedom to deal wholesale in all cities and towns, power to export their merchandize, and liberty to dwell where they pleased. They were promised speedy justice "secundum legem mercatoriam" from the

[1] Gross, Gild Merchant, i 52 and Statutes there cited.
[2] For specimens of such bargains by London with the merchants of Amiens, Corbeil, and Nesle see Munimenta Gildhallæ (R. S.) iii 164-175.
[3] P. and M. i 447, 448.
[4] Stubbs, C. H. ii 170, 208-210, 572.
[5] Munimenta Gildhallæ (R. S.) ii pt. i 205-211.

officials "feriarum, civitatum, burgorum, et villarum mercatoriariarum;" and any misdoings of these officials were to be punished. If the mayor and sheriffs of London did not hold their court from day to day another judge was to be substituted for them. In all pleas, except those of a capital nature, half the jury was to consist of foreign merchants. No future grant of liberties to any town was to derogate from the rights conferred upon the foreign merchants.

The growth of the powers of Parliament in Edward III.'s reign gradually prevented the crown from obtaining supplies by separate negotiations with the alien merchants.[1] But in his reign (1353)[2] similar privileges and a larger measure of protection was secured to them by the Statute of the Staple.

With a view to the better organization of foreign trade and the more convenient collection of the customs, certain towns, known as the Staple Towns, were set apart.[3] It was only in those towns that dealings could take place in the more important articles of commerce, such as wool, woolfells, leather, lead, and tin. Eleven such towns were named for England, one for Wales, and four for Ireland.[4] In each of these towns special courts were provided for the merchants who resorted thither. A mayor and two constables were to be chosen annually to hold the court of the Staple; and the authorities of the town in which the Staple was held were ordered to be attendant upon them.[5] They were to apply the Law Merchant, and not the common law. All manner of pleas concerning debt, covenant, and trespass fell within their jurisdiction. The jurisdiction of the king's courts was excluded except in cases touching freehold or felony.[6] The

[1] Stubbs, C. H., ii 576. In 1362 and 1371 it was enacted that the merchants should not set any subsidy on wool without the consent of Parliament.

[2] 27 Ed. III. St. 2.

[3] The Staple system dates from Edward I.'s reign. After several changes it was consolidated by this statute (Stubbs, C. H. ii 447, 448). After the statute changes were made in the places where the Staple was held, Gross, Gild Merchant, i 141-143. To be a Staple town was a privilege highly prized; for as Coke says (4th Instit. 238) "riches followed the Staple."

[4] 27 Ed. III. St. 2 c. 1. [5] Caps viii and xxi.

[6] 27 Ed. III. St. 2 c. v, vi, viii, and xxi.

mayor and constables had the assistance of two alien merchants, one of whom was chosen from the merchants who came from the north, the other from the merchants who came from the south.[1] Provision was made for the trial of cases in which aliens were concerned by a mixed jury, and for an appeal in cases of difficulty to the Chancellor and the Council.[2] A speedy means was provided for the recovery of goods of which merchants had been robbed at sea, or which had been cast away and thrown up on the shore.[3] Merchants going and returning to the Staple towns were protected against purveyance.[4] They were promised lodgings in the towns at a reasonable rent.[5] They were taken into the king's special protection.[6] These privileges are specially stated to be granted notwithstanding any privilege, franchise, or exemption granted to any towns or individuals.[7]

All these courts administered, and, by administering, helped to create, the Law Merchant. With the merchant, his courts, and his law the common law had little concern. He is protected by his special courts and can, in the last resort, appeal to the Chancellor and the Council.[8] The law is a customary law known to the merchants who can, if need be, inform the king's courts of its contents.[9] Fleta notices that it is a peculiar law.[10] A statute was needed to abrogate the rule of this law that one townsman is liable, as a kind of surety, for the debt of his fellow townsman.[11] The rule that if a debtor could pay, money in the hands of his debtor could be attached, was common to many towns.[12] The statute mer-

[1] c. xxiv.
[2] c. viii and xxiv.
[3] c. xiii.
[4] c. iv.
[5] c. xvi. [6] c. xx. [7] c. xxviii. [8] Above 306.
[9] In Edward II.'s reign a dispute on a question of law arising in the fair of St. Ives was brought into the King's Bench. Twelve merchants from London, Winchester, Lincoln, and Northampton were summoned to give evidence as to the law, Plac. Abbrev. 321 (cited Select Pleas in Manorial Courts (S. S.) 132).
[10] II. 58. 5; II. 61. 2.
[11] 3 Ed. I. c. 23; 2d Instit. 204. For a case of 34 Ed. I. illustrating this rule as applied to Foreign Merchants see Hale, 2 P. C. 13 n. a.
[12] I. e. Foreign Attachment. Munimenta Gildhallæ (R. S.) iii 41. Cp. Tross v. Michell, Cro. Eliza. 172; Paramore v. Veral, 2 Anderson 151; Malynes, Lex Mercatoria, 290, 291; Cox v. Mayor of London, L. R. 2 H. of L. 239.

chant and the statute staple gave to English and foreign merchants a right of recourse against their debtor's land.[1] The common law as yet knows but little of these rules. A writing obligatory payable to bearer is known among the merchants as early as the 13th century. The first English case upon a bill of exchange in the Common Law Courts is of the year 1603.[2]

In this period, as we have said, the merchant courts and the merchant law are so closely connected with the maritime courts and maritime law that we may regard them as branches of the same Law Merchant. In the middle of the 14th century the rise of the court of Admiralty causes a cleavage between these two branches of the Law Merchant. The cleavage is widened by the action of the Common Law Courts. Their jealousy confines the court of Admiralty rigidly to maritime causes, and leads them to appropriate to themselves jurisdiction over commercial causes. In the end they assimilate what they have appropriated, and construct our system of mercantile law.

(ii) The rise of the Court of Admiralty and its Jurisdiction.

(*a*) *The rise of the Court of Admiralty.*

The earliest mention of the term Admiral is in a Gascon Roll of 1295, in which Berardo de Sestars is appointed Admiral of the Baion fleet.[3] There are similar mentions of Admirals in these Rolls in 1296 and 1297. In 1300 Gervase Alard is appointed Admiral of the Cinque Ports; and this appears to be the earliest use of the title in England. "It would appear that the title of Admiral, originating probably in the East, and afterwards adopted by the Genoese and other navies of the Mediterranean, came by way of Gascony to England, and was there adopted about the beginning of the 14th century."[4]

[1] 11 Ed. I. (Statute of Acton Burnell); 13 Ed. I. St. 3; 27 Ed. III. St. 2 c. 9.

[2] Martin v. Boure, Cro. Jac. 6-8.

[3] Select Pleas of the Admiralty (S. S.) i xii. The Black Book of the Admiralty (i 56, 72) contains references to an Admiralty court in the reigns of Henry I. and John. These are apocryphal tales of the 14th century, Select Pleas of the Admiralty i xi.

[4] Ibid xii.

We have seen that in the earlier part of the 14th century the Admiral did not possess any jurisdiction except a disciplinary jurisdiction over the fleet under his command.[1] He does get such jurisdiction about the middle of the 14th century, owing to the diplomatic difficulties in which the king found himself involved, from the want of some efficient authority to coerce the marauding and piratical propensities of his subjects.

It appears from the documents contained in the record known as the "Fasciculus de Superioritate Maris" that the kings of England had been constantly negotiating with foreign countries — more especially with France and Flanders — as to claims in respect of piracies committed by English subjects.[2] From 1293 to 1337 attempts had been made at arbitration. In 1337 Edward had made payments out of his own pocket to the Flemings, the Genoese, and the Venetians. The claims of the French were put an end to by war. In 1339 a commission was sitting to consider the piracy claims made by Flanders. It may be that the resolution to erect a court of Admiralty was the result of recommendations made by that commission. At any rate the battle of Sluys (1340) gave to England that command of the sea, which had been already claimed in the 13th century, and so rendered the erection of such a court the more possible. "It is not unreasonable to suppose that after the battle of Sluys Edward III., acting upon the advice of the commissioners of 1339, extended the jurisdiction of the Admiral, which had up to that date been mainly disciplinary and administrative, so as to enable

[1] Above 304; Lambard, Archeion (Ed. 1635) 49, 50. The court of Admiralty for some time exercised a jurisdiction over the navy, and merchant ships in time of war. The last remnant of it was suits against merchantmen for carrying naval flags, Encyclopædia Britannica (10th Ed.) Tit. Admiralty.

[2] The documents contained in the Fasciculus are described in Select Pleas of the Admiralty i xxx-xxxiv. It contains (1) the case of certain English merchants in respect of depredations committed between 1297 and 1304. It claims for England the sovereignty of the sea of England. It is printed by Coke, 4th Instit. 142-144. (2) The appointment of commissioners to advise as to French Piracy claims; partially printed by Coke, 4th Instit. 144. (3) A treaty made by Ed. I. with Count Guy of Flanders 1297. (4) A document addressed to commissioners appointed to deal with piracy claims by Flanders; partly printed by Coke, 4th Inst. 144.

him to hold an independent court and administer complete justice in piracy and other maritime cases."[1] We have seen that the older methods of administering justice in such cases had been found to be very unsatisfactory. In 1353 a case was heard before the Admiral and the Council.[2] In 1357 there is the earliest distinct reference to a court of Admiralty.[3] In 1360 John Pavely is appointed "capitaneus et ductor" of the fleet, with powers, not only disciplinary, but also judicial.[4] In 1361 the commission to Sir Robert Herle confers upon him similar powers, and gives him power to exercise them by a deputy.[5] This power was probably inserted in order to provide a judge for the new court. There were at first several Admirals and several courts. From the early 15th century there is one Lord High Admiral, and one court of Admiralty. In 1482 we have an actual patent of the judge of the court.[6]

The earliest parts of the Black Books of the Admiralty, which refer to the office and the court of the Admiral, probably date from the period between 1332 and 1357.[7] It is clear that the jurisdiction of the court is as yet new. There is an article expressly directed against the withdrawal of cases from the court.[8] In 1361 a commission of oyer and terminer was recalled on the ground that the matter fell within the jurisdiction of the Admiral's court.[9] In 1364 a writ of supersedeas issued to the judges on the ground that the Admiral had already tried the case.[10] In 1375 the in-

[1] Select Pleas of the Admiralty i xxxv, xxxvi. [2] Ibid xl.

[3] Ibid xli, xlii. The King of Portugal had made a claim on behalf of a Portuguese subject in respect of goods taken by an Englishman from a French vessel. Edward III. says that the Admiral had adjudged them to belong to the English captor.

[4] "Querelas omnium et singulorum armatæ prædictæ audiendi et delinquentes incarcerandi, castigandi, et puniendi, et plenam justitiam, ac omnia alia et singula quæ ad hujusmodi capitaneum et ductorem pertinent, et pro bono regimine hominum prædictorum necessaria fuerint faciendi, prout de jure et secundum legem maritimam fuerit faciendum" (ibid xlii). [5] Ibid xlii, xliii.

[6] Select Pleas of the Admiralty i lv. It empowers him, "ad cognoscendum procedendum et statuendum de et super querelis causis et negotiis omnium et singulorum de hiis quæ ad curiam principalem Admiralitatis nostræ pertinent."

[7] Parts A, B, and C. See Black Book i xxviii, xxix.

[8] Ibid i 69.

[9] Select Pleas of the Admiralty i xlv.

[10] Ibid.

quisition of Queenborough was held in order to ascertain certain points of maritime law.[1] We shall see that the new court aroused the suspicions of Parliament and that its jurisdiction was limited by statute.[2] But the part of the Black Book dealing with the procedure and practice of the court (which dates from the 15th century) shows us that its jurisdiction is becoming settled.[3]

Under Henry VIII. the court of Admiralty considerably extended and settled its jurisdiction. In that reign much attention was paid to naval matters. Trinity House was incorporated in 1516. Deptford dockyard was constructed at about the same period. The records of the court began in 1524.[4] It was settled in 1585 that the judge of the court of Admiralty, though a deputy of the Admiral, did not cease to be judge during a vacancy of the office of Admiral.[5] The criminal jurisdiction of the court was extended; and just as the crown had asserted its jurisdiction in ecclesiastical matters, so it asserted an increased jurisdiction, through the court of Admiralty and the Council, in maritime and commercial causes. The Council records show how close was the connexion between the Council and the Admiralty.[6]

During the Tudor period the court sat at Orton Key near London Bridge.[7] Later it sat, like the Ecclesiastical Courts, at Doctors' Commons.[8] We shall see that the determined attack of the Common Law Courts in the 17th century left the court with but a small part of the jurisdiction which it had asserted under the Tudors, and denied it the status, which it had formerly possessed, of a court of record.[9]

[1] Black Book of the Admiralty i 132 seqq.
[2] Below.
[3] i 178-220; 246-280; 345-394.
[4] Select Pleas of the Admiralty i lvii.
[5] Ibid ii xii.
[6] Dasent i 154, 155; iii 149, 467, 469; vii *xviii;* xiv *xxviii;* xx *xiv-xvi;* xxiv 196, 356, 385-393, 403-405.
[7] Select Pleas of the Admiralty i lxxix; Bl. Comm. iii 69.
[8] In fact the judge of the court of Admiralty and the Dean of the Arches were often the same person (Anson, the Crown, 417). 3, 4 Vict. c. 65 § 1 provided that the Dean might sit for the judge of the Admiralty court.
[9] Select Pleas of the Admiralty i xlv. A writ of supersedeas, issued in 1364, implies that it is a court of record. The contrary was stated, Coke, 4th Instit. 135; cp. Sparks v. Martyn (1668) 1 Ventris 1.

Statutes of this century restored to the court of Admiralty some parts of the jurisdiction of which the Common Law Courts had deprived it. They restored also its status of a court of record, and gave to the judge of the Admiralty many of the powers possessed by the judges of the superior Courts of Common Law.[1]

Appeals from the court of Admiralty lay originally to the king in Chancery. This is clear from a statute of 1533.[2] The king on each occasion appointed *judices delegati* to hear the appeal. In the Tudor period these Delegates were civilians. In later times a judge of one of the Common Law Courts was associated with them. In 1563 it was enacted that their decision should be final.[3] We get the records of the Court of Delegates from the beginning of the 17th century. We have seen that in 1832 the jurisdiction of the Delegates was transferred to the Council, and that in 1833 the Judicial Committee of the Council was formed to hear such appeals.[4]

(*b*) *The jurisdiction of the Court of Admiralty.*

In the 14th and 15th centuries the jurisdiction of the Admiralty is somewhat wide and vague. It comprises the ordinary criminal and civil jurisdiction of later days,[5] the Prize jurisdiction,[6] and the jurisdiction over wreck, and the other droits of the crown or the Admiral.[7] The procedure of the court was becoming fixed upon the models rather of the civil than of the common law.[8] Its jurisdiction was beginning to encroach upon the rights of those seaport towns which possessed Admiralty jurisdiction.[9] For these reasons the court aroused a Parliamentary opposition similar in kind

[1] 24 Vict. c. 10 §§ 14, 17, 23, 24; below.

[2] 25 Henry viii c. 19 § 4. For earlier commissions to hear appeals see Select Pleas of the Admiralty ii lix-lxii.

[3] 8 Eliza. c. 5. This was not necessarily so before, Select Pleas of the Admiralty i. 18-20. Above.

[5] Select Pleas of the Admiralty i xlvi-liv.

[6] Ibid xli, xlii; Rhymer, Fœdera, vi 14, 15.

[7] Ibid xliv, xlv; ibid ii xxv, xxvi.

[8] Black Book of the Admiralty (R. S.) i 178-220.

[9] R. P. iii 322 (17 Rich. II. n. 49) the towns of Bristol, Bridgewater, Exeter, Barnstaple and Wells complain of the encroachments, errors, and delays of the court. Appeals, they say, have been pending 3 years and more, "pur diverse delaies de la ley de Civill, et subtill ymagination de les parties pleintiffs." Cf. Sampson v. Curteys (Select Pleas of the Admiralty i 1) and Gernesey v. Henton (ibid 17) which bear out the statements in the petition.

to that aroused by the jurisdiction of the Council. The result of this opposition was seen in two statutes of Richard II.'s reign which defined the jurisdiction of the Admiralty. 13 Richard II. St. 1 c. 5 recites that "a great and common clamour and complaint hath been often times made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office." It enacts that, "the admirals and their deputies shall not meddle from henceforth with the sea, as it hath been used in the time of King Edward, grandfather of our Lord the King that now is." 15 Richard II. c. 3 enacts more specifically, "that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties as well by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power, nor jurisdiction." But, "nevertheless, of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognisance." [1] In view of further petitions as to the encroachments of the Admiral's court, it was enacted in 1400 that those sued wrongfully in that court should have a right of action for double damages.[2] Petitions were still directed against the court and its procedure.[3] But these statutes effected some settlement of the court's jurisdiction; and the Courts of Common Law maintained their observance by the issue of writs of supersedeas, certiorari or prohibition.[4]

We have seen that the reign of Henry VIII. witnessed a revival of interest in the navy and an increased activity in

[1] The statute also (§ 4) recognises the disciplinary powers of the Admiral.

[2] 2 Henry IV. c. 11.

[3] R. P. iii 498 (4 Hy. IV. n. 47), the prayer is for the enforcement of remedies against the admirals and their deputies, "et auxi que les ditz Admiralles usent lour Leies tant soulement par la Ley de Oleron et anxiens Leyes de la Meer, et par la Leye d'Engleterre, et nemye par Custume, ne par nulle autre manere;" R. P. iii 642 (11 Hy. IV. n. 61), the prayer is that the justices of the peace may have power to enquire into the doings of the Adimrals and their agents.

[4] Coke, 4th Instit. 137, 138; Select Pleas of the Admiralty ii xli.

the court of Admiralty. A statute of 1540[1] gave to the Admiral a jurisdiction in matters of freight and damage to cargo. The patents of Henry VIII.'s admirals not only omit the proviso to be found in earlier patents, confining their jurisdiction within the limits marked out by the statutes of Richard II.'s reign, they also insert a non obstante clause dispensing with those statutes.[2] We begin to be able to classify the jurisdiction of the court under the following heads: —

(1) Ordinary or "Instance" Jurisdiction. This comprises —

(*a*) Criminal Jurisdiction.
(*b*) Civil Jurisdiction.
(*c*) Admiralty Droits.

(2) Prize Jurisdiction.

(1) Ordinary or Instance Jurisdiction.

(*a*) *Criminal Jurisdiction.*

We have seen that after 1363 the Admiral's criminal jurisdiction was recognised as exclusive on the high sea.[3] This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship whether subjects or not, over any one in cases of piracy at common law.[4] It could be exercised over no other persons.[5] The act of Richard II. recognised also a jurisdiction in cases of homicide and mayhem committed in ships below the bridges.[6] This jurisdiction was,

[1] 32 Henry VIII. c. 14.

[2] The patent of Henry Duke of Richmond (1525) gives him power "audiendi et terminandi querelas omnium contractuum inter dominos proprietarios navium ac mercatores seu alios quoscunque cum eisdem dominis ac navium ceterorumque vasorum proprietariis pro aliquo per mare vel ultra mare expediendo contractuum omnium et singulorum contractuum ultra mare proficiendorum vel ultra mare contractuum et in Anglia et ceterorum omnium quæ ad officium Admiralli tangunt. . . . Aliquibus statutis, actubus, ordinationibus, sive restrictionibus in contrarium actis editis ordinatis sive provisis, non obstantibus," Select Pleas of the Admiralty i lviii. The later commissions are very similar; but they omit the non obstante clause.

[3] 13 Rich. II. St. 1 c. 5; 15 Rich. II. c. 3.

[4] Stephen, H. C. L. ii 27-29. In cases of piracy by statute, jurisdiction only exists over British subjects.

[5] R. v. Keyn (1877) 2 Ex Div. 63. The effect of the decision was overruled by the Territorial Waters Act (41, 42 Vict. c. 73). The Act declares that offences committed by anyone within the territorial waters of the crown, i. e. on the sea to such a distance as is necessary for the defence of the dominions of the crown, are within the jurisdiction of the Admiral.

[6] 15 Rich. II. c. 3.

up to low water mark, concurrent with that possessed by the Courts of Common Law.[1]

We have seen that the procedure in the Admiral's court had come to be modelled on the procedure of the civil law. The early precedents for trial by jury were not followed.[2] Trial by witnesses took its place. In 1536 dissatisfaction with this method of trial produced a statute, the ultimate effect of which was to transfer to the Courts of Common Law the criminal jurisdiction of the Admiralty.[3]

The statute recites that those who have committed crimes upon the sea, "many times escaped unpunished because the trial of their offences hath heretofore been ordered . . . before the Admiral . . . after the course of the civil laws; the nature whereof is, that before any judgment of death can be given against the offenders, either they must plainly confess their offences (which they will never do without torture or pains) or else their offences be so plainly and directly proved by witness indifferent, such as saw their offences committed, which cannot be gotten but by chance at few times, because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should witness against them in that behalf; and also such as should bear witness be commonly mariners and ship men, which, because of their often voyages and passages in the seas, depart without long tarrying." It provides that treasons, felonies, robberies, murders and confederacies, committed in any place where the Admiral has jurisdiction, shall be enquired into and tried by commissioners appointed by the crown as if the offences had been committed on land. The commissions can be issued to the Admiral, his deputy, or three or four other substantial persons to be appointed by the Lord Chancellor. In 1799 this Act was extended to the trial of all offences committed on the high seas.[4]

[1] 5 Co. Rep. 107 (Sir Henry Constable's case). "Below the low water mark the Admiral has the sole and absolute jurisdiction. Between the high water mark and low water mark the common law and the Admiral have *divisum imperium* interchangeably."

[2] Select Pleas of the Admiralty (S.S.) i liv.

[3] 28 Henry VIII. c. 15.

[4] 39 Geo. III. c. 37.

The three or four substantial persons to be appointed under the act of Henry VIII. came to be invariably the judges of the Common Law Courts. The indirect result of the act was, therefore, to transfer the criminal jurisdiction of the Admiralty to the Courts of Common Law.[1]

Special commissions under this act have been rendered obsolete by later legislation. In 1834 the Central Criminal Court Act gave to that court the jurisdiction of these special commissioners.[2] In 1844 a similar jurisdiction was given to the ordinary justices of oyer and terminer and gaol delivery.[3] Provisions to the same effect are contained in the Criminal Law Consolidation Acts[4] and the Merchant Shipping Acts.[5]

The criminal jurisdiction of the Admiralty has thus for three centuries been exercised by the Courts of Common Law. It has, for this reason, almost wholly lost the international character which marked all branches of the maritime law in the Middle Ages. Piracy "at common law" is perhaps the only crime, which still retains some trace of an international character, in the rule, that it can be tried by the court of any country wherever and by whomsoever committed. The criminal jurisdiction of the Admiralty, having been administered by the ordinary courts, has become part and parcel of the common law, to be spelt out of English statutes, to be changed only as that law is changed. This fact was strikingly illustrated by *Reg. v. Keyn.*[6] No consensus of international jurists was held sufficient to give to the English courts a criminal jurisdiction over foreigners not recognised by English law. Cockburn, C. J., denied that a consensus of jurists could effect, in maritime law, what, in another branch of the old law merchant, he allowed might be effected by a consensus of merchants.[7] The case was decided by a bare majority. We may, perhaps, conjecture that it would have been decided the other way, if the criminal jurisdiction of the Admiralty

[1] Stephen, H. C. L. ii 19.
[2] 4, 5 Will. IV. c. 36 § 22.
[3] 7, 8 Vict. c. 2.
[4] 24, 25, Vict. c. 96 § 115; c. 97 § 72; c. 98 § 50; c. 99 § 36; c. 100 § 68.
[5] They deal with crimes committed on British ships or by British seamen. 17, 18 Vict. c. 104 § 267; 18, 19 Vict. c. 91 § 21; 57, 58 Vict. c. 60 § 686, 687.
[6] (1877) L. R. 2 Ex Div. 63, 202.
[7] Goodwin v. Robarts (1875) L. R. 10 Ex. 337; below.

had been freely developed in the court of Admiralty, and not in the Courts of Common Law.

(*b*) *Civil Jurisdiction.*

We have seen that under the Tudors the court of Admiralty claimed a wide jurisdiction. It seemed inclined to disregard altogether the limitations which statutes had imposed upon it. The extent of the jurisdiction which it claimed will appear from a list of the cases which, during this period, were brought before the court.[1] It practically comprised all mercantile and shipping cases. "All contracts made abroad, bills of exchange (which at this period were for the most part drawn or payable abroad), commercial agencies abroad, charter parties, insurance, average, freight, non-delivery of, or damage to, cargo, negligent navigation by masters, mariners, or pilots, breach of warranty of seaworthiness, and other provisions contained in charter parties; in short, every kind of shipping business was dealt with by the Admiralty court."[2] The Admiralty court was, in fact, regarded as one of the recognised tribunals of the Law Merchant.[3] In addition, the court exercised jurisdiction over various torts committed on the sea, and in public rivers, over cases of collision, salvage, fishermen, harbours and rivers, and occasionally over matters transacted abroad, but otherwise outside the scope of Admiralty jurisdiction.[4]

We have seen that during Elizabeth's reign the Common Law Courts began their attack upon the Chancery and the Council. It was not to be expected that they would tamely acquiesce in the encroachments of the Admiralty. Moreover, as we have seen, they were able to base their attack upon a statutory basis.

The Common Law Courts had issued writs of prohibition, based upon these statutes, from an early period. It is probable, however, that during the earlier part of the Tudor period the statutes had been largely disregarded;[5] and, as

[1] Select Pleas of the Admiralty (S. S.) i lxv-lxxi. Cp. Malynes, Lex Mercatoria, 303, 304 (Pt. III. c. xiv).
[2] Select Pleas of the Admiralty (S. S.) i lxvii.
[3] Malynes, Pt. III. c. xiv.
[4] Select Pleas of the Admiralty (S. S.) i lxx. In the 16th century "even marriage contracts and wills made abroad are occasionally met with as the subject of suits in Admiralty." [5] Above.

we have seen, the aid of the legislature had even been invoked on behalf of the Admiralty.[1] The Admiralty, also, had sometimes assumed the offensive, by means of a process of contempt, taken against those who brought proceedings upon maritime causes in another court.[2] It would appear that when the Common Law Courts resumed their efforts against the Admiralty, they at first had recourse to writs of supersedeas and certiorari issuing from the Chancery. But such applications to the Chancellor often left the Admiralty with the disputed jurisdiction. It was seen that writs of prohibition were the most effective instrument of attack or defence which the Common Law Courts possessed.[3]

In 1575 a provisional agreement was arrived at. But, after 1606, when Coke was raised to the Bench, the agreement was repudiated.[4] Coke, as Buller, J., once said, "seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."[5] He denied that the court was a court of record. He denied it the necessary power to take stipulations for appearance, and performance of the acts and judgments of the court. He denied that it had any jurisdiction over contracts made on land, either in this country, or abroad, whether or no they were to be performed upon the sea; and similarly he denied its jurisdiction over offences committed on land, either in this country, or abroad.[6] In support of his position he did not hesitate to cite precedents which were far from deciding what he stated that they did decide.[7] It is fairly certain that the earlier prohibitions were all founded upon the exercise by the Admiralty of

[1] 32 Henry VIII. c. 14 gave the court a certain jurisdiction in cases concerning charter parties and freight.

[2] Select Pleas of the Admiralty (S. S.) i. lxviii, 78. On proof of the facts the party in contempt was arrested.

[3] Select Pleas of the Admiralty (S. S.) ii xli. For a list of Prohibitions, see ibid i lxxiii-lxxviii; ii xli-lvii; 4th Instit. 137-142; Prynne, Animadversions, 75-77. For a specimen of the writ, see App. XII. A 2.

[4] Select Pleas of the Admiralty (S. S.) ii. xiv; Coke, 4th Instit. 136; Zouch, Jurisdiction of the Admiralty Asserted, Assertion v.

[5] Smart v. Wolff (1789) 3 T. R. 348. Lord Holt said (1 Ld. Raym. 398) that, "heretofore the common law was too severe against the Admiral." Prynne 103.

[6] 4th Instit. 136-138; Thomlinson's case (1605) 12 Co. Rep. 104; 2 Brownlow 16, 17 (1611).

[7] Prynne, Animadversions, 75-77; De Lovio v. Boit (1815) 2 Gall 407-418 (Story, J.).

jurisdiction within the bodies of counties. The common law had not in the past claimed jurisdiction over contracts made or offences committed abroad, and probably not over contracts made and offences committed in ports intra fluxum et refluxum maris.[1] Such jurisdiction was now coveted. By supposing these contracts or offences to have been made or committed in England the Common Law Courts assumed jurisdiction;[2] and thus by a "new strange poetical fiction," and by the help of "imaginary sign-posts in Cheapside"[3] they endeavoured to capture jurisdiction over the growing commercial business of the country. The other common law judges followed Coke's lead. It was not of course to be expected that all the cases, decided at a time when the Common Law Courts were engaged upon a systematic series of encroachments, should be consistent.[4] But it is clear that they were all tending in one direction, regardless of the fact that the procedure of the Common Law Courts, and the law which they applied, were far less fitted than that of the Admiralty,

[1] De Lovio v. Boit, at pp. 400-405; Y. B. 13 Hy. IV. Mich. pl. 10. Cp. F. N. B. 114, an English merchant's goods were spoiled by a merchant stranger beyond the sea. A writ was sent to the mayor of the town, in which other merchant strangers of the same nation were resident, directed against them; "but it seemeth that the English merchant shall not have such writ, for any debt due to him by contract from a Merchant Stranger, upon a contract made beyond the seas, if the merchant do come to England, or his goods — *Quare tamen* thereof." Prynne, Animadversions, 84, referring to those cases says, "neither Statham, Fitzherbert, or Brook in their Abridgments, Titles Prohibition, nor any of our Year Books Abridged by them, nor yet Mr. Crompton in his Jurisdiction of Courts, nor yet judge Crook's nor serjeant Moore's reports, or Hughes or serjeant Rolle, their late Abridgments cite any such precedents before 7 Jac. or King Charles his reign." Life of Sir Leoline Jenkins, Wynne, i lxxix.

[2] Bl. Comm. iii 107.

[3] Prynne, Animadversions, 95, 97.

[4] Sir R. Buckley's case (1590) 2 Leo. 182, agreement made in England for assistance at sea in taking a prize; Admiralty jurisdiction seems to be recognised. Tucker v. Cappes and Jones (1625) 2 Rolle 497, suit on a contract made in Virginia; Prohibition refused; it was said that the Admiralty had jurisdiction over things done in foreign parts, that foreign contracts were governed by the civil law, and that it was not reasonable that the common law should judge of them. Ambassador of King of Spain v. Joliff and others, Hob. 78, 79, "the Admiralty of England can hold no plea of any contract but such as ariseth upon the sea: no, though it arise upon any continent, port, or haven in the world out of the king's dominions. . . . The Courts of Common Law have unlimited power in causes transitory." Coke said, 2 Brownlow 17 (1611), that if a question of civil law arose the judges could consult with the civilians. De Lovio v. Boit 2 Gall 422.

to deal with the cases over which they claimed jurisdiction.

The merchants keenly felt the ill effects of these attacks made by the Common Law Courts. A conflict of jurisdiction must always give advantages to the unscrupulous litigant. It was clear that the Admiralty process was more speedy, and therefore more fit to deal with the cases of merchants and mariners. "Not one cause in ten comes before that court but some of the parties or witnesses in it are pressing to go to sea with the next tide." [1] The Admiralty could issue commissions to examine witnesses abroad, and it could examine the parties themselves. "The merchant if he can avoid the Admiralty, where he must answer upon oath, and proof may be made by commission, thinks himself secure from any danger at the common law." [2] The Admiralty could arrest the ship, and thus give far more effective security to those who had been employed upon it. The Admiralty could allow all the mariners to sue together for their wages, whereas the Common Law Courts insisted upon separate actions. The judges of the court of Admiralty, being civilians, were far more likely to be able to understand contracts made abroad with reference to the civil law. [3] Two cases, put by Sir Leoline Jenkins in his argument before the House of Lords in 1660, illustrate the incompetence of the Common Law Courts to deal with the jurisdiction which they claimed. In the first case put, a Spanish merchant resident in Spain owes money to A. The Spanish merchant has a ship in an English port, which the Admiralty process alone can reach. An action is brought by A in the court of Admiralty. The ship is arrested; but in consequence of a prohibition it is released. What is the use of suing a debtor in Spain with no available property in this country? In the second case A owes money to a Spanish merchant. The Spaniard sues in the Admiralty, and is prohibited. He then sues at common law, and, to prove his case, produces a copy of his contract. A pleads "non est factum." The original is in Spain deposited with a

[1] Life of Sir Leoline Jenkins, Wynne, i lxxxii.
[2] Zouch, Jurisdiction, etc., 130.
[3] Life of Jenkins i lxxvii, lxxxiii. Zouch 129 130.

notary who will not part with it. The Spaniard loses his case for want of evidence.[1]

Another compromise was attempted in 1632. Charles I. issued a commission to the Privy Council, empowering it to reconcile the differences between the Common Law Courts and the Admiralty. Sir Leoline Jenkins said that the agreement arrived at was "the result of many solemn debates, and not of artifice or surprise."[2] We can well believe this, if we consider the ill results which followed from the assumption of jurisdiction by the Courts of Common Law. The agreement conceded to the Admiralty a jurisdiction in the following cases: —

(1) In the case of contracts made, or wrongs committed, beyond the sea, or upon the sea.

(2) In suits for freight or mariners' wages, or for the breach of charter parties for voyages to be made beyond the sea, though the charter parties are made within the realm, and the money is payable within the realm. But if the proceeding is for a penalty, or the question is whether the charter party was made or not, or, if made, has been released, the Common Law Courts have jurisdiction.

(3) In suits for building, amending, saving or necessary victualling of a ship, brought against the ship itself, though the cause of action arose within the realm.

(4) The court is allowed a jurisdiction to enquire of, and to redress, all annoyances and obstructions in all navigable rivers beneath the first bridges, and also to try personal contracts and injuries done there which concern navigation upon the sea.

(5) It is provided that if any be imprisoned, and, upon a writ of Habeas Corpus being obtained, the exercise of jurisdiction by the Admiralty in any of these points be certified as the cause of the imprisonment, the parties shall be remanded.

It is probable that this agreement was acted upon for a

[1] Life of Jenkins i lxxxi, lxxxii.

[2] i lxxxi. It is printed by Prynne 101, and in the first edition of Croke's reports. In the later editions of these reports it is stated not to be law. It is only mentioned in two cases, Rolle, Abridgment 533 and T. Raym. 3.

few years. Prynne cites a case in which the House of Lords upheld the jurisdiction of the Admiralty in 1645;[1] and an ordinance passed in the time of the Commonwealth conceded to the court a jurisdiction similar to that which was conceded to it by the agreement of 1632.[2]

But, as we have seen, the Great Rebellion ensured the victory of the common law over jurisdictions which threatened to be its rivals. Although the merchants of London petitioned Parliament to give to the court of Admiralty a jurisdiction similar to that which had been given to it in the time of the Commonwealth, they petitioned in vain.[3] The civil jurisdiction of the Court was reduced to a very low ebb. Torts committed on the high seas; contracts made on the high seas to be there executed; proceedings in rem on bottomry bonds executed in foreign parts; the enforcement of the judgments of foreign Admiralty courts; suits for the wages of mariners,[4] were almost the only pieces of jurisdiction which it was allowed to exercise. Pepys[5] tells us that he went to St. Margaret's Hill in Southwark, "where the judges of the Admiralty come, and the rest of the Doctors of Civill law." He remarks, "I perceive that this court is yet but in its infancy (as to its rising again): and their design and consultation was, I could overhear them, how to proceed with the most solemnity, and spend time, there being only two businesses to do, which of themselves could not spend much time."

[1] Animadversions 123-125.

[2] Williams and Bruce, Admiralty Practice, 12.

[3] Sir Leoline Jenkins' argument in favour of the bill is printed by Wynne i lxxvi-lxxxv.

[4] Contracts made at sea, not maritime in their nature, were claimed by the Common Law Courts as not proper for the Admiral. Contracts, marine in their nature, but made on land, were claimed by reason of their locality. Convenience of process gave the Admiralty jurisdiction over seamen's wages after a struggle, cp. Winch 8 (1622); T. Raym. 3 (1660); 1 Keb. 712 (1664); 2 Ld. Raym. 1247 (1707). The courts were very puzzled to find some principle on which they could justify their exception, cp. 4 Burr. 1944; 2 Ld. Raym. 1452. In Clay v. Sudgrave (1700) Salk. 33, it was stated that, though against the statute, it was allowed for the sake of convenience, and, "communis error facit jus." The exception was narrowly construed. Though the mariners could sue in the Admiralty the master could not.

[5] Pepys' Diary, March 17, 1662-63. Jenkins said in his argument before the House of Lords, "I may truly say that every place in Europe intrusts the Admiral with more ample jurisdiction than England does."

It is quite clear that the court of Admiralty had on its side not only historical truth, but also substantial convenience. Prynne, Zouch, and Jenkins prove clearly both these facts. It is clear that the opposition of Coke and the common lawyers was unscrupulous. But it is clear that the common law had, after the Great Rebellion, gained the upper hand. And, from the point of view of the common law, the attack had been skilfully directed upon a position which it was worth much to secure; for the prize was nothing less than jurisdiction in all the commercial causes of a country the commerce of which was then rapidly expanding. Its commerce was in the future destined to expand beyond the most sanguine dreams of the 17th century. Coke could not foresee this. But he worshipped the common law; and he rendered it by no means the least of his many valuable services when he directed, and perhaps even misdirected, his stores of technical learning to secure for it this new field. To the litigant his action meant much inconvenience. To the commercial law of this country it meant a slower development.[1] But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future, which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity.[2]

[1] Select Pleas of the Admiralty (S. S.) ii lxxx, "Many points of maritime law that were afterwards painfully elaborated by the common lawyers had for at least a century been familiar to the civilians," e. g. the liability of a carrier for loss by thieves was discussed at Westminster in 1671. It had been settled in the Admiralty as early as 1640. We can say the same as to many questions relating to Bills of Exchange, Bills of Lading, General Average, and Insurance. The common law followed the Admiralty "with tardy steps, perhaps unconsciously, certainly without acknowledgement."

[2] It is curious to note that a similar jealousy between the common law and the Admiralty manifested itself in the United States. The Massachusetts House of Representatives, just before the Revolution, resolved that, "the extension of the powers of the court of Admiralty within this province is a most violent infraction of the right of trial by juries," Williams and Bruce 5 n. k. Cp. Ramsay v. Allegre (1827) 12 Wheaton 611. As Roger North says "it is the foible of all judicatures to value their own justice and pretend that there is none so exquisite as theirs; while, at the bottom, it is the profits accruing that sanctify any court's authority."

Modern legislation has restored to the court of Admiralty many of the powers, and much of the jurisdiction of which it had been deprived in the 17th century.[1] It has been restored, as we have seen, to its ancient position of a court of record; and its judge has been given the powers possessed by the judges of the superior Courts of Common Law. It has been given jurisdiction in cases of salvage, bottomry, damage, towage, goods supplied to foreign ships, building, equipping, and repairing ships, disputes between co-owners. In addition, it has been given a new jurisdiction in the case of booty of war, if the crown sees fit to refer any such question to it, and a new jurisdiction under the Foreign Enlistment Act.[2] But the contests of the 17th century have left their mark upon the law administered by the court. The Common Law Courts often came to decisions, similar to those which the Admiralty had already given, upon the principles of the civil law. But the decisions, though the same in substance, were the decisions of English courts and enunciated rules of English law. The law administered by the court of Admiralty possesses, it is true, affinities with the maritime law of foreign countries. The law of Oleron, and other maritime codes, may still be usefully cited in English courts. But Admiralty law has lost the international character which it once possessed. It is essentially English law. "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English maritime law."[3] "Neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England. . . . But they contain many principles and statements of marine practice, which, together with principles found in the Digest, and in the French, and other ordinances, were used by the judges of the English Court of Admiralty, when they were

[1] 3, 4 Vict. c. 65; 13, 14 Vict. c. 26; 24 Vict. c. 10.
[2] 3, 4 Vict. c. 65 § 22; 33, 34 Vict. c. 90 § 19.
[3] The Gaetano and Maria (1882) L. R. 7 P. D. at p. 148.

moulding and reducing to form the principles and practice of their Court." [1] These statements would not have been made by the judges of the Court in the 16th, or even in the 17th centuries. The contact with, and the control exercised by the Courts of Common Law, have effected in a similar way both the civil and the criminal jurisdiction of the court.

(*c*) *Admiralty Droits.*

The crown had originally certain rights to property found upon the sea, or stranded upon the shore. [2] The chief kinds of property to which the crown was thus entitled were, great fish (such as whales or porpoises), [3] deodands, [4] wreck of the sea, flotsam, jetsam, and lagon, [5] ships or goods of the enemy found in English ports, or captured by uncommissioned vessels, and goods taken or retaken from pirates. [6]

In early days, before the rise of the court of Admiralty, many of these droits were granted to the lords of manors, or to the towns which possessed Admiralty jurisdiction. Yarmouth had such rights. [7] In 1829 Dunwich and Southwold spent £1000 to determine the question whether a puncheon of whiskey, taken up in the sea, was within the jurisdiction of one town or the other. [8] The Lord Warden of the Cinque Ports and the Ports themselves shared these droits between them. [9] In 1836 there was litigation between the crown, and the owner of the manor and castle of Corfe and the Isle of

[1] The Gas Float Whitton, No. 2, L. R. 1896, P. at pp. 47, 48.

[2] Stat. Prærogativa Regis (17 Ed. II. St. 1 c. xi). On the whole subject see L. Q. R. xv 353.

[3] Lord Warden of Cinque Ports v. The King (1831) 2 Hagg. Adm. 438.

[4] I. e. a thing causing the death of a man, Stephen, H. C. L. iii 77, 78; Holmes, Common Law 24-26; Select Pleas of the Admiralty ii xxvi, xxvii. They were abolished 9, 10 Vict. c. 62.

[5] "That nothing shall be said to be wreccum maris but such goods only which are cast or left on the land by the sea. . . . Flotsam is when a ship is sunk or otherwise perished and the goods float on the sea. Jetsam is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (vel potius Ligan) is where the goods which are so cast into the sea, and afterwards the ship perishes, and such goods are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork . . . and none of these goods are called wrecks so long as they remain in or upon the sea," Sir Henry Constable's case (1601) 5 Co. Rep. 106.

[6] Select Pleas of the Admiralty ii xxxix.

[7] Ibid xxii. [8] Ibid. [9] Ibid xxiii.

Purbeck, as to the right to 49 casks of brandy.[1] If not so granted out, they were dealt with by the Common Law Courts or by special commissioners.[2]

After the rise of the court of Admiralty the Lord High Admiral becomes entitled to these droits by royal grant. At the end of the 14th and the beginning of the 15th century it would appear that he shared them with the crown.[3] From the reign of Henry VI. it would appear that they were generally granted to him. "The Admiral's Patents of the sixteenth and following centuries contain express grants of royal fish, wrecks, waifs, flotsam, jetsam, and lagon, as well as many other perquisites connected with the sea and the sea-shore."[4] In Anne's reign, George Duke of Denmark, the Lord High Admiral, surrendered his droits during the war for a fixed annual sum. The office was in commission after his death, except for a short time, when it was held by George Duke of Clarence, afterwards William IV. The droits during this period were always reserved to the crown, but in terms which showed that they had been previously annexed to the office of Admiral.[5]

The right to droits carried with it a certain jurisdiction. Inquisitions were held into these droits at the ports,[6] or the Vice-Admirals or droit gatherers reported them to the Admiral.[7] The large terms of the Admiral's Patents incited them, or their grantees, to frequent litigation with private persons or other grantees of the crown.[8] If the property was unclaimed, it belonged to the Admiral or other person en-

[1] The King v. 49 Casks of Brandy 3 Hagg. Adm. 257; 5 Co. Rep. 107 b it is said that "those of the west country prescribe to have wreck in the sea so far as they may see a Humber Barrel."

[2] Select Pleas of the Admiralty (S. S.) i xli.

[3] Black Book of the Admiralty (R. S.) i 150; Select Pleas of the Admiralty ii xxiv.

[4] Select Pleas of the Admiralty ii xxv.

[5] The King v. 49 Casks of Brandy 3 Hagg. Adm. at pp. 280, 281. "During the last French war the sums raised by droits was very large. Sums of £100,000, £190,000, and £58,360 are mentioned as having been paid to members of the royal family; the last sum is stated to have been paid out on account of the building, etc., of the Pavilion at Brighton," Select Pleas of the Admiralty ii xxxix.

[6] Select Pleas of the Admiralty ii xxvii-xxxii. [7] Ibid xxxvii.

[8] Ibid xviii, xix, xxii. In 1619 there was a dispute between the Lord Warden and the Admiral as to wrecks in the Goodwins. In 1632 there is a report to the Admiral on the encroachments of Lords of Manors.

titled, who might or might not reward the finder.[1] If a claimant appeared, he was entitled to restoration on proof of his claim, and the payment of a reasonable salvage. Such salvage was often allowed to the Vice-Admirals of the coast as a reward for taking possession of, and looking after, the property.[2]

The Admiralty droits, where the right has not been granted to other persons, are now transferred to the consolidated fund.[3] But it is provided that the crown may reward the finder. In 1854 they were put under the control of the Board of Trade.[4] In 1894 the method of dealing with wreck, flotsam, jetsam, and lagon found within British jurisdiction, was regulated by the Merchant Shipping Act.[5]

(2) Prize jurisdiction.

The term Prize is applied to the property of a belligerent seized at sea. Prizes can as a rule only be made by some vessel acting under the authority of the government.[6] It is clear that many complicated questions must arise as to the ownership of the ships or goods so captured. Such questions tended to become more complicated with the growth, during the 18th century, of that part of international law which relates to the rights and duties of neutrals. Lord Stowell, by his decisions in the many cases arising out of the wars at the end of the 18th and the beginning of the 19th century, settled the principles of prize jurisdiction of the Admiralty, as he settled the principles of the instance jurisdiction of the court.

From a very early period jurisdiction over prize was vested in the Admiral or the Council. It is clear that the Admiral had such jurisdiction in 1357.[7] Special provisions with regard to the exercise of the jurisdiction were often made by

[1] Select Pleas of the Admiralty xxxviii.

[2] Ibid xxxvii. As to wreck see ibid xxxix-xli; Hamilton v. Davis (1771) 5 Burr. 2732. [3] 1 Will. IV. c. 25; 1, 2 Vict. c. 2.

[4] 17, 18 Vict. c. 120 § 10.

[5] 57, 58 Vict. c. 60 §§ 510-529.

[6] Pitt-Cobbett, Leading Cases in International Law (Ed. 1892) 205. Prizes can only be made by private vessels if they have been attacked in the first instance, ibid 211.

[7] Rhymer, Fœdera, vi 14, 15, a letter to the King of Portugal stating that the Admiral had rightly condemned goods of his subjects captured by the French, and taken in French ships.

treaties with foreign sovereigns. In 1498 a treaty between Henry VII. and Louis XII. stipulates that mariners shall give notice to the Admiral of any spoil which they have taken, and that they are not to dispose of it until the Admiral has adjudged it to be lawful prize.[1] We can see that, from the 16th century, the prize jurisdiction of the court is beginning to be regarded as distinct from the instance jurisdiction.[2] Captors sailing under commissions granted by allies of England, as well as captors sailing under English commissions, resorted to the Admiralty court. "These cases frequently resolved themselves into suits between the respective Ambassadors of the powers to which the captor and prize belonged."[3] Prohibitions were not as a rule issued in prize cases.[4] Shortly after the Restoration the court held distinct sittings for prize business, and the records of such business were kept distinct. It became the custom to issue special commissions to the Admiral at the beginning of a war, requiring the judge of his court to hear prize cases.[5] The ordinary commission did not mention this jurisdiction.[6] The prize court thus became a court almost entirely distinct from the instance court. Lord Mansfield could say in 1781 that, "the whole system of litigation and jurisprudence in the prize court is peculiar to itself: it is no more like the court of Admiralty than it is to any court in Westminster Hall."[7] The Naval Prize Act of 1864, passed to enact permanently the provisions before usually made at the beginning of a war, gives to the court of Admiralty the jurisdiction of a prize court throughout His Majesty's dominions.[8] This jurisdiction is now exercised by the Probate, Divorce, and Admiralty

[1] Rhymer, Fœdera, xii 690-694; xiv 147-151; cp. a case before the Council (1589) cited Malynes, Lex Mercatoria, 108, 109.

[2] Select Pleas of the Admiralty ii xvii, xviii.

[3] Select Pleas of the Admiralty ii xvii, 170.

[4] Lindo v. Rodney (1781) 2 Dougl. 613, 618, 619. In his judgment Ld. Mansfield gives a complete history of the Prize jurisdiction. Cp. Select Pleas of the Admiralty ii lxxix.

[5] Lindo v. Rodney 614; re Banda and Kirwee Booty (1866) L. R. 1 A and E 129; 13 Car. II. c. 9; 22, 23 Car. II. c. 11; 6 Anne c. 13.

[6] Possibly the jurisdiction was originally regarded as inherent in the court. In 1793 a claim to this effect was put forward by the Admiralty court of Ireland. It is said to have been the opinion of Sir W. Wynne that the Admiralty of Scotland had a similar jurisdiction.

[7] Lindo v. Rodney 614. [8] 27, 28 Vict. c. 25.

division of the High Court.[1] The appeal from the prize court was to the Council,[2] and, after 1833, to the Judicial Committee of the Council. We shall see that appeals from the instance court now go to the House of Lords. Appeals from the prize court still go to the Council.[3]

It was in fact inevitable that the distinction between the prize and the instance business of the Admiralty should grow more definite with the growing definiteness of the principles of International Law on the one side, and the principles of Admiralty Law as administered in English courts on the other. The court of Admiralty administers, as we have seen, English Admiralty law. Though for historical reasons it resembles in general outline the maritime law of Europe, it is essentially English law.[4] The two greatest judges who have sat in a prize court have laid it down that a prize court administers international law. Lord Mansfield said,[5] "by the law of nations and treaties every nation is answerable to the others for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by the same law equally known to each." Lord Stowell said in the case of *the Recovery*,[6] "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and, what foreigners have a right to demand from it, is the administration of the *Law of Nations* simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence." It may be that English statutes or orders in Council will compel the judge to depart from these principles.[7] But it is these principles which form the basis of the law administered. This is fully

[1] 54, 55 Vict. c. 53 § 4.
[2] Bl. Comm. iii 69, 70; 3, 4 Will. IV. c. 41 § 2.
[3] 54, 55 Vict. c. 53 § 4, 3. [4] Above.
[5] Lindo v. Rodney 616.
[6] 6 C. Rob. 348, 349 (1807).
[7] The Fox and Others (1811) Edw. 312-314; Phillimore, International Law (Ed. 1857) iii 535, 541.

recognised by the statutes of this century which deal with prize jurisdiction.[1] By reason of its international character, the prize jurisdiction of the Admiralty, resembles, more closely than the ordinary jurisdiction of the court, the maritime law of the Middle Ages.

(iii) The decay of the special courts administering the commercial part of the Law Merchant, and its absorption into the common law system.

With the increase in commerce in the 14th and 15th centuries, a division and specialization of trades and industries begins to take place. The large trader or the merchant becomes entirely distinct from the small trader or the craftsman. The old Guild Merchant, which embraced all the traders in a town, gives place to separate companies of merchants on the one side, and to separate craft guilds on the other.[2]

The internal trade of the country continued to be largely regulated by the companies of merchants, or the craft guilds, which usually possessed large powers over trade, and sometimes a monopoly of trade in their own town.[3] It was strongly felt that "a general liberty of trade without a regulation doth more hurt than good;"[4] and throughout the 18th century there are cases in which the courts upheld these powers.[5] They were finally abolished by the Municipal Corporations Act of 1835.[6]

Though the old organization of trade lingered on till the

[1] 27, 28 Vict. c. 25 §§ 37 and 55.

[2] In Edward II.'s reign the crafts in London were divided into the two classes of officia mercatoria and officia manuoperalia, Munimenta Gildhallæ i 495; but the trade of London was so extensive that it was in advance of other towns, Gross, Gild Merchant, i 129.

[3] Gross, Gild Merchant, i chaps. vii and viii; Newcastle Merchant Adventurers (Surtees Soc.) i xxxiii, xxxiv, xxxiv-xl.

[4] Mayor and Commonalty of Colchester v. Goodwin (1666) Carter's Rep. 114, 120.

[5] Mayor of Winton v. Wilks (1705) 2 Ld. Raym. 1129, Holt considered that a power to restrain persons from exercising their trade was bad. Such powers were upheld in Bodwic v. Fennell (1748) 1 Wils. 233, and Wooley v. Idle (1766) 4 Burr. 1951.

[6] 5, 6 Will. IV. c. 76 § 14. "Whereas in divers cities, towns, and boroughs a certain custom has prevailed, and certain bye-laws have been made, that no person not being free of a city, town, or borough, or of certain guilds, mysteries, or trading companies within the same . . . shall keep any shop or place for putting to show or sale any or

19th century, the internal trade of the country had in the 16th century practically ceased to be ruled by a special law and by special courts. The companies of merchants and the craft guilds possessed no jurisdiction of their own. Some few courts of fairs survived; and we have seen that the courts of some large cities still continued to exercise jurisdiction. But, except in so far as statutes drew a distinction between traders and others,[1] the trader's or the merchant's dealings were not treated differently from those of any other class in the community. They were governed by the common law, and generally by the Common Law Courts. The common law had borrowed certain rules from the law merchant. The rules that there is no warranty of title in a sale of goods,[2] and that, under some circumstances, a sale in market overt by a non-owner will pass the property,[3] probably come from this source. The merchant's view of the efficacy of the earnest money to bind the bargain was recognised by the Statute of Frauds.[4] By the end of the 16th century the internal trade of the country was regulated by the common law so modified, and not by a separate Law Merchant.

The foreign trade of the country continued for a longer period to be governed by a separate Law Merchant. In France, Italy, and Germany the usages of the merchants were, in the 14th and 15th centuries, treated of by many writers. In the 17th century their works had been adapted by writers like Malynes, Marius, Molloy, and Beawes. They all considered the merchant as a class apart and subject to

certain wares or merchandize by way of retail or otherwise, or use any or certain trades, occupations, mysteries, or handicrafts for hire, gain, or sale within the same; be it enacted that notwithstanding any such custom or bye-law, every person in any borough may keep any shop for the sale of all lawful wares and merchandizes by wholesale or retail, and use every lawful trade . . . within any borough."

[1] Instances are the earlier bankruptcy acts, and the earlier acts rendering the real estate of deceased persons liable to their debts.

[2] 3 Co. Rep. 22; Parke B., Morley v. Attenborough (1849) 3 Ex. 500, 511.

[3] Coke, 2nd Instit. 713, 714. Coke draws his rules as to the conditions under which this is allowed from the Year Books of Hy. VI.-Hy. VII.'s reigns, and from some cases of Henry and Elizabeth's reign. Cp. Hargreave v. Spink, L. R. 1892. 1 Q. B. 25.

[4] Carta Mercatoria (Munimenta Gildhallæ ii Pt. 1 205); 29 Car. II. c. 3 § 17; P. and M. ii 206, 207.

a separate law.[1] "It is a customary law," says Malynes, "approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince;" and, "the said customary law of merchants hath a peculiar prerogative above all other customs, for that the same is observed in all places."[3] "That commonwealth of merchants," says Davies,[4] "hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge." Davies, however, recognised that it was only the foreign trade of the country that was now ruled by this special law. "Merchandizes that cross the seas are goods of another nature, quality, and consideration than other goods and chattels, which are possessed within the realm, and do not cross the seas."[5]

It is clear from these writers that specific differences between the Law Merchant and the common law could still be pointed out. There was no survivorship in the case of merchants who were joint tenants. Wager of law was unknown among them. Bills of exchange, policies of assurance, assignations of debts were all unknown to the common law.[6]

But by the end of the 17th century this Law Merchant was being gradually absorbed into the general legal system of the country. As in the case of the internal trade, so in the case of the foreign trade, the older mercantile courts had ceased to exist. Jurisdiction was therefore assumed by the ordinary courts of law and equity.

We have seen that in the Middle Ages the courts of the

[1] Smith, Merc. Law (Ed. 1890) lxxx, lxxxi. In the East India Company v. Sandys (1684) 10 S. T. at pp. 523-525 Jeffries drew a clear distinction between inland and foreign trade.

[3] Lex Mercatoria Preface.

[3] Lex Mercatoria 3.

[4] The Question concerning Impositions (Ed. 1656) 10. Davies was Attorney-General to James I.

[5] Ibid 11, 12 citing Y. B. 13 Ed. IV. pl. 9. He said that he had wondered why there were so few cases in the books concerning merchants. "But now the reason thereof is apparent, for the common law of the land doth leave these cases to be ruled by another law, namely, the Law Merchant, which is a branch of the law of nations," 16, 17.

[6] Davies 12-15; Malynes 73-76; East India Company v. Sandys (1684) 10 S. T. at p. 524.

Staple were the chief courts which regulated the dealings of foreign merchants. Malynes says, "our staple of wools is now out of use, and staple towns are all, as it were, incorporated into London." [1] It is clear from his account of the courts which administer the law merchant that there was in England, in the latter part of the 17th century, no effective court specially set apart for the merchants.[2] In the 16th and earlier 17th centuries the Council and the court of Admiralty had supplied the place of such a court. But the jurisdiction of the Council in England had come to an end in 1640; and we have seen that the Courts of Common Law had deprived the Admiralty of the greater part of its jurisdiction over mercantile causes. In 1601 [3] a court had been established in London consisting of the recorder, two doctors of the civil law, two common lawyers, and eight "grave and discreet" merchants, to hear insurance cases, "in a brief and summary course, as to their discretion shall seem meet, without formalities of pleadings or proceedings." But it had been held, in 1658, that proceedings before this court were no bar to an action at law; [4] and it was constantly hampered by prohibitions.[5] Merchants were therefore driven, either to arbitration,[6] or to the courts of law, or, in matters which involved the taking of accounts, to the court of Chancery.[7] Reported cases of the 17th century illustrate the effect of this upon the Law Merchant. They show that mercantile law is ceasing to be the law of a class, and that it is becoming part of the general law of the land. The earlier cases upon Bills of Exchange treat them as ruled by special customs, applica-

[1] Lex Mercatoria 155. [2] Ibid, Pt. III. chaps. xiv-xx.
[3] 43 Eliza. c. 12. Reënacted and amended 13, 14, Car. II. c. 23.
[4] Came v. Moye 2 Sid. 121.
[5] It was said in 1787 that, from the reign of Elizabeth to 1765, when Ld. Mansfield became C. J., it had not heard 60 cases on marine insurance, Smith, Merc. Law, lxix.
[6] Malynes, Pt. III. c. xv; cp. Dasent xxii *xxxiv;* xxiii *xlvi.*
[7] "Merchants' causes are properly to be determined by the Chancery, and ought to be done with great expedition; but it falleth out otherwise, because they are by commission commonly referred to merchants to make report of the state thereof unto the Lord Chancellor," Malynes 319. There is an affinity between the jus gentium of the merchants and English equity, as there was between the Roman jus gentium and jus naturale, Buller J. Lickbarrow v. Mason (1793) 1 S. L. C. 709.

ble only to merchants, which it is necessary to prove.[1] In 1699 Treby, C. J., said that Bills of Exchange at first extended only to merchant strangers trading with English merchants; afterwards to inland Bills between merchants trading with one another in England; and lastly to all persons whether traders or not; and that there was now no need to allege and prove the custom.[2]

The process was assisted, after the Revolution, by the greater freedom allowed to foreign trade. In the 16th and 17th centuries foreign trade was in the hands of companies incorporated by the crown with exclusive rights to trade.[3] The validity of such grants was upheld, in 1684, in the *East India Company v. Sandys.*[4] It is clear that such an organization of trade will tend to the settlement of disputes by the arbitration of the governing body of the company. But, in 1693, trade had been to a large extent freed by a resolution of Parliament, "that it is the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament."[5] It was a natural, though perhaps an indirect result, of the Great Rebellion and the Revolution that the ordinary courts should thus absorb jurisdiction over mercantile cases. The fact that the Law Merchant was not English law, but jus gentium, had been used to prove that the crown had such large powers over trade, that it could impose impositions, or create a monopoly.[6] It was clear that the Law Merchant must be administered in the

[1] Oaste v. Taylor (1613) Cro. Jac. 306, the custom of the merchants is fully set out. Similarly in Woodward v. Rowe (1669) 2 Keb. 105. In Witherley v. Sarsfield, Shower 127 (1689) Holt said that the act of drawing a bill made a man a trader for this purpose.

[2] Bromwich v. Lloyd 2 Lut. 1582, 1585. Cp. Chalmers, Bills of Exchange, xlv-xlvii, as to the result of this upon the English law of Bills of Exchange.

[3] Gross, Gild Merchant, i 140-156; Hall, Customs Revenue, i 50-54; L. Q. R. xvi 54.

[4] 10 S. T. 371. Cp. Company of Merchant Adventurers v. Rebow (1687) 3 Mod. Rep. 126, 128.

[5] Newcastle Merchant Adventurers (Surtees Soc.) i xli-xliv.

[6] This is the argument of Davies' work upon impositions, chap. vi. "Forasmuch as the general law of nations which is and ought to be law in all Kingdoms, and the Law Merchant which is also a branch of that law, and likewise the Imperiall or Roman law, have ever been admitted by the kings and people of England in causes concerning Merchants and Merchandize. . . . Why should not this question of Im-

ordinary courts of law or equity if it was to be made to harmonize with the now established principles of English law.

The complete incorporation of the Law Merchant with the common law was not effected till the time of Lord Mansfield. Up to his time mercantile business had been divided between the courts of law and equity. No attempt had been made to reduce it to a system.[1] This Lord Mansfield accomplished, and this entitles him to the fame of being "the founder of the commercial law of this country."[2] The Law Merchant has ceased to be a separate body of law administered by separate courts: "it is neither more nor less than the usages of merchants and traders . . . ratified by the decisions of courts of law, which upon such usages being proved before them, have adopted them as settled law."[3]

positions be examined and decided by the rules of those laws, so far forth as the same doth concern Merchants or Merchandizes, as well as by the rules of our Common Law of England?" Cp. Bate's case (1606) 2 S. T. at p. 389.

[1] Campbell, Lives of the Chief Justices, ii 402, 403.

[2] "We find in *Snee v. Prescott* that Ld. Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. . . . I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country," Buller J. Lickbarrow v. Mason (1793) 1 S. L. C. 674, 685.

[3] Goodwin v. Robarts (1875) L. R. 10 Ex. 337, 346; cp. Brandao v. Barnett (1846) 12 Cl. and Fin. 787, and Edelstein v. Schuler and Co. L. R. (1902) 2 K. B. 144, 154.

10. A COMPARISON OF THE HISTORY OF LEGAL DEVELOPMENT AT ROME AND IN ENGLAND[1]

By James Bryce[2]

IN the last preceding Essay the organs of legislation, and the methods whereby they were worked at Rome and in England respectively, were discussed and compared. A consideration of the course which legal change took, in its various phases of development, reform or decay, may be completed by inquiring into the general causes and forces which determined and guided the process of change. To justify the selection of Rome and England for comparison it is necessary to recur to two points only in which the history of institutions in these two States presents a remarkable analogy. Both have been singularly independent of outside influences in the development of their political character and their legal institutions. The only influence that seriously told on Rome was that of the Greeks: yet how thoroughly Roman all the institutions that ever had been Roman remained down till the second century of the Empire, after Hellenic influence had for more than two hundred years been playing freely and fully upon literature and thought! So English institutions have been far less affected by external influences than have been those of any other part of European Christendom. In

[1] The following essay forms the fifteenth in the author's "Studies in History and Jurisprudence," 1901 (New York: Oxford University Press, American Branch), pp. 745-781.

[2] His British Majesty's Ambassador to the United States of America. B. A. Oxford 1862, D. C. L. Oxford 1870; Fellow of Oriel College 1862; Barrister of Lincoln's Inn 1867; Regius Professor of Civil Law at Oxford, 1870-1893; LL. D. Edinburgh, Glasgow, Michigan, St. Andrews, Harvard; Pol. Sc. D. Buda-Pest; Litt. D. Victoria, Cambridge; D. C. L. Trinity (Toronto).

Other Publications: The Holy Roman Empire, 1862; Trade-Mark Law, 1877; The American Commonwealth, 1888; Impressions of South Africa, 1897; Studies in Contemporary Biography, 1903.

France, Italy, Germany, and Spain, the traces of Roman dominion were never obliterated, and Roman law too, both through its traditions and through the writings which embody it, has always been a more potent factor than it ever was here. These countries have, moreover, borrowed more from each other than we have done from any one of them, except, perhaps, in the days when Normandy gave a Continental tinge to the immature feudality of England. And, secondly, both Rome and England have extended their institutions over vast territories lying beyond their own limits. Each has been a conquering and ruling power, and the process by which each grew into a World State from being, the one a City and the other a group of small but widely scattered rural tribes, offers striking points of resemblance as well as of contrast. I might add that there are similarities in the character of the two nations, similarities to which their success in conquering and ruling is due. But, for the moment, it is rather to law and institutions than to character that I seek to direct the reader's attention.

Since the law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions, the causes which modify the law are usually to be sought in changes which have passed upon economic and social phenomena. When new relations between men arise, or when the old relations begin to pass into new forms, law is called in to adjust them. The part played by speculative theorists or scientific reformers who wish to see the law made more clear and rational is a relatively small factor in legal change, and one which operates only at rare moments. The process of development, if not wholly unconscious, is yet spontaneous and irregular. Alterations are made, not upon any general plan or scheme, but as and when the need for them becomes plain, or when it has at least become the interest of some ruling person or class to make them.

The relation of the general history, political, economic, and social, to changes in laws and institutions is best seen at certain definite epochs. It is indeed true that in nations which have reached a certain stage of civilization the conditions of

life, and the relations of men and classes to one another, never remain quite the same from generation to generation. Every mechanical discovery, every foreign war or domestic insurrection, every accession or loss of territory, every religious or intellectual movement leaves things somewhat different from what it found them. Nevertheless, though the process of change is, except in savage or barbarous peoples, practically constant and uninterrupted, it becomes at certain particular moments much more swift and palpable, rushing, so to speak, through rapids and over cataracts instead of gliding on in a smooth and equable flow. These are the moments when a nation, or its ruler, perceives that the economic or social transformations which have been taking place require to be recognized and dealt with by corresponding changes in law and institutions, or when some political disturbance, or shifting of power from one class or group to another, supplies the occasion for giving effect to views or sentiments hitherto repressed. Accordingly it is profitable to give special attention to these transitional epochs, because it is in them that the relation between causes and consequences can be studied most easily and on the largest scale. Let us see what are the epochs in Roman and in English history which may be selected as those marked by conspicuous legal or institutional changes before we examine the relations of these changes to the forces which brought them about.

I. Five Chief Epochs of Legal Change at Rome

In the thousand years of Roman history that lie between the first authentic records of the constitution and laws of the city, say 451 B. C., when the Decemviral Commission, which produced the laws of the Twelve Tables, was appointed, and 565 A. D., when Justinian died, having completed his work of codification and new legislation,[1] we may single out five such epochs.

1. The epoch of the Decemviral Legislation, when many of

[1] It is convenient to stop with Justinian, because he gave the law the shape in which it has influenced modern Europe, and because our historical data became much more scanty after his time. But of course the

the old customs of the nation, which had been for the most part preserved by oral tradition, were written down, being no doubt modified in the process.

2. The days of the First and Second Punic Wars, when the growth of population and trade, the increase of the number of foreigners resident in Rome, and the conquest by Rome of territories outside Italy, began to induce the development of the Praetorship as an office for expanding and slowly remodelling the law.

3. The end of the Republic and early days of the Empire, when there was a brilliant development of juridical literature, when the opinions of selected jurists received legal authority from the Emperor's commission, when the Senate was substituted for the popular assemblies as the organ of legislation, and when the administration of the provinces was resettled on a better basis — all these changes inducing a more rapid progress of legal reform.

4. The reigns of Diocletian and Constantine, when imperial legislation took a fresh and vigorous start, and when the triumph of Christianity brought a new, a powerful, and a widely pervasive force into the field of politics and legislation.

5. The reign of Justinian, when the plan of codification whose outlines Julius Caesar had conceived, and which Theodosius II had done something to carry out, was at last completed by the inclusion of the whole law of Rome in two books containing the pith of the then existing law, and when many sweeping reforms were effected by new legislation.

It is less easy to fix upon epochs of conspicuous change in English legal institutions and law, because English development has been on the whole more gradual, and because the territorial limits of the area affected by change have not expanded to anything like the same extent as did the territories that obeyed Rome. Rome was a City which grew to be the civilized world: the *Urbs* became *Orbis Terrarum*. The English were, and remain, a people inhabiting the southern part of an island, and beyond its limits they have expanded

history of the law goes on to A. D. 1204, and in a sense even to A. D. 1453, in an unbroken stream, the codes issued by the later Emperors, and especially the *Basilica* of Leo the Philosopher, being based upon Justinian's redaction.

(except as respects Ireland), not by taking in new territories as parts of their State, but by planting semi-independent self-governing States which reproduce England.[1] However, one may, for the sake of a comparison with Rome, take the five following epochs as those at which the process of change became the most swift and the most effective for destruction and creation.

II. Five Epochs of Legal Change in England

1. The time of Henry II, when the King's Courts became organized, and began to evolve a Common Law for the whole realm out of the mass of local customs.

2. The times of Edward I and Edward III, when the solidification of the kingdom saw the creation of a partly representative legislature, the enactment of important statutes, and the establishment of a vigorous organ for the development and amendment of the law in the Chancellorship.

3. The time of Henry VIII and Edward VI, when the progress of society and an ecclesiastical revolution caused the passing of several sweeping legal reforms, separated the courts and the law of England from a system of jurisprudence which had influenced it in common with the rest of Western Christendom, and permanently reduced the power of the clergy and of clerical ideas.

4. The epoch of the Great Civil War and Revolution, when legislative authority, hitherto shared or disputed by the Crown and the Houses of Parliament, passed definitely to the latter, and particularly to the popular branch of Parliament, and when (as a consequence) the relation of the Monarch to the landholding aristocracy, and that of the State to its subjects in religious matters, underwent profound alterations.

5. The reigns of William IV and Victoria, when the rapid growth of manufacturing industry, of trade, and of population, coupled with the influence as well of new ideas in the sphere of government as of advances made in economic and social science, has shaken men loose from many old traditions

[1] I do not include India or the Crown Colonies, because the population of these is not English.

or prejudices, and has, while rendering much of the old law inapplicable, made a great deal of new legislation indispensable.

Now let us consider what are the forces, influences, or conditions which at all times and everywhere become the sources and determining causes of changes in laws and institutions, these latter being that framework which society constructs to meet its needs, whether administrative or economic or social.

Five such determining causes may be singled out as of special importance. They are these.

1. Political changes, whether they consist in a shifting of power as between the classes controlling the government of a country, or affect the structure of the governmental machinery itself, as for instance by the substitution of a monarch for an assembly or of an assembly for a monarch.

2. The increase of territory, whether as added to and incorporated in the pre-existing home of a nation or as constituting a subject dominion.

3. Changes in religion, whether they modify the working of the constitution of the country or involve the abolition of old laws and the enactment of new ones.

4. Economic changes, such as the increase of industrial production or the creation of better modes of communication, with the result of facilitating the exchange of commodities.

5. The progress of philosophic or scientific thought, whether as enouncing new principles which ultimately take shape in law, or as prompting efforts to make the law more logical, harmonious and compendious.

The influence of other nations might be added, as a sixth force, but as this usually acts through speculative thought, less frequently by directly creating institutions and laws, it may be deemed a form of No. 5.

The two last of these five sources of change, viz. commerce and speculative or scientific thought, are constantly, and therefore gradually at work, while the other three usually, though not invariably, operate suddenly and at definite moments. All have told powerfully both on Rome and on England. But as the relative importance of each varies from

one country to another, so we shall discover that some have counted for more in the case of Rome, some in that of England. The differences throw an instructive light on the annals of the two nations.

III. Outline of Legal Changes at Rome

The legal history of Rome begins with the law of the Twelve Tables. This remarkable code, which, it need hardly be said, was neither a code in the modern sense, nor in the main new law, but rather a concise and precise statement of the most important among the ancient customs of the people, dominated the whole of the republican period, and impressed a peculiar character upon the growth of Roman law from the beginning till the end of the thousand years we are regarding. It gave a sort of unity and centrality to that growth which we miss in many other countries, England included, for all Roman statutes bearing on private law were passed with reference to the Twelve Tables, nearly all commentaries grouped themselves round it, and when a new body of law that was neither statute nor commentary began to spring up, that new law was built up upon lines determined by the lines of the Twelve Tables, since the object was to supply what they lacked or to modify their enactments where these were too harsh or too narrow. Its language became a model for the form which later statutes received. It kept before the minds of jurists and reformers that ideal of a systematic and symmetrical structure which ultimately took shape in the work of Theodosius II and Justinian. Now the law of the Twelve Tables was primarily due to political discontent. The plebeians felt the hardship of being ruled by customs a knowledge of which was confined to the patrician caste, and of being thereby left at the mercy of the magistrate, himself a patrician, who could give his decision or exert his executive power at his absolute discretion, because when he declared himself to have the authority of the law, no one, outside the privileged caste he belonged to, could convict him of error. Accordingly the plebs demanded the creation of a commission to draft laws defining the powers of the Consuls, and this

demand prevailed, after a long struggle, in the creation of the Decemvirs, who were appointed to draft a body of general law for the nation. This draft was enacted as a Statute, and became thenceforth, in the words of Livy,[1] "the fountain of all public and private law." Boys learnt it by heart down to the days of Cicero, and he, despite his admiration for things Greek, declares it to surpass the libraries of all the philosophers.[2]

For some generations there seem to have been comparatively few large changes in private law, except that declaration of the right of full civil intermarriage between patricians and plebeians, which the Twelve Tables had denied. But the knowledge of the days on which legal proceedings could properly be taken remained confined to the patricians for nearly a century and a half after the Decemvirs. The plebs had, however, been winning political equality, and three or four years after the time when the clerk Flavius revealed these pontifical secrets it was completed by the admission of the plebeians to the offices of pontiff and augur.

Meanwhile Rome was conquering Italy. The defeat of Pyrrhus in B. C. 275 marks the virtual completion of this process. A little later, the First Punic War gave her most of Sicily as well as Sardinia and Corsica, and these territories became provinces, administered by magistrates sent from Rome. She was thus launched on a policy of unlimited territorial expansion, and one of its first results was seen in two remarkable legal changes. The increase in the power and commerce of Rome, due to her conquests, had brought a large number of persons to the city, as residents or as sojourners, who were not citizens, and who therefore could not sue or be sued according to the forms of the law proper to Romans. It became necessary to provide for the litigation to which the disputes of these aliens (*peregrini*) with one

[1] "Decem tabularum leges quae nunc quoque in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privatique est juris" (iii. 24).

[2] "Bibliothecas mehercule omnium philosophorum unus mihi videtur xii tabularum libellus, siquis legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare" (*De Orat.* i. 44). An odd comparison, and one in which there is more of patriotism than of philosophy.

another or with Romans gave rise, and accordingly a Magistrate (*Praetor peregrinus*) was appointed whose special function it became to deal with such disputes. He was a principal agent in building up by degrees a body of law and a system of procedure outside the old law of Rome, which received the name of *Ius Gentium* (the law of the nations) as being supposed to embody or be founded on the maxims and rules common to the different peoples who lived round Rome, or with whom she came in contact.[1] Through the action of the older Urban Praetor much of this *ius gentium* found its way into the law administered to the citizens, in the way described in the last preceding Essay. Similarly the Proconsuls and Propraetors, who held their courts in the subject provinces, administered in those provinces, besides the pure Roman law applicable to citizens, a law which, though much of it consisted of the local laws and customs of the particular province, had, nevertheless, a Roman infusion, and was probably in part, like the *ius gentium*, generalized from the customs found operative among different peoples, and therefore deemed to represent general principles of justice fit to be universally applied. The Edicts which embodied the rules these magistrates applied became a source of law for the respective provinces.[2]

These remarkable changes, which may be said to belong to the period which begins with the outbreak of the First Punic War (B. C. 264), started Roman law on a new course and gave birth to a new set of institutions whereby new territories, ultimately extended to embrace the whole civilized world, were organized and ruled. It was through these changes that the law and the institutions of the Italian City became so moulded as to be capable not only of pervading and transforming the civilizations more ancient than her own, but of descending to and influencing the modern world. Now these changes, like those which marked the period of the Twelve Tables, had their origin in political events. In the former case it was internal discontent and unrest that were the motive forces, in the latter the growth of dominion and of trade,

[1] As to the *ius gentium* see Essay XI, p. 570 sqq. [in the original volume].

[2] As to this see Essay II, pp. 77, 78 [in the original volume].

trade being the consequence, not so much of industrial development as of dominion. But in both cases — and this is generally true of the ancient world as compared with the modern — political causes play a relatively greater part than do causes either of an economic or an intellectual and speculative order.[1]

How much is to be set down to external influences? The Roman writers tell us of the sending out of a body of roving commissioners to examine the laws of Athens and other Greek cities to collect materials for the preparation of the Twelve Tables. So too the contact of Rome with the Greek republics of Southern Italy in the century before the Punic Wars must have affected the Roman mind and contributed to the ideas which took shape in the *ius gentium*. Nevertheless any one who studies the fragments of the Twelve Tables will find in them comparatively few and slight traces of any foreign influence; and one may say that both the substance of the Roman law and the methods of procedure it followed remain, down till the end of the Republic, so eminently national and un-Hellenic in their general character that we must assign a secondary part to the play of foreign ideas upon them.

The next epoch of marked transition is that when the Empire of Rome had swollen to embrace the whole of the West except Britain and Western Mauretania, and the whole of the known East except Parthia.[2] It was the epoch when the Republican Constitution had broken down, not merely from internal commotions, but under the weight of a stupendous dominion, and it was also the epoch when the philosophies of Greece had made the Roman spirit cosmopolitan, and dissolved the intense national conservatism in

[1] Of course I do not mean to disparage the immense importance of economic causes always and everywhere, but in the ancient world, where communities were mostly small, they tended more quickly to engender political revolutions, and thus their action became involved with politics. In the modern world, where nations are mostly large and political change is usually more gradual, economic factors frequently tell upon society and affect the working of institutions without leading to civic strife. The more the world develops and settles down, and the further it moves away from its primitive conditions, the greater becomes the relative significance of the economic elements.

[2] "Parthos atque Britannos" are aptly coupled by Horace as the two peoples that remained outside the Empire.

legal matters which distinguished the older jurists. Here, therefore, two forces were at work. The one was political. It laid the foundations of new institutions, which ripened into the autocracy of the Empire. It substituted the Senate for the popular Assembly as the organ of legislation. It gave the head of the State the power of practically making law, which he exercised in the first instance partly as a magistrate, partly through the practice of issuing to selected jurists a commission to give answers under his authority.[1] The other force was intellectual. It made the amendment of the law, in a liberal and philosophical sense, go forward with more boldness and speed than ever before, until the application of the new principles had removed the cumbrousness and harshness of the old system. But it should be remembered that this intellectual impulse drew much of its power from political causes, because the extension of the sway of Rome over many subject peoples had accustomed the Romans to other legal systems than their own, and had led them to create bodies of law in which three elements were blent — the purely Roman, the provincial, and those general rules and maxims of common-sense justice and utility which were deemed universally applicable, and formed a meeting-ground of the Roman and the provincial notions and usages. So here too it is political events that are the dominant and the determining factor in the development both of private law and of the imperial system of government, things destined to have a great future, not only in the form of concrete institutions adopted by the Church and by mediaeval monarchy, but also as the source of creative ideas which continued to rule men's minds for many generations.

Nearly three centuries later we come to another epoch, when two forces coincide in effecting great changes in law and in administration. The storms that shook and seemed more than once on the point of shattering the fabric of the Empire from the time of Severus Alexander to that of Aurelian (A. D. 235 to 270), had shown the need for energetic measures to avert destruction; and the rise to power of men of exceptional ca-

[1] Described in the last preceding Essay, pp. 677, 678 [in the original volume].

pacity and vigour in the persons of Diocletian and Constantine enabled reforms to be effected which gave the imperial government a new lease of life, and made its character more purely despotic. Therewith came the stopping of the persecution of the Christians, and presently the recognition of their religion as that which the State favoured, and which it before long began to protect and control. The civil power admitted and supported the authority of the bishops, and when doctrinal controversies distracted the Church, the monarchs, beginning from Constantine at the Council of Nicaea, endeavoured to compose the differences of jarring sections.

These changes told upon the law as well as upon institutions. New authorities grew up within the Church, and these authorities, after long struggles, obtained coercive power. Not only was the spirit of legislation in such subjects as slavery and the family altered — marriage and divorce, for instance, began to be regarded with new eyes — but a fresh field for legislation was opened up in the regulation of various ecclesiastical or semi-ecclesiastical matters, as well as in the encouragement or repression of certain religious opinions. The influence on law of Greek customs, which seemed to have been expunged by the extension of citizenship to all subjects a century before Constantine, makes itself felt in his legislation.

Besides these influences belonging to the sphere of politics and religion, economic causes, less conspicuous, but of grave moment, had also been at work in undermining the social basis of the State and inducing efforts to apply new legislative remedies. Slavery and the decline of agriculture, particularly in the Western half of the Empire, throughout which there seems to have been comparatively little manufacturing industry, had reduced the population and the prosperity of the middle classes, and had exhausted the source whence native armies could be drawn. Thus social conditions were changing. The growth of that species of serfdom which the Romans called *colonatus* belongs to this period. The financial strain on the government became more severe. New expedients had to be resorted to. All these phenomena, coupled with the more autocratic character which the central government of the Empire took from

Diocletian onwards, induced a great and sometimes indeed a hasty and feverish exuberance of legislation, which was now effected solely by imperial ordinances.

Industrial decay seems to have been more rapid in Western than in the Eastern provinces, though palpable enough in such regions as Thrace and Greece. But everywhere there was an intellectual decline, which appeared not least in the sinking of the level of juristic ability and learning. The great race of jurists who adorned the first two and a half centuries of the Empire had long died out. We hear of no fertile legal minds, no law books of merit deserving to be remembered, during the fourth and fifth centuries of our era. The mass of law had however increased, and the judges and practising advocates were, except in the larger cities, less than ever capable of dealing with it. The substitution of Roman for provincial law effected by the Edict of the Emperor Antoninus Caracalla had introduced some confusion, especially in the Eastern provinces, where Greek or Oriental customs were deeply rooted, and did not readily give place to Roman rules. The emperors themselves deplore the ignorance of law among practitioners: and presently it was found necessary to prescribe an examination for advocates on their admission to the bar. Accordingly the necessity for collecting that which was binding law and for putting it into an accessible form became greater than ever. It had in earlier days been an ideal of perfection cherished by theorists; it was now an urgent practical need. It was not the bloom and splendour but the decadence of legal study and science that ushered in the era of codification. A century after the death of Constantine, the Emperor Theodosius II, grandson of Theodosius the Great, reigning at Constantinople from A. D. 408 to A. D. 450, issued a complete edition of the imperial constitutions in force, beginning from the time of Constantine, those of earlier Emperors having been already gathered into two collections (compiled by two eminent jurists) in current use. Shortly before a statute had been issued giving full binding authority to all the writings (except the notes of Paul and Ulpian upon Papinian) of five specially famous jurists of the classical age (Papinian, Paul,

Gaius, Ulpian, Modestinus). The advisers of Theodosius II had intended to codify the whole law, including the ancient statutes and decrees of the Senate and Edicts of magistrates so far as they remained in force, as well as the writings of the jurists, but the difficulties were too great for them, and they contented themselves with a revised edition of the more recent imperial constitutions.

Justinian was more energetic, and his codification of the whole law of the Empire marks an epoch of supreme importance in the history not merely of Rome but of the civilized world, for it is possible that without it very little of the jurisprudence of antiquity would have been preserved to us, so that the new nations which were destined to emerge from the confusion of the Dark Ages might have lacked the foundation on which they have built up the law of the modern world. It is indeed an epoch which stands alone both in legal and in political history.

Justinian's scheme for arranging and consolidating the law included a compilation of extracts from the writings of the jurists of the first three centuries of the Empire, together with a collection of such and so many of the Constitutions of the Emperors as were to be left in force, both collections being revised so as to bring the contents of each into accord and to harmonize the part of earlier date (viz. that which contained the extracts from the old jurists) with the later law as settled by imperial ordinances. It was completed in the space of six years only — too short a time for so great a work. It was followed by a good deal of fresh legislation, for the Emperor and his legal minister Tribonian, having had their appetite whetted, desired to amend the law in many further points and reduce it to a greater symmetry of form and perfection of substance. The Emperor moreover desired, for Tribonian was probably something of a Gallio in such matters, to give effect to his religious sentiments both by laying a heavy hand on heretics and by making the law more conformable to Christian ideas. Thus the time of Justinian is almost as significant for the changes made in the substance of the law as for the more compendious and convenient form into which the law was brought.

Some thirty years before the enactment of Justinian's Codex and Digest (which, though intended for the whole Empire, did not come into force in such Western provinces as had already been lost) three collections of law had been made by three barbarian kings for the governance of their Roman subjects. These were the *Edictum* of Theodorich, King of the East Goths, published in A. D. 500, the *Lex Romana Visigothorum*, commonly called the *Breviarium Alaricianum*, published by Alarich II, King of the West Goths (settled in Aquitaine and Spain), in A. D. 506, a year before his overthrow by Clovis, and the *Lex Romana Burgundionum*, published by the Burgundian King Sigismund in the beginning of the sixth century. These three compilations, each of which consists of a certain number of imperial Constitutions, with extracts from a few jurists, ought to be considered in relation to Justinian's work, partly because each of them did for a part of the Roman West what he did for the East, and, as it turned out, for Italy and Sicily also, when Belisarius reconquered those countries for him, and partly because they were due to the same need for accessible abridgements of the huge mass of confused and scattered law which prompted the action of Justinian himself. They are parts of the same movement, though they have far less importance than Justinian's work, and, unlike his, include little or no new law.

The main cause of the tendency to consolidate the law and make it more accessible was the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master, together with the decline of legal talent and learning, which made judges and advocates unable to comprehend, to appropriate and to apply the philosophical principles and fine distinctions stored up in the treatises of the old jurists. Here, therefore, political and intellectual conditions, conditions rather of decline than of progress, lay at the root of the phenomenon. But in the case of Justinian something must also be credited to the enlightened desire which he, or Tribonian for him, had conceived of removing the complexities, irregularities and dis-

crepancies of the old law, bringing it nearer to what they thought substantial justice, and presenting it in concise and convenient form. Plato desired to see philosophy in the seat of power, and in Justinian philosophic theory had a chance such as it seldom gets of effecting permanently important changes by a few sweeping measures. Yet theory might have failed if it had not been reinforced by the vanity of an autocrat who desired to leave behind him an enduring monument.

This rapid survey has shown us that two forces were always operative on the development of Roman law — internal political changes and the influence of the surrounding countries. As Rome conquered and Romanized them, they compelled her institutions to transform themselves, and her law to expand. Economic conditions, speculative thought and religion had each and all of them a share in the course which reforms took, yet a subordinate share.

IV. Outline of the Progress of Legal Changes in England

Let us now turn to England and see what have been the forces that have from time to time brought about and guided the march of legal change, and what have been the relations of that change to the general history of the country.

As with Rome we began at the moment when the ancient customs were first committed to writing and embodied in a comprehensive statute, so in England it is convenient to begin at the epoch when the establishment of the King's Courts enabled the judges to set about creating out of the mass of local customs a body of precedents which gave to those customs definiteness, consistency and uniformity. Justice, fixed and unswerving justice, was in the earlier Middle Ages the chief need of the world, in England as in all mediaeval countries; and the anarchy of Stephen's reign had disposed men to welcome a strong government, and to acquiesce in stretches of royal power that would otherwise have been distasteful. Henry II was a man of great force of character and untiring energy, nor was he wanting in the talent for selecting capable officials. He had to struggle, not only

against the disintegrating tendencies of feudalism, but also against the pretensions of the churchmen, who claimed exemption from his jurisdiction, and maintained courts which were in some directions formidable rivals to his own. He prevailed in both contests, though it was not till long after that the victory was seen to have remained with the Crown. It was his fortune to live at a time when the study of law, revived in the schools of Italy, had made its way to England, where it was pursued with a zeal which soon told upon the practice of the Courts, sharpening men's wits and providing for them an arsenal of legal weapons. It is true that the law taught at the Universities was the Roman law, and that the practitioners were almost entirely ecclesiastics. Now the barons, however jealous they might be of the Crown, were not less jealous of ecclesiastical encroachments and of the imperial law. They could not prevent judges from drawing on the treasures which the jurists of ancient Rome had accumulated, but they did prevent the Roman law from becoming recognized as authoritative; so that whatever it contributed to the law of England came in an English guise, and served rather to supplement than to supersede the old customs of the kingdom.

In this memorable epoch, which stamped upon the common law of England a character it has never lost, the impulse which the work of law-making received came primarily from the political circumstances of the time, that is, from the desire of the king to make his power as the receiver of taxes and the fountain of justice effective through his judges, and from the sense in all classes that the constant activity of the Courts in reducing the tangle of customs to order, no less than the occasional activity of the king when he enacted with the advice and consent of his Great Council statutes such as the Constitutions of Clarendon, was a beneficial activity, wholesome to the nation. But though political causes were the main forces at work, much must also be allowed to the influence of ideas, and particularly to the intellectual stimulus and the legal training which the study of Roman jurisprudence had given to the educated men who surrounded and worked for the king and the bishops.

The development of English institutions has been at all times so slow and so comparatively steady that it is not easy to fix upon particular epochs as those most conspicuously marked by change. However I take the epoch of Edward I and Edward III. Under Edward I, whose reign was one of comparative domestic tranquillity, the organ of government whose supreme legislative authority was to become unquestioned took its final shape in passing from a Great Council of magnates to an Assembly consisting of two Houses, in one of which the chief tenants of the Crown sat, while the other was composed of representatives of the minor tenants and of boroughs. Under his grandson the chief judicial Minister of the Crown began to sit as a Court, granting redress in the name of the Crown in cases or by methods which the pre-existing Courts were unable or unwilling to deal with. Parliament passed under Edward I some statutes of the first magnitude, such as *Quia Emptores* and *De Donis Conditionalibus*, which impressed a peculiar character on the English land system, and introduced some valuable improvements in the sphere of private rights and remedies. But the legislature was, for two or three centuries, in the main content to leave the building up of the law to the old Common Law Courts and (in later days) to the Chancellor. The action of this last-named officer was, during the fifteenth, sixteenth and seventeenth centuries, of capital importance, so that the establishment of his jurisdiction is one of the landmarks of our legal history. It was really a renewal, two hundred years after Henry II's time, of that king's efforts to secure the due administration of justice through the realm, but it grew up naturally and spontaneously, with less of conscious purpose than Henry II had shown. Both the legislature and the Chancellor were the outcome of political causes, but it must not be forgotten that in the methods taken by the Chancellor (hardly reduced to a system till the seventeenth century) we find the working of a foreign influence which thereafter disappears from English law, that, namely, of the civil and canon laws of Rome and of the Roman Church, for the Chancellors of the fourteenth and fifteenth centuries were all ecclesiastics and drew largely from Roman sources.

The days of the Reformation bring two new and powerful influences to bear upon laws and institutions. One of these influences is economic, the other religious. The growth of industry and trade had so far disintegrated the old structure of society and brought about new conditions that not a few new laws, among which the most familiar and significant are the Statute of Uses and the Statute of Wills, were now needed. The nation was passing out of the stiffness of a society based on landholding and recognizing serfdom into a larger and freer life. At the same time the religious revolution which severed it from Rome, which was accompanied by the dissolution of the monasteries, and which ended by securing the ascendency of a new body of theological ideas and of simpler forms of worship, involved many legal changes. The ecclesiastical courts were shorn of most of their powers, and the law they administered was cut off from the influences that had theretofore moulded and dominated it. The position of the clergy was altered. New provisions for the poor soon began to be called for. New tendencies, the result of a bolder spirit of inquiry, made themselves felt in legislation. One sees them stirring in the mind of Sir Thomas More. It was some time before the religious and economic changes took their full effect upon the law. But nearly all the remarkable developments that make the time of Henry VIII and Elizabeth an epoch of legal change, may be traced not so much to politics as to the joint influence of commerce (including the growth of personal, as distinguished from real, property) and of theology. Even the oceanic power and territorial expansion of England, which began with the voyages of Drake and the foundation of the Virginia Company and of the East India Company, did not affect either the law or the institutions of the country. The establishment of distant settlements was largely the result of the growing force of commercial enterprise, in which there was at first very little of political ambition, though it cordially lent itself to a political antagonism first to Spain and then to France.

With the time of the Great Civil War we return to an era in which, though religion and commerce continue to be potent forces, the first place must again be assigned to political

causes. The struggle which overthrew the old monarchy effected two things. It extinguished the claims of the Crown to a concurrent legislative or quasi-legislative power. The two Houses of Parliament were established as an engine for effecting legal changes, prompt in action and irresistible in strength.[1] Towards this England had long been slowly tending, as during a century before Augustus Rome slowly tended to a monarchy. The work was completed at the Boyne and Aughrim, but the decisive blow was struck at Naseby. And, secondly, it occasioned the accomplishment of several broad and sweeping reforms in institutions as well as in law proper. A Parliamentary Union of England, Scotland and Ireland was effected which, though annulled by the Restoration, was a significant anticipation of what the following century was to bring. The old system of feudal tenure and the relics of feudal finance were abolished. New provisions were made, and old ones confirmed and extended, for the protection of the freedom of the subject in person and estate. Commercial transactions were regulated, perhaps embarrassed, by a famous enactment (the Statute of Frauds) regarding the evidence required to prove a contract. Such of these things as lay outside the purely political sphere were due partly to the development of industry and commerce, which had gone on apace during the reign of James I, and was resumed during the government of Cromwell and Charles II, partly to that sense which political revolutions bring with them, that the time has come for using the impulse of liberated forces to effect forthwith changes which had for a long time before been in the air. On a still larger scale, it was the Revolution and Empire in France that led to the remodelling of French institutions and the enactment of Napoleon's Codes.[2]

As usually happens, an era of abnormal activity in recasting institutions and in amending the law was followed by one of comparative quiescence. It was not till the middle of the

[1] As Milton says: —

"And that two-handed engine at the door
Stands ready to strike once and strike no more."

[2] Although the Napoleonic government was in many things only completing work begun under Lewis the Fourteenth.

reign of George III that the beginnings of a new period of transition were apparent, not till after the Reform Bill of 1832 that the largest among the many reforms towards which men's minds had been ripening were effected. These reforms, which have occupied the last sixty-seven years, have touched every branch of law. They include a great mitigation of the old severity of the criminal law and the introduction of provisions for repressing those new offences which are incident to what is called the progress of society. They have expunged the old technicalities of pleading by which justice was so often defeated. They have striven to simplify legal procedure, though they have not succeeded in cheapening it, and have fused the ancient Courts of Common Law with those of Equity. They have removed religious disqualifications on the holding of offices and the exercise of the suffrage. They have dealt with a long series of commercial problems, and have in particular made easy the creation of corporations for business and other purposes, given limited liability to their members, and laid down many regulations for their management. They have altered the law of the land, enlarging the powers of life owners, and rendering it easier to break entails. They have reorganized the fiscal system, simplified the customs duties, and established a tariff levied for revenue only. They have codified the law, mainly customary in its origin, relating to such topics as negotiable instruments, sale and partnership. They have created an immense body of administrative law, extending and regulating the powers of various branches of the central government, and, while remodelling municipal government, have created new systems of rural local government. As regards the central institutions of the country, several new departments of State have been called into being. Ecclesiastical property has been boldly handled, though not (except in Ireland) diverted to secular uses; a new Court of Appeal for causes coming from the extra-Britannic dominions of the Crown has been set up, and the electoral franchise has been repeatedly extended.

These immense changes have been due to three influences. The first was the general enlightment of mind due to the play

of speculative thought upon practical questions which marked the end of last and the beginning of this century, and of which the most conspicuous apostles were Adam Smith in the sphere of economics and Jeremy Bentham in the sphere of legal reform. The second was the rapid extension of manufacturing industry and commerce, itself largely due to the progress of physical science, which has placed new resources at the command of man both for the production and for the transportation of commodities. The third influence was political, and was itself in large measure the result of the other two, for it was the combination of industrial growth with intellectual emancipation that produced the transfer of political power and democratization of institutions which went on from the Roman Catholic Emancipation Act of 1829 to the Local Government Act of 1894. Could we imagine this industrial and intellectual development to have failed to work on political institutions as it in fact did work, it would hardly the less have told upon administration and upon private law, for the new needs would under any form of government, even under an oligarchy like that of George II's time, have given birth to new measures fitted to deal with them. The legislation relating to Joint Stock Companies (beginning with the Winding-Up Acts), which filled so important a place in the English Statute-book from 1830 to 1862, and which still continues, though in a reduced stream, would under any political conditions have been required owing to the growth of commerce, the making of railways, the increased need for the provision of water, gas and drainage. And there went on, hand and hand with it, an equally needed development by the Courts of Equity of the law of partnership, of agency and of trusts, as applied to commercial undertakings. What the political changes actually did was to provide a powerful stimulus to reform, and an effective instrument for reform, while reducing that general distaste for novelties which had been so strong in the first half of the eighteenth century.

If we now review the general course of changes in institutions and law in the two States selected for comparison we shall be struck by two points of difference.

V. *Some Differences between the Development of Roman and that of English Law*

The branch of private law which is most intimately connected with the social and economic habits of a nation, and which, through social and economic habits, most affects its character, is that branch which touches Property, and the connexion of property with the Family. The particular form which the institutions relating to property, especially immovable property, take, tells upon the whole structure of society, especially in the earlier stages of national growth. The rules, for instance, which govern the power of an owner to dispose of his property during his life or by will, and those which determine the capacity of his wife and children to acquire for themselves by labour or through gift, and to claim a share in his estate at his decease if he dies intestate, or even against his last will — these rules touch the richer and middle classes in a community and affect their life. So one may perhaps say that the development of this branch of law comes nearer than any other to being the central line of legal development, bearing in mind that it is the needs and wishes of the richer and middle classes which guide the course of legal change. Here, however, we discover an interesting point of comparison between Roman and English legal history.

At Rome it is the history of the Family, especially as taken on its economic or pecuniary side, the most important part of which is the Law of Inheritance, that plays the largest part. The old rules, which held the Family together, and vested in the father the control of family property, were at first stringent. From the third century B. C. onwards they began to be modified, but they were so closely bound up with the ideas and habits of the people that they yielded very slowly, and it was not till the bold hand of Justinian swept away nearly all that remained of the ancient rules of succession, and put a plain and logical system in their place, that the process was complete.

In England, on the other hand, it is the Law of Land that is the most salient feature in the economico-legal system of the Middle Ages. Among the Teutons the Family had not

been, within historic times at least, a group closely bound together as it was among the Italians, whereas the historical and political conditions of the eleventh and twelfth centuries had in Western Europe made landholding the basis of nearly all social and economic relations. Hence the land customs then formed took a grip of the nation so tight that ages were needed to unloose it. The process may be said to have begun with a famous statute (*Quia Emptores*) in the reign of Edward I. Its slow advance was quickened in the seventeenth century by political revolution; and the Act of 1660 which abolished knight service recorded a great change. The peaceful revolution of 1832 gave birth to the series of statutes which from 1834 down to our own day have been reshaping the ancient land system, but reshaping it in a more piecemeal and perplexing fashion than that in which Justinian reformed the law of succession by the 118th and 127th Novels. Problems connected with landholding still remain in England, as they do in nearly all States, especially where population is dense; but they differ from the old problems, and though disputes relating to the taxation of land give trouble, and may give still more trouble, questions of tenure have lost the special importance which made them once so prominent in our legal history.

Both Rome and England have been, far beyond any other countries except Russia, expanding States. Rome the City became Rome the World-State. The Folk of the West Saxons went on growing till it brought first the other kingdoms of South Britain, Teutonic and Celtic, then the adjoining isles of Ireland and Man, then a large part of North America, then countless regions far away over the oceans under the headship of the descendants of Cerdic and Alfred. But in the case of Rome this expansion by conquest was the ruling factor in political and legal evolution, the determining influence by which institutions were transformed. In England, on the other hand, it is the relations of classes that have been the most active agency in inducing political change, and the successive additions of territory have exerted a secondary influence on institutions and an insignificant influence on law. Not only has English law been far less affected (save at the

first two of the five epochs above described) by foreign law or foreign thought than Rome was, but the increase of England by the union, first of Scotland and then Ireland, and by the acquisition of transoceanic dominions, has not interrupted the purely insular or national development of English law. The conquest of Ireland, which began in the twelfth century but was not completed till the seventeenth, made no difference, because Ireland, always since the twelfth century far behind England in material progress and settled social order, received a separate civil administration with separate Courts. As these Courts administered English law, they followed in the path which England had already travelled and did not affect the progress of law in England. Nothing speaks more of the long-continued antagonism of the Teutonic and the Celtic elements in Ireland, and of the dominance of the Teutonic minority over the Celtic majority, than the practical identity of the common law in the two countries, and the total absence of any Celtic customs in that law. The few and comparatively slight differences which exist to-day between the law of England and that of Ireland are all due to statute. One is the absence of judicial divorce in Ireland, which an Act passed so recently as 1857 introduced in England. The second is to be found in the law relating to land, largely altered by statutes passed for Ireland by the British Parliament of our own time. The third is the existence in Ireland of what are admitted to be exceptional and supposed to be temporary penal provisions, the last of which is the Prevention of Crime Act of 1887. As regards Scotland, when her king became king of England, and when, a century later, her Parliament was united with that of England, she retained her own law intact. In some few respects her law, founded on that of Rome, and her system of judicial administration are better than those of England, nor has she failed to contribute distinguished figures to the English bench and bar; but, as she stands far below England in population and wealth, she has affected the law of the larger country as little as the attraction of the moon affects the solid crust of the Earth.

The vaster territorial expansion of the eighteenth and nine-

teenth centuries has told quite as little on the law of England as did the unions with Scotland and Ireland. When the English began to people what are now the self-governing colonies, and when India came under British sway, English law was too fully developed to be susceptible to influences from them, not to add that they were too distant to make any assimilation either desirable or possible. Had India lain no further from England than Sicily and the Greek cities lay from Rome, had she been as near the level of English civilization as those countries were to that of Roman civilization, and had she been conquered in the reign of Elizabeth instead of in the reign of George III, the history of English institutions and English law must have been wholly unlike what it has in fact been. These three differences measure the gulf which separates the course of English from that of Roman development.

Another salient point in which the two States may be compared relates to the smaller part which purely political as compared with economic and intellectual changes have played in the development of English laws and institutions. Although there is a sense in which every political change may be described as the result of an economic or intellectual change, or of both taken together, still it is true that at Rome the desire to grasp political power counted for more in the march of events than it has done in England.

Economic changes sometimes operate on politics by raising the material condition of the humbler class and thereby disposing and enabling them to claim a larger share of political power. This happened at Rome more frequently in the earlier than in the later days of the Republic. In England it has happened more in later times than it did in earlier. Sometimes, however, economic causes so depress the poor that their misery becomes acute or their envy intense, whence it befalls that they break out into revolt against the rich. This was on the point of happening more than once at Rome, but has been no serious danger in England since the days of Richard II. Sometimes, again, the growth of immense fortunes and the opportunities of gaining wealth through politics threaten the working of popular institutions. This occurred at Rome; and was one of the causes which brought

the Republic to its death. It is a peril against which England has had, and may again have, to take precautions.

Changes in thought and belief operate on politics either by weakening the deferential and submissive habits of the classes which have been excluded from power so that they insist on having their fair share of it, or by implanting in the minds of the middle and upper classes new ideas which grow strong enough to make them insist on bringing old-fashioned practice into accord with new and more enlightened theory. It was the concurrence of these two forms of intellectual change that gave its specially destructive character to the French Revolution. Ideas of course act most quickly and powerfully when they are such as rouse emotion, for that which remains a mere intellectual concept or speculative opinion is not a thing to stir or to shake established institutions. The best illustration is to be found in religious beliefs. But the notion of Equality — that is to say, the notion that rights vested in every man as a man demand that every man shall be treated alike — has also proved an energetic explosive. Influences of this kind counted for little at Rome. Neither have they, except in the form of religious beliefs, or when their force coincided with that exerted by religious convictions, become the source of strife or constitutional change in England.

One may indeed say that the course of England's political development has been less interrupted by convulsions than that of any other great State, for even the scars made by the Civil War were before long healed, so that hardly any of the old institutions perished, though some of them passed into new phases. The new buildings which popular government has within the present century added to the old edifice are built out of the same kind of stone, and (if one may venture to pursue the metaphor) weather to the same colour. So the growth of our law, both public and private, both criminal and civil, has been a gradual and quiet growth, due in the main to the steady increase in the magnitude and complexity of the industrial and commercial relations of life, which have made the law expand and improve at the bidding of practical needs. Where politics have affected the law,

this has been through the rise of the humbler classes, a rise largely due to economic causes. So likewise the influence of ideas, of new views as to what law should be and how it should serve the community, has been marked by few sudden crises, and has been ruled by practical good sense rather than by aspirations after a theoretical perfection. As regards private law, this remark applies to the Romans also, although the constant strain placed upon their institutions by their territorial expansion as well as the differences between a City State and a large rural State exposed their political system to more frequent shocks and ultimately to a more radical transformation.

Finally, it may be observed that the interest felt in law, and the amount of intellectual effort given to its development, was probably greater among the educated class in Rome than it has ever been in any large section of the English people. Romans of intellectual tastes had fewer things to think about, fewer subjects to attract or to distract them, than the English have had. Law was closely interwoven with public life. Country life and country sports, commerce, religion, travel and adventure, covered less of the mental horizon than these pursuits have covered to Englishmen of the upper or educated class, so that more of thought and time was left to be devoted to law. Nor were many Romans carried off into other regions, like the Greeks, by the love of art, or of music, or of abstract speculation.

From this reflection another arises, viz. that legal and constitutional studies, as a subject for research and thought, find the competition of other subjects more severe in England to-day than they did in the eighteenth century.[1] Historical inquiries, economic inquiries, and, to a still larger extent, inquiries in the realm of Nature, claim a far larger share in the interest of eager and active minds now than in the days of Hobbes or Locke or Bentham. They have done much to extrude law from the place it once held among subjects of interest to unprofessional persons. This is true all over the world; but legal topics, whether constitutional or belonging to the sphere of penal or administrative, or in-

[1] I owe this observation to my friend Mr. Dicey.

ternational or ordinary private law, seem now to claim even fewer votaries in England than they do in France or Germany, and certainly fewer than they do in the United States.

VI. *Observations on France and Germany*

The sketch which I have sought to draw of the relations of general history to legal history might have been with advantage extended to include the legal history of other States, and particularly of two such important factors in modern civilization as France and Germany. But, apart from the undue length to which an essay would stretch if it tried to cover so large a field, there is a good reason why we may deem these two countries less well suited for the sort of comparative treatment here assayed. Neither of them has had the kind of independent and truly national legal development which belonged to Rome and belongs to England. Each of them started on its career with a body of pre-existing law, made elsewhere, viz. the Roman law which had come down to France and to Germany from antiquity. In Gaul, even in the parts most settled by the Franks, the law of the Empire held its ground, though everywhere largely modified by feudal land usages, and in the northern half of the country, when it had ceased to be Gaul and had become France, in the form of customs and not of written Roman texts. In Germany the old Teutonic customary law was by degrees (except as regards land rights) supplanted by the *Corpus Iuris* of Justinian, in conformity with the idea, fantastic as that idea now appears to us, which regarded the Roman Emperors from Julius Caesar down to Constantine the Sixth as the predecessors in title of the Saxon and Franconian Emperors. Thus neither the French nor the Germans built up on their own national foundation a law distinctively their own. Moreover, both Germany and France stand contrasted with England as well as with Rome in the fact that neither country ever had a true central legislature or central system of law courts comparable with the Parliament and King's Courts of England. The German Diet, though enactments were occasionally made in it with its con-

sent by the sovereign, enactments which however were not universally obeyed, dealt very little with law proper, even in the days of its greatest strength. Still less were the French States-General, even before their long eclipse, an effective legislature. Thus the development of the law of both Germany and France fell mainly into the hands of the jurists, qualified to some extent in Germany by the ordinances enacted by the electors, landgraves, and other princes, as well as by the free imperial cities, and (in later days) by the kings whose dominions formed part of the decaying Empire, and qualified in post-mediæval France by the ordinances of the king. In both countries it was upon the Roman law, as modified by custom, that the jurists worked, and hence in neither did a body of law grow up which was truly national, in the sense either of having a distinctive national quality or of embracing the whole nation or of having been enacted by a national legislature. The first complete unity given to law in France was given by Napoleon. His Code was based on the Roman law theretofore used, which had to a considerable extent been already codified under Lewis XIV; yet the creation of one Code for the whole country was a step so bold that it could hardly have been attempted except by an autocrat and on the morrow of a revolution. The first modern effort to give unity to law in Germany, itself an efflux of the aspiration for national unity, was made by the General Bills of Exchange Law (*Wechselordnung*) (1848-1850), while a general Commercial Code (*Gemeines Handelsgesetzbuch*) enacted in various States between 1862 and 1866 was re-enacted for the new Empire in 1871. The fuller unity long desired was attained in 1900, when the new general Code for the whole German Empire came into force. This similarity between the legal history of France and that of Germany seems the more curious when one remembers that, so far as mere political unity is concerned, France attained that unity comparatively early, one may say at the end of the fifteenth century, while Germany continued down till the extinction of the old Empire in 1806 to go on losing what political unity she had possessed. It was not till 1866 that she began to

regain it, though the Customs Union of the German States, formed in 1829, had been a presage of what was coming.

VII. Private Law least affected by Political Changes or Direct Legislation

One phenomenon is common to the legal history in all these nations. That part of the law which has the greatest interest for the scientific student, and the greatest importance for the ordinary citizen, the private civil law of family and property, of contracts and torts, has been the part least affected either by political changes or by direct legislation. It has been evolved quietly, slowly and almost imperceptibly, first by popular custom, then by the labours of jurists and the practice of the Courts. Direct legislation by the supreme power has stepped in chiefly to settle controversies between conflicting authorities, or to expunge errors too firmly rooted for judges to rectify, or to embody existing usage in a definite and permanent form. In the sphere of private law, and even in that of criminal law (so far as not affected by politics), legislation scarcely ever creates any large new rule, and seldom even any minor rule which is absolutely new, not an enlargement of something which has gone before. Pure legislative novelties mostly turn out ill. Fortunately, the good sense of Englishmen, like that of Romans, has rarely permitted them to appear.

The parallel drawn between the history of Roman and that of English law is less instructive when we reach the later stages of that history. It cannot be made complete, not only because we know comparatively little of the inner condition and practical working of the Courts after the time of Constantine, but because there was after his time both a political and an intellectual decay, which few will profess to discover in the England of this century. The expansion and enrichment of the Roman system had stopped even before Constantine, while that of English Law is still proceeding.[1] In Eng-

[1] Within two centuries after Justinian's time official abridgements of his *Corpus Iuris* began to be issued, and it was virtually superseded in the end of the ninth century by the *Basilica* of the Emperor Leo the

land commerce is still growing, education is still advancing, new and complicated problems are still emerging, so that many forces continue to work for the development of law. Though we cannot foresee what lines this development will follow we may feel sure that some of the old causes of change are disappearing. The democratization of political institutions seems nearly complete, religious passions have grown cold, and all classes have been so fully admitted to a share in political power that any such bold reforms in central and local administration, in procedure, in penal law, and in one or two departments of private civil law as followed the Reform Bill of 1832, seem improbable. In some departments the possibilities of further progress appear to be exhausted, though there are others, such as those concerned with questions of the right of combination among employers or among workmen, and the character which motive imparts to acts in themselves lawful on which the last word is far from having been said.[1] But there are at least two real difficulties which remain to be grappled with. One relates to the methods of legal proceedings. Their cost is so great as to deter many persons from the attempt to enforce just claims, to impose a heavy and unfair burden upon successful litigants, and to furnish opportunities for blackmail (especially in libel cases) to men who are equally devoid of money and of scruples. All efforts to cheapen them have so far failed. The other problem relates to a matter of substance. What are the general principles to be followed in empowering the State to regulate the conduct of individuals or groups of individuals, in permitting the central government or a local authority to compete with individuals in industrial enterprises and in restricting the power of combinations formed for commercial or industrial objects? This group of problems are being daily pressed to the front by political forces on the one hand and by industrial progress on the other. They are as urgent in the United States as in Britain. Nor are they matters for legislation

Philosopher. The action of his successors was largely directed to cutting down the old law into a shape better fitted for the changed conditions of the Empire, and the declining intelligence of the people.

[1] The interest excited by cases such as those of the *Mogul Steamship Company* v. *Macgregor* and *Allen* v. *Flood* illustrates this.

only, for cases frequently arise which the best legislation cannot count upon having provided for, and which it needs not only technical skill but also a philosophic grasp of principles on the part of the bar and bench to conduct to a solution. The experience of the ancient world and that of the Middle Ages throws little light upon them. But as they have appeared simultaneously in many modern nations, each may have something to learn from the others. Comparative jurisprudence has no more interesting field than this: nor is there any task in labouring on which an enlightened mind may find a wider scope for the devotion of learning and thought to the service of the community.

I am tempted to venture on some other predictions as to the influences that may be expected to work on the legal changes of the coming century. But we have been pursuing an historical, not a speculative, inquiry, and it will be enough to suggest that industry and commerce, as quickened by the progress of physical science, are likely to be factors of increasing power, and that the purely political element in the development of law will count for less than that contributed by the effort to readjust social conditions and to give effect to social aspirations.

PART III.

THE AMERICAN COLONIAL PERIOD

[Other References on this Period. The following essays also deal with this period:

In Select Essays:

Courts of Chancery in Colonial America, by Solon D. Wilson: Volume II.

Equity through Common Law Forms in Pennsylvania, by Sidney G. Fisher: Volume II.

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11. THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES[1]

By Paul Samuel Reinsch[2]

Introduction

WHEN American legal history comes to be studied more thoroughly, it will perhaps be found that no country presents, in the short space of three centuries, such a variety of interesting phenomena. An old nation, marked for a sturdy sense of right, sends colonies into a wilderness; they form rude institutions, often suggesting early European experience, to govern their simple social relations. As this society grows more intricate and more highly organized, the legal institutions of the mother country are gradually introduced, until a large portion of the common law is transferred to the actual practice of the colonies. Their law, however, always retained the impress of the earlier originality, when new conditions brought forth new institutions and new legal ideas. The struggles with the mother country caused a wide spread of legal knowledge, and the common law came to be revered as a muniment of personal liberties. Blackstone was outdone by American lawyers in extravagant panegyrics. It is only when the rationalizing tendencies of French democracy become triumphant in America, that the

[1] This essay was first published in 1899, at Madison, in the Bulletin of the University of Wisconsin, Vol. II.

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Other Publications: World Politics at the End of the Nineteenth Century, 1900; Colonial Government, 1902; Colonial Administration, 1905; American Legislation and Legislative Methods, 1907; International Unions and their Administration, 1907.

value of the common law is openly and bitterly attacked. Then comes the great reforming and codifying movement of this century, in which New York is the leading state. Unconscious development of custom, reversal to simpler forms, adaptation and modification of a technical system brought from abroad, conscious reform, and, finally, the effort to cast all legal relations into a simple and lucid system, — all these phenomena can be traced in our law, and nowhere can the interaction of popular consciousness of right with legal institutions be more fully and clearly ascertained.

The first question that confronts the investigator concerns the influence upon our system of the English common law, that complex body of principles and rules, contained, at our early colonial period, in the Year Books, Reports, and the standard law treatises of quasi-judicial authority. Statutory law-making had been but sparingly used up to this time in England, and the law of property and personal security, criminal law, and procedure, found their norms in a long series of judicial precedents. The transfer of this system to the colonies, its amalgamation with new forms there originated, its adaptation to novel conditions, constitutes a subject of rare interest.

The accepted legal theory of this transfer is well known. It is clearly stated by Story in Van Ness v. Packard, 2 Peters, 144: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition." This theory is universally adopted by our courts, and it has given them the important power of judging of the applicability of the principles of the common law to American conditions. According to this view, the common law was from the first looked upon by the colonists as a system of positive and subsidiary law, applying where not replaced by colonial enactments or by special custom suited to the new conditions.

While this legal theory has obtained acceptance as a satis-

factory explanation of the jurisprudence of to-day, it is not complete enough to afford an adequate synthesis of colonial legal facts for the historian. It contains, of course, the great truth that men cannot all at once cut themselves loose from a system of thought or action under which they have lived; that, though they transfer themselves entirely to new conditions, their notions and institutions must necessarily be circumstanced and colored by their former experience. Thus, of course, the more simple, popular, general parts of the English common law were from the first of great influence on colonial legal relations. This is, however, very far from declaring the common law of England a subsidiary system in actual force from the beginning of colonization. On the contrary, we find from the very first, originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence. The first problem to be determined is therefore this: What was the attitude of the earliest colonists towards the common law as a subsidiary system? To the solution of this question this thesis addresses itself.

The earliest settlers in many of the colonies made bodies of law, which, from every indication, they considered a complete statement of the needful legal regulations. Their civilization being primitive, a brief code concerning crimes, torts, and the simplest contracts, in many ways like the dooms of the Anglo-Saxon kings, would be sufficient. Not only did these codes innovate upon, and depart from, the models of common law, but, in matters not fixed by such codes, there was in the earliest times no reference to that system. They were left to the discretion of the magistrates.

In many cases the colonists expressed an adhesion to the common law, but, when we investigate the actual administration of justice, we find that usually it was of a rude, popular, summary kind, in which the refined distinctions, the artificial developments of the older system have no place. A technical system can, of course, be administered only with the aid of trained lawyers. But these were generally not found in the

colonies during the 17th century, and even far down into the 18th we shall find that the legal administration was in the hands of laymen in many of the provinces. Only as the lawyers grow more numerous and receive a better training, do we find a general reception and use of the more refined theories of the common law. It is but natural that, with increased training, the courts and practitioners should turn to the great reservoir of legal experience in their own language for guidance and information; the courts would be more ready to favor the theory of the adoption of the common law, as it increased their importance, virtually giving them legislative power. The foregoing statements are especially true of New England, where the subsidiary force of the common law was plainly denied; where a system of popular law (Volksrecht) grew up; and, where the law of God took the place of a secondary system.

The legal theory of the transfer has its established place in American jurisprudence; but, historically, it should be modified so as to bring out the fact that we had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. In this way only shall we understand, from the first, the very characteristic and far-reaching departures from older legal ideas which are found in the New World; while, at the same time, its full importance is assigned to the influence of English jurisprudence in moulding our legal thought. The theory of the courts is an incomplete, one-sided statement needing historical modification. When the courts come to analyze the nature of the law actually brought over by the colonists they find it a method of reasoning,[1] "a system of legal logic, rather than a code of rules;" or the rule, "live honestly, hurt nobody, and render to every man his due."[2] Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles

[1] Morgan vs. King, 30 Barbour, 13.
[2] Marks vs. Morris, 4 Hening and Mumford, 463.

of the common law, to establish virtually new and unprecedented legal rules. On the other hand, a historical study will reveal a most interesting organic growth, and, after the records have been more fully published, no system will offer more of interest to inquiring students than that developed on American soil. The study of the documents reveals great diversities in the early systems of colonial laws. Then with the growth of national feeling there comes also a growth of unification of legal principles, for which the English common law affords the ideal or criterion. And, though during the decade immediately preceding Independence, the English common law was generally praised and apparently most readily received by the larger part of American courts, still the marks of the old popular law remain strong and most of the original features in American jurisprudence can be traced back to the earliest times.

The object of this essay is to present the attitude of the colonists during the 17th century, and in some cases during the 18th, towards the common law of England. The manner of treatment will be by colonies: the purpose is to discuss first the colonies of New England in which the departure from common law ideas is most clearly marked, followed by the Middle and Southern colonies, many of which adhered more closely to the Old World model.

Neither does the scope of this essay include, nor the extent of the hitherto published sources permit, a complete presentation of the varying systems of private law in use in the colonies. Very few of the colonial court records have been published; in some cases, as in Virginia after the Richmond fire of 1865, most of them are unhappily lost forever. A publication of characteristic records of this kind is a desideratum not only for legal history, but for the study of the general economic and social development. However, sufficient material is extant in accessible form to show the general attitude of the colonists and colonial courts towards the common law as a technical system.

I. NEW ENGLAND

Massachusetts

The ideas of the Massachusetts colonists on the matter of law appear very clearly from a resolve of the general court [1] of the year 1636. The government is there entreated to make a draft of laws "agreeable to the word of God" to be the fundamental laws of the commonwealth. This draft is to be presented to the next general court. In the meantime, the magistrates are to proceed in the courts to determine all causes according to the laws then established (the early laws of the general court), and where there is no law "then as near the law of God as they can." The council is also empowered to make orders for the general conduct of business which is not yet covered by any law, and herein to apply its best discretion according to the rule of God's word. There is here absolutely no reference to the common law of England. As a subsidiary law the word of God is appealed to, as interpreted by the best discretion of the magistrates. This led to the administration of a rude equity, according to the idea of justice held by the magistrate, influenced by popular ideas and customs. With a homogeneous population holding the same general views on morals and polity, a true popular system of law could thus be produced, unrefined by juristic reasonings, untrammeled by technical precedents, satisfying, in general, the sense of right in the community. Should, however, alien elements intrude, they would find such a system exceedingly uncongenial and oppressive.

We find that in the early years of the colony the magistrates and persons in authority were intensely reluctant to have any written laws made, because by these their discretion would be restrained. The reason assigned by Winthrop [2] for this reluctance was the desire to have laws grow up by custom, so as to have them adapted to the nature and disposition of the people, which could not be sufficiently known to the magistrates properly to legislate for them. A second

[1] *Massachusetts Colonial Records*, I, 174.
[2] John Winthrop's *History of New England*, 322.

reason was that the charter provided that the colonists should make no laws repugnant to the laws of England. This they held to refer to positive legislation. The growth of law by custom, though the product might be radically opposed to English principles, they believed no infringement of the charter. Notwithstanding these reasons of the magistrates, the general court insisted upon having a comprehensive body of laws made. The controversy had none of the acrimony of the similar struggle for written laws in Rome before the Twelve Tables; but we can note the same principles at work; the magistracy, in whose discretion the administration of the laws has so far been founded, are reluctant to give up a part of this power, and therefore resist a codification of law The outcome of this agitation was the passage of the celebrated Body of Liberties,[1] in 1641. To evade one of the objections noted by the magistrates, this code was not really enacted as law, but the general court did "with one consent fully authorize and earnestly entreat all that are and shall be in authority to consider them as laws." The laws had been prepared by Nathaniel Ward, a minister with some legal training. They had been revised by the general court and sent into every town for further consideration. Upon the suggestions thus gathered they were again revised and then established as above mentioned. A more careful process of legislation is perhaps nowhere recorded. The laws may therefore be looked upon as a full expression of the popular sense of what the legal relations in the colony should be.

Ward, in a letter to Governor Winthrop,[2] December 22, 1639, questions the advisability of submitting the laws to the different towns for consideration by the freemen thereof, and fears that the spirit of the people might rise too high. They should not be denied their proper and lawful liberties, but he questions "whether it be of God to interest the inferior sort in that which should be reserved '*inter optimates penes quos est sancire leges.*'"

Turning now to the Body of Liberties itself, we find

[1] Winthrop's *Journal*, Ed. 1790, p. 237.
[2] *Massachusetts Historical Collections*, Series IV, vol. VII, 26.

the doctrine stated in 1636 again announced, that no man's life shall be taken away unless by virtue of some express law established by the general court, or, in case of the defect of the law in any particular case, by the word of God.[1] The principle is thus stated in the Massachusetts fundamentals:[2] "In all criminal offenses where the law hath prescribed no certain penalty, the judges have power to inflict penalties according to the rule of God's word."

The provisions of the Body of Liberties also show the theocratic nature of the Puritan colony. It contains, moreover, many provisions originated by the colonists in response to their special needs. The criminal law is founded on the code of Moses, though the breaking of the Sabbath and the striking of parents are not made capital offenses. In the laws of 1658, however, the latter offense, as well as rebellious conduct against parents is made capital.[3] The law of inheritance is taken from the Scriptures.

Imprisonment for debt, except when property is concealed, is not in use. Any debt due in bill or specialty may be assigned, and the assignee may sue upon the same. Cases involving an amount not over forty shillings are to be heard by magistrates or a commission of three freemen without a jury. A suit is commenced by summons or attachment. Testimony may be taken in writing by any magistrate or authorized commissioner to be used in criminal or civil cases. If the party cast has any new evidence or matter to plead he can obtain a new trial or bill of review. Free tenure of lands is adopted and all feudal incidents are abolished. Conveyances are to be by deed in writing. The period of prescription for title by possession is fixed at five years. Civil marriage is instituted.

The code of Ward was not the only one prepared for Massachusetts. John Cotton also submitted to the general court a body of laws, founded throughout on the Scriptures, with references thereto.[4] This code, though published in

[1] *Body of Liberties*, p. 1.
[2] Hutchinson, *State Papers*, 205.
[3] *Book of General Lawes and Liberties*, 1660, p. 8 and following.
[4] *Hutchinson Papers*, vol. I, 160.

England and there reputed to be in force in the colony, was never enacted at all by the general court. The conception of law current among the Puritans is well illustrated by the remark of Cotton that he should not "call them laws because God alone has the power to make law, but conventions between men." This theory of law as the command of God, the mediæval conception uncolored by the modern views of sovereignty, seems to have been firmly held by the Puritans of New, as of Old England.[1] The same view in addition to the reasons cited above may have prompted the general court not to call the Body of Liberties laws, but to pass them in the form of recommendations.

Turning now to the practice of magistrates and courts in the actual conduct of cases we shall find the same principles universally acknowledged. Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked upon as the binding subsidiary law; while the common law is at most referred to for the sake of illustration.

In 1641, the court had under consideration the case of the rape of a small child. There was a great question as to what kind of sin it was, and the court "sought to know the mind of God by the help of all the elders of the country." On the authority of Deuteronomy XVII, 12, it was held in another case that presumptuous sins were not capital unless committed in open contempt of authority; and, in connection with this, Winthrop remarks that the "only reason that saved their lives was that the sin was not capital by any express law of God, nor was it made capital by any law of our own." In the same connection, Winthrop discusses the exaction of a confession from a delinquent in capital cases. It was decided that where one witness and strong presumption point at the offender, the judge might examine him strictly; but if there is only slight suspicion the judge is not to press him for answer.[2] After the trial in the Hingham matter[3] the Deputy Governor stated in a public speech: "The great questions that have troubled the country

[1] Figgis, *Divine Right of Kings*, p. 223.
[2] Winthrop's *History of New England*, II, 56, 250.
[3] Ibid., II, 221, 228.

are about the authority of the magistrates and the liberty of the people. The covenant between you and us is that we shall judge you and your causes by the rules of God's law and our own."

On the trial of Mr. Hubbard [1] the court told the prisoner that he was to be tried by the law of God, which the magistrates were to judge by in case of the defect of the express law. Hubbard complained that the law of God admitted of various interpretations, and after being fined and bound to his good behavior he asked to know what good behavior was. The jury in this case found him guilty of uttering diverse speeches "tending to sedition and contempt of said government and contrary to the law of God and the peace and welfare of the country." [2] The form of punishment was largely in the discretion of the magistrates. [3] Although the English names of actions were used, the practice was exceedingly lax, and the action on the case was constantly used for the recovery of land; thus disregarding the fundamental distinction between real and personal property and real and personal actions in the English law. [4] The distinctions between common law and admiralty procedure were totally disregarded. [5]

In the *Hutchinson Papers* [6] there is preserved a very interesting account of a case before Symonds, a magistrate. To judge from his letters, Symonds was a careful student and great admirer of the English common law. [7] The case under consideration, Giddings vs. Brown, brought up some interesting questions as to the nature of law and the power of the courts. A dwelling had been voted by a town to its minister; the plaintiff had resisted the collection of the tax that had been levied to pay for this dwelling, and his goods were accordingly distrained. Symonds, in giving

[1] Winthrop's *History of New England*, II, 255.
[2] *Massachusetts Historical Society Collections*, II, vol. IV, 110.
[3] Lewis, *History of Lynn*, pp. 73, 81.
[4] Washburn, *Judicial History of Massachusetts*, p. 61.
[5] Case of Lady Latour vs. Bailey, Winthrop's *History of New England*, II, 192.
[6] *Hutchinson Papers*, Vol. II, p. 1.
[7] Letters of Symonds to Gov. Winthrop, *Massachusetts Historical Society Collections*, IV, vol. VII, pp. 124, 132.

judgment for the plaintiff, says that "the fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable." Symonds refers with respect to the English law and quotes Finch and Dalton. He uses it, however, merely for illustration, and says "let us not despise the rules of the learned in the laws of England who have every experience." The precedents on which he relies are colonial and their binding force is recognized. The substance of the judgment is that property cannot be taken by public vote for private use. The opinion is interesting as an expression of natural law philosophy, and it is, perhaps, the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law.[1] The case, moreover, shows very clearly in what light the common law was regarded by the New England colonists; not at all binding *per se*, but in as far as expressive of the law of God to be used for purposes of illustration and guidance.

Popular courts of jurisdiction in petty cases, which had long fallen into disuse in England, were established in most of the colonies. In Massachusetts inferior courts consisting of five judges, one of whom was an assistant, and having jurisdiction in lesser civil and criminal cases, were early established.[2] Petty civil cases in the towns were tried by courts of one judge, or commissions of three freemen.[3] A system of appeals was instituted, ascending from the town court to the inferior or county court, thence to the assistants, thence to the general court. Appeal to England was not allowed and claims for it were always strenuously resisted.

The pleadings in these courts were very concise and informal, and there was little regard paid to forms of action.[4]

[1] *Cf. Coke's opinion in Bonham's Case*, 8 *Rep.*, 118a.
[2] *Massachusetts Colonial Records*, I, 169.
[3] Ibid., 239.
[4] Washburn, *Judicial History*, 48.

Up to 1647, the pleadings seem to have been oral. By a law of that date [1] it was enacted that the declaration should be drawn up in writing and should be filed with the clerk of the court three days before the term.

Contrary to the English custom, a record of evidence given in the courts seems to have been kept from the earliest times. In 1650, it was enacted [2] that on account of the inconvenience of taking verbal testimony in court, the clerk not being able to make a perfect record thereof and prevent all mistakes, the evidence should be presented in writing to the court, either attested before a magistrate or in court upon oath. This provision, thoroughly at variance with the common law, excited the adverse comment of professional lawyers.[3]

Coming now to the trial by jury, we find that this ancient and popular institution was in early use in Massachusetts, a jury having been empanelled a few months after Winthrop's arrival.[4] The system was, however, by no means unquestionably accepted, and seems to have had a very insecure tenure for a time. In 1642, a commission was appointed to consider whether to retain or dismiss juries in the trial of causes;[5] and it appears that juries were for a time abolished, for, in 1652, we find the following resolve "the law about juries is repealed and juries are in force again."[6]

The mode of trial exhibits many interesting peculiarities. The province of judge and jury is quite correctly defined in an act of 1642, where the finding of matters of fact by the jury, instructions in law by the court, and the decision of matters of equity by the latter is provided for.[7] In 1657, the jury was permitted to present a special verdict.[8] But it seems that for a time the magistrates acquired a very considerable power of controlling the jury. Hutchinson says: "The jury sometimes gave their verdict, that there were strong grounds of suspicion, but not sufficient for convic-

[1] *Massachusetts Colonial Records*, II. 219.
[2] Ibid., II, 211.
[3] *Documents Relative to the Colonial History of New York*, IV, 929.
[4] *Massachusetts Colonial Records*, I, 77-78.
[5] *Massachusetts Colonial Records*, II, 28.
[6] Ibid., IV, 107. [7] Ibid., II, 21. [8] Ibid., III, 425.

tion. Upon such a verdict the court would give sentence for such offenses as the evidence at the trial might have disclosed." He adds in a note the advice of Lieut. Gov. Stoughton to Governor Hinckly of Plymouth, given in 1681: "The testimony you mention against the prisoner I think is sufficient to convict him; but, in case your jury be not of that mind, if you hold yourself strictly obliged by the laws of England, no other verdict but 'not guilty' can be brought in; but, according to our practice in this jurisdiction, we should punish him with some grievous punishment according to the demerit of his crime, though not found capital." [1]

In 1672, an attempt was made to limit the power of the magistrates in this respect.[2] For the controlling authority of the magistrates there is offered as a substitute the archaic method of attainting the jury for giving a verdict contrary to the weight of evidence; and the law allowing the magistrates to refuse the verdict of the jury is repealed. This is a remarkable instance of the revival of an archaic method which had all but disappeared in England. The jury in such a case was to be tried by a new jury of twenty-four, and the court had no control over the verdict. It seems that many juries were attainted, because in 1684 it was enacted [3] on account of the unreasonable trouble caused by numerous attaints, that the cause of attaint shall be given in writing; that if the verdict is confirmed, the person attainting shall be fined 34 pounds; and that the jury may also prosecute him for slander, with other additional penalties. The jury were also at liberty, when they were not clear in their conscience about any case, "in open court to advise with any man they should think fit, to resolve and direct them before they gave their verdict." [4]

In the colonial system of Massachusetts we do find traces of the common law; the less technical parts of its terminology are in use, forms of contracts and deeds are modeled on

[1] *Massachusetts Historical Society Collections,* Series II, Vol. I, p. XXII.
[2] *Massachusetts Colonial Records,* IV, part 2, p. 508.
[3] *Massachusetts Colonial Records,* V, 449.
[4] *Colonial Laws of Massachusetts Bay,* Ed. 1660, pp. 47, 48.

English precedents, although for the latter acknowledgment and recording is essential to validity.[1] But the authority of the common law as a subsidiary system is nowhere admitted, its principles are radically departed from, and its rules used only for purposes of illustration.

The magistrates administered a rude system of popular law and equity, on the basis of the Scriptures and their own ideas of right, generally to the satisfaction of the homogeneous Puritan communities; though there are some struggles recorded, such as that for written laws and for the control of the juries. Capt. Bredon writes to the Council of Colonies, speaking of the printed laws of Massachusetts: "What laws are not mentioned in this book are in the magistrates' breasts to be understood."[2] The elements dissatisfied with this regime generally left for Rhode Island, the Connecticut river settlements, Maine or New Hampshire, where society was less autocratic; but still we find a number of protests recorded against the manner of administering the law by persons remaining in the colony.

The complaint that no one could have justice but members of the church[3] is very common on the part of outsiders. In 1646, there was a very important controversy, in which a party of men led by Robert Child demanded the establishment of English law. In their remonstrances[4] they say that they cannot discern a settled form of government according to the laws of England; nor do they perceive any laws so established as to give security of life, liberty, or estate. They object to discretionary judgments as opposed to the unbowed rule of law, and petition for the establishment of the wholesome laws of England, which are the result of long experience and are best agreeable to English tempers; that there should be a settled rule of adjudicature from which the magistrates cannot swerve. Those laws of England, they say, are now by some termed foreign, and the colony termed a free state.

[1] *Massachusetts Colonial Records*, I, 116; and *Suffolk County Deeds*.
[2] *Documents Relative to the Colonial History of New York*, III, 39.
[3] *Massachusetts Historical Society Collections*, Series IV, vol. VII, p. 370.
[4] *Hutchinson Papers*, Prince Society, I, 189.

In the answer by the general court[1] the petitioners are held up to ridicule for their own ignorance of what English laws they really wanted. It is then asserted that the laws of England are binding only on those who live in the English country, for neither do the laws of Parliament nor the King's writ go any farther. "The laws of the colony," they say in substance, "are not diametrically opposed to the laws of England, for then they must be contrary to the laws of God, on which the common law, so far as it is law, is also founded. Anything that is otherwise established is not law but an error, as it cannot be according to the intent of the law-makers to establish injustice." This is the true Puritan idea of law as the command of God; the general court asserts that the common law, so far as it is law, must embody divine justice. For their part the Puritans prefer to go to the original source of law, the Scriptures.

In connection with this matter the general court also made a declaration which was evidently intended for the general public and the home government.[2] They there assert that the government is framed according to the charter and the fundamental and common laws of England. They add in brackets, "taking the words of eternal righteousness and truth with them as the rule by which all kingdoms and jurisdictions must render account." Then they make a comparison between the fundamental and common laws of England and the laws of the colony, taking Magna Charta as the chief embodiment of English common law; and they state that, as the positive laws of England are constantly being varied to answer different conditions, they should consider it right to change and vary their legislation according to circumstances. They confess an insufficient knowledge of the laws of England, and say, "If we had able lawyers amongst us we might have been more exact." Their comparison of the laws shows the rudimentary character of their knowledge. Finding some discretion allowed English judges in criminal cases they take this as a precedent for

[1] Winthrop, *History of New England*, II, star p. 284.
[2] *Hutchinson Papers*, 1, 197.

the Massachusetts method of inflicting penalties according to the rule of God's word. They conclude by instancing the extraordinary jurisdictions in England, the chancery, the court of requests, the admiralty and ecclesiastical courts, and say that experience shows that Englishmen may live comfortably and securely under some other laws than the common and statutory laws of England.

The methods of Massachusetts colonial justice are described by Letchford in his book, *Plaine Dealing*. He was a lawyer who had been employed in doing minor editorial work on the *Body of Liberties*. Owing to the prejudice against lawyers, general in the colonies but especially strong here, he was not permitted to practise his profession, and therefore was perhaps an unreasonably severe critic of the system under which he suffered. As his views are, however, corroborated by the statements of other witnesses, their truth so far as the proceedings of the courts are concerned may perhaps be accepted. He says among other things[1] that the governor in charging the grand jury uses the heads of the ten commandments. That in jury trials matters of law and fact are not distinguished.[2] The records of the courts are not kept in due form of law, in most cases the verdict only being entered. Hence the disposition to slight all former laws and precedents, "but go hammer out new upon the pretense that the word of God is sufficient to rule us." He advises his brethren to "despise not learning, nor the learned lawyers of either gown."

In his narrative to the council[3] Edward Randolph states that "the laws and ordinances of Massachusetts are no longer observed than they stand in their convenience; and in all cases, regarding more the quality and affections of the persons to their government than the nature of their offense." He states that it was regarded as a breach of the privilege of the colony to urge the observation of the laws of England, and notes some of the provisions repugnant to the common law, such as obtaining prescriptive title to

[1] *Plaine Dealing*, Trumbull's edition, p. 26.
[2] Ibid., p. 27.
[3] *Hutchinson Papers*, II, p. 210.

land by possession for five years, and the use of the word of God as a rule in criminal cases. In another report in 1678 he states that the laws of England are neither in the whole nor in any part of them valid or pleadable in the colonial courts until received by the General Assembly.[1]

The colony always resisted claims of a right of appeal to England; this was one of the most important points of controversy between the colonial court and the home government after 1660. In that year the colonists instructed Captain John Leveritt as their agent in England to resist any claims or assertions of appellate jurisdiction, because that would render government and authority in the colony ineffectual and bring the court into contempt with all sorts of people.

In 1667, the Privy Council made specific objection to the laws of Massachusetts repugnant to the laws of England. The Attorney General submitted a catalogue of such laws.[2] In answer to these objections the general court made several amendments in 1681;[3] the law concerning rebellious sons, concerning Quakers, and the law against keeping Christmas were left out; but no alteration was made in the law of marriage and Sunday legislation. In connection with this controversy the general court again asserted the independence of the colony from English laws.[4] They speak of the laws of England as bounded within four seas and not reaching to America. The American subjects not being represented in Parliament should not be impeded in their trade by Parliament. Before this time legal proceedings had been carried on in the name of the colony. One of the results of the controversy was that the general court yielded in this respect, and process was hereafter issued in the name of the king.

After the charter had been annulled, there followed a strong and continued effort to introduce the common law. By the commission of Sir Edmund Andros, in 1688 the gov-

[1] *Edward Randolph, Prince Society Publications*, II, 311.
[2] Palfrey, quoting from Phillip's collection of manuscripts, *History of New England*, III, 309.
[3] *Massachusetts Colonial Records*, V, 321.
[4] Ibid., V, 198, 200.

ernor and council were appointed a court of record to try civil and criminal cases, their proceedings and judgment to be consonant and agreeable to the laws and statutes of England.[1] The arbitrary government of Andros, however, did perhaps more to introduce a knowledge of the common law, than this provision, because against his despotic rule the colonists now began to assert rights protected by the English law, such as the right of Habeas Corpus. Thus when we hereafter find expressions of admiration for or adherence to the common law, such as are very common in the succeeding century and especially at the beginning of the Revolutionary War, they refer rather to the general principles of personal liberty than to the vast body of rules regulating the rights of contract and property and the ordinary proceedings in court.

By the charter of 1692, the appointment of judges and justices of the peace was given to the governor and the council. Their tenure was practically during good behavior;[2] but though the direct popular nature of the courts was thus destroyed, it was a considerable time before trained jurists came to control the administration of law in Massachusetts.

Chief Justice Attwood visited Boston in 1700, and in his report to the Lords of Trade [3] he states that he had "publicly exposed the argument of one of the Boston clergy, that they were not bound in conscience to obey the laws of England." He complains of various insults offered him while sitting as judge in the admiralty court. He attended the session of the Superior court at Boston, and there observed that their "methods were abhorrent from the laws of England and all other nations." He especially notes the ease with which new trials are obtained and the fact that evidence is offered in writing, which is a temptation to perjury, new proofs being admitted at the later trials. This criticism shows that there was no sudden breach in the development of Massachusetts law, and that at the beginning of the

[1] *Documents Relative to Colonial History of New York*, III, 539.
[2] Washburn, *Judicial History*, p. 138.
[3] *Documents Relative to Colonial History of New York*, IV, 929.

18th century the old popular law was still largely administered in derogation of the more highly developed rules of the common law. It is stated that after the change in the appointment of judges, practice became very captious and sharp. In 1712, the first professional lawyer, Lynde, became Chief Justice, and after this we find that English books and authors are frequently cited.[1] Yet Massachusetts jurisprudence exhibited for a long time thereafter the marks of its early informality. Jefferson says in a letter to Attorney General Rodney, September 25, 1810,[2] speaking of Lincoln, of Massachusetts, as a possible successor to Cushing as Chief Justice: "He is thought not to be an able common lawyer, but there is not and never was an able one in the New England states. Their system is *sui generis* in which the common law is little attended to. Lincoln is one of the ablest in their system." How strongly the old view of law which we have noticed maintained itself in Massachusetts, we see from John Adams' statement in the Novanglus:[3] "How then do we New Englanders derive our laws. I say not from Parliament, not from the common law, but from the law of nature and the compact made with the king in our charter. Our ancestors were entitled to the common law of England when they emigrated; that is to say, to as much of it as they pleased to adopt and no more. They were not bound or obliged to submit to it unless they chose."

In Massachusetts, during the 17th century we find a continued, conscious, and determined departure from the lines of the common law. It is not accepted as a binding subsidiary system, the law of God there taking its place. Indeed, it colored and influenced the legal notions of the colonists, but they always resisted the assertion of its binding force. The absence of lawyers made the administration of a highly developed system impossible. We have a layman law, a popular, equitable system, which lacks the elements

[1] Arguments of Valentine, in Matson vs. Thomas, 1720, citing Coke and Hobart.
[2] Jefferson's *Complete Works*, V, 546.
[3] 1774, John Adams, *Works*, IV, 122.

of rigor, of clear cut principles, of unswerving application, but which forms a basis on which a simple community could well adjust its legal relations.

Connecticut and New Haven

In Connecticut and New Haven we find a development similar to that of Massachusetts. The Connecticut code of 1642 was copied from that of Massachusetts.[1] The fundamental order of New Haven[2] provides for the popular election of the magistrates, and for the punishment of criminals "according to the mind of God revealed in his word." The general court is also to proceed according to the Scriptures, the rule of all righteous laws and sentences. In the fundamental agreement[3] all free men assent that the Scriptures hold forth a perfect rule for the direction and government of all men in all duties. The Scriptural laws of inheritance, dividing allotments, and all things of like nature are adopted, thus very clearly founding the entire system of civil and criminal law on the word of God. This principle is re-enacted in similar language in 1644.[4]

In Connecticut the trial by jury was put into practice from the first, the use of the grand jury coming in somewhat later.[5] It was, however, provided that upon continued failure to agree, a majority of the jury could decide the issue, and in case of equal division, the magistrate had a casting vote.[6] In New Haven the institution of jury trial was not at first adopted.[7] It is stated that this was so settled upon some reasons urged by Mr. Eaton.

As already indicated, the system of popular courts was adopted in both colonies. In 1699, the practice of commissioning justices for stated periods was tried, but it was continued for only three years.[8] The judges of these courts

[1] *Connecticut Records*, I, 77.
[2] *New Haven Records*, I, 73.
[3] *New Haven Records*, I, 1.
[4] Ibid., I, 130.
[5] *Connecticut Records*, I, 9, 91.
[6] Ibid., 84.
[7] *Massachusetts Historical Society Collections*, series II, vol. VI, 320.
[8] Ibid., series VI, vol. III, 44.

exercised a broad discretion. That Connecticut was independent of the home country in legal matters is noted by Quary in his report to the Lords of Trade in 1707.[1] If possible, these colonies departed even further from the common law than Massachusetts in their system of popular courts, absence or radical modification of the jury trial, discretion of the magistrates, and in the case of New Haven, the clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters, as a guiding rule in civil and criminal jurisdictions.

New Hampshire

The settlers of New Hampshire and Vermont were in many cases malcontents who had left the Puritan colonies. They were not so homogeneous a society, and therefore the assertion of the binding force of the common law could be more successfully made. The commission of 1680 orders proceedings in the courts to be consonant to the laws and statutes of England, regard, however, being had to the condition of the colonists.[2] The General Assembly, meeting at Portsmouth in March, 1679-80, passed a body of general laws in which they claimed the liberties belonging to free Englishmen. They, however, refused to admit the binding force of any code, imposition, law, or ordinance not made by the General Assembly and approved by the president and council. The code itself is very simple, but in place of biblical references English statutes are cited.[3] As a matter of fact it may be questioned whether this apparent submission to English law was more than formal. The general court petitioned against appeals to England in 1680.[4] The settlers were so impatient of control that all questions of law and fact were decided by juries. The judges had a term of one year only and none of the influence of the

[1] *Documents Relative to Colonial History of New York*, V, 31.
[2] Poore, *Constitutions, Charters and Documents*, p. 1276.
[3] Belknap's *New Hampshire*, p. 454; *New Hampshire Documents and Records*, I, 382.
[4] Cited in Belknap's *New Hampshire*, p. 457.

Massachusetts magistrates.[1] Under this regime, the administration of the rules of the common law would of course be impossible. The early judges and chief justices were all business men, seamen, or farmers; only in 1726 did a man of liberal education, Judge Jaffray, a graduate of Harvard in 1702, appear on the bench.[2] And it was only in 1754 that a lawyer, Theodore Atkinson, also a graduate of Harvard, became chief justice. Samuel Livermore, chief justice in 1782, though trained in the law, refused to be bound by precedents, holding, "that every tub should stand on its own bottom;" he looked upon the adjudications of English tribunals as only illustrations.[3] It may be said that no real jurist, no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power in New Hampshire during the entire 18th century.

Rhode Island

This colony was consciously founded on a democratic basis.[4] The charter is made the basis of government, by which legislative action is to be restricted. In order to escape the imputation of anarchy, and to preserve every man safe in his person and estate, the common law is to be taken as a model for legislation in as far as the nature and constitution of the colony will permit. The code itself shows a very archaic conception of law. In its classification it especially reminds us of the Anglo-Saxon dooms in the prominence it accords to crimes and torts. It classifies law under five general heads: (1) murthering fathers and mothers; (2) man slayers; (3) sexual immoralities; (4) menstealers; (5) liars, under which heading are comprised perjury, breach of covenant, slander, and other torts. On the other hand, however, it contains some provisions of an ad-

[1] Danl. Chipman, *Vermont Reports*, pp. 11, 19, 21.
[2] C. H. Bell, *Bench and Bar of New Hampshire*, 18.
[3] Bell, *Bench and Bar*, p. 37.
[4] Code of Civil and Criminal Law of 1647; cited in full in Arnold's *History of Rhode Island*, I, 205, et seq.; *Rhode Island Colonial Records*, 1, 156.

vanced nature. Murder and man-slaughter are distinguished on the principle of malice aforethought. Theft committed by a child or for hunger is declared to be only petty larceny. Promises and contracts, especially for large amounts, are to be drawn up in writing. The conveyance of land must also be made in this form. This provision by many years antedates the celebrated Statute of Frauds of English law. Imprisonment of debtors is forbidden, "none shall lie languishing for no man's advantage." Lands are made liable to execution. In general, the statement of the code is concise and clear; English statutes are frequently cited, but in spirit the code is thoroughly original though in parts archaic. That it was considered a sufficient statement of law is shown by the enactment that "In all other matters not forbidden by the code all men may walk as their conscience persuades them." A modified form of jury trial is instituted by a later enactment.[1] The province of judge and jury is there defined. As in Massachusetts, attaint is made the remedy for a false verdict.

Bellomont sent the laws of Rhode Island to the Council in 1699,[2] when he gives it as his opinion that the world never saw such a parcel of fustian. He also says: "Their proceedings are very unmethodical, no wise agreeable to the course and practice of the courts of England, and many times very arbitrary and contrary to the laws of the place; as is affirmed by the attorneys at law that have sometimes practiced in their courts." . . . "They give no directions to the jury nor sum up the evidences to them, pointing out the issue which they are to try." Later, however, in 1708, Governor Cranston writes to the Lords of Trade: "The laws of England are approved of and pleaded to all intents and purposes, without it be in particular acts for the prudential affairs of the colony."[3]

Up to the time of the Revolution, judges were elected annually from the people. The Newport court records show us the extent of the discretion of magistrates. In an action

[1] *Rhode Island Colonial Records*, I, 198.
[2] *Documents Relative to Colonial History of New York*, IV, 600.
[3] Durfee, *Gleanings from the Judicial History of Rhode Island*, p. 78.

for debt the court, considering the defendant's poverty, ordered him to work for the plaintiff at carpentry until the debt were extinguished. Meanwhile other creditors were forbidden to sue him. Even after a verdict of not guilty, the court often imposed costs or ordered the accused to leave the colony.[1] The attitude of Rhode Island towards lawyers is shown by the fact that by an act of the general assembly in 1729 they were forbidden to be deputies, their presence being found to be of ill consequence.[2]

II. THE MIDDLE COLONIES

New York

In this colony the common law received early recognition and an approach was made to complete and intelligent enforcement. The population of New York was exceedingly heterogeneous; the original Dutch settlers, the early English settlers of various character from the different colonies and the mother country. The close knit social relations found in Massachusetts and Connecticut were here absent, and popular law could not therefore be so readily developed. There was a demand for a system of common law by which the relations and interests of these various elements may be regulated. The colony being under royal authority almost from the beginning, its rulers soon accustomed it to the principles of the English common law. Thus when the growing feeling of unity and nationalism called for a unification and harmonizing of American law, New York state, which had most successfully adapted the common law to American conditions, became the leader in juristic development. Its judges, like Kent, became the authoritative expounders of the American form of the common law. But, on the other hand, many of the original American ideas in jurisprudence, such as the reform of the law of real property and the law of pleading, which we find in germ in the early history of the other colonies, were carried to completion and given

[1] Durfee, *Gleanings from the Judicial History of Rhode Island*, p. 127-137.

[2] Arnold's *History of Rhode Island*, II, 98.

their lasting form in the state of New York, whose jurists had profited from a longer training in a regular system of jurisprudence.

We must, however, by no means conclude that the common law was administered in New York from the very beginning of English occupation as a complete subsidiary system. The feeling that for a new colony a new body of laws is necessary led to the compilation of what is known as the Duke of York's laws, which were promulgated at an informal assembly at Hampstead in 1665.[1] The first New York legislature met in 1683, and, among other acts, passed bills regulating the judicial proceedings, and for preventing perjuries and frauds.[2] Governor Nichols, before courts had been created, took upon himself the decision of controversies and pronounced judgment after a summary hearing.[3] In writing to Clarendon, July 30, 1665, he says: "The very name of the Duke's power has drawn well-affected men hither from other colonies, hearing that the new laws are not contrived so democratically as the rest."[4] At this time laws are confirmed, reviewed, and amended by the general assizes composed of the governor, the general council and the judges upon the bench. A year later, April 7, 1666, Nichols writes to Clarendon[5] remitting a copy of the laws collected from the laws of the other colonies with such alterations as would tend to revive the memory of old England; he says that "the very name of Justice of the Peace is held an abomination, so strong a hold has Democracy taken in these parts." He complains of the refractory disposition of the people, and describes his efforts to introduce English statutes and authority. It is apparent from this correspondence that it was considered necessary to restate the law in a codified form for the use of the colonists; and an informal transfer of the common law in its original "unwritten" character was evidently not considered sufficient or suitable to the circumstances by the men in authority.

[1] *Documents Relative to Colonial History of New York*, III, 260, 416; IV, 1154.
[2] Ibid., III, 355. [3] Smith's *History of New York*, 55.
[4] *New York Historical Society Collections*, 1869, 75.
[5] Ibid., p. 118, 119.

Governor Dongan in his report to the Committee on Trade,[1] February 22, 1687, gives a list of the courts of justice established at that time: (1) a court of chancery composed of the governor and council, which is the supreme court of appeals; (2) the courts of oyer and terminer held yearly in each county; (3) the court of the mayor and aldermen in New York; (4) the courts of session (justices of the peace); (5) court commissioners for petty cases; (6) a court of adjudicature, a special court established to hear land cases. These courts had none of the popular elements which we have noted in the Puritan colonies. Governor Dongan also states that the laws in force were the laws of the Duke of York and the acts of the general assembly, not mentioning the common law in this connection. In a similar report, Governor Nichols [2] states that "all causes are tried by juries, and that there are no laws contrary to the laws of England," while he ascribes full law-making power to the court of assizes (1669). Governor Andros reports that, "He keeps good correspondence with his neighbors as to civil, legal and judicial proceedings." Bellomont, in 1699, sending a copy of the printed laws to the council, asks for a careful perusal and criticism of them by some able lawyer in England; which would indicate the absence of trained jurists in the colony at that time.[3] In a report on the methods of proceedings in court, William Smith writes to Bellomont in 1700:[4] "The rules and methods we are governed by in all trials is the common law of England, and the several statutes declarative thereof according to the manner and methods of the courts at Westminster." In the earlier days of the colony, confused notions of law and equity seem to have prevailed; and in a number of reported cases tried on Long Island after verdict of the jury there was an appeal to equity, most generally successful. No settled rules were here regarded, but a discretion similar to that of the New England magistrates was exer-

[1] *Documentary History of New York*, I, 147.
[2] *Documentary History of New York*, I, 87.
[3] *Documents Relative to Colonial History of New York*, IV, 520.
[4] Ibid., VIII, 28.

cised.[1] In one of these cases the judgment is said to be given according to law and good conscience.[2]

Immediately upon the occupation by the English, the jury came into use in New York. Jury trials are, however, at first, very informal, more after the manner of a simple arbitration, and verdicts are often given in the alternative.[3]

In the form of testamentary disposition the Roman Dutch law of the New Netherlands left abiding traces. The method of making wills by oral declaration before a notary, or by a written and sealed instrument deposited with that official, was used long after the first English occupation.[4]

We find that in these early days the functions of the court were not only judicial but administrative, much like those of the earliest itinerant judges in England. Thus the judges are directed to make inquiries into town training, the bearing of arms, the price of corn, wages, and escheats.[5] As another reversion to older practice, we may note the concentration of various functions, judicial, administrative, and legislative, in the hands of the colonial council of the earliest time. A still closer analogy to mediæval English history in this respect we shall find in the case of Pennsylvania.

In the year 1700, a professional English lawyer, Attwood, became chief justice of New York. It was his avowed purpose to introduce the common law and practice of the English courts into the colony. He was, however, too assertative, and favored strong government too much, so that he in some cases perverted the law to his own uses, as when he declared that whatever was treason before 25 Edward III. was still treason at common law;[6] or when he held that a grand jury was only an inquest of office and that eleven could indict.[7] He complained in a letter to the Lords of Trade[8] that "several here cannot well bear with the exe-

[1] *Documents Relative to Colonial History of New York,* XIV, 570, 589, 600, 629.
[2] Underhill vs. Hempstead, Ibid., 589.
[3] Fernow, *Records of New Amsterdam,* V. 267ff.
[4] Fernow, *Calendar of Wills,* p. IV. For other traces of the Dutch law, see Judge Daly's prefatory note in 1 E. D. Smith (N. Y.).
[5] *Documents Relative to Colonial History of New York,* XIV, 637.
[6] Ibid., IV, 974. [7] Ibid., 1010. [8] Ibid., 923.

cution of the laws of England." His methods soon led to his unpopularity and his final disgrace.

As in other colonies, lawyers were unpopular in the early days of New York. "The general cry of the people both in town and country was, 'No lawyer in the Assembly!'"[1] As we have seen, the early governors exercised what was called an equity jurisdiction, but no regular court of equity was established. In 1711, Governor Hunter addressed the Lords of Trade in this matter. He speaks of the necessity of giving equitable relief in many cases, and instances the case of a merchant, who inadvertently confessed judgment for 4,000 pounds, the real debt being 400 pounds, and who then languished in prison. He says that the House declared that the trust of the seal constitutes him the Chancellor, but having already too much business and being ignorant in law matters he asks the Lords of Trade for advice.[2] They simply answer[3] that he is authorized to establish, with the consent of the council, any court that may be necessary. A court of chancery was accordingly established, but in 1727 the assembly resolved that the creation of this court without its consent was illegal. Its fees were reduced and its jurisdiction languished for a time.[4] Colden ascribes these resolves to the vindictive intrigues of the speaker, who had been defeated in a chancery suit.[5]

The complete doctrine of the binding force of the common law in New York was not declared before 1761. A most thoroughgoing statement is found in Governor Tryon's report,[6] where he declares that "the common law of England is the fundamental law of the province, and it is a received doctrine that all the statutes enacted before the province had a legislature are binding upon the colony;" also that in the court of chancery the English practice is followed. Some years before, in 1762, Chief Justice Pratt, in a memo-

[1] Gov. Colden to Hillsboro; *Documents Relative to Colonial History of New York*, VIII, 61.
[2] *Documents Relative to Colonial History of New York*, V, 208.
[3] Ibid., 252.
[4] Smith's *History of New York*, 270.
[5] *New York Historical Society Collections*, XVIII, 211.
[6] 1774; *Documentary History of New York*, I, 752.

rial to the Lords of Trade, complains of the insufficient influence of the judiciary. He says that "All the colonies being vested with legislative power, their systems of laws are gradually varying from the common law. If the judgments of the supreme courts are only vague and desultory decisions of ignorant judges the mischief is augmented, and a more influential and better paid judiciary is called for."

New Jersey

The two parts of New Jersey, East and West Jersey, had a different social complexion, and we may therefore look for divergent views on the subject of law. West Jersey was a pure Quaker commonwealth, where the influence of Penn was very strong; while in East Jersey conditions similar to those in New York prevailed. We find, however, in both parts of New Jersey a system of popular courts. In East Jersey [1] the court system was established by the legislature in 1675. A monthly court for the trial of small causes was held in each town of the province by two or three persons chosen by the people. County courts were held twice yearly in each county; from these there was an appeal to the court of chancery. Proceedings in these courts were of the utmost simplicity. It was provided that any person might plead for himself and that no money was to be taken for pleading or advice.[2] West Jersey had a similar system of courts, comprising justices of the peace, county courts, and a supreme court of appeals; the latter was instituted in 1693 and a final appeal from it to the general assembly was authorized in 1699. The term "court of chancery" is not used in West Jersey. The power of the jury was exaggerated, the three judges having no authority to control the verdict of the twelve men "in whom only the judgment resides." In case the judges should refuse to pronounce judgment, any one of the twelve by consent of the rest may do so.[3] Capital punishment was not fixed by the law. It was enacted [4] that

[1] *Grants and Concessions*, p. 96.
[2] Ibid., p. 128. [3] Ibid., p. 396.
[4] *Grants and Concessions*, p. 404.

"All persons guilty of murder or treason shall be sentenced by the general assembly, as they in the wisdom of the Lord shall judge meet and expedient." This would indicate a view of law similar to that held by the colonists of Massachusetts and New Haven.

The early laws of East Jersey were founded largely on scriptural authority.[1] Thus the law of trespasses and injuries by cattle, of injury by fire, of negligence, and the criminal law, are in agreement with the laws of the Exodus. In 1675 imprisonment for debt was prohibited except in cases of fraud. In 1698 the privileges of the English common law were assured to every one. In Delaware no professionally trained judge held office before the Revolution.[2]

Pennsylvania

The colony of Pennsylvania was fitted out with the most complete system of colonial codes. There was (1) the frame of government, which was unchangeable without the consent of the governor and six-sevenths of the freemen in council and assembly, all freemen at that time being members of the assembly; (2) there were the laws agreed upon in England in 1682, which had the same provisions as to alteration; (3) the Great Law or body of laws enacted at Chester in 1682, containing sixty-one chapters and called the written laws to distinguish them from the foregoing two, called printed laws; (4) the act of settlement passed in Philadelphia in 1683; (5) the laws made at an assembly in Philadelphia in 1683, consisting of 80 chapters; (6) the frame of government of 1683; (7) the frame of government of 1696; and, finally, (8) the laws of October, 1701.[3] These laws are of great interest to the student of legislation, containing the opinions of enlightened and thoughtful statesmen embodied in enactments and gradually modified by practical experience in colonial affairs. They show clearly how very necessary a complete and full

[1] Whitehead, *East Jersey under the Proprietors*, p. 239.

[2] Grubb, *Judiciary of Delaware*, p. 9.

[3] See the collection called *The Duke of York's Laws and Pennsylvania Colonial Laws*, which will be cited simply as *The Duke of York's Laws*.

statement and codification of the law that should prevail was held by the founders of Pennsylvania; that they did not rely on an informal transfer of the applicable parts of the common law; but that they, with great painstaking, stated in entirely original form the provisions considered necessary for colonial society.

These laws contain many new and far-reaching reforms. Thus, in the laws agreed upon in England in 1682 there are the following provisions concerning procedure in the courts. Persons may appear in their own way and according to their own manner and personally plead their cause; the complaint shall be filed in court fourteen days before trial; a copy of the complaint is to be delivered to the defendant at his dwelling house; the complaint must be attested by the oath of the plaintiff;[1] all pleadings and processes and reports in court shall be short and in English and in ordinary and plain character, that they may be understood and justice speedily administered.[2] This provision antedates by almost two centuries the celebrated New York code-pleading reform, and this clause very clearly and simply states the object this reform sought to bring about. The period of prescription for the acquisition of title to land is fixed at seven years.[3] The lands and goods of felons shall be liable to make satisfaction to the party wronged.[4] This is a return to an older idea of law, which at that time did not prevail in the English law; for a felony only the king enforced a forfeiture, the injured party could not obtain any satisfaction. In the laws made at Philadelphia in 1683, there is contained a chapter enumerating the fundamental provisions which are to be changed only by the consent of six-sevenths of the council and assembly; this early attempt to separate the fundamental from the secondary provisions of the law is of great interest to students of American constitutional development. The subjects referred to as fundamental are the following: Liberty of conscience, naturalization, election of representatives, taxes, open courts and freedom of pleading, giving evidence, return of inquest and judgment by inquest (jury),

[1] *The Duke of York's Laws*, Laws of 1682, Chap. 6.
[2] Ibid., Chap. 7. [3] Ibid., Chap. 16. [4] Ibid., Chap. 24.

bail and liberty of person, registry, marriage, speedy justice, the use of the English language in laws and proceedings.

The proceedings of the earliest courts were quite informal. We have some accounts of trials, before the coming of Penn, under the Duke's laws which provided for a jury of six or seven. The major part of this jury could give in a verdict. An informal statement of the matter at issue was made, and though the names of actions were used, there was no sharp discrimination and not even the distinctions between civil and criminal cases were clearly drawn. The administration of justice was rather founded upon the ideas of the magistrates than on any rules of positive law.[1] Lord Petersboro, during his visit to Pennsylvania, was astonished at the simplicity and fewness of laws, the absence of lawyers and the informality of judicial proceedings.[2]

County courts were instituted in the territory later called Pennsylvania in 1673. The procedure was informal, juries of six or seven were in use.[3] Under the new regime, the jurisdiction of courts was defined by the laws of 1683, Chap. 70, and in 1684, courts were given jurisdiction in equity as well as in law.[4] The same court even reversed in equity its own judgment in law.[5] Against this method the assembly complained.[6] In a number of the courts, the names of English actions were used, but *case* was often substituted for *ejectment*.[7] The practice was very much like modern code practice; the complaint was filed fourteen days before trial; ten days before, the defendant had to be summoned, arrested or his goods attached. In court, he might answer in writing; the pleadings were to be in the English language; any defense, legal or equitable, might be interposed.[8] Thus from

[1] See *Pennsylvania Archives*, vol. VII, pp. 725-730; *The Duke's Laws*, 462; *Memoirs of the Historical Society of Pennsylvania*, vol. VII; Dr. Geo. Smith's *History of Delaware County*.

[2] I Spencer's *Anecdotes*, 155, quoted in *Pennsylvania Bar Association Reports*, I, 229.

[3] *Duke's Laws*, 414.

[4] Ibid., 167.

[5] Hastings vs. Yarrall, *Records Chester County Court*, 1686.

[6] *Votes of the Assembly*, I, 76.

[7] *Sussex County Records*, 1682, quoted in *Pennsylvania Bar Association Reports*, I, 362.

[8] Laws of 1683, Chap. 66; Laws of 1684, Chap. 167.

the first legal and equitable relief was administered by the same courts in Pennsylvania. By the laws of 1683, Chap. 71, an informal body of arbitrators, called peace-makers, was instituted. The appellate court was called the provincial court, but the council also had appellate jurisdiction; and in connection with this it had a jurisdiction, like that of the permanent council of the mediæval English kings and of the Star Chamber, to punish maladministration and malfeasance on the part of powerful officials.[1] As the English Parliament of the time of Edward III, so the Pennsylvania assembly petitioned against this extraordinary jurisdiction. In 1701, it requested that "no person shall be liable to answer any complaint whatsoever relating to property before the governor or his council or in any other place but the ordinary courts of justice."[2]

Pennsylvania at this early period effected the union of equity and law in jurisdiction and in practice, a method that has always characterized the jurisprudence of that state. The voluminous legislation in the case of Pennsylvania may be due to the fact that the charter granted by Charles II. declared that the laws of property and of crimes in the province should be the same as they were in the kingdom of England, until altered by the proprietor. The legislation of Pennsylvania covering virtually the whole field of property law may be called the first complete codification of law made in America.

Penn himself was anxious to secure the services of trained lawyers. In a letter to Logan[3] he says that he has granted Roger Mompesson the commission of chief justice and he advises the people to lay hold of such an opportunity as no government in America ever had of procuring the services of an English lawyer. Mompesson, however, did not remain in Pennsylvania long; he went to New York where he became chief justice, being appointed by Cornbury. The first lawyer who became chief justice of Pennsylvania was Guest, in 1701.[4]

[1] *Pennsylvania Colonial Records*, I, 20, 79, 95, 96.
[2] Ibid., II, 37.
[3] Quoted in Field's *Courts of New Jersey*, 58.
[4] *Penn and Logan Correspondence*, I, 19, 48.

The early law of Pennsylvania is very original and contains the germs of many developments that specially characterize American jurisprudence. There was, in this colony, from the first a desire for settled legal relations, which finds expression in a discussion in the colonial council in 1689. When it was there proposed that in doubtful cases the magistrates might apply the colonial laws or the common law at their discretion, this was held too uncertain, and the sole validity of the laws of Penn was upheld.[1] On the question of substituting affirmation for oath, numerous English law precedents were, however, cited by the assembly to the governor.[2] The law of manslaughter is left to be determined by the law of England, in 1705.[3]

Maryland

By the charter of Maryland, full powers of government were given to the proprietor. He might establish laws, and was not required to submit them for the approval of the Crown. He could establish courts, and process ran in his own name, and he was empowered to grant titles of nobility. He stood in the position of a count palatine.[4] In 1635, the first legislative assembly met, passing a body of laws which was rejected by the proprietor. In 1637, the proprietor and the assembly mutually rejected laws proposed by each other. This caused a serious dead-lock, and it seemed impossible to create a code of laws such as had been found necessary in all the other colonies. The colonists, accordingly, in the absence of a code of positive laws claimed that they were governed by the common law of England, so far as applicable to their situation. The proprietor opposed this claim on account of the interference with his rights, and the controversy thus arising was not finally settled until 1732.[5]

The rule of judicature was first fixed by the laws of 1642, in which it was ordered that civil causes should be tried according to the law and usage of the province, having regard

[1] *Pennsylvania Colonial Records*, I, 291.
[2] Ibid., II, 627. [3] Ibid., 210.
[4] Brown, *Civil Liberty in Maryland, Maryland Historical Society Papers*, 1850.
[5] McMahon's *History of Maryland*, Chap. III.

to the former precedents. In defect of such law, usage, or precedent, the case shall be determined according to equity and good conscience "not neglecting (so far as the judge shall be informed thereof and shall find no inconvenience in the application to this province) the rules by which right and justice useth and ought to be determined in England." The common law of England seems here rather to be looked upon as a system useful for illustration and guidance than a subsidiary law; equity and good conscience was considered to afford proper rules to fill the omissions of the positive law.[1]

The rules for trial were in many respects unusual. The judge is allowed to administer an oath to either party in a civil cause, and on the refusal of the party to testify may proceed as if the matter asked had been confessed.[2] The power of the judge in controlling the jury is very great. If he thinks a verdict unjust he may return the jury or charge another. If he find the jury evidently partial or willful, he may charge another jury, and if their verdict is contrary the first jurors may be fined. Among these provisions we also find one of the earliest exemption laws. Tobacco, necessary clothing, bedding, utensils, and tools are exempt from execution.[3]

The fettered legislative powers of this colony, the unlimited discretion allowed the governor and his council in administration, by the charter, and the somewhat heterogeneous character of the population, led the colonists later more strenuously to insist upon the observance of the principles of the common law as a subsidiary system. Therefore we find that in 1662 an act was passed declaring that when the laws of the province are silent, justice is to be administered according to the laws and statutes of England; and that "all courts shall judge of the right pleading and the inconsistency of the said laws with the good of the province according to the best of their judgment."[4] This act was in force for only a short time, and the rule of judicature was therefore not long estab-

[1] *Archives of Maryland, Proceedings of General Assembly*, 147.
[2] Ibid., p. 150. This practice is perhaps taken from the canon law.
[3] Ibid., p. 152.
[4] *Maryland Archives, Proceedings of Assembly*, p. 436.

lished by express law. It is, however, the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable. The rule stated in the act of 1662 was also contained in the commission of judges, and thus the proprietor seems to have sanctioned this adoption of the common law; the later controversy turned more on the question of the adoption of the statute law of England.

In 1674, an attempt was made to determine by law what English criminal statutes were in force in Maryland. The lower house insisted on the adoption of the whole English statute law, saving all laws of the province not repugnant to the laws of England.[1] The council argued with the lower house, asking them to consider the dangerous consequences of an adoption of the entire English criminal law. They referred to the volume of the English laws and to the difficulty of ascertaining what statutes are at present in force. On account of this uncertainty the lower house is requested to designate certain statutes which are to be re-enacted and thus be a guide to the judges.

In 1678, we find that it is ordered to purchase Keble's *Abridgment of the English Statutes* and Dalton's *Justice* for the use of the various county courts.[2]

The struggle between the proprietor and the people concerning English laws revived in 1722. The people claimed that the lord proprietor had already allowed them the benefit of the common law as their right according to the common opinions of the best lawyers, and that the controversy now was only concerning the applicability of the English statutes.[3] Lord Baltimore resisted the introduction of the English statutes "in a lump," as he expressed it, as doing away with his veto power; while the lower house insisted upon a complete adoption. By the act of 1732 the controversy was settled by the following somewhat equivocal statement that "when the acts and usages of the province are silent the rule of adjudicature is to be according to the laws and statutes and

[1] *Maryland Archives, Assembly Proceedings*, 1666-1676, p. 374.
[2] *Maryland Archives, Proceedings of Assembly*, 1678-83, p. 70.
[3] See citations in McMahon's *History of Maryland*, Ch. III.

reasonable customs of England, as used and practiced within the province." [1] However, the power of the courts to apply any English law, customary or statutory, which they found suitable to American conditions was no longer disputed.

The opposition to lawyers common in the colonies we also find in Maryland. [2] The great influence which the theory of the adoption of the common law gave to the courts was recognized in a resolve in 1684, which stated " that it left too much to discretion and is an open gap to corruption." [3] At this time, however, the lord proprietor insisted that if the English laws were to be used the governor and chief justice must be allowed to decide when they ought to be applied. Only on this basis would he consent to a re-enactment of the judicature act. [4] The attitude of the people toward the proprietor is further illustrated by the fact that an appeal to the king in legal proceedings was asked for. [5]

Although, even in the earlier practice of Maryland, the terms of English law were used, its principles were often entirely neglected, and matters settled according to a rough equity. [6] Thus, in a case of homicide, the jury brought in a verdict finding accidental killing and no negligence; the court, however, fined the person who had handled the weapon that caused the accident. [7] In another criminal proceeding the accused is arraigned and pleads guilty before the grand jury passes on the indictment and finds it *billa vera*. [8]

III. THE SOUTHERN COLONIES

Virginia

The prevailing belief that codes of law are necessary for new colonies is evidenced by Crashaw's sermon preached before the London Company in February, 1609-10. Crashaw

[1] McMahon's *History of Maryland*, p. 127.
[2] *Proceedings of Assembly*, II, 168.
[3] *Maryland Archives, Proceedings of Assembly*, 1684-1692, p. 71.
[4] *Maryland Archives, Lower House Journal*, 1676-1702, q. 107.
[5] *Maryland Archives, Proceedings of Council*, II, 140.
[6] *Maryland Archives, Provincial Court.*
[7] This recalls the early principle that the possessor or even the owner of the weapon by which the injury was caused is responsible.
[8] Ibid., p. 183.

said: "Be well advised in making laws, but being made let them be obeyed, and let none stand for scare-crows, for that is the way at last to make all to be condemned." [1]

The instruction for the government of the colonies [2] fixed general rules for the descent of lands, criminal law, jury trials, and placed civil jurisdiction in the hands of the governor and council. The first code intended for the colonies, printed at London in 1612, and entitled Laws Divine, Moral and Martial,[3] was exceedingly severe, and Sir Thomas Smith, the governor, was later much abused for having introduced it into Virginia. On account of the character of the population a strict rule was, however, absolutely necessary. In 1620, an attempt was made by the London company to compile a more adequate and humane code. Sir Edwin Sandys proposed the appointment of several committees for the following purposes: (1) compiling the laws of England suitable for the plantation; (2) collecting the orders and constitutions already in existence; (3) revising the laws passed by the Assembly. These committees were finally to meet and harmonize the entire body of laws which was then to be submitted to the king. Among the commissioners was John Selden.[4] These committees, however, did not report and Governor Yeardley asked for authority to make a collection of suitable laws.[5]

The first legislative assembly of Virginia met in 1619. It passed a number of laws and petitioned the council that they would "not take it in ill part if these laws passed current and be of force until we know their further pleasure out of England, for otherwise this people would in a short time grow too insolent." There is here so far no claim of the immediate validity of English laws in the colony, and all parties concerned seem to think the formation of a new code adapted to the circumstances of the settlers necessary. In 1631, the oath of commissioner of monthly courts was fixed as follows: "You shall do equal right to poor and to rich after your

[1] Brown, *Genesis of the United States*, p. 371.
[2] Ibid., pp. 368-71. [3] Ibid., p. 528.
[4] Proceedings of the Virginia Company of London. *Virginia Historical Collections*, vol. VII, p. 55.
[5] Ibid., p. 55.

cunning, wit and power and after the laws and customs of this colony, and as near as may be after the laws of the realm of England." [1] There was not in Virginia, as we have noted in many of the other colonies, a system of courts whose magistrates were elected by the people. The county courts were presided over by eight or ten gentlemen receiving their commission from the governor. Notwithstanding the source of their appointment, these men, not being educated in law, would perhaps not be governed by considerations much different from those obtaining in the popular courts of Massachusetts and Connecticut. The large number of the members of the court gives it the character of a popular tribunal, recalling the Doomsmen of the Anglo-Saxon courts, who declared the custom and fixed the mode of trial. Appeal lay from these courts to the general court, composed of governor and council. Their jurisdiction was developed by custom and the forms of proceedings were quite irregular. They also exercised a general chancery jurisdiction.

By the statutes of 1661-1662, procedure in the courts was regulated. At the time of the Restoration, Virginia seems to have been especially anxious to show herself loyal to England, and these enactments breathe a deep respect for the common law. In the preamble it is stated that the legislature has endeavored in all things to adhere to these "excellent and refined laws of England to which we profess to acknowledge all due obedience and reverence." As a reason for enacting laws at all they assign the vast volume of the English law from which courts would be unable to collect the necessary principles without the aid of such codification.[2] The former laws are repealed and a new code is enacted. As some former laws restrained the trial by jury quite contrary to the laws of England, the law of juries is restated with special carefulness and precision. It is interesting to note in this connection that the colonists express their regret that they are unable to comply with the requirement of the English jury system that the jurors shall come from the immediate neighborhood of the place where the fact was committed; but they state that they

[1] Hening, *Statutes at Large*, vol. I, p. 169.
[2] Hening, *Statutes at Large*, vol. II, 43.

desire to approach as near as possible to compliance by enacting that six men of the ablest and nearest of the inhabitants of the county shall be on the jury.[1] This reminds us of Sir John Fortescue's contention that France could not have the jury system, because there no neighborhood could produce twelve intelligent and substantial jurors. In this code the period of prescription for land is limited to five years.[2]

The system of itinerant judges existed in Virginia for some time, but was abolished in 1662 on account of the great charge to the country.[3] The nature of the procedure in the county courts is seen from the provision that the bill or complaint must be filed the day before court, that the answer and judgment as well as evidence in the case is also to be filed, that the judgment is to be endorsed on the complaint if for the plaintiff, on the answer if for the defendant.[4]

The administration of law in Virginia was in the hands of the country gentlemen who looked down upon the legal profession, and in no state do we find more hostile legislation concerning lawyers than in the Old Dominion. In 1645 an act was passed expelling the mercenary attorneys.[5] In November, 1647, it is enacted that none shall plead for recompense. That in case the courts shall perceive that "either party by his weakness shall be like to lose his cause, they themselves may open the cause or may appoint some fit man out of the people to plead the cause, but shall not allow any other attorneys." In 1656 the hostile acts were repealed, but only a year later there was again proposed in the house "a regulation or total ejection of lawyers," whereupon the decision was "by the first vote an ejection."[6] A new act was therefore passed[7] forbidding any person to plead or give advice in any case for reward. The governor and council rather opposed this enactment, but promised to consent to the proposition "so far as it shall be agreeable to Magna Charta." A committee was appointed, who upon considering Magna Charta, reported that they did not discover any prohibition contained therein.[8] In 1728, in a paper on the state of the colonies in America,

[1] Hening, *Statutes at Large*, vol. II, 63.
[2] Ibid., 97. [3] Ibid., II, 179. [4] Hening, II, 71.
[5] Hening, I, 482. [6] Hening, I, 495. [7] Ibid., p. 482.
[8] Neill's *Virginia Carolorum*, p. 264.

Keith gives a very unfavorable account of the administration of law in Virginia. In order to unify and settle the law he favors the appointment of circuit judges from England.[1] Governor Gooch, in his answer to Keith's criticisms, says that the practice of courts is exactly suited to the circumstances of the respective governments and as near as possibly can be conformable to the laws and customs of England, and that the judges are of competent knowledge in the laws, though not all of them profound lawyers.[2]

The Carolinas

In the case of the Carolina colonies the enforcement of a very complete code, the celebrated Fundamental Constitutions, was attempted by the proprietors. These Constitutions were reactionary in the extreme, and attempted to introduce an intricate feudal system into the new colony. The redeeming feature of the act lies in its very liberal provisions concerning religious affairs, giving any body of believers the right to worship according to the dictates of their conscience. It is very doubtful if aside from these provisions concerning religion the Fundamental Constitutions had any permanent influence in molding the jurisprudence of the Carolinas. They were first promulgated in 1668, and were reissued in modified forms repeatedly until their final abandonment in 1698. The purpose of this code was to "establish the interest of the proprietor with equality and without confusion that the erecting of a numerous democracy may be avoided."[3]

We have no satisfactory information about the actual administration of justice in the early days of Carolina. The different colonies in the Carolinas had originally, however, very little in common, being settled by various elements. And it is highly probable that each of these colonies developed at first its own customary and popular methods of dealing with legal controversies.[4] The Carolinas were among the earliest

[1] Byrd Manuscripts, 1728, p. 222.
[2] Ibid., p. 237.
[3] Fox Bourne, *John Locke*, p. 38; and Hawks, *History of North Carolina*, p. 182.
[4] Chalmers' *Political Annals*, p. 521.

colonies to adopt the English common law as a rule of adjudicature. This was done in South Carolina by the act of December, 1712.[1]

Before, in 1692, the assembly in an address to Governor Ludwell had complained because "the Palatine Court assumed to put in force such English laws as they deemed adapted to the province; but the assembly conceived that either such laws were valid of their own force, or could only be made so by an act of assembly."[2] The proprietors assumed that all laws of England applied to the colonies, but in 1712 they receded from their position by approving the act adopting the common law and such statutes of England as had been selected by Chief Justice Trott as applicable to the condition of the colony.[3] The act of 1712 puts in force all English statutes declaring the rights and liberties of subjects, as well as the common law, except where it may be found inconsistent with the customs and laws of the province. The law concerning military tenures and ecclesiastical matters is especially excepted. The courts are here, as in Maryland, given the power to apply the principles of the common law. In North Carolina the same object was accomplished by the act of 1715, entitled "An act for the better observing of the queen's peace," which declares the colony to be "a member of the crown of England," and provides that the common law shall be in force in this government "so far as shall be compatible with our way of living and trade." The practice of issuing writs is specially excepted. Certain enumerated statutes, such as the statute confirming the privileges of the people and security of trade, the statute of limitations, and the statute of frauds, are also adopted by this act.

From the scanty records of the early days of the colonies we can glean that the proceedings were often very informal. The discretion of the magistrates in inflicting punishment was very wide, as is apparent from the cases cited by Hawks in his history.[4]

[1] See Robt. Mills, *Statistics of South Carolina*, p. 196.
[2] Rivers, *Historical Sketch of South Carolina*, p. 433.
[3] *Statutes of South Carolina*, II, 401.
[4] Hawks, *History of North Carolina*, II, 122, 218.

A court of chancery was established as early as 1697, in which the English chancery practice was in the main adhered to.[1] At a very early date trained lawyers were among the judges in these colonies; in the year 1729 we find that on the question of the effect of a general pardon an English case [2] is cited and followed in the adjudication, one of the earliest instances where such a use of English authorities can be ascertained.

In South Carolina, the city of Charleston was for almost a hundred years the seat of the colonial court, the source and center of judicial proceedings. This of course was favorable to an earlier reception of the English common law, as a centralized system of judicial administration always leads to a more highly developed form of juristic conceptions. On the other hand this concentration of jurisdiction had the effect of leaving large tracts of the colony virtually without regular administration of the law, so that in the remoter parts of South Carolina associations of regulators had to be formed to deal out a rough popular justice.[3]

Anthony Stokes, Chief Justice of Georgia, in his *View of the Constitution of the British colonies of North America and the West Indies*, London, 1783, gives a very interesting discussion of the state of legal administration in the southern colonies. He states that the colonies where the system of county courts prevailed, where there were a large number of judges in general unacquainted with the law, little decorum was observed in the courts; but the colonies where the judges of the superior court went on circuit had a more impartial administration of justice. A system of circuit courts, however, was not established in the colonies in the 17th century, except for a short time in Virginia. And the lack of a harmonious, unified, and consistent rule of adjudication may be inferred from the one fact of the absence of a unified judiciary. Of course a system of appeal would tend to unify the law, but in these early days an appeal to a central court was by no means an easy matter, and, in the ordinary administration of justice the citizens undoubtedly took their law from the

[1] Hawks, *History of North Carolina*, II, 134.
[2] 2 Croke, 148. [3] Ramsay's *History of South Carolina*, p. 120.

popularly elected magistrates who had no pretensions to a knowledge of technical jurisprudence.

Stokes also discusses the question as to what part of the English common law the colonists had brought along with them.[1] His answer illustrates the vagueness and the unhistorical character of the legal theory. He says that the general rules of inheritance and personal injuries were brought along; not, however, the artificial distinctions and refinements of property law, the laws of police and revenue, etc. Now we have seen that the law of personal injuries was usually fixed by the codes which the colonists established at an early date, the rule of inheritance too was in most colonies varied from that of the common law; and certainly an adoption of any system which would leave out property law could be styled an adoption only in a very modified sense of the term.

IV. CONCLUSION

When we come to consider from a more general point of view the attitude of the early settlers toward the common law, we find that certain views of law pervaded all the colonies; that in other matters the various colonies followed their own bent and were influenced by their special conditions or the special purposes of their polities. A general trait of early colonial law is codification. It seems to have been universally considered necessary to state the essential elements of law for the guidance of the colonists who had taken up their abode in a wilderness without books or facilities for legal study, who therefore in the nature of things could not use a system which, like the common law even of that date, necessitated a vast apparatus of technical treatises, of reports, and of statute books. In all the colonies except Maryland we find an early codification of the essential elements of the law. In Maryland, as we have seen, this was prevented by the controversy between the people and the proprietor, but even there considerable legislation was produced at an early date. Some of the codes, like those of Massachusetts and Penn-

[1] Stokes, *View of the Constitution of the British Colonies*, pp. 9, 10.

sylvania, departed in many essentials radically from the principles of the common law, and show that their framers consciously desired to meet the entirely novel conditions of the colonists by new and appropriate legal measures. We may safely say that these codes were in the first decades of the colonies almost the sole source of legal knowledge, of rules for adjudication. As to matters not covered by the law there stated, the good and careful discretion of the popularly elected magistrates or appointed judges was relied upon to furnish a just rule satisfactory to the popular sense of right. In some instances we have noticed the use of elementary English treatises on actions, like Dalton's *Justice*, but we have also noticed that while the names of the forms of actions were used, the greatest laxity and informality prevailed in their application and in the general practice of the popular courts.

Some of the colonies declared the English common law subsidiary in cases not governed by colonial legislation, at a comparatively early date. We have noted this in the case of Maryland, Virginia and the Carolinas. But other colonies very early made unequivocal declarations establishing the law contained in Scripture as subsidiary law in their system. This is true of Massachusetts, Connecticut, and New Haven and to a certain extent of New Jersey. In both cases, however, in the earlier days before a trained bench and bar had come into existence, a declaration of the existence of a subsidiary law would but little bind the otherwise unfettered discretion of the popular judges; because undoubtedly these judges (like the Chancellor in Marks vs. Morris, 4 Hening and Mumford, 463) would epitomize the common law in the ancient rule of "*honeste vivere*" and thus apply their own ideas of justice until called to account by a trained bar, which arose later, during the 18th century.

The records that have been examined exhibit everywhere, especially in the popular courts, a great informality in judicial proceedings. The large number of judges in these courts would of itself tend to make the practice informal, to make the trial more like a deliberation of a community

by its representatives on the justice or injustice of the case involved. The absence of a jurist class, and especially the universal prejudice against lawyers, proves that a popular and not a technical system was being enforced. The technical knowledge of the lawyer was not in demand, and, like Lechford, the lawyers had to turn their hands to semi-professional or non-professional work, the courts of the colonies at that date having no need of the aid of a trained profession to discover what was the law, as by the custom of the time the law was in so many cases determined by the discretion of the court. It seems just to conclude that usually the administration of law was carried on not according to the technical rules of a developed system of jurisprudence but by a popular tribunal according to the general popular sense of right.

The original elements in the early colonial laws are great in number and import. They foreshadow and anticipate some of the most far-reaching American law reforms. Pleading is simplified, and the intention is in many places expressed that it shall be possible for any man of ordinary intelligence to plead his own cause before the courts. This innovation supports the same conclusions that we have reached from the facts of the institution of popular courts and the absence of trained jurists. Evidence was in many colonies given in writing, or at least taken down by the clerk and made a part of the record in the action; a practice utterly abhorrent to common law ideas, not so to the popular mind to whom the evidence is the most important part of the case. Various modifications of the jury system have been noted, but in general this venerable and highly popular institution was adopted in the colonies in its English form at an early date. The period of prescription was in many of the colonies lowered to five or seven years, a change that was of course eminently consistent with the conditions of an infant colony on a new continent. Executions on land were permitted, and in many cases the fundamental distinction between real and personal property in the English law was obliterated or ignored. The laws of inheritance and of tenure were, as we have seen, very ma-

terially modified, very often leading to the adoption of a system totally unlike the common law at that period.

The historian will be interested in the reversion to the more ancient customs of the common law which we have ascertained in a number of cases. Such are the bestowal of judicial functions in law and in equity on the councils, protests against the extraordinary jurisdiction of which recall the history of the jurisdiction of the Great Council and Chancellor in England in the 13th and 14th centuries. We have seen how archaic ideas of the jury were given a new lease of life; Georgia, even after the period of independence, using a system of controlling the jury that was modelled on the old method of attaint. The idea of tort liability for crimes was revived, an idea that has been in the last decades again enforced with new emphasis by our legislatures. But the most important and interesting revival of older institutions is found in the popular courts composed of a comparatively large number of judges, recalling the twelve thanes of early English law, who declared law and custom in a simple, straightforward manner. Men here appear to plead their own causes, unassisted save by the unremunerated help of a friend or by the court itself. The court is not a trained judge, drawing his knowledge from, and supporting his judgment upon the accumulated wisdom of ages of legal development, but a popular committee representative of the people and enforcing the general popular custom and sense of justice.

We have also noted the prevailing views on the nature of law. The analytical theory of Hobbes, making positive law independent of moral considerations and basing it on a sovereign will, was not accepted at that time. The law of God, the law of nature, was looked upon as the true law, and all temporal legislation was considered to be binding only in so far as it was an expression of this natural law. With such a view of the nature of legal obligations, it does not seem strange that the magistrates should look for the true law in their own sense of right and justice, or, in the Puritan colonies, in the word of God.

The views of the common law when expressed are of the

most rudimentary and incomplete kind. Ignorance of the system is often most frankly confessed, and when a comparison is instituted between the colonial laws and the common law, Magna Charta is often taken as a complete embodiment and expression of the latter. This is true not only in the Puritan colony of Massachusetts, but also in Virginia where, when it was to be decided whether an act was contrary to the common law, the committee thought it sufficient to examine Magna Charta.

Among the early colonists we therefore find a very clear perception of their destiny to work out a new legal system, to establish rules dictated by their special polity or by the conditions of primitive and simple life in which they found themselves. Respect is often expressed for the common law, the resolution is in some cases even formed of using it as a model, but it is only in a few cases clearly established as the rule of judicature and in still fewer instances followed with precision in the ordinary administration of the law. The colonial codes cover the more essential parts of the law, leaving cases therein not anticipated to be decided by the discretion of the magistrates. The theory of the transfer of the common law as subsidiary law at the beginning of the colonies is therefore, in its unmodified form, not a true statement of colonial legal relations. We cannot understand the history of our law, nor justly value the characteristic development of our jurisprudence, unless we note the actual attitude of the earliest colonists towards the common law, an attitude sometimes of apathy, of lack of understanding, sometimes of resistance or ignorement, sometimes, as in the case of Maryland, of admiration and adherence from the first.

It has been said that the colonists imported the general principles, the general system of reasoning of the common law. This is either self-evident or too indefinite to be of any historical value. It is certainly true that ideas of right and positive law develop side by side mutually influencing and reacting upon each other; and in this sense the English colonists, in their general ideas of justice and right, brought with them the fruits of the " struggle for law " in England.

But when the expounders of the theory attempt to descend to particular statements of these general principles, they use colorless phrases that might as well be applied to any other system of civilized jurisprudence as to the common law. And when we apply the theory to the facts, we find that it is not a true and complete statement of the basis of jural relations in the early colonies.

Most of the colonies made their earliest appeals to the common law in its character of a muniment of English liberty, that is, considering more its public than its private law elements. In the 18th century, with a more jealous supervision of colonial development by the mother country, the introduction of law books, and the growth of a trained bench and bar, a more general reception of the private law principles of England is brought about.

To state the final conclusion arrived at: The process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles. This is but natural; the common law was a technical system adapted to a settled community; it took the colonies some time to reach the stage of social organization which the common law expressed; then gradually more and more of its technical rules were received. [1]

[1] For a short bibliography by the author of this Essay, of treatises, essays, and other sources, relating to Colonial Law, see Volume II of these Essays, Topic I, "Sources and Materials." — Eds.

12. THE THEORY OF THE EXTENSION OF ENGLISH STATUTES TO THE PLANTATIONS[1]

By St. George Leakin Sioussat[2]

THE rapid expansion, in recent years, of the territory belonging to the United States, and the judicial determination, in the Insular Cases, of the relation of subject peoples to the American Republic have revived a question as old as the Constitution itself. This latest phase, involving possessions disconnected and far removed, makes us readier than before to examine the experience of other colonizing powers, especially of that British Empire from which the thirteen colonies separated themselves by the Revolution. At the present writing, moreover, the modern constitution of that empire is being subjected to fresh scrutiny and review, through the pressure of economic problems whose solution involves to the foundation the relation of Great Britain and her dependencies. But since, in the logic of history, the present has grown out of the past, a study which carries us back to the first building of that imperial system, and to the time when we were part of it, seems to be not unseasonable. Therefore, as our last chapter was local in its point of view, this is to be imperial in its outlook; and, leaving as beyond our proper field all considerations of economic relations, we shall inquire

[1] These passages are extracted from an essay on "The English Statutes in Maryland," Johns Hopkins University Studies in History and Political Science, 1903, volume XXI., being c. II., pp. 17-30.

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Other Publications: Highway Regulation in Maryland, 1899; Baltimore (Historic Towns of the Southern States), 1900; Economics and Politics in Maryland 1730-1750 (Johns Hopkins Studies), 1903; Virginia and the English Commercial System (American Historical Association, vol. I.), 1905.

briefly into the theories held, in the seventeenth and eighteenth centuries, by English judges and lawyers, as to the legal status of the colonies, and especially as to the extension to these of Statutes of the British Parliament. Afterwards, for the purpose of comparison, we shall review the experiences of a few other colonies, which involved these theories or principles similar to those contested in Maryland.

We may first direct our attention to a case which was decided early in the seventeenth century, as a result of the union of the English and Scottish monarchies in the person of James I. For details as to the desire of James to secure for his Scotch subjects the rights of citizenship in the richer land of the South, and the general history of the "Post-nati," we must refer to the historical writings of Gardiner and Hallam, and here direct our attention to a test case, known as Calvin's Case, made up in connection with the Post-nati decision that citizens of Scotland born after James' accession were to be accounted as legally naturalized in England. In Calvin's Case the Judges enunciated certain opinions as to the position of "dependencies" with relation to the central government. A dependency, they held, was a "parcel of the Realm in tenure," and Parliament might make any statute to bind such dependency, where the latter was definitely named; but without such special naming a statute did not bind.

At the same time the judges went into an extended classification of the dominions dependent on the British Crown. These they divided into

1. Christian countries to which the laws of England have been given by King or by Parliament.

2. Countries which come to the King through inheritance. In neither of these can the King "change" the laws.

3. Conquered countries inhabited by Christians. Here the laws of the conquered remain in effect until the King changes them, — which is entirely within his prerogative.

4. Conquered heathen countries at once lose their rights or laws by the conquest, "for that they be not only against Christianity, but against the law of God and of nature,

contained in the Decalogue." As to these, the monarch "by himself and such judges as he shall appoint, shall judge them and their causes according to natural equity . . . until certain laws be established among them." [1]

The year in which this decision was rendered (1607) marks the very beginning of successful English settlement in North America; but the principles then formulated were put into practice especially in the colonization of Ireland in this and in the succeeding reign.[2] For the ends of this paper, it is to be remembered as the first "leading case" that declared the distinction between conquered and settled dependent territories, and applied a different rule to these classes respectively.

As settlement in the new world progressed, and governments of one form or another were established by royal permission, or instruction, we find all the charters save one granting to the colonists the rights of English citizens, and the claim to these rights maintained by the inhabitants of every colony, whether in possession of a charter or not. As to the interpretation of these rights, and the determination of their extent, discussion and dispute were more or less continuous. Every colony, however, at some time during its constitutional history had to face this question of the relation of the colonial law to the legal system of the mother country. In our ordinary study we naturally emphasize the history of the English

[1] 7 Rep. We have followed the analysis in Snow: The Administration of Dependencies. The case was almost always cited whenever the question came up. Of especial interest is Lord Mansfield's brief consideration of it in the Grenada Judgment (Campbell v. Hall), 1774. His remarks were published in pamphlet form as Lord Mansfield's Speech on Giving the Judgment of the Court of King's Bench . . . in the Case of Campbell v. Hall . . . London, 1775; A New Edition, Corrected. He calls attention to the "absurd exception, as to pagans . . . (which) shows the universality and antiquity of the maxim." The earlier history of these principles, before Calvin's Case, lies beyond our discussion. It may be noted, however, that they belong to International Law.

[2] The frequency of reference to the analogy of Ireland's law is noteworthy. See the matter upon the constitutional development in Ireland, in Hallam. The Constitutional History of England, ch. xviii. Compare, also, I. Blackstone's Comm. 103-4; Lord Mansfield's decision in Campbell v. Hall, quoted above; a pamphlet entitled The Privileges of the Island of Jamaica Vindicated, London, 1766 (rep.) A recent discussion of this whole matter is found in Snow, A, The Administration of Dependencies, chaps. 1-4.

colonies on the Atlantic coast — and of only some of those — but occasionally we are led to other regions for our best sources of information.

The next important judicial decision was one that concerned the colony of Jamaica. The whole constitutional development of this island is of the greatest significance in American colonial history, and far too little attention has been paid to it. In this connection, especially, certain similarities and certain differences render very interesting a comparison with Maryland.

The case of Blankard v. Galdy is one to which very frequent reference will be necessary. The matter at issue was a suit on a bond, and involved the extension of an English Act to Jamaica. The counsel for the plaintiff argued that Jamaica was an island beyond the sea conquered from the Indians and the Spaniards in Queen Elizabeth's time [1] [sic], that the inhabitants were bound by their own law, and that as they were not represented in Parliament, so they could not be bound by English statutes unless specially named. Statutes were cited — among them 5 Eliz. ch. 4, as to servants — which would be destructive if enforced there, and others, such as the Act of Usury, which does not apply, "for they allow them more for the loan of money than is permitted by that law." Several Acts of Parliament which have "taken notice" of Jamaica are cited.

Then is adduced the Earl of Derby's Case, where the Court held that English statutes did not bind the inhabitants of the Isle of Man, a conquered province, unless they were specially mentioned.

Counsel for the defendant argued contra that the liberties lost were those of the conquered; those that conquer cannot by this conquest lose their laws, which are their birthright, and which they carry with them wherever they go. Calvin's Case is then cited, with emphasis in its distinctions between heathen and Christian conquered countries. The experience

[1] The Conquest did not take place, of course, until Cromwell's time, in 1655. An attack was made in Elizabeth's reign, in 1596, under Shirley, but this was not followed up. See Preface to The Importance of Jamaica to Great Britain Considered: London, 1741? This tract deals rather lightly with Constitutional History.

of Ireland is used to point out an analogy between that and the situation of Jamaica.[1]

The Court held, in part:

"1. In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there: so it seemed to be agreed.

"2. Jamaica being conquered and not pleaded to be parcel of the Kingdom of England but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. . . ." [2]

That Jamaica was alleged to be a conquered country caused upon other occasions, some of which we shall notice later, considerable difficulty in determining the legal system of the island. The decision, it seems, is adverse to the extension of English laws, though the judges did not lay stress on the distinction between common and statute law.

A clearer statement appears in the opinion of the Attorney-General, West, rendered in 1720, in which he said:

"The common law of England is the common law of the plantations, and all statutes in affirmance of the common law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are thus in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear." [3]

Nine years later, in connection with the dispute in Maryland, Sir P. Yorke, then Attorney-General, gave an opinion on the same subject, which affords an interesting comparison with that of West.

"Such general statutes as have been made since the settlement of Maryland, and are not by express words located either to the plantations in general or to this Province in particular are not in force there, unless they have been introduced

[1] See below.
[2] 4 Modern 215 ff. Salkeld 411.
[3] Chalmers' Opinions, Vol. I., pp. 194-195.

and declared to be Laws by some Acts of Assembly of the Province, or have been received there by a long uninterrupted usage or practice which may impart a tacit consent of the Lord Proprietary and of the people of the colony that they should have the force of a law there." [1]

The modification here evident was without doubt a reflection of the agitation in Maryland to which we shall devote extended discussion hereafter.

Passing over other cases, we come to the doctrine of the pre-revolutionary period as summed up by Blackstone,[2] who, upon this subject delivers himself as follows:

"Besides these adjacent islands [Man and the Channel Islands], our most distant plantations in America, and elsewhere, are also in some respects subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held [3] that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject [4] are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. Such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police

[1] Chalmers' Opinions, Vol. I., p. 206. Also in Calvert Papers (MS.) No. 52, p. 14. Chalmers dates this March 9, 1729. The Jamaican controversy referred to below had been settled in the meantime; while the controversy in Maryland had reached its height.

[2] Blackstone's Commentaries (3rd ed. Cooley) Introduction, sec. 4, p. 107.

[3] Refers to Salkeld 411, 666. [4] Refers to 2 Peere Williams 75.

and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what time, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature subject to the revision and control of the King in council: the whole of their Constitution being also liable to be new — modeled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change these laws, but, till he does actually change them, the ancient laws of the country remain, unless such as are against the laws of God, as in the case of an infidel country.[1] Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what national justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there, they being no part of the mother country, but distinct, though dependent dominions. They are subject, however, to the control of the parliament, though (like Ireland, Man and the rest), not bound by any acts of parliament unless particularly named."

Lastly, the reader is referred to Mansfield's decision in the case of Campbell v. Hall.[2] Here the same general principles were stated more elaborately in six propositions, which need not be quoted at length upon the present occasion, as the time and place of the matter at issue lie too far from the limits described for this paper.

These opinions, judicial decisions, and the authority of Blackstone suffice to illustrate the legal theory with which we have to compare the claims put forth by the Maryland colonists. With the cases and decisions that come later, and

[1] Refers to Calvin's Case, 7 Rep. 17. Shower's Parliamentary Cases 31 (Dutton v. Howell).

[2] Cowper, 204. See also the pamphlet mentioned above, p. 18, n. 1.

with the modern classification of the British colonial system, we are not here concerned.[1] It must be remarked, however, first, that the opinions we have quoted show a process of development, and some lack of harmony; second, that while the principles as to extension which Blackstone lays down did, in American courts generally, become the accepted theory of the transfer of English law,[2] a different attitude was assumed towards his consideration of the American possessions as conquered territory; and thirdly, that as Reinsch has shown, the legal theory is not universally supported by the actual facts in the legal history of the colonies.[3]

As we have not undertaken any but the barest statement of this legal theory, so our reference to the experiences of other colonies must be of the briefest. While in every group of colonies incidents turned upon or called in question the same points as the Maryland controversy, and although no complete discussion of this part of the subject exists, we shall on this occasion mention only two or three such happenings which are peculiarly fitted to help us understand the more limited field that we have chosen.

In 1651 the Colony of Virginia surrendered to the Commissioners of the Puritan Government in England. The first article of capitulation declares:

"It is agreed and const'd that the plantation of Virginia, and all the inhabitants thereof, shall be and remain in due obedience and subjection to the Commonwealth of England according to the laws there established, and that this submission and subscription be acknowledged a voluntary act not forced nor constrained by a conquest upon the country, And that they shall have and enjoy such freedomes and priviledges as belong to the free borne people of England, and

[1] For a general discussion of the later development of the theory see Burge, W.: Commentaries on Colonial and Foreign Laws Generally, and in their conflict with each other and with the Law of England, London, 1838. Here will be found the story of the proclamations of 1763 — the Grenada judgment, etc. For Canada and the Quebec Case, see also Coffin: The Province of Quebec and the early American Revolution. See also Egerton, H. E.: A Short History of English Colonial Policy ch. iv.

[2] Van Ness v. Packard, 2 Pet. 137.

[3] Reinsch: English Common Law in the Early American Colonies, *passim* [reprinted in this Collection as Essay No. 11].

that the former government by the commissons and instructions be void and null." [1]

Here seems to be a conscious recognition of the " conquest " idea so emphasized in the decision just quoted. In Maryland itself, however, we have a still clearer example when, in 1684, in a debate between the Houses of the Assembly over the right of the Speaker to issue warrants for election to vacancies, the Proprietor's argument, in support of his own prerogative, that " the King had power to dispose of his conquests as he pleased," roused the ire of the Lower House, which asserted the rights of its members as based on their English origin. This was " their birthright by the words of the Charter." The word " conquest " had a sinister meaning which they resented, and they hoped that the words were the result, not of the Proprietor's own will, but of strange if not civil counsel. The Upper House at once explained that it had no idea of likening the freemen of the Province to a conquered people.[2] The discussion indicates that in Maryland, before the revolution of 1689, this legal theory was known and its application of this principle to Maryland denied.

The narrower question of the extension of the English statutes had been broached in many other plantations. One or two instances will suffice for illustration. In 1692 the Assembly of South Carolina passed an Act authorizing the judicial officers of the colony to execute the Habeas Corpus Act — an Act passed some years later than the settlement of Carolina. This the Proprietors disallowed, however, declaring that all laws of England applied to the colony, and holding that it was therefore unnecessary to re-enact that famous statute in their Province. " By those gentlemen's permission that say so, it is expressed in our grants from the Crown that the inhabitants of Carolina shall be of the King's allegiance, which makes them subject to the laws of England."

Here we have a proprietary Province, of a constitution analogous in so many respects to Maryland, in controversy

[1] Hening: Statutes at Large I., p. 363-4. Cited in part in Snow: The Administration of Dependencies, p. 115, and as a whole in Hart: American History Told by Contemporaries I., pp. 235-6.

[2] Sparks, Causes of the Maryland Rev. of 1689, p. 82 Md. Arch. III. Ass. Pro. pp. 124-125.

over this same matter; but the parties we find taking exactly opposite positions from that which they assumed, respectively, in Maryland. However, the Proprietors here receded from their position, and, in 1712, approved an Act which adopted the English common law and such statutes as were deemed applicable to the Constitution of the Province.[1] A somewhat similar law was passed in North Carolina, in 1715.

Of more direct bearing upon the course of events in Maryland is the experience of her northern neighbor, Pennsylvania, where legal controversies similar to that which we have to follow in Maryland were taking place just a few years before 1722. The efficacy of the English statute law, in comparison with that of local legislation, came up in connection with the unwillingness of the Quakers to take an oath, and their claim that an affirmation was equally valid for legal proceedings.[2]

More closely analogous to the issues developed in Maryland, however, was the evolution of the courts of judicature in Pennsylvania. In the course of a contest between Governor Evans and the Assembly, the former issued an ordinance to establish courts; in which the judges were directed to hear and determine cases "as near as conveniently may be to the laws of England, and according to the laws and usages" of the Province. In equity cases, they were to "observe" as near as may be the practice and proceedings of the High Court of Chancery in England. Against this establishment of courts by ordinance the Assembly remonstrated, but to little purpose, and the quarrel dragged on through subsequent administrations.[3] The constitutional points in dispute lie without the scope of our consideration, but the reference to the laws of England concerns us directly.

Furthermore, in 1718, Governor Keith and the Council fell out over the commissions of the judges. Should they run in the name of the Governor merely — as had been the case — or should they not rather run in the name of the King, with

[1] McCrady, E.: The History of South Carolina under the Proprietary Government pp. 247-8, 517 ff. Reinsch: English Common Law, pp. 49-50.

[2] Shepherd, W. R.: History of Proprietary Government in Pennsylvania, Columbia University Studies in History, Economics and Public Law, Vol. VI., pp. 351-369.

[3] Shepherd: Proprietary Government in Pennsylvania, pp. 386 ff.

the Governor's attestation? In supporting the latter view, the Governor argued that the judges were the King's judges; and that the Proprietor had only the right of naming them, and he argued the example of Durham, where by Act of 27 Henry VIII. ch. 24, the power of appointment was taken from the Bishop and vested in the Crown.

"In reply," says Shepherd, "the Council stated that the difficulty had arisen in not distinguishing the difference between England and 'new colonies made without the verge of the ancient laws of that Kingdom.' As the King could give power to subjects to transport themselves to the dominion of other princes, where they would not be subject to the laws of England, so he might allow them to go to any foreign country upon any conditions he might choose to prescribe. Furthermore, since the native Indians, who inhabited these newly discovered American lands, were not subject to the laws of England, 'those laws must, by some regular method, be extended to them, for they cannot be supposed of their own nature to accompany the people into these tracts in America' any more than into any other foreign place. The King, by his charter, had given the proprietor and the people full power to enact laws not repugnant to those of England, but 'without extending any other than such as were judged absolutely necessary for the people's peace and common safety till such time as they should think fit to alter them.'"

Continuing, they urged that precedent was upon their side in other colonies as well; and upon this occasion Keith yielded to their claims.[1]

Thus we see that public sentiment was on the side against extension. In line with this feeling, the Assembly, in 1718, passed an Act definitely extending several English penal statutes, which greatly altered the milder ideals of William Penn's early legislation. The necessity for this, Shepherd suggests,[2] was the advantage taken by many law-breakers of the privilege of affirmation instead of swearing oaths. In the passage just cited, the argument was not technically legal, but in the preamble to this Act the Assembly said:

[1] Shepherd: Proprietary Government in Pennsylvania, pp. 386-7.
[2] Ibid., pp. 388-389.

"Whereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions; but Acts of Parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts." [1]

Here is a clear-cut statement of the "orthodox" theory as to extension, exactly similar in tenor, it will be noticed, to the opinion of West in 1720, given above. Since it is easy to prove that contact between Maryland and Pennsylvania was continuous, and that the politics of the latter exerted a decided influence on those of the former, it is not unreasonable to suppose that this discussion in Pennsylvania, which occurred when discussion on the same point in Maryland was inactive, had something to do with the revival of the quarrel in Maryland in 1722. This hypothesis is helped by the emphasis that we shall find laid by Dulany and his party on the Commissions of the Judges. It is the more remarkable, as the latter argued precisely in opposition to the ideas of the Council in Pennsylvania.

A far more striking analogy appears in the history of Jamaica, to which the case of Blankard v. Galdy has already led us. We found it there claimed and adjudged that Jamaica was a conquered Province; but, as we might suppose, the English inhabitants of the island denied that they represented the conqueror. The military seizure of the island and its cession by Spain did, however, introduce this additional complication into the whole of Jamaica's constitutional history. Moreover, Jamaica was a Crown colony, and had no charter. The instructions and proclamations of Cromwell and of Charles II. were liberal, however. In the time of the latter, especially after the period of military rule had reached a conclusion, the progress of the colony towards a constitutional development like that of the other American colonies was constant. But in 1678, upon objections by the lords of the Committee for Trade, the royal government rejected some of the Jamaican laws, and went so far as to urge that the laws for the island must be made in England, then sent to Jamaica

[1] Shepherd: Proprietary Government in Pennsylvania, p. 390.

for passage by the Assembly, after the manner of Irish legislation under Poyning's Law.

This reactionary attempt of the Crown to compel the civilian was opposed and rejected by the Jamaican Assembly. Then ensued a long wrangle, which left it in great doubt what laws were in force and what not. A temporary agreement as to the practical difficulties was reached in 1684. But the claim of the colonists to the English laws — not only to those passed before the settlement, but to some, like the Habeas Corpus Act, passed after it — was denied by the King in Council and by the courts.

The Jamaica Assembly went farther than that of Maryland, in that they entangled with this controversy the question of levying the public money, and refused to pass a law to grant a perpetual revenue until the Crown would fully admit the rights they demanded. This the Crown for a long time refused to do; but at last, in 1728, the Assembly

"Settled a permanent revenue, not burthensome to themselves. . . . In return for this they obtained the royal confirmation of their most favourite and necessary Acts of Assembly, and the following declaration expressed in the 31st clause of this revenue Act:

"And also all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted or received as laws, in this island, shall and are hereby declared to be, and continue, laws of this his majesty's island of Jamaica forever!

"This clause is justly regarded by the inhabitants as the grand charter of their liberties, since it not only confirmed to them the use of all those good laws which originally planted and supported freedom in England, but likewise of all the other provisions made for securing the liberty and property of the subject in more modern times; when, upon the several overthrows of tyrannic powers in that Kingdom, the subjects' rights were more solidly fixed on the rational basis of three solemn compacts between the sovereign and people: at the Restoration of Charles II., the Coronation of the prince of Orange, and, lastly, the accession of the House of Hanover.

"The little clause before recited has cost the island, in fifty years, about £50,000, the net income of the revenue being about £10,000 *per annum*. Yet, considering the unspeakable benefits derived by them in virtue of this compact, they do not think it too dear a purchase." [1]

Such was the controversy in Jamaica, thus contemporaneous in part with that conducted by Dulany in Maryland. That the Jamaican affair was studied in Maryland will appear below, where we shall find the Proprietor, in 1724, citing the failure of the Jamaicans in one of their attempts to get their English laws. Five years later, in the Maryland Gazette, a letter from Jamaica announces the probability of an agreement. This Act "has been at home near a year" and "cannot well fail of being cofirmed, being exactly conformable in the substance to the draught sent hither from home." [2]

At the time, therefore, when Dulany began his decade of agitation in Maryland, there was, in the first place, a theory or tradition established in the English courts; a tradition not yet distinct, but approaching definiteness. Secondly, there had been frequent occasions in other colonies where the relations to the legal system of the mother country were matters of dispute. Lastly, the uncertainty in Maryland was as old as the colony. With these points in mind, we may perhaps sympathize with "An American," who in "An Essay on the Government of the English Plantations," published at the beginning of the eighteenth century, voiced his complaint that

"No one can tell what is law and what is not in the plantations. Some hold that the law of England is chiefly to be respected, and, when that is deficient, the laws of the several colonies are to take place. Others are of the opinion

[1] Long, Edward: The History of Jamaica, London, 1774, Vol. I., pp. 219-20. The account of Jamaica as a whole is based on the Appendix to the Tenth Chapter of Long's very valuable work; on a pamphlet entitled The Privileges of the Island of Jamaica Vindicated — reprinted in London, 1766, with an appendix; and on the opinion of Yorke and Wearg, the Attorney and the Solicitor-General, as to the legal constitution of Jamaica in 1722-25, Chalmers' Opinions (Colonial, Edition of 1814, Vol. I., pp. 204-224). See also Lord Mansfield's decision in Campbell v. Hall.

[2] Maryland Gazette, June 10-17, 1729. The Jamaican letter is dated March 5.

that the laws of the Colonies are to take the first place and that the laws of England are in force only where they are silent. Others there are who contend for the laws of the colonies, in conjunction with those that were in force in England at the first settlement of the colony, and lay down that as the measure of our obedience, alleging that we are not bound to observe any late acts of parliament in England except such only where the reason of the law is the same here that it is in England." [1]

[1] Quoted in Lincoln: The Revolutionary Movement in Pennsylvania, pp. 117-118. Compare also the section on the Civil Jurisdiction in a Short Discourse on The Present State of the Colonies in America. This pamphlet is No. 6 in A Collection of Papers and Other Tracts, by Sir William Keith, London, 1779 (2nd ed.). This pamphlet, No. 6, was presented to the King in 1728, and thus is contemporary with the struggles in Maryland and in Jamaica.

13. THE INFLUENCE OF COLONIAL CONDITIONS AS ILLUSTRATED IN THE CONNECTICUT INTESTACY LAW[1]

By Charles McLean Andrews[2]

THE colonial era of our history has generally been treated with an insufficient appreciation of its economic forces, and, in consequence, there has been a tendency to minimize the importance of certain periods of that history which show little political activity and are to the world at large dull and uninteresting. Such a period is the first forty years of the eighteenth century, and in the following paper I hope to show why I think that, from the point of view of the English policy toward the colonies and their economic development, this period will in the future stand much higher in the estimate of historians than it does now. The discussion that follows involves a number of points of law, and carries us through a controversy which, although of immediate importance to Connecticut only, was of exceeding interest to all New England, and indirectly touches the general subject of colonial history.[3]

[1] These passages are extracted from an essay on "The Connecticut Intestacy Law," Yale Review, 1894, volume III., pp. 261-294.

[2] Professor of History at Bryn Mawr College, since 1889, and at Johns Hopkins University. A. B. Trinity College (Connecticut) 1884, A. M., 1890; Ph. D. Johns Hopkins 1889; L. H. D. Trinity 1905.

Other Publications: The River Towns of Connecticut, 1889; The Old English Manor, 1892; The Historical Development of Modern Europe, 1896, 1898; Contemporary Europe, Asia, and Africa, 1891-1902; Guide to the Materials in British Archives for American Colonial History (Carnegie Institution), 1907-1908.

[3] My attention was originally directed to this subject by the publication of the first volume of the Talcott Papers by the Connecticut Historical Society and the remarks of Judge Mellen Chamberlain upon them as printed in the Proceedings of the Massachusetts Historical Society, March, 1893. The second volume of the Talcott Papers is now in press, but I am indebted to the editor, Miss Mary K. Talcott, a descendant of the old Connecticut governor, for advance sheets as far as completed.

The starting point of the controversy and its underlying cause was the agrarian system of New England. It is well known to students of the subject that the methods employed in the division of lands by the proprietors of the various towns involved certain principles based on the necessities of a new country. We may believe, if we wish, that these methods were the expression of deep-seated racial traits, but it is more rational to take into account two influences only; first, the agrarian environment in which the settlers had been reared; and, secondly, the conditions and necessities that govern the settlement of a new and uninhabited country. These two considerations will concern us here.

Those who settled the New England colonies were — save in a very few cases — men of the burgher and freeholder class, to whom the detail of the English agricultural life was familiar. They had been inhabitants of towns and villages located on feudal estates and subject to a superior, the King or the lesser lay or ecclesiastical lord; they had in a large number of cases been reared in the midst of the English agricultural system, of which the village community with its long streets, its homesteads, its open fields divided into shots or furlongs and subdivided into what were originally acre and half acre strips, its meadows, pastures, common and waste, was the local unit and that part of the system with which they were in daily contact. To this system that of New England bears a striking resemblance. One cannot compare the old manor maps of the seventeenth and eighteenth centuries with any plan based upon the land records of a New England town without feeling that the similarities are more than coincidences. There is the same village street, the same homestead plots, the same great fields, the same shots and furlongs, and the same subdivision into smaller strips; there are the enclosed meadows held by a few, the pasture and the waste common to all, and there are numbers of trifling manners and customs which show the English origin. It was the local, non-feudal land system which was transplanted with important changes to New England, and formed the basis of the law of real property.

But were we to be satisfied with this statement of the case,

we should be guilty of accepting a hasty analogy. There were other reasons why the local agrarian system of England was in its outward form reproduced by the New England settlers. Had it not accommodated itself to their notions of equality and equity, and to the economic needs of a people settling in a new and uninhabited country, it might have been altered and changed beyond recognition. But the local land-system of England was pre-feudal in its origin, and probably grew out of a primitive system of agrarian equality, a fact which the equal strips, the scattered holdings and the common rights serve to attest. The New England settlers were entering an environment similar to that out of which the English village came, and they therefore found it necessary to change the English local system but little in order to apply the methods of allotment demanded by a new country. The colonists took no retrograde step; all changes from the existing system at home were in keeping with the higher ideas of property and equality which the New Englanders brought with them. The principles which governed their action were three: first, that of preventing the engrossing of lands and their accumulation in the hands of a few, the dangers of which in England were familiar to the colonists;[1] secondly, that of subserving the law of equity by treating every man fairly, not only in giving him a share in conquered or purchased lands, but also in so allotting that share that he might be subject to all the advantages and drawbacks that bore upon his neighbors;[2] and thirdly, that of hastening settlement and

[1] "Whereas much experience shows that sundry inconveniences do arise to the burdening, disturbing or depopulating of smaller plantations, were either sundry lotts or accommodations are engrossed into one hand or possessed or held by unsuitable or unfit persons," etc. *Guilford Mss. Book of the More Fixed Orders.* "Where as there hath been a great abuse in several towns and plantations in this colony in buying and purchasing Home-lotts and laying of them together by means whereof great depopulation may follow," etc. *Laws of the Colony of Connecticut* (ed. 1715), p. 51.

[2] I have discussed this question briefly in an article entitled "Die Stadt in Neu-England," in the *Zeitschrift für Social-und Wirthschaftsgeschichte,* vol. ii. pp. 103-131, 224-240, especially p. 232, note 58. To the instances there quoted I will add two others, as the question is an important one.

"And whereas by the Law of Natural Equity and Right all those that joyned in making the conquest and those that joyned in subdueing the country from a Wilderness (as it then was and in a great measure

the improvement of land.[1] Land was therefore divided[2] by the towns or by the bodies of proprietors into fields, called "squadrons" in Worcester, "furlongs" in Middletown, "shots" in Milford, and "quarters" in New Haven, and these were subdivided into smaller strips ranging from one acre[3] to forty or more in size. Various methods were employed for obtaining equality,[4] and every effort was made to hasten cultivation and to increase industry. Removal was discouraged by liability to forfeiture;[5] alienation was limited by laws common to nearly every town in New England;[6] the

still is) to a condition fit for tillage and Profit should also joyntly and share in the advantages that arise from this their Conquest and Industry and accordingly the first Planters did devide the lands thus obtained among themselves," etc. "An Act for the Settlement of Intestate Estates," *Conn. State Archives, Foreign Correspondence,* II 146, Cf. *Talcott Papers,* I, 148.

"It is a fundamental agreement that all lands whether upland, meadow or home lotts should be made equal, that if it was not equall to other mens in the quality of it it should be made up in quantity, or if it unequall in distance of place it should be made equall in quantity also. So that where you find any parcell to exceed in number of acres more than it is charged with rate you may know that it is allowed for satisfaction to equall his lands to other mens." *Milford Mss. Town Records,* Dec. 28, 1646. For all the extracts from the Milford Town Records I am indebted to Miss J. L. Brownell.

[1] "It was inhabitants and not land that was wanting." *Talcott Papers* I, p. 145, Cf. *Conn. Col. Rec.* II, pp. 185, 187. Palfrey estimates the value of land in 1713 at 6 farthings an acre. *History of New England,* IV, p. 364.

[2] There was greater regularity and uniformity than in England. One system was new, the other old. But by curving the allotted strips, by running the shots and fields a little more irregularly, by throwing in a few gores and headlands, we should have what would be in its main features the same system.

[3] "It is agreed by vote that the remainder of the Dreadful Swamp . . . shall be laid out into acre lotts." *Milford Town Records,* I, p. 62.

[4] The "Purchase Right" which each proprietor had in the town was determined not only by the amount of money subscribed to the purchase of the lands but also by the number of heads in each family. I have discussed the "Purchase Right" at some length in "Die Stadt in Neu-England," and have endeavored to show that its scattered character was due to the desire to obtain equality. This principle permeated the system as the following will show: "Ordered that in this division every one shall have his division in two places, half in the nearest field and the other half in the furthest." *Milford Town Records,* I, p. 10. "The field was divided into two parts lengthwise and the order of holders in one tier would be reversed in the other thus making the distribution more equal." *River Towns of Connecticut,* pp. 44-45, J. H. U. Studies, VII.

[5] Rules to this effect are to be found in every book of Town Records. *Milford Town Records,* I, p. 13. *River Towns,* p. 50.

[6] "Ordered that no man shall sell his house but first he must propound his person and chapman to the town and within twenty days after his propounding it the town to answer his desire to take it off or

burden of taxation and the care of the fences, highways, etc., was distributed as evenly as possible; and every effort was made to increase the amount of land brought under cultivation. All this was characteristic of New England in general and of Connecticut in particular. The life in the latter colony was predominantly agricultural, the industrial and commercial aspects had hardly begun to appear, the government was republican — and for a hundred and fifty years of all the colonial governments it was the one most independent of the mother country [1] — the laws made were adapted to the

let him take his chapman always provided the Inhabitants may buy and sell within themselves notwithstanding this order." *Milford Town Records,* I, p. 11. I have quoted this law from the Milford Records, because it contains some new points supplemental to the many others printed before and has itself never been printed. A similar law passed by the Colony of Connecticut came to the notice of the legal advisor of the Board of Trade who commented on it thus: "This Act would be very extraordinary in England but whether it may not be proper in a country where they are encompassed with enemies is humbly submitted to your Lordship's consideration." The limited range of this law, which grew, as did the intestate law, out of the necessities of the settlement, and the brief period during which it was enforced, prevented it from assuming so important a place in the relations between England and the colonies.

[1] The colonies most exempt from English interference and control were of course Maryland, Pennsylvania, Connecticut, Rhode Island, and Massachusetts. Massachusetts, however, had a royal governor and was obliged to deliver her laws for the approval of the Council within three years after they had been passed, though if they were not repealed within that time they could not be repealed at all. Pennsylvania had a five years limit. But the laws of Connecticut and Rhode Island were not repealable by the Crown; these colonies never lost their charters as did Massachusetts, never came into direct dependence upon the Crown as did Maryland for a short time, and were almost outside the knowledge of the Privy Council and the Board of Trade. There is, however, one difference in the attitude of these colonies toward English law which is interesting. Rhode Island, by referring herself to the law of England in cases where she had none of her own, made some of the laws of England to be her own laws. Connecticut, on the other hand, in case of doubt referred to "some plain and clear rule of the Word of God." In 1665 the Deputy Governor and the Assistants desired the advice of the General Court concerning incest, whether the law of the colony "that orders in defect of a law we should have recourse to the Word of God for our law" were binding or not. The Court decided that the colony should act according to the Word of God. *Conn. Col. Rec.,* II, p. 184. Robert Quary commented on this statement in the Book of Laws as follows: "The people are of a very turbulent, factious and uneasy temper. I cannot give their character better than by telling your Lordships that they have made a body of laws for their government which are printed; the first of which is that no law of England shall be in force in their government till made so by act of their own. Having told your Lordships this, I think there is no further room to admire at any extravagancy acted in the government." Quary to the

conveniences of the inhabitants rather than to the common and statute law of England, and the policy of the colony at all times was to remain hidden as far as possible from the notice of the home authorities. It is no wonder, therefore, that there should have grown up under the conditions — agrarian and economic — attendant on the settlement of a new, partly uninhabited, partly unconquered territory, laws based not on legal theory but on custom, laws that either were not known to English law [1] or were not in accord with it.

Of all these laws none was more important, more an organic part of the life of the colony or fundamental to its welfare, than that which governed the disposal of intestate estates. It is manifest that people influenced by the principles already mentioned in their distribution of land would apply the same principles to the distribution of the realty of an intestate. They certainly would not have undermined the colonial structure by admitting into its construction methods foreign to the general plan. Primogeniture, favorable to the accumulaton of estates, but unfavorable to a rapid increase of the inhabitants, a furtherance of agriculture, and a cultivation of the soil, and opposed to the natural law of equity, was not in accord with the principles of the New England settlers. The intestacy law was, therefore, the unavoidable and logical outcome of the principles which underlay the land-system of

Board of Trade, *B. T. Papers, Plantations General, Entry Book;* D, fol. 201, Cf. *Milford Town Records,* I, 1; *Talcott Papers* I, 143, II. Appendix. "Instructions to Agent." Gershom Bulkeley in his "Will and Doom" complains that "by this Law all the Law of England (Common or Statute or other) is exploded at once." (From MSS. copy of the transcript sent over by Lord Cornbury in the possession of the Conn. Hist. Society. The transcript is in *B. T. Papers, Proprieties,* N. 20.) I know of but two Connecticut Acts directly taken from the English Statute law before 1750. First, "Act about Bastards" from 21 Car. c. 27 and second, "Act for Ease of those who soberly Dissent" from 1 Wm. and M. c. 18 commonly called the Toleration Act. Five others, however, are probably based on English Statute law. 1. "Act concerning the Dowry of Widows." 2. "Act concerning forms of Writs." 3. "Act concerning Deputies Salary." 4. "Act for Regulating Juries and Wiltnesses." 5. "Act relating to Sureties upon Mean Process in Civil Action." In 1750 the Colony printed all Acts passed by Parliament which were considered to be binding on the colony. There are ten Acts in all, and none of these had been reënacted by the colony. *Conn. Col. Rec.* viii. p. 352.

[1] Two laws certainly were not known to English law. 1. "Act for the punishment of Lying." 2. "An Act for the preventing of Oppression."

New England. This becomes the more apparent when we realize that for more than sixty years it existed as a custom in no way binding on the people, and that it did not become a law in Massachusetts until 1692, or in Connecticut until 1699.[1] By the English common law the eldest son was the sole heir and was entitled to the whole estate exclusive of all other children; whereas the colonial law[2] directed that the real estate of an intestate be distributed in single shares to all the children except the eldest son, to whom, following the ruling of the Mosaic Code, the law assigned a double portion.[3] The Connecticut law was not the arbitrary act of the assembly of the colony; it was the sanctioning of a custom which had grown out of the consent of heirs to an intestacy, and which had been proved by experience to be the best adapted to the needs of the colony.[4] Governor Talcott gives in brief the

[1] *Conn. Col. Rec. IV*, p. 307. "I have observed," writes Lieut. Governor Law, "the law to be of no ancienter date than 1699 and our old law book, dated in 1672, prescribes no rule excepting the righteousness and equity lodged in the breast of the County Court." Law to Talcott, *Talcott Papers*, I, p. 119. Also I, pp. 122-123, 144, 392-394. II, pp. 225, 244-245. The October Orders of 1639 contain the earliest form of the law, as follows: "But when any prson dyeth intestate the sayd orderers of the affayres of the Towns shall cause an Inventory to be taken and then the Public Court may graunt the administracon of the goodes and chattels to the next of kin, joyntly or severally, and divide the estate to wiefe (if any be) children or kindred as in equity they shall meet." *Conn. Col. Rec.*, I, p. 38. This was repeated verbatim in the Code of 1650. In the Revision of 1673 to which Law refers there are slight changes in phraseology but none in meaning.

[2] "The said Court of Probate shall and hereby are fully empowered to order and make a just distribution of the surplusage or remaining goods and estate of any such intestate, as well real as personal in manner following: That is to say one-third part of the personal estate to the Wife of the Intestate (if any be) forever, besides her dower or thirds in the housing and lands during life, where such wife shall not be otherwise endowed before marriage; and all the residue of the real and personal estate by equal portions to and among the children and such as shall legally represent them (if any of them be dead) other than such children who shall have any estate by settlement of the Intestate in his lifetime, equal to the other's share; children advanced by settlement or portions not equal to the other shares; to have so much of the surplusage as shall make the estate of all to be equal; except the eldest then surviving (where there is no issue of the first born or any other eldest son) who shall have two shares or a double portion of the whole, and where there are no sons the daughters shall inherit as co-partners."

[3] Deut. xxi. 17.

[4] Another clause of the Act makes this clear. "Unless where all the parties interested in any estate being equally capable to act, shall mutually agree of a division among themselves and present the same

reasons for the intestate law in his instructions to Belcher: — "And much of our lands remain unsubdued, and must continue so without the assistance of the younger sons, which in reason can't be expected if they have no part of the inheritance; for in this poor country, if the landlord lives, the tenant starves: few estates here will let for little more than for maintaining fences and paying taxes. By this custom of dividing inheritances, all were supply'd with land to work upon, the land as well occupy'd as the number of hands would admit of, the people universally imploy'd in husbandry; thereby considerable quantities of provisions are rais'd, and from our stores the trading part of the Massachusetts and Rhode Island are supply'd, the fishermen are subsisted, and the most of the sugars in the West Indies are put up in casks made of our staves. By means of this custom his Maj'ties subjects are here increased, the younger brethren do not depart from us, but others are rather encouraged to settle among us, and it's manifest that New England does populate faster than the Colonies where the land descends according to the rules of the common law. And such measures as will furnish with the best infantry does most prepare for the defence of a people settled in their enemies country. If this custom be, so ancient and so useful, *non est abolenda, sed privare debet communem legem.*"[1]

Such were the conditions out of which the intestate law grew, and such were the reasons for its embodiment, after sixty years of customary use, into law. Economists can find evidence here for the study of land-appropriation in a new country; students of the history of law will be interested in the growth of customary law; but for us the interest is of a different character. The law was clearly contrary to the corresponding law in England. Certain disaffected ones in

in writing under their hands and seals, in which case such agreement shall be accepted and allowed for a settlement of such estate and be accounted valid in law." Winthrop said the same in his Memorial to the committee of the Privy Council. "The Memorialist begs leave further to observe to your Lordships that the pretended custom of distributing intestate real estates amongst all the children was no otherwise introduced than by the consent of parties when lands in those parts were of little or no value." *Talcott Papers*, I, p. 394.

[1] *Talcott Papers*, I, pp. 145-146, Cf. 188-189.

the colony, opposed to the government,[1] and overzealous in finding flaws in colonial law and administration, and ever ready to exhibit such discoveries to the authorities in England, began to question the validity of the custom even before it became a law. This was done by Governor Talcott himself in 1691,[2] and by Major Palmes in 1698,[3] while in Massachusetts Dudley complained of the law in 1693.[4] The question was not destined, however, to become prominent for nearly thirty years, but it early became of importance as part of a larger question, the forfeiture of the charters and the proposal to unite the charter and proprietary colonies to the Crown. The agitation to produce this latter result seems to have grown out of the desire to unite the colonies of Northern America under one military head,[5] and was increased by the controversy over the right of appeal to the King in Council and the dissatisfaction arising therefrom. In Massachusetts a law had been passed regarding appeals, but it was

[1] Major Palmes refused to pay his dues because he considered the government restored after the revolution of 1688 "no government." *Col. Rec. IV*, pp. 325-326.

[2] It is not unlikely that there were other early unrecorded protests against the custom, though probably not many, if there were any, before 1688. Gershom Bulkeley speaks as follows in his "Will and Doom," "if a Man dye Intestate they will and do . . . . distribute his lands among sons and daughters, &c., as if they were pots and kettles. . . . So that their law will not allow an heir or Inheritance at the Common Law which is another repugnancy to the Law of England." It is an interesting fact that Governor Talcott himself, who afterwards so loyally defended the intestate law, should have petitioned the legislature in 1691 when but twenty-two years old against the equal division of his father's estate, and should have claimed possession of the real estate by right of primogeniture. *Talcott Papers*, I, p. xix.

[3] Palfrey, IV, p. 491.

[4] "For want of which [i. e. the same English laws] there are different laws and forms of administration very disagreeable not (only) in lesser matters but even in the descent of estates at the common law." Dudley's "Paper on the Governments of New England, New York, etc." *B. T. Papers, New England, vol.* 7. F. 13.

[5] The period from 1695 to 1715 was a time of trial for the colonies. They were attacked by the French, were in constant trouble from the Indians, were disturbed by the many irritating reports of royal officers and merchants in the colonies, and were not sufficiently established to resist encroachment and to maintain a position of self-reliance. As a result, they were often in distress, and it is little wonder that many in New England and New York petitioned for a stronger central government. In 1697 Harrison, Ashurst, Sewall of Salem and others petitioned for a union of colonies, the Board of Trade thought that security could be obtained in no other way, the Lords Justices favored the scheme, and, in consequence, although the agents of New Hampshire,

annulled, altered, re-enacted, and again annulled.[1] New Hampshire refused an appeal in the Allen case in 1701;[2] Connecticut an appeal in the Hallam case in 1699;[3] but in each of these cases the King in Council granted the petition for an appeal, resting the decision on the plea that it was the inherent right of his Majesty to receive and determine appeals from all his Majesty's colonies in America.[4] Connecticut, on the other hand, based its determination to resist such appeal upon its willingness that the Privy Council should be the interpreter of the colony's law.[5]

It was not difficult to find additional charges. Complaints were made that the colony broke the Navigation Acts, harbored pirates, neglected to take the oaths required by law, encouraged manufactures, were negligent in military duties and in the erection of fortifications, encroached on the jurisdiction of the Admiralty, and opposed the authority of its officers, protected escaped soldiers, seamen and servants,[6] and failed to comply with certain requirements of the home government — as in the case of the proclamation regarding coin, the instructions to naval officers, the command to aid New York with quotas of men against the French and Indians — etc. Through the influence of Dudley and the pertinacity of Edward Randolph, for it was he who personally led the campaign in the lobby of Parliament,[7] a bill was brought

New York and Connecticut opposed the plan, New Hampshire, Massachusetts and New York were joined in 1697 under one governor, and with Connecticut and Rhode Island were placed under Bellomont as their military head. The year before an admiralty system had been erected for the colonies by commission under the seal of the Admiralty of England. In the North courts were erected at Boston and New York.

[1] Palfrey, IV, pp. 172-174, 200. [2] *Ibid*, pp. 218-219.

[3] Caulkins, *History of New London*, pp. 222-227.

[4] Palfrey, IV, p. 224.

[5] In a deposition taken before Governor Cranston of Rhode Island two men, Fitch and Mason, said that they had heard Governor Fitz John Winthrop say, "I (or we) will grant no appeals for England but I (or we) will dispute it with the King, for if we should allow appeals I will not give a farthing for our charter." *B. T. Papers, Proprieties*, O. 39.

[6] Letter from the Board of Trade to Governor Blakeston of Maryland. *B. T. Papers, Maryland, Entry Book*, B. ff. 88-90. Winthrop in his complaints probably did little more, if we may judge from what we are told of them in Talcott's reply, than voice the complaints current among those opposed to the colonial administration. *Documents relating to the Colonial History of New York*, IV, p. 1079.

[7] Randolph's bill of expenses incurred amounted to £96. 11.6. *B. T. Papers, Proprieties*, G. 20.

forward in 1700-1701 for reuniting to the Crown the governments of several colonies and plantations of America — Massachusetts Bay, New Hampshire, Rhode Island and Providence Plantations, Connecticut, East and West New Jersey, Pennsylvania, Maryland, Carolina and the Bahamas and St. Lucia Islands — on the ground that "the severing of such power and authority from the Crown and placing the same in the hands of subjects hath by experience been found prejudicial and repugnant to the trade of this Kingdom and to the welfare of his Majesty's other plantations."[1] The bill, however, by reason of "the shortness of time and the multiplicity of other business,"[2] failed to pass, but the Board thinking it very likely that it would come up again for consideration, desired from the colonies all possible information that would aid in the matter. From 1701 to 1706 charges continued to be sent in. Quary, Bass, Congreve, Larkin, Dudley, and Cornbury all drafted lists of complaints. The Board in a representation to the Council in 1703 expressed its opinion "that the great mischief can only be remedied by reducing these colonies to an immediate dependence on the Crown."[3] For Connecticut it was a time of anxiety. The influence of the Hallam case, of the controversy over the Narraganset country and the boundary line with New York, of the case of the Mohegan Indians,[4] of the

[1] The text of the Act is to be found in *B. T. Papers, Proprieties, Entry Book,* C. ff. 426-430.

[2] Board of Trade to Governor Blakeston. *B. T. Papers, Maryland, Entry Book,* B. ff. 86, 83.

[3] *B. T. Papers, Plantations General, Entry Book,* C. f. 240. Every effort was made to discover charges particularly against Connecticut and Pennsylvania. In 1703 Penn wrote to the Crown, "I observe your bent is extremely strong to bring all proprietary governments under the disposition of the Crown." *B. T. Papers, Proprieties,* M. 19.

[4] It is interesting to note that the quarrels in the colony which brought it to the attention of the Board were in large part agrarian. This was but natural in a community where husbandry was dominant. Talcott said as late as 1728 "many of the actions here (in Connecticut) are conversant about nothing else" (than the titles of land). *Talcott Papers,* I, 157. The Hallam appeal rested on the denial of a devise of land to "the ministry" of the colony, on the ground that it was either in violation of the Statute of Mortmain, or, if it could not be so construed, it was a devise to "the ministry" recognized by the laws of England, that is, the ministry of the Episcopal Church. As all towns in Connecticut made grants to "the ministry" or to "the church," a decision in Hallam's favor would have made havoc with ecclesiastical land titles in the towns. Caulkins, *History of New London,* pp. 222-227.

petition of the English Quakers against a Connecticut law, was to keep certain aspects of Connecticut's management steadily before the Board of Trade and to lead to what were often serious misrepresentations to the home authorities. In consequence Connecticut got a bad name. In 1704 the colony narrowly escaped having a governor put over it [1] through the authority of the King in Council. But that body evidently preferred that Parliament should take the matter in hand, and in 1706 a bill similar to that of 1701 was introduced. It passed the House of Commons but failed of passage in the House of Lords. [2]

The long list of charges against the proprietary and charter governments already on the books of the Board was continually supplemented by additional charges from Congreve, [3]

[1] The Board of Trade sent a representation based on the charges of Dudley and Cornbury to the Privy Council. The Council sent it to Northey and Harcourt, the Crown lawyers. They replied advising that a governor be placed over both Rhode Island and Connecticut. This opinion was reported to the Board and was communicated to the agents of the colonies. A hearing was appointed at which they were to state why, in point of law, the Crown should not appoint governors over these colonies during the war. The hearing appointed for Nov. 30, 1704, was put off from week to week until Feb. 12, 1705. In the meantime Lord Cornbury sent over Gershom Bulkeley's "Will and Doom" to strengthen the case against Connecticut. The work was received Jan. 16, 1705. It is probable that at the hearing the agents were able to show the inexpediency, if not illegality of a military governor, for on the day of the hearing the Council, evidently convinced that the matter could be best attended to by Parliament, directed the Board to draw up a list of charges, which was done, the chief source being the letters of Cornbury and Dudley. The order in Council also instructed the Board to transmit the list of charges to the Governor of New York and New England. This was done April 18, 1705, and Cornbury was ordered to send copies to Connecticut and Rhode Island, where public depositions were to be made as to the truth or falsity of the charges. (*Documents relating to the Colonial History of New York*, IV, p. 1141.) Upon the evidence thus received the Board based its representation of Dec., 1705, in consequence of which an Order in Council was issued directing the Board to lay before her Majesty the misfeances of the charter governments. (*B. T. Journal*, 18, f. 153.) This report was sent to Mr. Secretary Hedges. He in answer sent back a draught of a bill relating to the uniting of the colonies to the Crown. After some alteration, Feb., 1706 (f. 219), this bill was introduced into Parliament. *B. T. Papers, Proprieties*, M. 47; *Journal*, 18, ff. 177-178, 252, 281; 20, ff. 9, 11.

[2] Palfrey, IV, 368-369. See previous note.

[3] Charles Congreve to the Board of Trade, Dec. 4, 1704. This letter containing a list of complaints against Connecticut was written at the order of the Board. *B. T. Papers, Proprieties*, M. 49.

Dudley, Quary, Gauden and others.[1] The failure of the bill of 1706 was a severe blow to its supporters, and the colony for several years experienced a relief from its anxiety. In 1715 the matter came up again because of the complaints regarding banks, naval stores, the trouble with Carolina, etc., and the House of Commons appointed a committee composed of members of the Board of Trade "to inspect into the miscarriage and to prepare a bill to resume the grants of the proprietary governments."[2] Again a list of charges was prepared,[3] but, whether another failure was feared[4] or a juster policy decided upon, a different plan was tried for Connecticut. The committee of the Privy Council directed the Board of Trade to inquire of the colony — through Jer. Dummer, the agent in London — whether it would be willing to surrender its charter peaceably. Connecticut's an-

[1] Quary to Board of Trade, Jan. 10, 1708-9. *B. T. Papers, Plantations General, Entry Book*, D. ff. 200, 205. The following extract will show the nature of Quary's misrepresentations. The important fact to be noted is that the Board had faith in Quary. He was in high favor with the members and they listened with gravity to his suggestions and to the information which he gave. *B. T. Journal*, vol. 15, minutes for June 26, and succeeding dates. 1703, "I attended the Governor Colonel Winthrope, who received me very kindly and desired me not to look too narrowly into the mistakes of that government. I quickly found that there was good reason for that caution for on examining the custom-house I found nothing but confusion and roguery. I was apprised of many dishonest practices acted in that place before I went but did not expect to have found matters so very bad. The person that acts as collector was one Mr. Withred, a pillar of their church, but a great rogue, for there is no villainy that a man in his post could do but was constantly practiced by him. . . . It would tire your Lordship to give you a history of the illegal trade carried on and encouraged in this government from Curaçoa, Surinam and other places. . . . This is a very populous country, able to raise 10,000 effective men and yet would never assist their neighbors in defending their frontiers from the public enemy, who hath destroyed whole towns and carried away the inhabitants for want of a regulated government and militia. . . . I have no hope of preventing illegal trade in that government whilst it is in the hands of those people." *B. T. Papers, Plantations General, Entry Book*, D. ff. 200-205.

"Memorial from Mr. Stephen Gauden, relating to the misfeances of Carolina and other Proprietary Governments, whereby they Forfeit their Charter." July 25, 1716. *B. T., Proprieties*, Q. 81.

[2] *B. T. Journal*, 25, f. 216, Aug. 11, 1715.

[3] *B. T. Papers, Proprieties, Entry Book*, F. ff. 464-465.

[4] This may be inferred from Gauden's Memorial: "The committee appointed by the Parliament . . . seemed somewhat at a loss how to fix proper causes and reasons for the doing" [of that for which they were appointed].

swer is a masterpiece of firmness and politeness and, although in the name of the Governor and Company, was undoubtedly written by Saltonstall.[1] He commends the justice and honor of the ministry in thus referring the question to the corporation, a method wise and just, possessing not the least appearance of force and terror. He contrasts it with previous methods unreconcilable with common rights, law and custom, of which the colonies had had full experience. This spirit of fairness he attributes to the existing King and Ministry, who, though unlimited and subject to none, yet observed the limits of wisdom and justice, and were tender of what others should enjoy as well as of their own prerogative; who did not make use of their power to terrify the colony out of its rights and property, but gave it leave to speak for itself. After these quieting words, the Governor and Company regret that they cannot choose that resignation of their rights which the King and Ministry think might be best for them, and conclude this portion of the letter with the following instructions to the agent: "You are therefore hereby directed in plainest terms to acquaint their Lordship that we can't think it our interest to resign our charter. But on the contrary, as we are assured, that we have never by any act of disobedience to the Crown made any forfeiture of the privileges we hold by it, So we shall endeavor to make it manifest and defend our right whenever it shall be called in question."

The limits of this paper will not allow a further discussion of the attitude of the home government toward the Colony. It is, however, fundamentally important that we should appreciate the relations which had previously existed, and the one-sided character of the information which the Board of Trade, the Privy Council and even Parliament itself received. The mere titles of the papers containing charges against the proprietary and charter governments cover twenty-one pages of an entry book. Regarding Connecticut there is almost nothing to relieve the unfavorable impression received

[1] "Letter from the Governor and Company of Connecticut relating to the surrender of their charter to the Crown by G. Saltonstall to Mr. Jer: Dummer, their agent, dated Oct. 28th, 1723, from N. Haven." *B. T. Papers, Proprieties,* R. 49.

by the Board, except a letter now and then from the Governor, and the answers to the queries that were occasionally sent to the colony. The references to Connecticut in the Journal are rare, and generally relate to some complaints against her. It is difficult to determine how far the Board believed the statements sent it, but its representations do not show any inclination to lighten the impression which the letters from the colonies give.

This was the position that Connecticut occupied in the sight of the home authorities when John Winthrop, a grandson of one Connecticut Governor and nephew of another, denying the validity of the intestate law, claimed all the real estate of his father who had died in 1717, and, ignoring the right which he had of appeal from the Court of Probate to the Court of Assistants, expressed his determination to appeal to the King in Council. This determination was carried out, and as the result of Winthrop's efforts the intestacy law was annulled by an Order in Council Feb. 15, 1728, as contrary to the laws of England and not warranted by the charter.[1] The case was a private one and the colony was not heard in the matter. There is no doubt that the defendant, Lechmere, was inadequately defended by some one little versed in the colony's affairs, that his evidence was far from complete, his purse far from full, and that he was especially in want of "a good sword formed of the royal oar."[2] Winthrop, on the other hand, was ably defended by Attorney General Yorke and Solicitor General Talbot. The Committee of the Council did not call in the assistance of the Board of Trade, and there are no documents bearing on this phase of the case among their papers. Winthrop did not rest his

[1] The decree is printed in full in *Conn. Col. Rec.* VII, *Appendix. Mass. Hist. Soc. Collections*, 6th ser. vol. V, pp. 496-506. It will be impossible to give here even an outline of the facts of the case. See *Talcott Papers*, I, pp. 94 note, 187, 241. *Mass. Hist. Soc. Proc., March*, 1893, pp. 125-127. *Conn. Col. Rec.*, VII, p. 572 ff. That there was considerable justice in Winthrop's position becomes evident when we know of the contents of Wait Winthrop's will and of Lechmere's impecunious condition. *Mass. Hist. Soc. Collections*, 6th ser. vol. V, pp. 367 (note)-370; also Winthrop's letter to Cotton Mather, pp. 425-428. The most detailed account of the case is to be found in the same volume, pp. 440-467.

[2] *Talcott Papers*, II, pp. 77-78, 136. *Conn. Col. Rec.*, VII, p. 191 note. *State Archives, Miscellanies*, II, doc. 313.

case solely upon the question of the validity or invalidity of the law, but he repeated most of the charges, which were already familiar to the Council and its committee, and thereby, as Mr. Parris said, "very much assisted his case."[1] The legal aspects of the trial have attracted but a small amount of attention from historians, for the incidents were neither dramatic nor politically exciting, yet there were involved in the case principles of great moment to the colonists, questions, the solution of which was to affect the future relations between them and the home government.

The effect of the vacating of the law shows at once that the Privy Council acted without a reasonable understanding of the matter at issue. It based its opinion upon the literal interpretation of the charter from its own point of view, and was entirely without an honest appreciation of the equity in the case.[2] Two conditions, defensible in themselves, had come into conflict. For the moment the customary law of one country, arising from one set of historical circumstances, was to be enforced in another country, the agrarian and economic life of which had brought into existence a customary law very different. The common law of England and the common law of the colony did not agree. The latter did not represent the defiant will of a body of law-makers, it represented a principle of land-distribution which the experience of the colony had shown to be best adapted to its own prosperity and continued existence. This becomes clearer when we note what would have been the economic effects of voiding the intestate law.

The first result would have been a general unsettling of titles to lands left intestate or alienated after intestate settlement. This was due to the fact that a large majority of the people consisted of farmers and agriculturists, possessing

[1] *Talcott Papers*, II, p. 77.

[2] Govr. Talcott recognized the unfairness of the decision from the standpoint of equity, when he said in a letter to the Board of Trade Nov. 4, 1731, "Your Lordships will be best informed of the reason, necessity and usefulness of our laws by considering the state and circumstances of our country so many ways differing from that of England." *B. T. Papers, Proprieties*, S. 36. *Talcott Papers*, I, p. 250; II, p. 225. It is worthy of notice that Winthrop's own counsel declared against the judgment of the Council afterwards. *Talcott Papers*, II, p. 72.

little personal estate.[1] Many of these settlements reached back to the beginnings of the colony, and the invalidating of titles would have affected large numbers of descendants who would thus have been liable to ejection at the instance of the eldest heir.[2] Such ejectment concerned the younger sons and the female heirs, for whom under such conditions there would be no place in the colony.[3] Even if the titles to estates already settled in the Court of Probate should be allowed to stand, yet there were many estates of twenty or thirty years standing that had never been settled, and more of a later date, so that the suffering would only be limited, not ended. Furthermore, litigation would have at once ensued, which would have involved the colony in an economic loss greater than that entailed in a resistance to the decree. The agrarian system of the towns would have given to this litigation a curious complexity. Quarrels were certain to arise within the towns themselves regarding the ownership of the common and undivided lands.[4] Would the title rest with the heirs at common law of those who received by grant from the King, that is, the patentees, or with those who as proprietors and contributors to the common fund purchased the lands from the Indians, and received their shares according to the size of their families and the amount of their subscription?[5] Judges, too, in settling all

[1] *Talcott Papers*, I, p. 234.
[2] *Talcott Papers*, I, p. 146. [3] *Ibid.*, I, pp. 122, 146.
[4] In the *Middletown Mss. Proprietary Records* there is "An Account of the Interest of the Several Proprietors of the Common and Undivided Lands [computed] according to the Custom of Deviding Intestates in the Colony of Connecticut." Dec. 28, 1733. A study of the lists herein contained shows graphically the practical working of the intestacy law. In 1673 a list of proprietors had been drawn up, 52 in number, with real estate "rights" in the undivided lands ranging from £224 to £24. In 1733 this list was revised, and it was found that by constant subdivision of "rights" through purchase, bequest and intestacy settlement, the number of proprietors had increased to 328, the number of "rights" to 386 (circa) ranging in value from £103 to 9sh. with by far the greater number valued at less than £5. An examination of such lists proves how impossible it would have been to carry out the Order in Council voiding the law. The Middletown proprietors paid no attention whatever to the king's decree.
[5] *Talcott Papers*, I, 177. It is not unlikely that considerable trouble might have been caused had this feature of the case been brought to the attention of the authorities at home. It might have been decided in favor of the Patentees if we may judge from the legal opinion of At-

these disputes, would have been thoroughly perplexed as to whether they should obey the decree, in which case the foundation of the colony would have been "rip't up from the bottom and the country undone;"[1] or whether they should disregard the decree, and so bring down upon the colony the loss of its charter.

But the injustice would have concerned others besides those holding lands derived from intestate settlements. Creditors who had taken lands in payment of debts — a procedure not in favor with the colony because of the cheapness of lands — would be defrauded, unless the lands, which might have considerably improved in their hands, had been made chargeable for the original loan and the improvements.[2] Furthermore, the will and intent of many who had died intestate might have been frustrated, inasmuch as they, trusting in the colonial custom, with which they had been perfectly satisfied, had made no will.[3]

In addition to these results, so contrary to justice and equity, certain economic consequences would have inevitably followed the carrying out of the Order in Council, consequences detrimental not merely to the colony, but, judging from the standpoint of her clearly avowed colonial policy, to England as well. The voiding of the law meant the abatement of husbandry. The towns of all New England, and of Connecticut in particular, were, at this stage of their development, predominantly agricultural. The results of such abatement would be a desertion of lands, a lessening of population, and a decrease in the supply to the neighboring provinces, which, engaged in trade and fishery, were dependent on Connecticut for provisions.[4] It was a clever stroke on the part of the colonial supporters of the law

torney-General Northey, Aug. 7, 1703, upon an Act of New Hampshire for Confirmation of Town Grants, "it is fit that same be repealed for that it confirms all grants of lands that have heretofore been made unto any person or persons by the inhabitants of the respective towns within that Province or by the selectmen or a committee in each Town without having any regard to or saving of the right of any persons who might be entitled to the same before the making such grants." *B. T. Papers, New England,* M. 46.

[1] *Talcott Papers,* I, p. 177.
[2] *Ibid.,* I pp. 122, 146-147.
[3] *Ibid.,* I, pp. 144, 189, 234. [4] *Ibid.,* I, p. 147.

when they showed that its confirmation was adapted to the furthering of England's policy, and that its vacation was to the injury of that policy. Voiding the law would lead to manufacturing, for the younger sons from sheer necessity, driven from agriculture, would turn to trade and manufacturing, or else would be obliged to leave the country.[1] Thus, by this argument, England was placed on the horns of a dilemma as regards the colonies, either beggary or insufficient population on the one side, or the promotion of trade and manufactures on the other. This, as Law surmised, "was a tender plot," and there is no doubt that as an argument it was frequently repeated in order that it might be "thôt of at home."[2] These economic results are sufficient to show that the law was an organic part of the life of the colony. Indeed, as Talcott said in a later letter to Francis Wilks in London, "we cannot think our law will be looked upon to be contrary to the law of England for the colony could not have been settled without it."[3]

The colony immediately made every effort through its agents, Dummer, Belcher, and Wilks, to defend the law if possible. There was reason for hope in such action from the fact that the Massachusetts law of 1692, after which the Connecticut law has been modeled, with one amendment, one addition, and three explanatory acts had been confirmed by the Crown.[4] Furthermore, the law was a general one in New England and, if the Order in Council were to be insisted on, it might endanger the titles to a considerable amount of New England real estate; and it would seem incredible that the home government could persist in so crippling the colonies.[5] Therefore the colony was justified in believing that, if all the arguments were fairly presented to the Lords of

[1] *Talcott Papers*, I, pp. 147, 189; II, pp. 245-248.
[2] *Ibid.*, I, p. 123. [3] *Ibid.*, II, p. 246.
[4] *Ibid.*, II, p. 79, *Mass. Hist. Soc. Proc.*, 1860-62, p. 72-73.
[5] *Talcott Papers*, I, pp. 153-154. pp. 77-85. Governor Talcott says that the law had been sent over with other laws "some thirty years ago," by Gov'r Winthrop and that as nothing was said about the law then the colony had reason to think itself safe. There is a mistake here somewhere; the law was passed in 1699 and Gov'r Winthrop sent over the Book of Laws as an enclosure in his letter of Oct. 27, 1698. *B. T. Papers, Proprieties* 2A. It may be that he is referring to the October order as revised in 1673.

Trade, the good offices of that Board might be obtained.[1] This was an important step, for by the report of the committee of the Council the matter had been referred to the Board.[2]

The strongest argument against the law was that it was contrary to the law of England, and in the discussion which followed the colony exerted all its strength to minimize the force of this argument. The question is an important one in itself, but the value of the discussion lies in the expression of opinion on the part of the English and the colonial authorities regarding the interpretation and strict construction of the phrase "contrary to the law of England." There were three views held regarding the English law in the colonies, as to how far it was binding there, and to what extent the colonial corporations had been invested by their charters with law-making powers. The first of these opinions was held by all those who were opposed to the colonial prerogatives, such as Palmes, Hallam, Gershom Bulkeley, in his "Will and Doom," Winthrop the appellant, in his "Complaint" and "Memorial," Dudley and others. According to this view the colonies were erected as corporations within the kingdom of England; they held by and were subject to the laws of that kingdom, and their legislative power extended to the making of by-laws and ordinances only for their own good government, provided the same were not contrary to the law of England.[3] From this point of view

[1] *Talcott Papers*, I, pp. 174, 249.

[2] *Ibid.*, I, pp. 200-201. *B. T. Papers, Proprieties*, R. 108.

[3] *Talcott Papers*, I, p. 393. Dudley in his letter to the Board of Trade expresses this view. "On the part of the Crown it would be provided [in case a union of colonies was affected] that the laws of England, common and statute, which have hitherto always been or ought to have been the laws of all those provinces, should be so declared and the government there directed to present to the King not Magna Charta or chapters of capital laws, but such by-laws as the several provinces in their settlements require, which are not provided for by the common and statute law of England." *B. T. Papers, New England*, vol. 7, F. 13. For Dudley's motives see Palfrey IV, pp. 367-368. Bulkeley said in his "Will and Doom," "We think that the colony of Connecticut is de Jure (we wish we could say de facto) as much subject to the Crown of England as London or Oxford." Again, "forgetting . . . that their Courts are but inferior Courts and their laws not laws properly so called or parcel of the Laws of England but only By-Laws, i. e. the Local, private and particular orders of a corporation."

all laws passed by the colonial assemblies which were of a higher character than by-laws, and which, even within that limit, touched upon matters already provided for by English common or statute law, were illegal. The colonies were as towns upon the royal demesne.

The second view was expressed by the agent of Connecticut, Francis Wilks, and was doubtless held by those at home who, with English proclivities, were nevertheless well disposed toward the colonies. According to this view, it followed that when the colonists came to America they brought with them the common law to which they were entitled as Englishmen, and such part of the statute law as was in force before the settlement of the plantations took place. To this body of law, written and unwritten, binding on the colonies, were to be added all such later Acts of Parliament as expressly mentioned the plantations, and such Acts as had been re-enacted for the colony by her own legislature.[1] But no other statutes passed since the settlement could be held as binding. Therefore, according to Wilks, that law was contrary to the law of England which was contrary to the common and statute law prior to the settlement, or to the statute law made afterwards which expressly mentioned the plantations.

Both of these views, however, were strictly opposed by the colony. To the statement that the common and statute law existent at the time of the settlement was in force in the colonies, the answer was made that the charter nowhere directed the administration to be according to one law or another, whether civil, common, or statute law;[2] that by a decision of the Council itself an uninhabited and conquered country was to be governed by the law of nations and of equity until the conqueror should declare his laws,[3] and that if such declaration had not been made, then it was evident that the law of equity and of nations governed and not the common or statute law of England.[4] Therefore, the

[1] *Talcott Papers*, I, p. 274.
[2] *Ibid.*, I, pp. 149, 158.
[3] *Blancard v. Galdy, Salkeld's Reports*, I, p. 411. *Talcott Papers*, I, p. 144; II, Appendix, "Instruction to Agent."
[4] *Talcott Papers*, I, p. 148.

colony argued, English common law could be binding beyond the sea only in case it had been accepted by the colonist's own choice.[1] From the nature of the laws passed, it is evident that the colonial government never considered the common law to be in force within its jurisdiction, and in this belief it said it had never been corrected or otherwise instructed from the throne. In this connection Governor Talcott pertinently asks, "And why should we be directed to make laws not contrary to the laws of England if they were our laws, for what propriety can there be in making that a directory to us in making a law which was our law before we made it."[2] As this was the case, it is evident that something more was implied in the charter than the making of by-laws. In that document was proposed an object, the religious, civil, and peaceable government of the colony, which could not have been attained by the passing of by-laws. The charter implied a power to enact in the colony that which was law in England and also any good and wholesome law which was not contrary to it; and such limitations could not be to by-laws only.[3] Furthermore, the colony insisted that the analogy to a municipal corporation in England was not sound, inasmuch as it was the privilege of Englishmen to be governed by laws made with their own consent.[4] The colonies were not represented as were the English towns in Parliament; therefore the only laws made with the consent of the colonies were those of their own legislatures, and those were more than by-laws. The opinion of the colony, therefore, was that the phrase, "contrary to the law of England," referred only to laws contrary to those Acts of Parliament which were in express terms designed to extend to the plantations.[5] That this had been the practice as well as the theory in Connecticut is evident from Congreve's letter to the Board of Trade, in which he says, "They allow of

[1] "The common law always hath its limits environ'd by the sea." *Talcott Papers*. II, Appendix, "Instructions to Agent," p. 492.
[2] *Ibid.*, II, Appendix, "Instructions to Agent." These instructions were drawn up by John Read and not by Talcott, II. 489 note.
[3] *Ibid.*, I, p. 149.
[4] *Ibid.*, I, p. 159; II, Appendix, "Instructions to Agent."
[5] *Ibid.*, I, p. 152.

none of the laws of England either common or statute to be pleaded in their courts." [1]

According to the opinion held by Winthrop and Wilks the intestate law was clearly contrary to the law of England. Even Lieutenant Governor Law of the colony seems to have inclined to this view, for he came to the conclusion that the colony in acting in the past, contrary to the view expressed by Wilks, had been mistaken.[2] But Gov. Talcott was led into no such concession; he stood firmly on the ground already taken, and adroitly persisted in maintaining the complete validity of the intestate law. He probably realized that under the circumstances concession was more dangerous than resistance, and that to accept Wilks's theory would be to strike a blow at the absolute integrity of the charter. "We would," he writes, "with the greatest prostration request your Majesty, that when we find any rules of law needful for the welfare of your Majesty's subjects here, which is not contrary to and agrees well with some one of the Tryangles of the law of England, as it then is, or heretofore had been, when England might have been under the like circumstances

[1] *B. T. Papers, Proprieties*, M. 49. See also *Talcott Papers*, I, p. 154. Gershom Bulkeley says much the same in his "Will and Doom," but facts come to us from his pen strangely distorted, while his arguments are full of pedantry and bitterness. "The case is otherwise with us, their Majesties are not yet received to reign in Connecticut, their laws are of no force or effect here." . . . "The abolition of the Common and Statute laws of England and so of all humane laws, except the forgeries of our own popular and rustical shop . . . A strange fancy that coming over from England to another of the King's dominions we should so far ceaśe to be his subjects as that the laws of our King and Nation should not reach us." The most recent legal decision affecting our subject is that of Justice Baldwin in "Campbell's Appeal from Probate," 64 Connecticut Reports, 1894. He held that the Connecticut rule of inheritance, differing fundamentally from the rule of England, had been the uniform doctrine of the Connecticut courts (p. 290); and he gave it as his opinion "that the common law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut" (p. 292). His decision is both historically and judicially sound.

[2] *Talcott Papers*, I, p. 121. It was Jonathan Law who in 1731 drafted the "Act for the Settlement of Intestate Estates," which was to take the place of the old Act. It excluded females from the inheritance, but admitted the younger sons to inherit with the eldest son, as co-heirs. This did not better matters at all for it was equally contrary to the common law of England with the older Act. *State Archives, Civil Offices* II, doc. 169. *Foreign Correspondence* II, doc. 146. See Wilks's remarks upon this Act. *Talcott Papers*, I, p. 241.

in that particular, which we are when we make the law, that it might not be determined to be contrary to the law of England." [1]

The opinions of the English lawyers of this period, so far as I am able to discover them, are neither definite nor complete. In a report to the Board of Trade, Attorney General Yorke and Solicitor General Talbot upheld the colony's position regarding by-laws. They affirmed that the assembly of the colony had the right by their charter to make laws which affected property, on condition that such laws were not contrary to the law of England; but, although it seems probable that they intended "law of England" to cover the whole law, they did not make it clear what they meant by this term.[2] Yet these same lawyers in a later judgment declared that in one particular case, the barring of an heir to entailed lands lying in the plantation by a process of fine and recovery in England, the common law did not extend to the plantations, unless it had been enacted in the plantation where the entailed lands lay.[3] The Board itself supported the colony against adverse criticism [4] when it stated that according to the charter the laws were not repealable by the Crown, but were valid without royal confirmation unless repugnant to the law of England.[5] The most definite expression of opinion, however, was adverse to the view which the colony took. Mr. West, in a judgment rendered regarding admiralty jurisdiction in the plantations, took the ground that wherever an Englishman went there he carried as much of law and liberty with him as the nature of things allowed; that, in conse-

[1] *Talcott Papers*, I, pp. 149-150.

[2] *B. T. Papers, Proprieties*, R. 130. Aug. 1, 1730.

[3] *Talcott Papers*, I, p. 238. II, Appendix. "Instructions to Agent," p. 493.

[4] *Ibid.* I, p. 152, Winthrop's 8th Complaint. II, pp. 75-76, Parris' Opinion.

[5] "Copy of a Representation of the Board of Trade to the House of Lords" Jan. 23, 1733-34. *British Museum*, 8223 e-15. Mentioned by Wilks. *Talcott Papers*, I, p. 294. In 1760 the Board took a different view "supporting his Majesty's right to examine into every provincial law and to give or to withhold his negative upon any good reasons which may be suggested to him by the wisdom of his Privy Council or by his own royal prudence and discretion." *B. T. Papers, Proprieties, Entry Book*, I, ff. 299-307; Cf. opinion of House of Lords, 1734, *Talcott Papers*, I, p. 297.

quence of this, the common law of England was the common law of the colonies, and that all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony were binding upon that colony. He also held, as did Wilks, that no statutes made since the settlements were in force unless the colonies were particularly mentioned.[1] His view, which I do not doubt was very generally held by English lawyers outside of the colony, was simply a legal opinion, and was probably based on little real knowledge of the subject to which it referred. We are, therefore, fortunate in having another and different view of the matter of greater practical value. In 1773 the legal advisor of the Board, Francis Fane, returned to the Board his comments upon the first installment of the laws of Connecticut and he completed his examination of the entire 387 laws in 1741. In this report opinion came face to face with facts, and the lawyer realized the anomaly of attempting to force English law upon a people whose conditions of life were in so many particulars different from those at home. In his comment upon the intestate law Fane notices that it was different from the law of England, but it is evident that this aspect of the case troubles him little. He is chiefly concerned with matters of rule, form, and procedure, and it is in these particulars that his real objection to the law lies. He recommends the repeal of the Act,[2] but would substitute another law "either as it is now done in England or by such other methods as may best fit the province where this law is to take effect." In this statement there was for the colony a world of meaning. Furthermore, in his criticism of the later amendments and additions to the law he says nothing about their being contrary to the law of England; his recommendations for repeal are based upon the ground of uncertainty or upon some other defect of the law which would naturally attract a lawyer. An analysis of his comments upon the remaining

[1] "Mr. West's Report relating to the Admiralty Jurisdiction practiced in the Plantations." June 20, 1730. *B. T. Papers, Plantations General,* L. 10.

[2] Fane evidently took it for granted that the Connecticut laws could be repealed by the King in Council. It is not probable that the Board had instructed him on that point.

384 laws[1] gives us approximately the same result. The laws recommended for repeal were too strict, severe or unreasonable, incomplete or not severe enough, inexact, giving too much power to certain bodies, etc. In only one instance is a law declared contrary to the law of England, and then it is the legal principle implied in a part of the law that a man can be convicted on a general presentment which is declared repugnant. It is true that in a number of cases he recommends the repeal of a law which is different from the law of England, but it is not on the ground of its difference that the recommendation is made; it is because the law is unsatisfactory from a legal standpoint and would not be a good law in any civilized community. In nine cases, however, he considers the colony's convenience, and recommends the acceptance of the law, even though it would not have been proper for England or was not so good as the corresponding law in England. In these instances he recognizes the principle that the colony was generally the best judge of its own law, and practically concedes two of the points for which the colony contended, the principle of equity and that of custom. Fane's comments are uniformly fair and reasonable, and contain not a trace of animus toward the colonies.[2]

The circumstances and discussions thus far outlined are necessary to an understanding of the influences that acted upon the Board when it came to draw up its representation to the committee of the Council upon the petition of Belcher

[1] The following is an analysis of the report:
There are in the list 387 Acts and 3 Resolutions. Of the Acts 312 are good, proper, well contrived for the purpose intended, reasonable, containing nothing amiss, fit to be confirmed, open to no objection or agreeable to the conveniences of the colony, and 75 are open to objection and should be repealed. Of the latter 28 are too severe or unreasonable, 2 are not severe enough, 9 are too loose, inexact, or uncertain, 6 give too much power to the selectmen, the county court or the court of assistants, 3 omit certain necessary definitions or limitations of the corresponding English law, 7 are different from the law of England and for the object intended inferior to the English law, 2 are incomplete in themselves, 9 concern Bills of Credit, 3 the intestate law, 5 are good in part and 1 has been repealed. It would be worth while as a commentary upon Gershom Bulkeley's "Will and Doom" to compare his partisan arraignment of the Connecticut laws with the judicial criticisms of Francis Fane.

[2] "Francis Fane on the Connecticut Laws." *B. T. Papers, Proprieties*, V. 19-27.

and Dummer.[1] In this petition the colony begged the King to confirm by an order in Council to the inhabitants of the province the lands already distributed under the intestate law, to quiet them therein, and to enable them to divide the lands of intestates in the same manner in the future.[2] The colony had already discussed at considerable length the wording of the petition, debating whether it would be best to ask for a confirmation by an Order in Council, or to apply for leave to bring forward a bill in Parliament. Belcher strongly advocated the latter method.[3] Talcott in a forcible communication presented his fears of Parliament in case the matter were brought to its attention, and he had good reason to fear if we are to judge from later events. He was a prophet in his apprehension that it might lead Parliament to inquire whether the government had not accustomed itself to take the same liberty of making other laws contrary to the law of England; and, further, that it might lead Parliament to the opinion that the charter had not made them a government or province but only a corporation. Yet, on the other hand, it was equally true that neither the petition of Belcher nor the introduction of a bill in Parliament was needed, if that body had desired to end the privileges of

[1] The order of events may be briefly given. The petition was sent to the King in February, 1730; it was referred to the Committee on Appeals Apr. 10, and to the Board of Trade Apr. 15. The Order in Council and the Petition were read before the Board Apr. 21, and the letter of inquiry was sent to the Crown lawyers the next day. The Memorial of Winthrop in reply to the Petition was received and read on the 28th, and was sent to the Crown lawyers two days after. On the 13th of May, the Crown lawyers not having replied, a letter was sent to remind them of the Board's request. Finally, on Aug. 1, they replied and their report was read Aug. 13, when the preparations for the representation to the Committee of the Council were begun: a draught of the representation was ordered on Nov. 12, and on the 18th a letter with the Petition and the Memorial was sent to Francis Fane. He replied on the 21st and his report was read on the 24th and the work upon the draught was continued. On Dec. 2, the agents, Dummer and Wilks with Winthrop, were summoned before the Board, and appeared and presented their case on Friday, the 4th. On the 8th the draught of the representation was agreed upon, and on the 31st it was signed. *B. T. Papers, Proprieties, Entry Book,* H, ff. 10-11, 23, 39. *Journal,* 40. ff. 90, 97, 104, 111, 209, 221, 295, 299, 303, 312, 316, 322, 339.

[2] *B. T. Papers, Proprieties,* R. 108. I have used the copy of the petition sent down from the committee to the Board of Trade, instead of the transcript enclosed by Belcher in his letter to Talcott, Feb. 10, 1730, and printed in the *Talcott Papers,* I, pp. 187-190.

[3] *Talcott Papers,* I, pp. 167-168.

Connecticut in 1730 as it practically did those of Massachusetts in 1774.[1]

It is not quite clear to which conclusion the agents arrived, though in the petition upon which the Board based its representation, confirmation was asked for by an Order in Council.[2] This request at once raised an exceedingly important question expressive of the political change which had come over England since the Revolution of 1688. Could the King by virtue of his prerogative and without the assistance of Parliament grant the wish of the colony? To this Attorney Francis Fane answered, at the request of the Board, as follows: "I cannot pretend to say whether the King by virtue of his prerogative can do what is desired by the petitioners. But I must submit it to your Lordship's consideration supposing the King had a power by his prerogative of gratifying the request, whether under the circumstances of this case it would not be more for his Majesty's service to take the assistance of Parliament, as that method will be the least liable to objection as well as the most certain and effectual means of gratifying the request of the petitioners."[3] That this was the opinion widely held among English lawyers is evident from Belcher's letters, in which he mentions Lord Chancellor King and the counsel which he had secured as inclined to this view.[4]

[1] *Talcott Papers*, I, pp. 175-179. The history of the relations between Parliament and the proprietary and charter colonies since 1701 shows the accuracy of Talcott's judgment. The representation of the Board of Trade upon the petition, the resolution of the House of Lords and the revival of the effort to introduce a bill into Parliament in 1731 to unite Connecticut and Rhode Island (*Talcott Papers*, I, p. 221) were a speedy fulfilment of Talcott's fears. There is history here to be written. See Judge Chamberlain's remarks, *op. cit.*, pp. 131-133.

[2] The petition upon which the Board based its representation contains the words "pray your Majesty to be pleased by your Order in Council to confirm," the petition which Belcher enclosed to Talcott says "pray that you would be pleas'd to give leave that a bill may be brought into this present Parliament of Great Britain to confirm." It is evident that the latter was the form originally intended to be used (*Talcott Papers*, I, pp. 184, 191). But probably Talcott's fears of Parliament, and particularly the pressure of more weighty matters upon Parliament just at that time, induced a change, and the petition was altered and request for a confirmation by Order in Council inserted instead. (*Ibid.*, I, p. 197.)

[3] *B. T. Papers, Proprieties*, R. 132.

[4] *Talcott Papers*, I, pp. 167, 168, 184, 259.

With this opinion of its legal advisor before it, the Board summoned to its presence the agents of the colony and Winthrop and listened to the arguments on both sides.[1] It then finished the draught of its own representation. Many influences underlay the wording of that report, influences which it has been the purpose of this paper to disclose. The report was the resultant of at least three forces: first, the desire to gratify the colony in confirming the lands already settled under the intestate law, for Dummer had ably presented the inconveniences which would follow the upholding of the decree of the Council; secondly, the determination to syncopate the privileges of Connecticut on the ground that she had been too independent of the Crown, and had too long a list of charges against her to escape some limitation of her powers; and thirdly, the conviction, in view of the changing constitutional relations of King and Parliament, that the only safe method whereby such end could be accomplished was to apply to the King for leave to bring in a bill for that purpose.[2] A few extracts from the report will exemplify this. After recommending compliance with the request of the colony, the Board adds, "And we think this may be done by his Majesty's royal license to pass an Act for that purpose with a saving therein for the interest of John Winthrop, Esq. But we can by no means propose that the course of succession to lands of inheritance should for the

[1] The minute in the Board of Trade Journal is as follows: "Mr. Dummer and Mr. Wilks attending, as they had been desired with Mr. Winthrop, their Lordships desired to know from them how the colony of Connecticut would be affected by the annulling the Act for settling intestate estates. And Mr. Dummer acquainted the Board that the colony would be reduced to the utmost confusion if their estates as they now hold them should not be secured to the present possessors, their tenures being liable to be reversed or at least to be disputed in a manner that cannot fail to be expensive and vexatious. Upon the withdrawal of these gentlemen their Lordships agreed to consider the matter further at another opportunity." *B. T. Journal*, 40, f. 316. It is a little remarkable that the clerk of the Board makes no mention of Winthrop's speech, for in Wilks's report of the interview we are told that he spoke at some length. *Talcott Papers*, I, pp. 217-218. Perhaps Mr. Winthrop had overreached himself. (*Ibid.*, pp. 166, 171.)

[2] Judge Chamberlain says that this recommendation of the Board marks a changing constitutional policy in the direction of parliamentary supremacy over the colonies which finally led to the severance of the empire. *Op. cit.*, pp. 134, 136.

future be established upon a different footing from that of Great Britain. In return for so great a favor from the Crown we apprehend the people of Connecticut ought to submit to the acceptance of an explanatory charter whereby that colony may for the future become at least as dependent upon the Crown and their Native Country as the people of Massachusetts Bay now are whose charter was formerly the same with theirs. And we think ourselves the rather bound in duty to offer this to his Majesty's consideration because the people of Connecticut have hitherto affected so entire an independence of Great Britain that they have not for many years transmitted any of their laws for his Majesty's consideration nor any account of their public transactions. Their governors whom they have a right to choose by their charter ought always to be approved by the King, but no presentation is ever made by them for that purpose. And they, thô required by bond to observe the laws of Trade and Navigation, never comply therewith, so that we have reason to believe that they do carry on illegal commerce with impunity, and in general we seldom or never hear from them except when they stand in need of the countenance, the protection or the assistance of the Crown." [1]

With this report the case of Winthrop vs. Lechmere, growing as it did, out of the land system of the New England colonies, has brought us step by step dangerously near to the principles and theories which underlay restriction on the one side and revolution on the other. How far this particular case and the discussions which grew out of it aided in the shaping of those principles, we need not attempt to discover. As part of the larger question of the uniting of the colonies and the annulling of the charters, its influence was direct and definite. After 1700 the fact of parliamentary supremacy was proven each time an effort was made to limit the independence of the proprietary and charter colonies and to bind them more firmly to the Crown; and at the same time the continuance of such efforts for thirty years increased the familiarity of Parliament with the task of controlling the

[1] *B. T. Papers, Proprieties, Entry Book,* H. ff. 25-27. Cf. Wilks's statement in *Talcott Papers,* I, pp. 217-219, 222.

colonies. In this the English authorities were not showing themselves either arbitrary or despotic. The Board of Trade, the Crown lawyers, even the Privy Council acted according to their convictions, which, though honest, were based undoubtedly upon insufficient and *ex parte* information. Connecticut's policy of reticence was in part responsible for this; she had made it possible for her enemies to fill the minds of the home authorities with suspicion, and there was just enough truth at the bottom of the charges for them to be extremely effective. Other colonies as well were on the black list of the Board. Among intelligent Englishmen both in and out of Parliament there was a strong feeling that some of the colonies were not acting consistently with the interests of England, and needed the strong hand of Parliament to curb them, even to the taking away of their treasured privileges.[1]

But the blow was not to fall yet. Parliament was perhaps not yet prepared to intervene in the management of colonial affairs, however general the opinion seemed to be that it had a right, in view of the events of 1688, to assume this function of the royal prerogative. Although for thirty years ample opportunities for so doing had been given, yet the rights and privileges of the charter colonies remained unimpaired. Perhaps the colonies had given insufficient provocation; if so, time would soon render the provocation greater, not because of any defiant act of the colonies but because of the inevitable

[1] See the representation of 1733 and the resolution of the House of Lords (*Talcott Papers*, I, p. 297), where strong language is used. Wilks reports a speech made one day in the House of Lords to the same effect (*Ibid.*, I, pp. 294-295). The opinion of intelligent Englishmen can be inferred from an extract from Salmon's Modern History published in 1739. "The laws [of the charter governments] are liable to be repealed and their constitution entirely altered by the King and Parliament; which, one would think, should render them extremely cautious in making laws that may prove disadvantageous to their mother country . . . for they may very well expect that when this shall be done to any great degree the Parliament will keep a severe hand over them and perhaps deprive them of their most darling privileges. It may be found expedient hereafter also for their own defence and security to appoint a viceroy or at least a Generalissimo in time of war . . . Or at least it may be found necessary to make all the colonies immediately dependent on the Crown, as Virginia, Carolina and New York are: for the charter governments are not to be depended on in such exigencies." *Modern History* by Mr. Salmon, III, p. 568 (London, 1739).

tendency of their economic development. The intestacy law is but a straw showing the direction of the wind; it has a legal stamp upon it but it is in origin and effect an economic measure.

The representation of 1730, followed soon after by that of 1733, resulted in a vehement body of resolutions of the House of Lords, but no further effect was seen. One session of Parliament passed and still another, but, as no steps were taken pursuant to the resolutions, the colony began to breathe more freely. That it would have resisted the acceptance of an explanatory charter is evident; it is fortunate that it was never called upon to put the matter to the test. While the fate of Connecticut was thus hanging in the balance, another case, that of Phillips vs. Savage, was carried by appeal from the Superior Court of Massachusetts to the King in Council.[1] Here a decision in favor of the intestacy law gave new courage to Connecticut, and in another private suit, that of Clark vs. Tousey, the matter was again brought before the King in Council. The appeal was dismissed, however, by the Privy Council in 1745 not through any decision as to the right or wrong of the case, but because of the fact that Clark had not prosecuted the appeal within a year and a day as required by the Council. Connecticut accepted the dismissal as a decision in her favor, although it was in fact nothing of the kind. It ended the matter only because no one dared to make another appeal and the question never came up again.[2]

With this dismissal the colony returned, to all outward appearance, to the position that it had occupied seventeen years before. But this was not true in fact. Seventeen years of experience with England's policy, years of argument and controversy, had enlarged the mind and toughened the sinews of Connecticut's leaders, and had formed a body of tradition, made up of higher reverence for the charter and higher regard for its integrity, to be handed down to the succeeding generation. It was not the influence of any theory of the fundamental rights of man, or of any inherent

[1] For the case of Phillips vs. Savage see *Mass. Hist. Soc. Proc.* 1860-1862, pp. 64-80, 165-171.

[2] The proceedings of the Privy Council upon the appeals of Clark and Tousey are to be found in *Conn. Col. Rec.* IX, pp. 592-593.

hostility to England that underlay the attempt of Connecticut to keep her charter and to preserve her privileges; it was the determination to maintain at any cost the integrity of the colony and the welfare, happiness, and prosperity of its people. In the issue which arose in 1730, as well as in that which arose in 1765, it will be found that economic causes and conditions drove the colonists into opposition to England quite as much as did theories of political independence or of so-called self-evident rights of man.

We have now followed step by step this important question from its starting point in the land system of New England to its final issue in the prerogatives of Crown and Parliament. The land system, representing the pre-feudal idea rather than the feudal, was reproduced in America with some important changes. Out of this sprang the law of intestacy, differing in principle from that of England which rested upon feudal law. This difference between the common law of the two countries was taken advantage of by certain disaffected ones of Connecticut who sought to benefit themselves by appealing to England against the colonial law. This matter, at first private, touching the lands and interests of but a few persons, became of wider importance by the vacation of the law by the King in Council. By this the agrarian harmony of Connecticut, and possibly of New England, was threatened. This roused the colony, and the issue became a part of the larger question of the relations of the proprietary and charter colonies to the Crown. This made the matter of importance not merely to Connecticut and New England, but to the other colonies of this class as well. But the influence of the Winthrop case did not stop here; it passed even higher, and raised the question of fundamental importance to all the colonies as to the constitutional relations of Crown and Parliament. The settlement of this question foreshadowed the action which Parliament was to take forty years after.

PART IV.

EXPANSION AND REFORM OF THE LAW IN THE NINETEENTH CENTURY

14. Anticipations under the Commonwealth of Changes in the Law.

R. ROBINSON.

15. Bentham's Influence in the Reforms of the Nineteenth Century.

JOHN FORREST DILLON.

16. Progress in the Administration of Justice during the Victorian Period.

CHARLES SYNGE CHRISTOPHER, BARON BOWEN.

17. The Development of Jurisprudence during the Nineteenth Century.

JOSEPH HENRY BEALE, JR.

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14. ANTICIPATIONS UNDER THE COMMONWEALTH OF CHANGES IN THE LAW [1]

By R. Robinson [2]

THIS essay touches on some of the alterations made or suggested by the statesmen and jurists of the Republic in our judicature and in our criminal and civil law. It avoids social, constitutional, and political questions — political, like the union of Great Britain, though that involved an union of laws; [3] constitutional, like the abolition and reconstruction of the Upper House of Parliament; [4] social, like the establishment of public works for the poor,[5] and of a public post-office.[6]

The goodness of the laws of Charles II., contrasted with the badness of his government, has drawn a compliment from Blackstone, epigrams from Burke and Fox, and a paradox from Buckle. An enquiry into the source of these laws may show that the paradox is unreal, the epigrams unfounded, the compliment due to the Republicans; that they, in

[1] This essay is taken from volume III, pp. 567-601, of "Papers read before the Juridical Society" (London: Wildy and Sons). It is without date, but was read in 1869 or 1870.

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With the above Essay may be compared the following: The Constitutional Experiments of the Commonwealth, by Edward Jenks (1890; Cambridge, University Press); The Interregnum, by F. A. Inderwick.

[3] St. 1654, cc. 8, 9, 10: Whitelock, 517, 532, 632: "The decisions of the Engl. judges during the ursurpation," *etc.* Cp. Bacon, "Certayne articles touching the Union . . . of Engl. and Scotl." [*M. s.* Qu. Coll. Oxf. 32.27 (D. 2. 129, [194])].

[4] Stt. 1648-9, c. 17; 1656-7, cc. 6, 18; 1659, July 12: Comm. Journ.: Whitelock, 377, 569, foll.: 6 Thurloe, 107, 668: Ludlow (246).

[5] J. Coke, "*Unum necessarium*." Stt. 1649, May 7: 1653-4, c. 20: Whitelock, 384, 531. Cp. St. 43 Eliz. c. 2: Child, "Proposals for the relief and employment of the poor" [11 Somers's Tracts, 606].

[6] Comm. Journ. 1649, Mar. 21; 1657, June 9: Stt. 1654, c. 51; 1656, c. 30.

redressing grievances which from the time of James and Bacon [1] had been fostering rebellion, forestalled the law-reformers, not of the Restoration only, but of our own age.

The legislators of 1641 had struck blindly at all courts which seemed to them arbitrary or peculiar; they had not asked how far these were due to the faults of the Common Law, to the wants of society, to the difficulty of travelling. That year had seen the Privy Council, the Stannary Court, the Forest Court, nominally regulated, but, in fact, paralyzed, the Court of Chivalry abolished by resolution, the Courts of Star Chamber, of Requests and of High Commission, and the right of temporal jurisdiction, which was among the "royal rights" of the Bishops of Durham and of Ely, taken away by statutes. With the Star Chamber the Palatine courts, as far as they were its antitypes, and the Courts of the Councils of Wales and of the North fell to the ground. Nay, it was forbidden to erect such tribunals.[2] But the necessity for them was overwhelming: diversity of usage, caused by difference of circumstances, made it possible to pass a bill for the uniformity of law.

Take, for instance, the series of High Courts of Justice constituted to try the King, the democrat Lilburn, the Royalists Hamilton, Holland, Norwich, Capel and Owen, constituted again or continued in 1650, again in 1651, again in 1652, again in 1653, again for the trial of Gerard and Vowel in 1654, again in 1656. Besides these, the jurisdiction of which was national, there was one erected in 1650 for Norfolk and Norwich, Suffolk, Huntingdonshire, Cambridgeshire, Lincolnshire and the Isle of Ely. They were constituted sometimes by Parliament, sometimes, seemingly, by the Executive. They were not meant to be perpetual; but they were meant to reach by Equity crimes and criminals which Common and Statute Law and public opinion would not have reached. Clarendon calls them "a new form." Rather they were suggested by the Star Chamber, in favour of which

[1] J. Coke, "The vindication of the profession and professors of the Law," A 4: Bacon, "Works" [*e. g.* vol. 10, ed. Spedding: essay "of Judicature:" "*De Augm. Sc.:*" "Henry VII."]

[2] St. 16 and 17 Car. i. cc. 10, 11, 15, 16, 28: Comm. Journ.: Clar. bks. 3 and 4.

the Privy Council and the Chancery had parted with their criminal jurisdiction, which dexterously construed intentions into acts, which (like the High Courts of Justice, as Clarendon taunts them) did away with "distinction of quality" in capital cases, and made "the greatest lord and the meanest peasant undergo the same judicatory and form of trial,"[1] equalizing them in the dock as, during the French Revolution, the guillotine equalized them on the scaffold. Clarendon's sneer, repeated in earnest in St. 1656, c. 3, that these tribunals were "for the better establishment of Cromwell's empire,"[2] in other words, for the maintenance of order, is their apology.

Changes more or less sweeping in the Superior Courts of Common Law and in the Law Terms were proposed. The latter were regarded by the people as of Norman, indeed, of the Conqueror's institution, and wasted time and money. Nor need we have wondered if, as the early Christians, abhorring Pagan festivals, administered justice daily, so the Puritans, abhorring Catholic festivals, had effaced the distinction between term-time and vacation. However, Michaelmas Term having been shortened so as to suit the farmers, no more was done.[3] The alterations made in the Superior Courts embarrassed Chief Justice Foster after the Restoration, but, such was the strength of the Common-lawyers, did not satisfy the reformers.[4] Stt. 1649, c. 10, and 165¾, c. 4, only accommodated their forms to those of the new constitution. Fines

[1] Stt. 1648-9, cc. 6, 10: 1650, c. 1, Apr. 2, cc. 24, 40; 1651, cc. 8, 20; 1653, c. 25; 1653-4, c. 4; 1654, c. 27; 1656, c. 3; Comm. Journ.: "State Trials:" Cock, "English Law" (1651), p. 74: Whitelock: Clar. bks. 11, 13, 14: Spence, pt. 2, bk. 1, c. 4, and bk. 4, c. 1. For the reference to Spence I have to thank Sir G. Young.

[2] "Divers officers and soldiers" call Cromwell "the first Christian King and Emperour" ["A supply to a draught of an act," *etc.* (1653), p. 22]. Cp. "The Homilies" (1547), bk. 1, serm. 10, pt. 3. I am indebted to the Rev. J. R. Green for reminding me that Archbp. Heath, in 1559, spoke of Elizabeth as "our Emperour and Empress" [Freeman, 1 "Norman Conquest" 161, 626].

[3] Selden, "*Janus Angl.*" bk. 2, § 9: Warr, "The corruption and deficiency of the laws of Engl." *etc.*, cc. 3 and 4: Winstanly, Barker, and Star, "An Appeal to the H. of C. *etc.*, pp. 18, 19: Jones, "The new *returna brevium*," *etc.*, *passim*: Thierry, "The Conquest of Engl." *etc.*, conclusion, § 4: Spelman, "Of the Terms:" St. 16 Car. i., c. 6.

[4] "*Examen legum Angl.*" (1656): Cole, "A rod for the lawyers" (1659). But see "A vindication of the laws of Engl. as they are now established."

on declarations were taken away with those on bills and on original writs; but fines on writs of covenant and of entry were left.[1] The conflicts of jurisdiction carried on not only between the Common Law Courts and the Chancery and the Admiralty and the Ecclesiastical Courts, but also among the Courts of Common Law themselves, carried on by means of fictions and prohibitions and injunctions, and causing great expense, were a scandalous evil.[2] The Committee of Law Reform (1653) dealt with this grievance.[3] It would have confined all tribunals within certain bounds, have kept all actions between subjects under that "lock and key of the Common Law" — the Court of Common Pleas, have allowed barristers as well as serjeants to plead before that bench, and every attorney to practise in any court, and have paid the judges by salary and not by fees. Now, it was covetousness rather than desire to amplify jurisdiction, rather even than ambition, which led to those costly conflicts; and therefore such measures, combined with others against judicial corruption, would have abated nuisance. But they could not be carried. A century later Willes, C. J. C. P., proposed that Parliament should open his court to barristers; he was met by the plea that there should be there (as there now is to some extent in the courts of first instance in Equity) a resident bar. In 1834 another attempt was made: in 1840, amid a furious tempest of wind (as Bingham, the reporter, notes), it was repelled. In 1847 the plan of 1653 was accomplished.[4]

Between the Equity and the Common Law Bar there was a quarrel of old standing; and now that the latter, the soul of the Rebellion, was in the ascendant, the Chancery seemed

[1] 6 Somers's Tracts, 179: St. 1653, c. 4: Resolution, Nov. 7: Stt. 1654, c. 53; 1656, c. 10.

[2] North, "Guilford" (1742), p. 99. See Mr. Commissioner Hill's "Letter to Thomas Pemberton," *etc.* (1838), pp. 27-38: Bacon, "Works," vol. 10, p. 367 (ed. Spedding): 12 Rep. 109: 4 Inst. 99: Jones, *u. s.;* and other works, *passim.*

[3] See its draughts in 6 Somers's Tracts, 211 foll. ridiculed in "The proposals of the Committee for regulating the law," *etc.* [*ibid.* 528-32], and sensibly criticized by the army in "A supply to a draught of an act," *etc.* (1653).

[4] Wynne, "Serjeant at Law:" Manning, "*Serviens ad Legem:*" 10 Bing. 571: 1 and 6 Bing. n. c.: St. 9 & 10 Vict. c. 54: 3 C. B. 537.

marked for destruction. Bishops had presided over it, kings had favoured it, its jurisdiction had been extended (substantially, as time shewed, in compliance with the wants and spirit of the age), but illicitly, irregularly, and tyrannically. An injured public declared that it swarmed with "a numberless armado of caterpillars" and "Egyptian grasshoppers;" and in 1653 an act, which never operated, passed for its abolition.[1] Meanwhile, it had been reforming itself. In 1649 the Commissioners of the Seals, Whitelock, Keble, and l'Isle, assisted by Lenthal, M. R., in provisional orders, forbade prolix, scandalous, and ambiguous pleadings and set bounds to multiplicity of suits, to suits *in formâ pauperis* and to the granting of injunctions: these were granted often for the sake of the fees, and dissolved by connivance with the Common Law judges, that they, when they went circuit, might not have nothing to do.[2] Many other attempts were made by the Commissioners and by the Commons to improve the court. But the "cases" of the latter were "far more precious than their carcases," and little was done till the Committee of 1653 suggested the best part of Cromwell's famous ordinance.[3] That passed on the 22nd of August, 1654. It was bitterly attacked by the bar,[4] and not unjustly; for it aimed with more earnestness than skill at rapidity, simplicity, and cheapness. Its prevailing tendency and that of the orders of 1649 and of public opinion was to deprive Equity of what she had taken from Law, and to protect obligors and mortgagees. Plaintiffs were to give security for costs; as many admissions as possible were to be made by each party; each was to suffer for causing unnecessary expense; witnesses were to be properly examined, but not, it seems, in court. On the other hand, no case was to be heard for more than one day. The schedule again, besides

[1] Jones, "The new *returna brevium*," *etc.* Hudson, 25 "Archaeol" 349, foll.: J. Coke, "A vindication," *etc.* "An exact relation of the proceedings and transactions of the Parliament which began July 4, 1653, by a member thereof."

[2] Orders in Beames: Jones, "Judges **judged**," *etc.*, p. 92.

[3] Whitelock, 519, 548: Jones, "The new *ret. brev.*" *etc.* A 6: 6 Somers's Tract, 202, foll.

[4] Stt. 1654, c. 44; 1656, c. 10: Whitelock, 621-7. Cp. 4 Comm. Journ. 701.

attacking the length of legal documents ("the round-about, Robin-Hood circumstances, with 'saids' and 'aforesaids,'" the "huge gaps, wide as meridians in maps," the reckoning fifteen or eighteen lines to a folio) as an absolute evil, attacked it also as profitable to the lawyers; the answer, that lawyers must be properly paid, indirectly if not directly, was old as Bacon.[1] On the whole, though some of the reforms were tacitly adopted by Clarendon, they were not enough; and the best thing which the Commonwealth did for Equity was, not to fuse it with — I find no notion of fusing, but to reduce it to, Common Law. That it did by placing on the Equity Bench Common-lawyers whose political career had made them acquainted with the defects of their own school, and whose antecedents had disposed them to find in Equity one of the grounds of Common Law, to study it as a science, and administer it regularly.[2] That view, so rational, so true to history, reconciling Coke and Selden with Bacon, Ellesmere and Hobbes, inherited from Hale by Nottingham, has descended through Camden and Eldon, and, if now out of date, was suited to England in the seventeenth century. England needed Equity, and yet that Equity should cease to be "mysterious," and "the measure of the Chancellor's foot."[3]

A series of statutes professed to take away all "ordinary jurisdiction,"[4] and, no doubt, from spiritual persons, took it and every privilege away. The Courts Christian had long been doomed. 'They remind those whose hatred of the episcopate had led them to fix on spotted dogs the name of "bishop" that prelacy had been in the ascendant:[5]

[1] Carey, "The present state of England" (1627): "Saint Hilary's tears" (1642 or 1643): 2 "Hudibras" 3, 325-30, and Grey's n.: Bacon, "Arguments against the Bill of Sheets" ["Works," vol. 10, p. 287 (ed. Spedding), cp. vol. 8, p. 226]: Williams, "Real Property," pt. 1, c. 9.

[2] "A noble person," in Burnet's "Hale," pp. 113 foll. (1682).

[3] Cp. Selden, "Table Talk" and Whitelock, 378, with Hooker [5E. P. 9] and Hobbes, "A dialogue between a philosopher and a student of the Common Laws of Engl." And see Smith, 1 Ex. Dev. 534 n. *t.* (1844); 2 Swanston, 414; 3 De G. F. and J. 238; Best, 1 Jur. Soc. Pap. 399, foll.; Marshall, *ib.*, 2, 283, foll.

[4] Stt. 16 Car. i. c. 11; 17 Car. i. c. 28 (repealed by 13 Car. ii. c. 2); 1646, cc. 64, 66; 1649, c. 24: Clar. bks. 3, 4.

[5] 1 "Hudibras" 2, 531; 3, 2, 544; and Grey's notes.

they reminded the many of penance done with paper lantern and in white sheet for heresies and vices;[1] of comfort given to tyranny and to popery: the law which they administered was not English, and though intrinsically less obscure, was less easily understood by the people than Common Law: their judges had been corrupt[2] and the civilians who pleaded in them unpopular:[3] lastly, the time favoured, and the constitution of those tribunals justified, and alteration. Yet ordinary jurisdiction was transferred only, and not entirely taken away: partly it was necessary, and partly it was suited to the age. The business of the Clerical Courts, administrative and litigious, had still to be done; acts regarded in law as crimes did not cease in public opinion to be criminal; tithe was exacted still; property left by testators and intestates had still to be disposed of; clerks had still to be instituted and inducted: these duties were transferred by degrees to lay hands.[4]

On the civil side of the Spiritual Courts analogous changes were made, such as Bacon might have recommended,[5] such as have nearly all been since carried out. All questions about tithes — "Norman" though they were — were tried at Common Law.[6] As to probate and administration: Bacon and Selden had argued that, by the Civil and the Canon and the English Law, the profane hand has a better right than the sacred to grant probate, to distribute legacies, to administer the property of intestates;[7] *Brown* v. *Wentworth*

[1] *Ib*, 2, 1, 870: Proceedings in the Bp.'s and Archdn.'s Cts., Oxf.

[2] 13 Rep. 24: 12 Rep. 78 and 3 Ist. 147: 4 Inst. 336; cp., as to Sir John Bennet, Willet, "*Synopsis Papismi*" (Charitable work done in the U. of O.) and Macray, "Annals of the Bodl.," p. 37.

[3] Froude, c. 24: Hallam, cc. 2, 4, 8: Steph., "Comm." intr. § 1: Clar. *u. s.*, Burton, "Dairy," 4 Nov. 1654: Whitelock, 655: "*Merc. Pol.*," No. 238.

[4] Stt. 1643, May 17 and 20, c. 10; 1644 Nov. 5. Cp. the permission given by St. 1 Eliz. c. 1, §§ 39-43 to proceed with appeals to the Court of Rome in the cases of *Tyrril* v. *Chetwood and Wife* and *Harcourt* v. *Tydell*.

[5] See his "Certain considerations touching the better pacifications and edification of the Church of England."

[6] Statt. 1644, c. 45, 1647, March 24, c. 85; 1648, cc. 110, 121, 1649, cc. 24, 31; 1650, c. 5; 1654, c. 45; 1656, c. 10: *Harwood* v. *Paty*, Hardres, 63: Jones, "The crie of bloud," p. 16; "A case concerning tythes;" Winstanly, *etc. u. s.* pp. 18, 19: W[m.] S[hepherd], "The Parson's Guide" (1654), c. 8.

[7] Bacon *u. s.*: Selden, "Eccl. Jurisdiction of testaments." (c. 1626).

and *Hensloe's Case* were recent authorities in their favour,[1] and another was the practice of civilized Europe, — France, and especially Brittany, excepted.[2] In 1653, accordingly, a temporal tribunal was erected and endued with the powers of the Consistory and Prerogative Courts: it consisted of twenty judges, five of whom were a *quorum;* among them were Cooper, afterwards Lord Shaftesbury, Hale, Desborough, Cock, Peters, and Rushworth. The measure was crowned by the establishment of district registries for all wills and for letters of administration.[3] Legacies were to be sued for at Common Law.[4] St. 165$\frac{0}{1}$, C. 43, appointed delegates to try the validity of questionable marriages.[5] The effect of all this was to replace Ecclesiastical by Common Law, not simply to bound the jurisdiction of the former by the latter.[6] "I would not have law bookes to be dealt withall like the Common Prayer Booke, which as (*sic*) happily laine aside like an old caske for its ill savour," says John Coke, solicitor-general at Charles's trial, and afterwards Chief Justice of Munster, "but refined, purged, and conformed to Right Reason, speedy justice, and consconable (*sic*) Equity. Let his expurgation be, at the first dash, of all matters ecclesiastical and bishops' appurtenances, for what feare is there to expel that brats (*sic*) having banisht the father?"[7]

A mercantile country found our marine courts necessary, but in need of reform. Their judges were deputies, often without experience[8] and often inclined by covetousness or

[1] Yelverton, 92: 9 Rep. 37. Cp. 5 Rep. i, xvi., xvij., 74: 9 Rep. 48.

[2] Selden, l. c. pt. 1, c. 6.

[3] "An experimental essay," *etc.* p. 3: Statt. 1653, c. 2, Dec. 24; 1654, c. 4: Burton, "Diary," 1656, Dec. 3 and 24: Wynne, Jenkins, 2, 695.

[4] St. 1654, c. 44, § 48: "*Exam. legg. Angl.,*" c. 14, §§ 31, 33, 34: Rep. on Eccl. Cts. (1832), P. 39.

[5] "*Exam. legg. Angl.,*" c. 14, § 27; *p. s.* § 69: 3 "Hudibras," 1, 623-30. The attacks made in "A plea for ladies," *etc.* on Milton's book about divorce, which he defended by translating Bucer's, and by writing "*Colasterion*" and "*Tetrachordon,*" prevented thorough legislation.

[6] Wingate, "Maxims of Reason," 1, 4.

[7] "The Vindication," etc., p. 83.

[8] As Lewes, Principal first of New Inn Hall, and then of Jesus Coll. Oxf., appointed by Lord Clinton, in 1558, Judge of the High Ct., of Admiralty [Ms. among the records of the court: Wood, 1 "*Fasti Oxon.*" 127].

by ambition to stretch their powers. During twenty years the Republicans settled and restrained their civil jurisdiction by statutes:[1] and, when these were set aside at the Restoration a bill embodying them was brought into Parliament and supported by Sir Leoline Jenkins.[2] St. 1649, c. 61, vested in the Common Law Courts (and presumably took from others) jurisdiction over crimes committed on or beyond the seas: St. 1650, c. 7, however, explained that the Court of Admiralty had such jurisdiction still. Letters of marque were granted though under restrictions.[3] Stress of war and ignorance of Political Economy made the Commonwealth pass Acts of Navigation and maintain the pressgang.[4] But impressment was balanced by high wages, short periods of service, provision made for disabled seamen and for seamen's families. Stt. 1650, c. 28, and 1651, c. 22, perpetuated with aggravations in 1661 and 1663, approved by Blackstone, approved by even Adam Smith and Brougham,[5] were not repealed till 1854.

District courts to try small causes were in demand: not only such as have been erected since 1846, but more like those which Smith, J., and the Solicitor-General have lately recommended.[6] The sheriff's county court, the hundred court, the freeholder's court baron, had become inadequate, and were too often obliged, by writs of *pone accedas*, *recordari* and false judgment, to send cases up to the Superior Courts, there to be slowly and expensively decided. In Bacon's time the subjects of England did already fetch justice somewhat far off, more than in any other nation that he knew, the largeness of the kingdom considered; nor did the circuits nor the Courts of the Councils of Wales and of the North, which he compared to the French Parliaments, and to

[1] See among other Stt. 1648, c. 112; 1648-9, cc. 13, 14; 1640, cc. 21, 22, 23, 38; 1650, cc. 7, 33, 48, 50; 1651, cc. 3, 4; 1654, cc. 21; 1656, c. 10.

[2] Williams and Bruce, "Admiralty Jurisdiction and Practice," intr. pp. 13, 14: Browne, "Civil Law," vol. 2, c. 1.

[3] Statt. 1649, cc. 21, 38; 1650, c. 7.

[4] Stt. 16 Car. i. c. 5; 17 Car. i. cc. 30, 32; 1647, cc. 78, 101; 1648-9, cc. 12, 15; 1649, cc. 21, 73; 1650, c. 7; 1651, cc. 21, 29; 1652, cc. 15, 36; 1653, ord. 21; 1654, c. 13; 1656, c. 24.

[5] Bla. 1 "Comm." 418: Adam Smith, "W. of N." bk. 4, c. 2, and McCulloch's 12th n.: Campbell, "Brougham," c. 8.

[6] 1st. Rep. of the Judicature Commission (1869), note.

which he would have added a Border Court at Carlisle or Berwick, meet the want.[1] The inconveniences flowing from that practical denial of justice to those rustics who had sustained slight injuries or had little debts outstanding conspired with fashion to centralize England in London. The determination of wealth and ability to the capital had been resisted by Tudors, Stuarts and Republicans with futile measures against building and absentees.[2] But the Republicans were for resisting it also by improving the judicial and administrative system of the country. Carey in 1627 had turned to Spain, then in many respects another and a better England,[3] and asked for district courts with a summary jurisdiction such as he saw there.[4] The first steps taken by the Long Parliament were even in an opposite direction: it abolished all courts of the kind, and, no doubt, their scope, like that of the Stannary Court according to Clarendon, "had been extended with great passion and fury." But in 1645 complaint was made of the tedious journeys to Westminster: in 1648 Carey's request was renewed and a proposal made that all Superior Courts but that of Parliament should be swept away; and many a pamphleteer joined in the chorus: — "Let the people have right at their own doors."[5] In answer, the Palatine and the Duchy Court of Lancaster were revived by statute under Bradshaw and others, courts of conscience were established and county judicatures planned for England, courts baron were erected in Scotland and manorial courts[6] in Ireland.

[1] Bacon, "Certayne articles touching the Union of Engl. and Scotl.," *u. s.*

[2] St. 1656, c. 24. Cp. d'Israeli, "Cur. of Lit." ("Building in the Metropolis," *etc.*, and "Royal Proclamations"): Hallam, C. 8: Evelyn, "*Fumifugium:*" "The Apology for the Builder" (1685).

[3] Robertson, "Charles V.," notes: Allen, "The Royal Prerogative in Engl.," pp. 100 foll.: Stubbe, "a select senate" (1659).

[4] Carey, "The present state of Engl.:" Jones, "Every man's case," p. 17.

[5] Jones, "Eight observable points of law:" "An experimental essay, touching the reformation of the laws of Engl.:" Warr, "The corruption and deficiency of the laws of Engl.," cc. 3, 4: Jones, "Judges judged," *etc.;* "the new *returna brevium:*" "*Exam. Legg. Angl.*" c. 13: Lechford, "Plaine dealing," p. 25.

[6] These manors were created under the confiscatory statt. of Eliz., under "The Adventurers Act." (17 Car. i. c. 34), and under St. 1656, c. 23. Cp. St. 37 Hen. viij. c. 2; and see Kingston's case (1 Ridg. 384,

I pass from the courts to the attorneys, barristers, and judges. The first, not long distinguished from the second, had multiplied with the increase of business, and, on the abolition of arbitrary courts in 1641, those of them who had practised in these, and were called solicitors, flooded the Court of Chancery. There, though much of the work done by their modern representatives was then done by clerks of the court acting as the suitors' agents, they were very useful and very unpopular. The Commissioners of the Seals and Cromwell regulated both them and the clerks.[1] They tried also to regulate counsel's fees,[2] but (because these had risen naturally) without success. They did not perceive how much the Common-lawyers had strengthened their position by their action in the Rebellion. It was recommended in 1645 and 1649, and proposed in 1653, that no one practising at the bar should be a M. P.[3] That attempt to revive the Ordinance of 1372 would have been justified if the Lower House had sat as a law court; but, even so, had it not failed, it would have deprived the bar of those political instincts which may impair its scientific perfection, but, at least, keep it in the stream of national life.

On one important point the Republicans were beyond their age. Parliament recommended Cromwell and his Council "to take some effectual advice with the judges for . . . reviving the readings in the several inns of court, and the keeping up of exercises by the students there."[4] Among the Equity judges and those of the Court of Probate and Administra-

Vern. and Scr. 135), and Ormond's (St. 8 & 9 Will. iij. c. 5; 2 Bro. P. C. 256), and 2 T. R. 425, 705. They were perhaps created also by patent as in Delacherois' case (11 H. L. C. 62). They had no freeholders nor copyholders.

[1] Earle, "Miscrocosmographie" ("and aturney"): Clar. bk. 9: Hudson, *u. s.*: J. Coke, "The Vindication," *etc.*, p. 25: Orders in Beames: St. 1654, c. 44: Oglander, "Mem. of the Isle of Wight:" "*Exam. Legg. Angl.*," and Cock, *u. s.*

[2] "Some advertisements for the new election of burgesses for the H. of C.:" J. Coke, *l. c.*: Clayton, "Reports and pleas of assises at Yorke," pref.: 6 Somers's Tracts, 184, 189: St. 1654, c. 44.

[3] "Some advertisements," etc.: Whitelock, 430-3: 6 Somers's Tracts, 184.

[4] Burton, "Diary," 1657, June 26: "Merc. Pol.," No. 309. Cp. 4 Rep. xviij., xix.: North, "Guilford," p. 22: Burnet, "Hale," *etc.*, on "put-cases" and "mooters": Smith, 1 Jur. Soc. Pap., 385, foll.

tion there were some laymen, and there were to have been others in the county judicatures. These were not welcomed by the lawyers,[1] and, no doubt, they did some harm; but they were "expert assessors," and also they brought public opinion to bear, as it is now brought by the Press to bear, upon jurisprudence and legal proceedings. Like the assessors in France and Germany, like those suggested by the Judicature Commission, and even like a jury, they gave the *judicium* to the lawyers' *jus*. That separation of duties, says Mommsen, and the tendency of pleadings to a clear issue, were the distinctive excellences of Roman Law.[2] On the abolition of the House of Lords some of the Common Law judges, Hale, Rolle, Saint John, sat in the Commons. The practice of appointing judges "during their good behaviour" was that of Spain and of mediæval England, and was once, at least, adopted by Charles. Under the Commonwealth it was established, and after the Restoration it was by degrees, in the course of a century, established again.[3] Up to the time of the Great Rebellion judges had bought their places for fabulous sums, and had received in fees, bribes, and perquisites sums equally fabulous;[4] and the inequality of their incomes led to the conflicts of jurisdiction of which I have spoken. The Puritans struck at the root of this: they seized the notion that a law court is for the advantage of the community — not a shop having the monopoly of a certain kind of justice; they laid the foundation of the suitors' fee fund; they had all fees paid into a public account; they gave the judges fixed, but handsome, salaries; they did their best to check judicial simony.[5]

[1] Clayton, *l. c.* But see a petition against the monopoly of lawyers (British Museum $\frac{190.g.12)}{45}$, and the 1st Rep. of the Judicature Commission, p. 14.

[2] "Hist. Rome," bk. 2, c. 8, n.

[3] See Walter's case (Whitelock 11, 16: Kal. St. Pap. [Dom. Ser.], 1629-31, pp. 76-8), and Rolle's, Whitelock's, Keble's I'Isle's, Hale's. See also 1 Sid. 2: St. 12 and 13 Will. iij. c. 2, § 3: Hallam, c. 15 (compared with Macauley, c. 18): St. 1 Ann. s. 1, c. 8: 2 Ld. Raym. 747: St. 1 Geo. iij. c. 23: Blackstone in Steph. "Comm.," bk. 4, pt. 1, c. 6.

[4] As Vernon, J.; Richardson, C. B.; Cæsar and Buck: Jones, "The new *returna brevium*," pp. 23, 30.

[5] Comm. Journ. 5,528; 7,670: 6 Somers's Tracts, 186, 189: Whitelock, 382, 680: Cock, "Christian Government," p. 186.

Partly principle, and partly necessity, compelled the Puritans to respect scruples about oaths and affirmations. Some of the sects were too strong to be oppressed; and, again, "variers" had the countenance of public opinion as long as they were "pious," and their variations within limits. A bill drawn by the Committee of 1653 did away with promissory oaths on admission into universities, corporations, societies, companies, and with homage and fealty, and retained only oaths on admission to public offices. This anticipation of Locke and Berkeley and Bentham and even the Victorian legislation was due partly to dissent from the doctrine of the 39th Article, and partly to a sense of the harm done by multiplying oaths.[1]

But how imperfect was this tolerance! Stat. 1650, c. 27, repealing the Elizabethan statutes which enforced attendance at church, itself enforced attendance at some place of worship. The favour shown to the Hebrews, as much for pecuniary reasons as for religious,[2] did not extend to Secularists, Friends, Socinians, Roman and Anglo-Catholics. Such as it was, the Restoration put an end to it, and, in spite of the efforts made in 1668 by Hale and Bridgeman, it but slowly obtained once more. Gould, J., allowed witnesses to hold up their hands after the '45 and in 1786: so did Wilson, J., and the Recorder of London in 1788; and so in 1791, after some demur, did Lord Kenyon.[3] The philosophical views contained in the Report of the Oaths Commission, and more fully in Mr. Denman's bill, hardly existed under the Commonwealth.[4]

[1] Cp. 6 Somers's Tracts, 181, with Bps. Burnet and Tomline on the 39th Article, and with St. 17 & 18 Vict. c. 71, §§ 43, 44. And see "Hudibras," 1, 2, 1112, and 2, 2, and "The Lady's answer to the Knight," 183, and Grey; *"Exam. legg. Angl.:"* Sanderson, *"de Jur. Prom. Obl.," s. f.*

[2] Brett, "Narrative of the proceedings of a great council of Jews:" Dury, "A case of conscience:" "A narrative of the late proceedings at Whitehall concerning the Jews:" Ben Israel, *"Vindiciae Judaeorum:"* Lingard, vol. 8, c. 7: Hallam, c. 11: Carlyle, "Cromwell," pt. 9. Contrast Kal. St. Pap. (Dom. Ser.), 1660-1, p. 366. There were, of course, undisguised Jews in England before Cromwell connived at their return [Smith, "Willet," (1634)].

[3] *Mildrone's Case*, 1 Leach, C. L. 412: *Walker's, id. ib.* 498: *Mee* v. *Reid*, 1 Peake, 23. Cp. Reilly, 1 Jur. Soc. Pap. 435, foll., with Anstey. *ib.*, 371, foll.

[4] But see Cock, "Christian Govt.," p. 175.

Legal proceedings and literature were in Latin or in French. The reformers demanded what Coke had advised,[1] that they should be in English. The French, they said, was "pedlar's" and "hotch-potch," the Latin "barbarous" and "*quelque chose*," and the only use of them was to give lawyers a monopoly of advocacy.[2] In 1650 and 1651, Parliament, complying with a petition from the army and with the general wish, enacted English should be the language of law, committed to the Speaker, the Commissioners of the Seals and the three Heads of the Common Law Courts the supervision of the translators, and prohibited the use of court-hand. Only the proceedings in the Admiralty Court were to remain in Latin — the successor of Spanish, the predecessor of French — as the diplomatic and international language. In 1651 the Upper Bench made a rule in English, and afterwards, while the Commonwealth lasted, all courts, even those of manors, recorded their proceedings in the vulgar tongue.[3]

The reporters forewent the use of their "peculiar dialect," now under protest, evasively, and with regret,[4] now with cheerfulness, and even enthusiastically.[5] French and Latin were restored with Charles. The Wimbledon rolls were again kept (all but the returns to precepts) in the latter; cases, even those decided under the Commonwealth, appeared "in their native beauty" in the former.[6] But in ten years there was a cry for the late convenience;[7] and in seventy years an act, bitterly opposed, almost neutralized two years

[1] 4 Rep. xx., xxi.: 1 Inst. xl., xli. (citing St. 35 Edw. iij. c. 5).

[2] Jones, "Eight observable points of law," §§ 4, 8; "The new *ret. brev.*," pp. 7, 15, 21-3; "Judges judged," *etc.*, pp. 107, 114, 115; "Jurors judges of law and fact," pp. 4, 5, 51, 77, 79, 86: Warr, "The Corruption," *etc.*, cc. 3, 4: Winstanly, *etc.*, *u. s.*, pp. 18, 19: Cock, "Christian Govt.," pp. 133-5.

[3] Stt. 1650, c. 37; 1651, c. 4: followed up by Stt. 1654, c. 28; 1656, c. 10: Whitelock, 384, 475-83: Style, 261: Wimbledon rolls, Nos. 12-15; roll of misc. scripts; bks. 7-9: "*Merc. Pol.*," No. 19.

[4] Bulstr. *u. s.*: Noy [?], pref.: Clayton, *u. s.*: Hetley, pref., 26, 36.

[5] March, pref.: Bridgeman, pref.: Leonard by Hughes, *u. s.*

[6] Yelverton, pref.: 2 Siderfin.

[7] "An appendix by way of dialogue [to the 2nd part of 'The people's ancient and just liberties asserted in the proceedings against and tryals of Thomas Rudyard, Francis Moor,' *etc.*]" (1670): North, "Guilford," p. 22.

later, and productive of some bad consequences, revived the statutes of 1650 and 1651.[1]

It is no wonder either that the Republican jurists should have desired a code, or that they should have failed to make one. The outline of a code had been partly and roughly drawn; the need for one was urgent; the necessary science wanting. The outline had been drawn: authorities had been published in great numbers since 1640, some for the first time — writs, original (by Hughes) and judicial (by Brownlow); "Bracton;" "Britton," Bishop of Hereford, or whoever else; "The Mirror," in French and in English; Fitz-Herbert's "*De natura brevium;*" the last three parts of "The Institutes." Cases and statutes had been abridged — statutes by Wingate and by Hughes; Coke's reports by Trotman, Dyer's by Ireland, Brooke's by March; while Shepherd had abridged statutes and cases too.[2] Digests, more or less systematic, had appeared — Swinburne on "Wills," Bacon on "Uses," Wingate's "*Statuta Pacis,*" Shepherd's "Parson's Guide;" not to speak of Lambarde's and Selden's researches, West's "Symboleography," Brownlow's "Declaration and Pleadings." All these suggested something more, and made it seemingly feasible. "It is fit," said Sir Anthony Ashley Cooper, "that laws should be plain for the people."[3] To make them plain, John Coke proposed to clear them of everything, "either properly and directly, or collaterally and obliquely, repugnant to the law of God," a method which he may have pursued in Ireland,[4] and which had been pursued in the Judaized code of New England.[5] Ten years later Bulstrode wished "to file off the rust" from the laws, and to reduce them "into a sound

[1] Stt. 4 Geo. ii. c. 26 (see 7 C. B., 462: Willes, 601); 6 Geo. ii. c. 14, §§ 3, 5 (cp. Noy [?], pref.): Bl. 2 "Comm.," 323: Smollett, bk. 2, c. 4, § 25: J. Wesley, "The doctrine of original sin," 1, 2, 9.

[2] Add "Special and selected law cases concerning persons and estates, collected out of the Reports and Year Books of the Common Law of Engl." (1641), and Finch's "Law" condensed by Wingate.

[3] Burton, "Diary," 1657-8, Febr. 2, Rutt's note.

[4] "The Vindication," *etc.*, pp. 25, 26. Cp. "*Exam. legg. Angl.,*" cc. 11; 12; 14, § 13. Coke, though his "Vindication" is flattering and cowardly, was praised by Cromwell for his conduct in Ireland and died bravely [Ludlow, 123 (137), 398 (407)].

[5] Lechford, "Plaine dealing," pp. 26, 27, cited in "*Exam. legg. Angl.,*" c. 14, § 3. Even then English Puritanism looked to America.

and solid body:" the task would be heroic, and those who did it the founders and restorers of our laws.[1] Parliament, meanwhile, had been less idle than ineffectual; it appointed a Committee of Law Reform; it read the book containing the whole system of the law which that committee composed; it ordered three hundred copies of it to be printed; and, after that, all Cromwell's persuasion could not induce it to do any more.[2] The truth is, that the Dutch or Swedish simplicity which Hugh Peters demanded[3] was possible only in the United Provinces or in Sweden, and that the reformers were exorbitant. Still codification was desired. In 1666 a committee was appointed under Clarendon to make a code,[4] and Hale's "Pleas of the Crown," and his "Analysis of the Civil [rather, of the non-criminal] Part of Our Law," are torsos of parts of the code of the Commonwealth. On the latter, though neither exhaustive, nor free from cross-divisions, a system might have been built far more palatial and perfect than Blackstone's; and, comparing those sections of it which correspond with the "*Synopsis totius Littleton analytice*" (1659), we see how near the Puritans were to that Baconian "reduction and recompilation of the laws" for which we wait. Mr. Fitz-James Stephen contrasts the "Pleas of the Crown" with the "Third Institute," as a code with a digest; and Professor Amos says that though Hale has not extended his supremacy over the whole see of the Criminal Law, he was peculiarly qualified for the Papal Chair.[5] A criminal code is easier to make than a civil, and perhaps more useful: the magistrate is never a more successful schoolmaster than when he teaches from such a text-book; and the value of a civil code to the laity was even more exaggerated under the Commonwealth than it now is.

[1] 1 Bulstr., pref. Cp. "An experimental essay," *etc.* (1648).

[2] Whitelock, 519: Carlyle, "Cromwell," Speeches 2 and 5: "A Vindication of the laws of Engl.," *u. s.*

[3] Peters, "Legacy" (in Harris 1 "Lives," xxv., quoted by Rutt., *u. s.*): Whitelock, 430-3, 521, 601.

[4] Comm. Journ. 1666, Oct. 5.

[5] Austin, "Lectures" (1863), vol. 1, p. cix.; vol. 3, p. 279: A. Amos, "Ruins of the time exemplified in Sir Matthew Hale's 'Hist. of the Pleas of the Crown'" (1856), pp. 1, 3: Stephen, "Criminal Law," c. 2: Bacon, "Certayne articles," *u. s., etc.*

In what is commonly though too narrowly called Criminal Law the Republicans made few improvements. As to treason and rebellion, that necessity of preserving some constitution which created High Courts of Justice must answer for their proceedings. As to other crimes, reforms were planned, but (so inadequate were conceptions of the dignity and value of the individual) few of these were carried out, and some measures were proposed and contemplated which were retrogressive. In 1648 it was suggested that treason, rebellion, and murder only should be capital, and that other felonies should be punished by fines or by servitude to the person injured.[1] The Committee of 1653 proposed to discontinue pressing to death in default of pleading,[2] to acquit (without penalty or forfeiture, pardon or deodand) justifiable and excusable homicides, to punish principals in manslaughter and accessories before the fact with judgment of death without forfeiture or corruption of blood, and accessories after the fact with forfeiture and five years' imprisonment;[3] to abolish "clergy;" to repeal the law approved by Selden "of devoting to the flames those wicked baggages who stain their hands with the nefarious murder of their husbands."[4] Then acts were passed — one, embodying another of their proposals, against provocations to duels;[5] one against those who encouraged others in extravagance;[6] others against cockfights and horseraces.[7] But the imaginary offence of witchcraft was left criminal; deer-killing was punished by a fine of £15 or a year's imprisonment; acts, sinful or vicious rather than criminal, were punished; incest, adultery, and repeated fornication were punished with death; so the Committee were for making bigamy capital, and cutting off the right hand of a murderer before

[1] "An experimental essay," *etc.*

[2] 6 Somers's Tracts, 234, 235: "*Exam. legg. Angl.*" c. 11, § 9. Cp. Stt. 12 Geo. iij. c. 20; 7 and 8 Geo. iv. c. 28.

[3] 6 Somers's Tracts, 235.

[4] 6 Somers's Tracts, 236: 6 Rep. pref. (quoting Cæsar, 6 B. G. 19): Selden, "*Janus Augl.*," bk. 1, c. 11. Cp. Statt. 30 Geo. iii. c. 48; 54 Geo. iii. c. 146; 9 Geo. iv. c. 31.

[5] 6 Somers's Tracts, 188: Statt. 1654, c. 36; 1656, c. 10.

[6] St. 1656, c. 26: Comm. Journ. 1650, June 7: 3 Parl. Hist. 1346.

[7] Statt. 1654, cc. 2, 39: Grey's note on "Hudibras," 1, 1, 800.

hanging him.'[1] In 1649 Whitelock inveighed against the inequality of punishment; and in 1656 Cromwell repeated his invective.[2] One doctrine of Whitelock's was accepted by the Committee: it was that criminals prosecuted by counsel should be defended by counsel; that criminals should have copies of their indictments, and that their witnesses should be heard on oath. But it seems to have been thought that criminals had already too many chances, and therefore these rights and that of appeal were denied them.[3]

The law of marriage, in a country such as this, is almost the groundwork of the law of property. The variety, the occasional contempt of ceremony in which the Puritans indulged, the downfall of that hierarchy which had taken cognizance of matrimonial affairs, made legislation unavoidble. A form of solemnization had been prescribed by the Presbyterian Directory, but was regarded with ridicule by Churchmen, with suspicion by those who prescribed it; others did not regard it at all.[4] The Committee of 1653 proposed a new order: it becamc law that year, and in 1656 ceased to be compulsory, but, as optional, was ratified. It directed three weeks' advertisement to be given in Church, chapel or market-place of intended marriages; the parents' or guardians' consent to be obtained; the form to be a mutual agreement expressed before a justice of the peace: girls below fourteen and boys below sixteen were not to be married.[5] That statute unwittingly revived something of the practice of Christian antiquity; then the faithful, though he might hallow his union by the benediction of the Church, yet, hating paganism, and perhaps being of the lower orders, would avoid anything like *confarreatio*, and, as a Roman citizen, would be bound by the civil contract only;

[1] Statt. 1652, c. 27 (cp. 14 "St. Tr." 639 foll., 690 foll.); 1651, c. 12: 6 Somers's Tracts, 190, 235, and statutes cited above, pp. 589, 590: "*Exam. legg. Angl.*" c. 14, §§ 29, 32.

[2] Carlyle's "Cromwell" (speech 5): "*Exam. legg. Angl.*" c. 11.

[3] Whitelock, 433; "Life," 109-120: 6 Somers's Tracts 235: Hutton, 133: "Directions for justices of the peace," No. 7 (prefixed to Kelyng): Mr. Commissioner Hill, "The repression of crime" (1857), pp. 25-41.

[4] St. 1645, c. 51: Grey on "Hudibras," 3, 1, 888. Cp. Nelson, "Bull," § 9: Cock, "Christian Govt.," p. 52.

[5] Stt. 1653, c. 6; 1656, c. 10: 6 Somers's Tracts, 179. Cp. the New Engl. law (Lechford, *l. c.* p. 39).

it also anticipated our statute of 1837, and even the French codes.[1] In accordance with it, the daughter of Saint John, C. J., was married in his presence; and in actions of debts and of ejectment marriages between Friends were held valid. But at the Restoration the greater part of these irregular rites were and had to be confirmed.[2] The statutes of 1645 and 1653 improved also on the Tudor and Stuart registration system; that system did officially what private records (such as the *Liber obitalis* at Queen's College, Oxford) had long done; it chronicled the performance of baptisms, weddings, and burials. The Republican method chronicled the occurrence of the birth, the making of the marriage contract, but the burial — not the death.[3] The statute of 1650 against incest being penal, marriages took place within degrees which it did not prohibit, though the law existing did: many of these were pronounced invalid after the Restoration.[4] Women were deservedly influential among the Republicans; men's extravagance was restrained by statute; a bill intended to restrain women's, and much needed, was thrown out; and, not to speak of other movements in their favour, the protection given under Charles II. by Hale and others to wives against their husbands.[5]

That men's titles to their estates in land should be thoroughly known had become of great importance. Many an acre had been sequestrated and brought into the market;

[1] Milman, "Latin Christianity," bk. 3, c. 5: "*Manuale Ebor.*" and "*Man. Sarisb.:*" Dr. Goldingham in *Bunting* v. *Lepingwell*, Moore, 170: Chaucer, "The wife of Bathe's prologue:" Menochius, "*De praesumptionibus*" (1595), 3. 2. 7, *et 11 cc.: Dalrymple* v. *Dalrymple*, 2 Hagg. C. R. 64, 67-70: Jurieu, "Hist. Counc. Trent," bks. 7 and 8: Stt. 6 & 7 Will. iv. c. 85; 10 & 11 Vict. c. 58: *Le Code Civil*, §§ 75, 76, 165: *Le Code Penal*, §§ 199, 200. The ring is a trace of *coemptio:* cp. Benjamin, "contract of sale."

[2] 1 Hagg. C. R. app. 9 n.: Burnet, "Hale:" North, "Guilford:" Stt. 12 Car. ii. c. 33; 13 Car. ii. c. 11. And see St. 6 & 7 Will. iii. c. 6, §§ 63, 64.

[3] Cp. the 70th Canon with 6 Somers's Tracts, 179; Stt. 1645, c. 51; 1653, c. 6, §§ 4, 10, 11: and these again with St. 30 Car. ii. c. 3, and the acts since 1820. St. 1653 c. 6, extended to Ireland.

[4] See *Harrison* v. *Burwell: Hill and Wife* v. *Good: Watkinson* v. *Murgatroyd; Collet* v. *Collet; Hinks* v. *Harris. Cp. Selden*, "*De successionibus*," etc., cc. 14, 15; "*Uxor Ebraica*," bk. 1, cc. 12-15.

[5] 2 Lev. 128; 1 Str. 477; 1 Sid. 113, 116: 3 Keble, 433. Cp. St. 1656, c. 26, with "Parl. Hist." 1650, June 7.

the market was full of powerful capitalists. Never had registration been in greater request. As long as landed property was transferred by physical delivery, so long its transfer was notorious to those to whom it was likely to pass.[1] And though that form, like mancipatio in Rome, was abandoned on account of its awkwardness, there was a custom of selling "book-land" at the sheriff's county court, and of recording the sale at the nearest monastery in a cartulary or in a *m. s.* of the Gospels or in a "land-book," and these were sometimes placed on the Altar. Such a register, but of the house's own title, is the *Liber Evidentiarum* of S. Augustin's at Canterbury.[2] Analogous to these records, dating from the earliest English times, were the court rolls of manors, as those of the manor of Taunton and Taunton Deane. But now monasteries had been swept away; the Statute of Inrolments did not apply to counties palatine and to many corporate towns, and was not regarded in one case out of an hundred.[3] How many law suits were due to the want of a land registry we know from Hobbes [4] and we might guess from the establishment of such institutions for soldiers' debentures, and for the sale of Church, Crown, and Royalist property.[5] There were even proposals for county registeries: sales not recorded in them within a certain time were to be void; land, the sale of which was so recorded, was not

[1] 1st Rep. of the Registration and Conveyancing Comm. (1850) pp. 3, 4; app. 6; Rep. of the Registration of Title Comm. (1857), p. 2; Steph. "Comm." 2, 1, 17, 20: Williams, 1 Jur. Soc. Pap. 45; 2, 589; Ludlow, *ib.* 2, 140.

[2] Hickes to Shower, "*Dissertatio epistolaris,*" p. 9 (1703) Brit. Mus. Arundel Mss. 310. The inventories or "stars," perhaps the same as *shetarim,* which Richard I. made the Hebrews keep of their debts, mortgages, lands, houses, revenues and possessions, were rather part of an apparatus for extortion than registers of title. See Roger of Hoveden, "*Annales,*" *pars post., Riv. prim., capitula de Judaeis;* Selden, "Of the Jews sometimes living in Engl.: "Du Cange," *sv.* "*starrum:*" Steph. "Comm." 6, 14, 3, n.

[3] Sanders, 2 Uses, 66: Pierrepoint, "A treatise concerning registers," etc. (c. 1660). Was he the Protector's friend (as to whom see Carlyle, "Cromwell")?

[4] "A dialogue between a philosopher and a student of the Common Laws of Engl." (of Courts): "*Exam. legg. Angl.*" c. 14, § 35: Cock, "Christian Govt." p. 171: Grey on 3 "Hudibras," 1, 1519, 1520.

[5] Stt. 1646, c. 66; 1647, c. 75; 1648, c. 113; 1649, cc. 24, 42, 76; 1650, cc. 29, 30, 47; 1651, c. 10; 1652, cc. 6, 16, 23, 31; 1653, c. 10.

to be subject to any incumbrance. But, because the Committee could not, after trying for three months, settle what an incumbrance was, the proposal fell to the ground, and registration was left permissive, that is, nugatory. "The English people," said Cromwell, "will take Ireland, which is as a clean paper in that particular, for a precedent; and when they see at how easy and cheap a rate property is there preserved, they will never permit themselves to be cheated and abused as they now are."[1] And yet the advocates of registration had not wholly failed. The Bedford Level was a creation of the Republicans; to them it owes its registration system:[2] to them also are due, however remotely, the acts for Yorkshire, and Kingston, and Middlesex, the Victorian legislation for Ireland, the permissive statutes of 1862.[3] Pierrepoint objected to their schemes, the injustice done to persons nominally entitled, and the expense.[4] Hale was on the other side.[5] But a student of the history of land registries in England may well doubt whether any one interested in land desires them. As Hale said, every feature of the title must be inrolled, "as well for the time past as for the time to come; otherwise the plaister is too narrow for the sore . . . for, if any one leak be left unstopped, the vessel will sink as if more were open."

The law of personal property was at this time more important than that of real. Personal property, when employed in agriculture, had still a far higher relative value than it now has;[6] and commerce was on the rapid increase. Cases like Twyne's[7] of mercantile immorality, connoting

[1] 7 Comm. Journ. 67, 100, *etc.:* Ludlow, 123 (137), 165 (184), 398 (407) St. 1653, c. 10. Cp. G. Smith, "Irish Hist. and Irish Character," *s. f.*

[2] Statt. 1649, c. 29; 1654, c. 20 (cp. c. 57); 1650, c. 10; 15 Car. ii. c. 17 (cp. 10 Sim. 127): Dugdale, "Hist. of Imbanking," *etc.*, cc. 32-41, 54 (1662): Carlyle "Cromwell."

[3] With St. 25 and 26 Vict. c. 53 cp. *Bradish* v. *Ellames* 10 Jur. (N. S.)

[4] "A treatise," *etc. u. s.*

[5] "A treatise showing how useful . . . the enrolling and registering of all conveyances of lands may be," etc. Cp. Philpot, "Reasons and proposals for a registry," *etc.* (1671); Adam Smith, "W. of N.," book 5, c. 2, pt. 2, app. to articles 1, 2: Mill, "Pol. Ec." bk 5, c. 8, § 3.

[6] Prof. Rogers, "The laws affecting landed property" (1869), p. 11.

[7] 3 Rep. 82 ("*quaeritur ut crescant tot magna volumina legis: in promptu caussa est; crescit in orbe dolus*").

mercantile enterprise, complicating law which otherwise might have been as simple as the Swedish;[1] the growth of banking;[2] the fact that the Jacobean and Caroline exactions were so long borne; the evidences of Bacon, Mun, and Clarendon[3] — all convince us of this. One result of that increase was that the mantle of Equity thrown by Ellesmere over the mortgagor was taken from him. Another was that debts, hitherto assignable by and to the Crown only, were made assignable by and to any one; hence that development of the law as to bills of exchange (especially necessary to commercial intercourse when the exportation of the precious metals was prohibited) which had taken place in Spain, took place in England.[4] Then, besides the minor courts of which I have spoken, means were proposed of recovering small debts and debts due from corporations.[5] Again, notwithstanding the jealousy of monopolies, inventors received patent rights, even if they did not come within the statute of James.[6] The Statute of Fraudulent Devises was forestalled; and even that of Frauds and Perjuries, suggested by Hale to Nottingham, brought in by him, enlarged and revised by Guildford and Jenkins, may well have been planned by the Committee of 1653.[7] Lastly, bankruptcy acts protected the unfortunate and sent the dishonest to be tried by a jury; imprisonment for debt, though no doubt unnecessarily cruel, and bitterly attacked, particularly by prisoners, was well and successfully defended.[8]

The frequency of sales of confiscated land, the unwilling-

[1] Whitelock, 430-32; 601.

[2] "*Exam. legg. Angl.*" c. 14, § 39: Clar. "Life," 3, 7: St. 22 and 23 Car. ij. c. 3, § 2.

[3] Bacon, "Advice to Sir G. Villiers" (1615-16): Mun. "Engl. treasure by foreign trade" (*c.* 1625): Clar. bk. 1.

[4] *Breverton's Case,* Dyer, 30 b.: Rolle, "Abr." (*action sur case* [V] 60, 61): Stt. 1646, c. 65; 1649, c. 24 (Scobell [1658], pt. 2, pp. 23, 28): 6 Somers's Tracts, 187. But see Mayor, "Baker's 'Saint John's Coll., Cambr.' p. 383."

[5] 6 Somers's Tracts, 184, 187. [6] Stt. 1650, c. 39; 1651, c. 2.

[7] 6 Somers's Tracts, 186: St. 1654, c. 25. Cp. Stt. 29 Car. ii. c. 3; 3 & 4 W. & M. c. 14: and see Benjamin, "Contracts of Sale," bk. 1, pt. 2, c. 1 (where read 5 East, 17, and Wynne, "Jenkins," I, liij.); Gilbert, 171.

[8] Statt. 1653, c. 13; 1654, c. 41: Jones, "The new *ret. brev.*" p. 11; "The peace of justice" *p. s.*; "Judges judged," *etc.*; "The crie of bloud;" "Every man's case," *etc.*: petition to Cromwell from the prisoners in the Fleet against oppression [Brit. Mus. $\frac{190.g.12}{121}$]: "Reasons

ness of purchasers to take a parliamentary title, the outcry against feudal and manorial rights, drew men's eyes to the law of realty. "It were convenient," wrote an essayist in 1648, "that there might be no estate but absolute, for life or inheritance, without conditions and entayles, whether given by will or purchased by deed in writing; and this would shorten all suits about estates." Such a change, though considered, was never brought about,[1] and another proposal of the essayist, that all customs should be assimilated, was rejected, even as to the customs affecting the inheritance of the land. But every temptation and security was offered to purchasers.[2] James had consented to the sacrifice of many feudal incidents on condition of being repaid by fee farm rents. Gustavus Adolphus had abolished purveyance in Sweden; the Republicans abolished it in England, and, with it, billet and free quarter. They put an end to the Courts of Wards and Liveries, to wardships, liveries, primer seisin, ouster-le-main, and charges incident to these, to homage, to fines, licenses, and seizures for alienation of lands held by tenure in chief; they turned into common socage all higher tenures. The profits to the State from these were replaced by a real land-tax, itself replaced after the Restoration by an increase of the Republican excise.[3] Then it was proposed to take away fines and recoveries, and to compel by simple means the payment of rent.[4] Trusteeship to preserve contingent remainders was invented to evade the confiscatory acts; as from the statutes against Romanists so much else in conveyancing flowed.[5] It would have been rash to disregard the claims of "the common people," as the copyholders (in opposition

for the continuance of the process of arrests," *etc.* (c. 1651). Hugh Peters's "Good work for a good magistrate" was answered by Vaughan [Jones, "The crie of bloud," A 2].

[1] "An experimental essay," *etc., u. s.* Cp. 6 Somers's Tracts, 182: "*Exam. legg. Angl.*" c. 11, §§ 22, 23.

[2] Stt. 1642, c. 4; 1646, c. 67; 1647, c. 124; 1648, c. 122; *etc.*

[3] Bacon, "Works," ed. Spedding, vol. 10, pp. 178 foll., 266 foll., 304, 305: Stt. 1643, c. 19; 1645, c. 59; 1646, Feb. 24; 1647, c. 92; 1649, c. 25; 1652, c. 14; 1654, c. 9 (abolishing wardship, *etc.*, in Scotland); 1656, cc. 4, 7, 10, — 25 St. 1656, c. 4, especially: 1 Bl. "Comm." 288, 319. Cp. the Statt. of 12, 13, 14, and 15 Car. ii.

[4] 6 Somers's Tracts, 182, 183.

[5] Williams, 1 Jur. Soc. Pap. 54, 55: Davidson, "Precedents," intr. § 1: Prof. Rogers, *u. s.* pp. 9, 10.

to the gentry and the freeholders) were then and long afterwards called,[1] for these had been led to think that the success of the Parliament would relieve them of their "Norman" lords.[2] Accordingly, it was proposed to ascertain arbitrary fines upon the descent and alienation of copyholds, and to place the conditions of the tenure beyond the discretion of the homage.[3] Many copyholds were actually enfranchised; but many, even of those confiscated, were still demised by copy of court roll and not otherwise. Commonable rights were not so far recognized that commoners were allowed to break up common land.[4] The allotment system instituted under Henry VII, carried out under his grandchildren, recommended by Bacon, but already decaying, was partly restored, and there were fewer "silly" cottages.[5]

But, after the Restoration, Parliament continuing to the greater tenures the relief afforded to them under the Republic, but substituting an excise for a land-tax, left the lesser tenures exposed to the old abuses. That, as North says, "was somewhat unequal."[6]

What would have been the economical effect of these changes? Would Coke's copyholder,[7] if his land, enfranchised during the Commonwealth, had not been reinstated at the Restoration, have escaped being bought up by capitalists? Would a land registry have preserved or aided to extinguish a peasant proprietary? Would the annihilation of equities of redemption have favoured any but the rich?

[1] Winstanly, Barker and Star, *u. s.*: Foote, "The Mayor of Garratt," 2, 1. Sheridan, "A trip to Scarborough," 5, 2.

[2] Winstanly, *etc., u. s.* Cp. Cock, "Engl. Law," p. 48; Thierry, *u. s.* Absurd as it was to call the Royalists "Norman," still in that party were probably most of the lords of manors. Lambert was Lord of the Manor of Wimbledon during the Commonwealth.

[3] 6 Somers's Tracts, 183: "*Exam. legg. Angl.*" c. 14, § 36.

[4] Winstanly, *etc., u. s.*: St. 1646-7, c. 72: Cock, "Christian Govt." p. 174.

[5] Bacon essay "of the true greatness of kingdoms and estates;" "Henry VII.;" speech of naturalization (1607): "An experimental essay," *etc., u. s.*: "The Pall Mall Gazette," No. 1286.

[6] North, "Guilford," pp. 23, 24, 140, 241. Contrast Cock, "Christian Govt." p. 170.

[7] Co. Cop. in Williams, "Real Property," pt. 3.

If we contrast the legislation of the Commonwealth with that of Frederick the Great, or with that of the French Revolutionists, or even with our legislation for India, we are struck by its poverty of principle, by its abundance of anomalies. How shall we account for this? The English had more learning than thought. They were not sufficiently nor critically acquainted either with Roman Law or with Comparative Nomology. They were illuminated, not by Philosophy, but by a misconception of what had been the religion of the Hebrews. They were slightly instructed in Philology (as opposed to Latin Literature), still more slightly in Natural Science, Political Economy, and other sciences and quasi-sciences ancillary to jurisprudence. They had chaos before them, and they had not, except in Ireland, "a clean paper" to work upon. Such a fair field lay in Prussia,[1] in France, in India, and lies in Russia now. We in England have the materials which they had, but better digested; we have those sciences. Philology has redeemed Law from barbarism[2]; Political Economy and Natural Science have supplied it with principles. No solicitor-general and chief justice would propose John Coke's theocratic reform of our statutes and leading cases. Not an Hale only, but ordinary students in our universities, read Roman Law by the light of Roman History and the History of Philosophy.[3]

We look at the systems of the Hebrews, the Spaniards, the Dutch, the Swedes, not with the contracted vision of the Republicans, but comprehensively, as critics should. And yet — I mean, and therefore — we cannot sneer with Blackstone at the crude and abortive schemes for amending the laws devised in the times of confusion.

[1] See Carlyle, "Frederick," 11, 1; 16, 1, 2, 4, 8.

[2] Cp. "*praebendarius, qui praebet auxilium episcopo*" [E. Coke], "*qui praebendam suscipit*" [Du Cange]: and see Hamilton, "Discussions," (1853), pp. 344, 345: Phillimore. "Roman Law," pt. 1, c. 1: Doellinger, "Universities past and present."

[3] Burnet, "Hale," pp. 17, 18: cp. Leibnitz, "New methods of teaching and learning law" (1667), and "Plan for rearranging the *Corpus Juris*" (1668); and see the lines beginning, "*In* Institutis *comparo vos brutis*," quoted by Lord Westbury, 1 Jur. Soc. Pap. 6; Phillimore, *l. c.*, pt. 2, c. 4: Gueterbock, "Bracton," c. 7.

15. BENTHAM'S INFLUENCE IN THE REFORMS OF THE NINETEENTH CENTURY[1]

By John Forrest Dillon[2]

"BENTHAM'S theories upon legal subjects have had a "degree of practical influence upon the legislation "of his own and various other countries comparable only to "those of Adam Smith and his successors upon commerce." Such is the opinion of Sir James Stephen concerning the influence and effect of Bentham's legal writings and labors.[3] As late as 1874 Sir Henry Maine went so far as to declare: "I do not know a single law reform effected since Ben- "tham's day which cannot be traced to his influence; but a "still more startling proof of the clearing of the brain pro- "duced by this system [the system of Hobbes, Bentham, and "Austin], even in an earlier stage, may be found in "Hobbes. In his 'Dialogue of the Common Laws,' he argues "for a fusion of law and equity, a registration of titles to "land, and a systematic penal code, — three measures which we are on the eve of seeing carried out at this moment."[4]

[1] These passages are taken from "The Laws and Jurisprudence of England and America," 1894, being lectures delivered at Yale University; (Boston: Little, Brown, & Co.), Lecture XII, pp. 316-347; the author has revised them for this Collection.

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Other Publications: Law of Municipal Corporations, 1872; Law of Removal of Causes from State to Federal Courts, 1877; Law of Municipal Bonds, 1876; Life, Character, and Judicial Services of Chief Justice Marshall.

[3] Sir James FitzJames Stephen, "History of Criminal Law of England," London, 1883, vol. ii., chap. xxi., p. 216.

[4] Early History of Institutions, Lecture XIII. Others also, well

Opposite views are entertained by others. It is worth while, therefore, to essay to define Bentham's place in the history of our law, and to attempt an estimate of the character and influence of his writings; and such is the purpose of this hour. Bentham's fertile and active mind embraced in the scope of its operations many other subjects than those of law and legislation, such as ethics, political economy, political reform, and even practical politics. Nevertheless, his principal attention was given to the English law and to the mode by which its improvement could best be effected; and this lecture will be restricted to his writings and labors concerning English law and the method of reforming or amending it.

It is essential to a correct view of the character and value of Bentham's labors to bear in mind the period of time covered thereby, and also the condition of the English law especially as it existed when his efforts for its improvement were begun.[1] Jeremy Bentham was born in London in 1748. In 1763, at the early age of sixteen, he was graduated with honors at Oxford. He was in due time called to the English bar. His first work, the Fragment on Government,

qualified to judge, have assigned to Bentham a place in the foremost rank of men of extraordinary intellectual endowments. I subjoin an extract giving Macaulay's judgment. He is by no means a partial witness: he was a Whig of the Whigs; Bentham, a Radical of the Radicals. If there was anything that a Whig hated more than a Tory, it was a Radical. Macaulay had in Bentham's lifetime attacked with fierceness and rancor the Benthamic notions of politics. Yet within a few months after the death of Bentham, in reviewing (July, 1832) Dumont's "Mirabeau," Macaulay thus expresses his opinion of Bentham's character and labors: "Of Mr. Bentham," he says, "we would at all times speak with the reverence which is due to a great original thinker and to a sincere and ardent friend of the human race. In some of the highest departments in which the human intellect can exert itself he has not left his equal or his second behind him. From his contemporaries he has had, according to the usual lot, more or less than justice. He has had blind flatterers and blind detractors, — flatterers who could see nothing but perfection in his style; detractors who could see nothing but nonsense in his matter. He will now have his judges. Posterity will pronounce its calm and impartial decision; and that decision will, we firmly believe, place in the same rank with Galileo and with Locke the man who found jurisprudence a gibberish and left it a science." (A general truth, rather too strongly expressed.) See below for opinions of Brougham and others concerning Bentham's writings and labors.

[1] See *ante* Lecture XI.

being a criticism on a portion of Blackstone's Commentaries, was published (anonymously) in 1776; his attack on Usury Laws in 1787; his Panopticon in 1791; his protest against Law Taxes in 1796; his great work (Dumont's Edition, in Paris) on Legislation, Civil and Criminal, in 1802; on Codification in 1817; on Rewards and Punishments (Dumont's Edition) in 1818; on Judicial Evidence, in Paris, in 1823, English translation thereof in 1825, and from original English manuscripts, edited by John Stuart Mill, in 1827. I omit in this enumeration, as not essential to my present purpose, some minor works concerning law or legislation, and many important writings relating to education, prison discipline, political reforms, morals, and kindred subjects.

Bentham was, broadly speaking, contemporary with what may be styled the legal reign of Eldon. The common law in its substance and procedure was by everybody in England regarded with a veneration superstitious to the verge of idolatry. It was declared, and generally believed to be, "the perfection of reason." Lord Eldon and the Court of Chancery, with its suitorcide delays, "pressed heavily on mankind." Imprisonment for debt, and distress for rent with all its harsh and oppressive incidents, were in unabated force. The criminal law, defective and excessively technical, abounding with capricious and cruel punishments, and which denounced the penalty of death on about two hundred offences, remained in a state which no one any longer hesitates to pronounce outrageous and shocking.[1] It was on this system that Bentham, when he was under thirty years of age, solitary and alone, commenced the attack which he incessantly continued until his death in 1832, at the age of eighty-four. He was a multiform man; but it is as a law reformer that he stands the most conspicuous and pre-eminent. He had all the personal qualities of a reformer, — deep-hearted sincerity, unbounded faith in his own powers and self-sufficiency, unwearied zeal, and dauntless moral courage.[2]

One who should not bear in mind the peculiar aversion of the English people to innovation, the inveterate conservatism of the bar, and the awe and reverence with which they re-

[1] See *post* Lecture XIII. [2] See *ante* Lecture VI., p. 180.

garded the existing system, might suppose that the work of amendment would readily follow when the defects were pointed out. But Bentham's voice for nearly fifty years, so far as England was concerned, was like that of one crying in the wilderness. Parliament did not heed it; the bar did not heed it; nobody heeded it. For quite twenty-five years he seems to have had no following beyond Mill, senior, and a few other personal friends. Happily for him he had a competence and was able to give his days and nights to the work to which he had resolved to consecrate his life. Happily, perhaps, also, he had no domestic cares or distractions, being without wife or children. Bowring preserves an affecting letter from which it appears that at one time in his earlier life a lady had engaged his affections and rejected his proposals. In a letter written long, long years afterwards to the lady herself, the Recluse says: "I am alive, "more than two months advanced in my eightieth year, — "more lively than when you presented me in ceremony "with the flower in Green Lane. Since that day not a "single one has passed in which you have not engrossed "more of my thoughts than I could have wished." He concludes: "I have a ring with some snow-white hair in "it and my profile, which everybody says is like; at my "death you will have such another;" and then playfully, perhaps pathetically, adds, "Should you come to want, it "will be worth a good sovereign to you."

There is in this a genuine touch of nature! Alike in peasant, prince, poet, and philosopher, the human heart, once truly touched by love, becomes thence like the ocean, — restless and insurgent evermore. Amid all his engrossing pursuits, in which he wholly shut himself out from society, and indeed from every person but a few friends whom he would occasionally meet when the toil of the day was over, the vision and the memory of the giver of the flower in Green Lane, pushing aside for the while Codes, Panopticons, Chrestomathias, Pannomions, and all such, were, he confesses, present to him every day. But although "along the "plains, where Passionate Discord rears eternal Babel, the "holy stream of wedded happiness glides on," it glided

not on for him, but passed him by irreversibly. One so thoroughly absorbed in work which he regarded as so pressing and so important to the world, would have made, it is to be feared, a poor husband, just in proportion as he was a devoted philosopher. Doubtless she judged wisely. It was well for her, and perhaps well for him, that he never saluted the woman who gave him the flower in Green Lane with the tender and sacred name of wife.

In forming a judgment of Bentham's work and of the way he did it and of the efficiency of that way, it is almost as essential to see how he regarded the English law as it is to inquire precisely how far his opinions were correct. Bentham's voluminous writings leave no doubt as to his views concerning English law. There was no health in it. Admitting, as he did, that the legislative enactments and the reports of adjudged cases contained more valuable materials for the construction of a system of laws than any other nation in the world possessed,[1] he yet maintained that the existing law, so far from being the perfection of human reason or the product of matured experience, was (to use his own language) but "a fathomless and boundless chaos, "made up of fiction, tautology, technicality, and inconsis- "tency, and the administrative part of it a system of exquis- "itely contrived chicanery, which maximizes delay and denial "of justice." Thus viewing it, he saw no remedy but its overthrow and destruction as a system, and rebuilding it anew, using old materials as far as they were useful and no farther. He regarded the whole system, as I have often thought, with much the same feeling that the French people contemporaneously looked upon the Bastille, as a monument of feudalism, oppression, and injustice, fit only to be destroyed. Blackstone, on the other hand, viewing the system with the optimistic eyes of the age in which he wrote, compared it, in his inimitable style, to "an old Gothic castle, "erected in the days of chivalry, but fitted up for a modern "inhabitant. The moated ramparts, the embattled towers, "and the trophied halls are magnificent and venerable, but "useless, and therefore neglected. The inferior apart-

[1] See *ante* Lecture VI., p. 174; Lecture X., p. 270.

"ments, now accommodated to daily use, are cheerful and "commodious, though their approaches may be winding and "difficult." [1] What could be more charming, what more desirable! All the interest and grandeur that attach to a structure at once imposing, venerable, and historic, combined with the convenience that results from its being already fitted to the amplest modern uses, — the only defect being, if, indeed, it is such, that the approaches *may* be (he does not feel quite sure that they are) somewhat winding and difficult.

Bentham's claims upon our regard will not be duly valued unless we keep ever in mind the difficulties which he was called upon to face. He stood alone. For more than twenty-five years he stood absolutely alone. But like Milton (whose London house it was Bentham's pride to own, although it was one of his peculiarities that he utterly disesteemed poetry), — like Milton in his blindness, through all neglect and discouragements, Bentham "bated not a jot of heart "or hope, but still bore up and steered right onward."

I have not the time, if I had the power, adequately to present a picture of the obstacles Bentham met with. And yet I must not pass these entirely over, as they are the background of any portraiture of the man and his work. There was the traditional, constitutional, ingrained aversion of the English people to innovation, combined with their idolatrous regard for the existing order of things. [2] It is worth while to illustrate this. Burke was undoubtedly the most enlightened statesman of his age, — one of the profoundest political thinkers and philosophers of any age. In one of his greatest speeches [3] he thus expressed in his felicitous way the traditional and habitual regard of the English mind for the established Constitution and for ancient acts of Parliament: —

"I do not dare to rub off a particle of the venerable "rust that rather adorns and preserves than destroys the "metal. It would be a profanation to touch with a tool

[1] 3 Black. Com., 268; 2 Dillon, "Municipal Corporations" (4th ed.) § 934. *a*, and note.

[2] See *ante* Lecture XI. [3] Conciliation with America, 1775.

"the stones. I would not violate with modern polish the "ingenuous and noble roughness of these truly constitu- "tional materials. Tampering is the odious vice of restless "and unstable minds. I put my foot in the tracks of our "forefathers, where I can neither wander nor stumble. "*What the law has said, I say.* In all things else I am "silent. I have no organ but for her words. If this be "not ingenious, I am sure it is safe."

Again, in 1791, speaking of the English Constitution, Burke says: —

"We ought to understand this admired Constitution (of "England) according to our measure, combining admiration "with knowledge if we can, and to venerate even where we "are not able presently to comprehend." [1]

Than this nothing can be more opposed to Bentham's mode of thought, since he would take nothing for granted, and would not, he said, admit murder or arson or any other act to be wrong unless it could be shown by reasoning to be so. I find in Henry Crabb Robinson's Diary [2] another contemporary illustration of the difficulty of attacking things established, so pertinent that it will excuse its irreverence. He relates that in 1788 a deputation of distinguished men waited on Lord Chancellor Thurlow to secure his support in their attempt to obtain the repeal of the Corporation and Test Act. The Chancellor received them very civilly, and then said: "Gentlemen, I'm against you, by "G—. I am for the Established Church, d— me! Not "that I have any more regard for the Established Church "than for any other church, but because it *is* established. "And if you can get your d—d religion established, I'll be "for that too!" This national peculiarity, as well as the natural conservatism of the bar, had been greatly intensified by the French Revolution. As late as 1808 Sir Samuel Romilly, speaking of his own parliamentary labors and discouraging experience, says: "If any person be desirous of "having an adequate idea of the mischievous effects which

[1] Appeal from the New to the Old Whigs. Burke's Works, vol. iv., p. 213 (Little, Brown, & Co.'s Ed.).
[2] Vol. i., chap. xv., American Ed., p. 243.

"have been produced in this country by the French Revolu-
"tion and all its attendant horrors, he should attempt some
"legislative reform on humane and liberal principles. He
"will then find, not only what a stupid dread of innovation,
"but what a savage spirit it has infused into the minds of
"many of his countrymen." [1]

Eldon was for a quarter of a century Lord Chancellor. It is certain that he never originated a reform act; and if he ever favored an act which could be fairly said to have been intended to amend the law, I do not recall it. It was difficult and almost impossible to pass any act which Eldon disapproved. He considered the existing system as perfect; or if not, that if the least innovation were favored or allowed no one could tell where it would stop, and therefore the true course was to destroy all innovation in the egg. He was "accused by Bentham of nipping in the bud the "spread of improvement over the habitable globe." [2] And yet I love old Eldon. He could not help his impenetrable and incorrigible conservatism. He was sincere and immovable in his sincerity. If he was true to his party and "never ratted," he was also true to his heart and conscience and sense of duty. No breath of suspicion ever rested upon him or the absolute purity of his court. What a great advance had been made from the time of Bacon to the time of Eldon. Eldon had, moreover, the qualities of a great judge. He loved right. He hated wrong. He appreciated arguments of counsel and freely heard them. He was deeply learned in his profession. His judgment was sure-footed. His love of justice was so great, his sense of the fearful responsibility attaching to the exercise of judicial power so

[1] "Life of Sir Samuel Romilly," edited by his sons, vol. i., Diary, June, 1808. See also his beautifully written Letters to C., letter iii., September, 1807, in same volume, 3d ed., London, 1842, p. 537.

[2] Townsend, "Lives of Twelve Eminent Judges," vol. ii., chap. x., p. 455, London, 1846. Bowring says that Bentham hated Eldon as much as it was possible to his benevolent nature to hate, — considered him the mightiest and most mischievous of all the opponents of law reform; and he calls him, in another place, the Lord of Doubts. Defective as the laws were, they were doubtless in a vastly better condition than they would have been if Bentham could have subjected them to the full operation of his radical, and to a large extent impracticable views, which, however, were never favored in their full scope and details by such conservative reformers as Brougham, Romilly, and Bickersteth.

keen, that he habitually hesitated and doubted; but his doubts and hesitations all had their origin in the dread of doing injustice, and a noble anxiety to know and to do the right. If he vigorously resisted amendment or change in our law, he as vigorously protected and conserved existing excellences and merits. Again I say I love old Eldon! With all his ultra-conservatism and dubitations, — his only defects, — I love his sturdy, genuine, honest nature. I have said this that you might not conceive an undue bias against Eldon from what Sydney Smith, Bentham and other Whigs have said of him and his court.

The libel laws even were in Bentham's way. Not to mention other instances, as late as 1811 there was difficulty in obtaining a publisher for the "Introduction to the Rationale of Evidence." More than one bookseller declined, giving as a reason that the book was libellous. The "Elements of the Art of Packing," which lay six years printed but unpublished, had alarmed the "trade," and it never was fully published until after Bentham's death. But Bentham kept right on. At length he began to attract the attention of a few gifted minds. One of the earliest of these was Sir Samuel Romilly, who of all English lawyers is, as I think, the one that nearest approaches a perfect model.[1]

[1] Romilly was the means of rendering Bentham what turned out to be a most signal service. About 1788, when Bentham was forty years of age, Romilly sent to Genevese Dumont some of Bentham's writings. They greatly impressed this gifted man with their originality and value. Dumont gave a large portion of his life to the *redaction* and translating into French some of the most important of Bentham's works. But this required years. On April 5, 1791, Romilly writes to Dumont: "Bentham leads the same kind of life as usual at Hendon, — seeing nobody, reading nothing, and writing books which nobody reads." In 1802 Dumont's French edition of Bentham's treatise on "Legislation Civil and Criminal" appeared, and was translated into Spanish, Russian and Italian; in 1811 "Rewards and Punishments," and in 1823 "Judicial Evidence," thus treated and translated by Dumont, were published in Paris. This gave Bentham a European reputation, and quickened his tardy appreciation at home. In the history of letters there is nothing more remarkable than the relation between Dumont and Bentham. Macaulay's account of the services rendered by Dumont is as interesting as it is, generally speaking, accurate. Of the character and value of Dumont's labors the great reviewer remarks: —

"They can be fully appreciated only by those who have studied Mr. Bentham's works, both in their rude and in their finished state. The difference, both for show and for use, is as great as the difference between a lump of golden ore and a rouleau of sovereigns fresh from the

Romilly excepted, no persons in England of distinction or official influence acknowledged adhesion to Bentham's doctrines until the early part of the present century. Among the most eminent of these was Mill, senior, the father of the still more eminent John Stuart Mill. Mill, the father, and his family were for years members of Bentham's household; and Mill was one of the ablest exponents and advocates of Bentham's doctrines. Afterwards came Bickersteth (subsequently Lord Langdale, Master of the Rolls), who was the well-beloved disciple; for not long before the master's death he received his benediction in these words: "Of all my "friends, Bickersteth was the most cordial to law reform "to its utmost extent." Then came Brougham and Sir James Mackintosh, and at a later period others. Romilly, Langdale, Brougham, and Mackintosh each held seats in Parliament; and their efforts for the reform of the laws, civil and criminal, and the slow, tedious, and piecemeal process by which such reforms were accomplished, are known to history, and need not be related here, even if time there

mint. . . . Never was there a literary partnership so fortunate as that of Mr. Bentham and M. Dumont. The raw material which Mr. Bentham furnished was most precious; but it was unmarketable. He was, assuredly, at once a great logician and a great rhetorician. But the effect of his logic was injured by a vicious arrangement, and the effect of his rhetoric by a vicious style. His mind was vigorous, comprehensive, subtle, fertile of argument, fertile of illustrations. But he spoke in an unknown tongue; and, that the congregation might be edified, it was necessary that some brother having the gift of interpretation should expound the invaluable jargon. His oracles were of high import; but they were traced on leaves and flung loose to the wind. . . . M. Dumont was admirably qualified to supply what was wanting in Mr. Bentham. In the qualities in which the French writers surpass those of all other nations — neatness, clearness, precision, condensation — he surpassed all French writers. If M. Dumont had never been born, Mr. Bentham would still have been a very great man; but he would have been great to himself alone. The fertility of his mind would have resembled the fertility of those vast American wildernesses in which blossoms and decays a rich but unprofitable vegetation, 'wherewith the reaper filleth not his hand, neither he that bindeth up the sheaves his bosom,' . . . Many persons have attempted to interpret between this powerful mind and the public. But in our opinion M. Dumont alone has succeeded. It is remarkable that in foreign countries, where Mr. Bentham's works are known solely through the medium of the French version, his merit is almost universally acknowledged. Indeed, what was said of Bacon's philosophy may be said of Bentham's. It was in little repute among us till judgments came in its favor from beyond sea, and convinced us, to our shame, that we had been abusing and laughing at one of the greatest men of the age." Essay on Mirabeau, July, 1832.

were. Lord Brougham thus excellently states the grounds of Bentham's title to distinction and to our regard:

"The age of law reform and the age of Jeremy Bentham "are one and the same. No one before him had ever "seriously thought of exposing the defects in our English "system of jurisprudence. He it was who first made the "mighty step of trying the whole provisions of our juris- "prudence by the test of expediency, fearlessly examining "how far each part was connected with the rest, and "with a yet more undaunted courage inquiring how far "even its most consistent and symmetrical arrangements "were framed according to the principles which should "pervade a code of laws, their adaptation to the circum- "stances of society, to the wants of men, and to the promo- "tion of human happiness. Not only was he pre-eminently "original among the lawyers and legal philosophers of his "own country; he might be said to be the first legal phil- "osopher who had appeared in the world. None of the great "men before him had attempted to reduce the whole system "of jurisprudence under the dominion of fixed and general "rules; none ever before Mr. Bentham took in the whole "departments of legislation; none before him can be said "to have treated it as a science, and by so treating made "it one. This is his pre-eminent distinction. To this praise "he is justly entitled; and it is as proud a title to fame as "any philosopher ever possessed."[1]

[1] Lord Brougham's Speeches, Edinburgh, 1838, vol. ii., p. 288, Black's Edition. Brougham and Bentham were well acquainted. In a sense Brougham was one of Bentham's disciples. Both aspired to be law reformers. Indeed, Brougham's most useful labors in Parliament were directed towards law reform. There were, however, radical differences of opinion between Bentham and Brougham as to the best method of effecting the desired improvement. These differences naturally arose out of the difference in the situation and surroundings of the two men. Bentham, though he was regularly bred to the law and called to the bar, never pursued the profession. Bentham thus summarized his own career as a practising lawyer: "I never pleaded in public. On my being called to the bar, I found a cause or two at nurse for me. My first thought was how to put them to death; and the endeavors were not, I believe, altogether without success. Not long after a case was brought to me for my opinion. I ransacked all the codes. My opinion was right according to the codes; but it was wrong according to a manuscript unseen by me and inaccessible to me, — a manuscript containing the re-

Bowring once remarked to Talleyrand, "Of all modern "writers, Bentham was the one from which most had been "stolen, and stolen without acknowledgement." "True," replied Talleyrand; "*et pillé de tout le monde, il est toujours* "*riche*," — "and robbed by everybody, he is always rich."

I have thus sought to give a notion of Bentham's intellectual qualities, of his times, and of the general character of his writings respecting law and legislation. This has been necessarily an outline view only. It remains to attempt, by way of summing up, a critical estimate of the value of his labors, and the nature and extent of the actual influence upon our laws and jurisprudence of his doctrines and writings.

If we are to form a sound judgment on this subject, we must not mistake the point of view from which to look at him. To be truly appreciated, Bentham must, as I have already said, be regarded primarily and essentially as a law reformer generally, and specially as a reformer of the then existing law of England. He was bold, courageous, and original. He was the first to expose its defects and to sug-

port of I know not what opinion, said to have been delivered before I was born, and locked up, as usual, for the purpose of being kept back or produced according as occasion served."

Bentham's solitary habits made him unfamiliar with practical life, and unable clearly to distinguish the attainable from the unattainable. Brougham, on the other hand, was a man of affairs, acquainted with the world of men, with the world of lawyers, with the temper of Parliament, and able to form a practical judgment concerning matters of legislation. Though a man of liberal views, and with the courage boldly to maintain them, he had in the matter of law reform not a little of the usual conservatism of the lawyer and the prudence and tact of the legislator. Bowring records that in anticipation of Brougham's great speech on Law Reform, Bentham said: "Insincere as Brougham is, it is always worth my while to bestow a day on him. I shall try to subdue him and make something of him. I shall see whether he has any curiosity to assist in tearing the established system of procedure to rags and tatters." This was Bentham's notion of the heroic, the destructive nature of the remedy required. Brougham's heralded and famous speech on the Present State of the Law, and which he entitled "Law Reform," was delivered on the seventh day of February, 1828; but the remedy proposed by him was to preserve the garment and patch it up, instead of "tearing it to rags and tatters." Two days afterwards Bentham thus records his disgust and disappointment: "Mr. Brougham's mountain is delivered, and behold! a mouse. The wisdom of the reformer could not overcome the craft of the lawyer. Mr. Brougham, after all, is not the man to set up a simple, natural, and rational administration of

gest the remedies required. He destroyed with his own force the professional and general superstition that the law was perfect, and by his labors and writings he was the means of at length awakening the public mind from its stupor and inertia on this subject. His merits as a critic and censor of the law as he found it in his day and in his country, it is difficult to overvalue. Blackstone, the type of the professional mind of his age, regarded the English law as almost perfection itself; and he found his pleasurable function to be to defend, to exalt, to glorify it.[1] Bentham held precisely opposite views. To him the English law, instead of a model of excellence, was a system full of delays, frauds, snares, and uncertainties; and the lawyers were its unthinking or interested defenders. His remedy was not to stop leaks in the roof, put in new panes of glass, and otherwise repair the rotten and dilapidated structure, but to demolish it and rebuild anew. By many he was regarded for the greater part of his life as an iconoclast, and by others as a dreamer who labored under the harmless delusion that he was

justice against the entanglements and technicalities of our English law proceedings." I do not know that Brougham ever heard of this contemptuous opinion, although of course he knew that his proposed remedies utterly failed to meet Bentham's views of what the case demanded. In 1838 Brougham edited an edition of his own speeches (namely, the one above cited, printed by the Messrs. Black), himself preparing historical introductions to the various subjects, and among others to the speech on Law Reform. In tracing the history of this movement, he gives many pages to a consideration of Bentham's personal and intellectual qualities, and to a critical estimate of his writings upon law, jurisprudence, and legislation. Brougham excels in biographical sketches and descriptions of this kind, and this seems to me to be one of his best. It will well reward full perusal, but I have space only for the few sentences given in the text. Mr. John Stuart Mill in a note to his article on Bentham ("Dissertations and Discussions," Am. Ed., vol. i., p. 417), commends Brougham's view of Bentham, and explains and extenuates Bentham's "unreasonable attacks on individuals, and in particular on Lord Brougham on the subject of Law Reforms; they were no more the effect of envy or malice, or any really unamiable quality, than the freaks of a pettish child, and are scarcely a fitter subject of censure or criticism."

The late eminent law teacher, Professor Theodore W. Dwight, wrote me, October 24, 1890, in regard to Bentham, thus: "I am astonished at his legal genius, revere him for his kindly disposition even towards brutes, am delighted with his wit and playful repartee, and enjoy his sarcasm, of which, however, he never made use except when the occasion required it."

[1] See *ante* Lecture XI.

a benefactor of his race, while in reality he was passing his life uselessly in Utopia. [1]

It does not essentially detract from Bentham's merits, or the regard in which posterity should hold him, that he exaggerated, as he doubtless did, the absurdities and defects of the system that he assailed, or that his invectives against lawyers, who as a body supported it and resisted all attempts to reform it, were extravagant and unjust. All this may well be pardoned to his honest convictions, to his lifelong labors and his disinterested zeal for the public good. Nor does it essentially detract from his just estimation that he is an illustration of Bacon's observation that "there is a super-"stition in avoiding superstition, when men think to do best "if they go farthest from the superstition formerly received." Nor does it materially diminish his fame that we cannot accept all of his doctrines as sound, or all of his conclusions from doctrines whose general soundness are no longer questioned.

The following which I give in John Stuart Mill's own words, seems to me to set forth with judicial fairness Bentham's chief merits and the nature of the obligations of the world to him: —

"Bentham," he says, "is one of the great seminal minds

[1] Sir Samuel Romilly gives this interesting account of a visit which he made in 1817 to Bentham: —

"Our last visit was to my old and most valuable friend, Jeremy Bentham, at Ford Abbey. The grandeur and stateliness of the buildings form as strange a contrast to his philosophy, as the number and spaciousness of the apartments, the hall, the chapel, the corridors, and the cloisters, do to the modesty and scantiness of his domestic establishment. The society we found and left with him were Mill and his family and a Mr. Place, — the Charing Cross radical tailor. We found Bentham passing his time, as he has always been passing it since I have known him, — which is now more than thirty years, — closely applying himself six or eight hours a day in writing upon laws and legislation and in compiling his Civil and Criminal Codes, and spending the remaining hours of every day in reading, or taking exercise by way of fitting himself for his labors, or, to use his own strangely-invented phraseology, taking ante-jentacular and post-prandial walks to prepare himself for his task of codification. There is something burlesque enough in this language; but it is impossible to know Bentham, and to have witnessed his benevolence, his disinterestedness, and the zeal with which he has devoted his whole life to the service of his fellow-creatures, without admiring and revering him."

Life of Sir Samuel Romilly, edited by his sons, vol. ii., p. 473 (3d ed. Diary, under date September, 1817).

"in England of his age." "He is the teacher of teachers." "To him it was given to discern more particularly those "truths with which existing doctrines were at variance." "Bentham has been in this age and country the great ques- "tioner of things established. It is by the influence of the "modes of thought with which his writings inoculated a con- "siderable number of thinking men, that the yoke of author- "ity has been broken, and innumerable opinions, formerly "received on tradition as incontestable, are put upon their "defence and required to give an account of themselves. "Who, before Bentham, dared to speak disrespectfully, in "express terms, of the British Constitution or the English "law? . . . Bentham broke the spell. It was not Bentham "by his own writings; it was Bentham through the minds "and pens which those writings fed, — through the men in "more direct contact with the world, into whom his spirit "passed. If the superstition about ancestorial wisdom; if "the hardiest innovation is no longer scouted *because* it is "an innovation, — establishments no longer considered "sacred because they are establishments, — it will be found "that those who have accustomed the public mind to these "ideas have learned them in Bentham's school, and that the "assault on ancient institutions has been, and is, carried "on for the most part with his weapons." [1]

[1] Essay on Bentham, "Dissertations and Discussions" (Am. Ed.), vol. i., pp. 355-358. John Stuart Mill in his Autobiography says: "During the winter of 1821-22, Mr. John Austin, with whom at the time of my visit to France my father had but lately become acquainted, kindly allowed me to read Roman law with him. [John Stuart Mill was then in his seventeenth year.] My father, notwithstanding his abhorrence of the chaos of barbarism called English law, had turned his thoughts towards the bar as on the whole less ineligible for me than any other profession; and these readings with Mr. Austin, who had made Bentham's best ideas his own, and added much to them from other sources and from his own mind, were not only a valuable introduction to legal studies, but an important portion of general education. With Mr. Austin I read Heineccius on the Institutes, his Roman Antiquities, and part of his exposition of the Pandects, to which was added a considerable portion of Blackstone. It was at the commencement of these studies that my father, as a needful accompaniment to them, put into my hands Bentham's principal speculations, as interpreted to the Continent, and indeed to all the world, by Dumont, in the 'Traité de Législation.' The reading of this book was an epoch in my life, one of the turning-points in my mental history" (chap. iii.).

Further legal education Stuart Mill appears not to have received.

If time permitted, it would be easy to trace Bentham's influence through other minds, and in the way here pointed out, in England and in this country,[1] not only in modifications and changes in specific legislation and in modes of judicial procedure, but upon existing notions in respect of legal education, the necessity for and the methods of legal reform. It would be interesting, for example, to draw the parallel between Bentham and Austin, one of Bentham's most eminent disciples, and to show the partial reaction of Austin against

He was never called to the bar. I may here mention what, it seems to me, is a remarkable circumstance. When Bentham was seventy-seven years of age he committed to John Stuart Mill, then about nineteen years of age, who was without other legal training than that above mentioned, the work of editing and preparing for the press "The Rationale of Evidence." Speaking of this subject, Mill in his Autobiography (chap. iii.), says: "About the end of 1824, or beginning of 1825, Mr. Bentham, having lately got back his papers on Evidence from M. Dumont (whose *Traité des Preuves Judiciaires*, grounded on them, was then first completed and published), resolved to have them printed in the original, and bethought himself of me as capable of preparing them for the press. I gladly undertook this task, and it occupied nearly all my leisure for about a year, exclusive of the time afterwards spent in seeing the five large volumes through the press. Mr. Bentham had begun this treatise three times, at considerable intervals, each time in a different manner, and each time without reference to the preceding; two of the three times he had gone over nearly the whole subject. These three masses of manuscript it was my business to condense into a single treatise, adopting the one last written as the groundwork, and incorporating with it as much of the two others as it had not completely superseded. I had also to unroll such of Bentham's involved and parenthetical sentences as seemed to overpass by their complexity the measure of what readers were likely to take the pains to understand. It was further Mr. Bentham's particular desire that I should, from myself, endeavor to supply any *lacunae* which he had left; and at his instance I read, for this purpose, the most authoritative treatises on the English Law of Evidence, and commented on a few of the objectionable points of the English rules, which had escaped Bentham's notice." "My name as editor was put to the book after it was printed, at Mr. Bentham's positive desire, which I in vain attempted to persuade him to forego." "The 'Rationale of Judicial Evidence' is one of the richest in matter of all Bentham's productions. The book contains, very fully developed, a great proportion of all his best thoughts; while among more special things it comprises the most elaborate exposure of the vices and defects of English law, as it then was, which is to be found in his works, not confined to the Law of Evidence, but including, by way of illustrative episode, the entire procedure of practice of Westminster Hall."

[1] The influence of Bentham in America, not only in respect of the emendations of the Law of Evidence, but through the efforts of other men who had caught his spirit, is directly seen in the extent to which codification has been adopted. See *ante* Lecture IX., p. 260, note. The labors of the celebrated Edward Livingston afford another interesting illustration of Bentham's influence in this country. In the prime of his

some of Bentham's extreme views, and the extent to which the questions thus raised are profoundly agitating at this moment not only a few thinking minds but the body of the profession, — and this not only in England, but in every country which speaks the language and which has adopted the institutions of England. This would lead to a consideration of the controversies between the analytical and the historical schools of jurisprudence, which their respective advocates yet debate with much of their original warmth, tending to the result, however, that there is, after all, truth in each; that properly understood the two schools are not antagonistic but complementary; and that the true course is to combine the logical or analytical with the historical and experimental, the former mainly supplying data for scientific arrangement, the latter mainly supplying the matter for a revised, improved, and systematic jurisprudence. I must

life misfortunes led Livingston in 1804 to quit the home of his ancestors in New York and to make a new home in New Orleans, then recently acquired by the United States. The question whether the procedure in Louisiana should be according to the common law or continue upon the basis of the civil and Spanish law having been judicially determined in favor of the latter, Livingston drew up what is in effect a Code of Procedure, which was adopted by the Legislature in 1805, consisting of twenty sections and of about twenty-five printed pages. In its essential features it anticipated the codes of nearly half a century later. Under an act of the General Assembly of Louisiana, approved February 10, 1820, which provided that a person learned in the law shall be appointed to prepare a Code of Criminal Law, Evidence, and Procedure, Livingston was on February 13, 1821, elected by the joint ballot of the Legislature to discharge this duty. He reported his plan to the next Assembly, which "earnestly solicited him to prosecute this work according to his report."

In 1829 Livingston had an interesting correspondence with Bentham, in which the former acknowledged that he received his first impulse "to the preparation of an original, comprehensive, and complete system of penal legislation from Bentham's works which had appeared in the French of Dumont in 1802." Hunt, "Life of Edward Livingston," p. 96, note. "The perusal of your works," said Livingston to Bentham, "first gave method to my ideas, and taught me to consider legislation as a science governed by certain principles, applicable to all its different branches, instead of an occasional exercise of its powers, called forth only on particular occasions without relation to or connection with each other." He thus concludes: "Hereafter no one can in criminal jurisprudence propose any favorable change that you have not recommended, or make any wise improvement that your superior sagacity has not suggested." Hunt, p. 96, note; Bentham's Works (Bowring's Ed.), vol. x., p. 51. Livingston prepared a complete Code of Crimes and Punishments, of Procedure, of Evidence, and of Reform and Prison Discipline; but having been elected to Congress and practically ceasing to reside

content myself with mentioning, without dwelling upon, these interesting subjects.

Passing from these general considerations, I proceed to notice specifically two other subjects. One is Bentham's reforms in the Law of Evidence. Here the direct fruits of Bentham's labors are plainly to be seen. In some respects his "Judicial Evidence," before mentioned, is the most important of all his censorial writings on English law. In this work he exposed the absurdity and perniciousness of many of the established technical rules of evidence. "In certain cases," he says, "jurisprudence may be defined, the art of "being methodically ignorant of what everybody knows." Among the rules combated were those relating to the competency of witnesses and the exclusion of evidence on various grounds, including that of pecuniary interest. He insisted that these rules frequently caused the miscarriage of justice, and that in the interest of justice they ought to be swept away. His reasoning fairly embraces the doctrine that parties ought to be allowed and even required to testify. This work appeared in Paris in 1802, and in England in

in Louisiana, his codes were never enacted into laws. Each code was accompanied with an elaborate introductory report; and these labors gave him great and deserved fame at home and abroad. Chancellor Kent declared that Livingston had "done more in giving precision, specification, accuracy, and moderation to the system of crimes and punishment than any other legislator of the age, and that his name would go down to posterity with distinguished honor." Hunt, p. 281. Bentham urged that Parliament should print the whole work for the use of the English nation. Hunt, p. 278; Bentham's Works, vol. xi., p. 37. Villemain declared it to be "a work without example from the hand of any one man." Hunt, p. 278. Sir Henry Maine pronounced Livingston to be "the first legal genius of modern times." "Village Communities," paper on "Roman Law and Legal Education," published in 1856. Although the Livingston Code was not adopted as a whole, yet Bancroft is quite justified in the observation that "it has proved an unfailing fountain of reforms suggested by its principles." Introduction to Hunt's Life of Livingston, p. xvii. The Livingston Codes and Reports were republished in full in 1873 by the National Prison Association of the United States, with an Introduction by Chief-Justice Chase, in which he expresses the satisfaction of the Association in reproducing a work marked with such "keenness of insight, clearness of statement, force of logic, beauty of diction, elevation of sentiment, and breadth of sympathy." He declared his own opinion to be that the work "will prove that if Livingston was in advance of his times, the day is at least approaching when his broad and comprehensive views will not only be appreciated but realized."

1825 and 1827; but it produced no immediate effect on the professional mind. It was generally regarded as the speculations of a visionary. As I write I have before me Starkie's Evidence, the third edition of which appeared in 1842, and the wisdom of the exclusionary rules of evidence is not so much as criticised or questioned.

But Bentham had set a few men thinking. He had scattered the seeds of truth. Though they fell on stony ground they did not all perish. But verily reform is a plant of slow growth in the sterile gardens of the practising and practical lawyer. Bentham lived till 1832, and these exclusionary rules still held sway. But in 1843, by Lord Denman's Act, interest in actions at common law ceased, as a rule, to disqualify; and in 1846 and 1851, by Lord Brougham's Acts, parties in civil actions were as a rule made competent and compellable to testify. I believe I speak the universal judgment of the profession when I say that changes more beneficial in the administration of justice have rarely taken place in our law, and that it is a matter of profound amazement, as we look back upon it, that these exclusionary rules ever had a place therein, and especially that they were able to retain it until within the last fifty years.

Let us be just. The credit of originating this great improvement is due not to Denman and Brougham, but it essentially belongs to Bentham, although he was in his grave before it was actually effected.[1] Lord Justice Stephen forcibly remarks of Bentham's assault on the system of judicial evidence that "it was like the bursting of a shell in the "powder magazine of a fortress, the fragments of the shell "being lost in the ruin which it has wrought."[2] The moral is obvious. The philosophic student of our laws may often have a keener and juster insight into their vices and imperfections than the practising lawyer, whose life and studies are exclusively confined to the ascertainment and application of the law as it is, and who rarely vexes himself with the question of what it ought to be, or makes any serious effort

[1] See *post* Lecture XIII.

[2] "General View of the Criminal Law of England," p. 206; also Introduction to his Digest of Evidence.

to reform it. But let me not be misunderstood. While the philosophic student is able to point out defects in the laws, yet the history of the law shows that only practical lawyers are capable of satisfactorily executing the work of reform. Bentham's failure in *directly* realizing greater practical results grew out of his mistaken notion that the work of actual amendment could be accomplished without experts, — that is, without the aid of the bar and without its active support.

The last matter to which I shall refer is that to which Bentham gave the name by which it is now universally known, — codification.

With a view to ascertain with exactness Bentham's views, I have recently gone over anew his writings relating to this subject. Very different ideas in our day are, as I have heretofore said, attached to what is meant or implied by a code, and much of the dispute concerning codification is after all one over words, or one arising from the want of a previous definition of the subject-matter of the disputation.[1] What Bentham meant by codification, however, is plain enough. He meant that a code should embrace all general legislation, not simply as it exists, but as it ought to be amended and made to exist, — that is, all legislation except local and special statutes; that it also should embody all the principles of the common law which it were expedient to adopt, — these to be expressed in words by legislative enactment, the gaps or *lacunæ* to be filled up in like manner by the legislature; the whole to be systematically arranged, so that all possible cases would be expressly provided for by written rules; that the function of the courts to make "judge-made law" as he is fond of stigmatizing it, should cease, and that thereafter all changes or additions to this complete and authoritative body of law should be made by the law-making body, and by it alone.

I must say that in my judgment this in its full extent is not only an impracticable scheme, but one founded in part upon wrong principles. In a refined and complex civilization no legislative foresight, no finite intelligence, can antic-

[1] See *ante* Lecture VI., p. 180.

ipate, define, catalogue, and formulate in advance rules applicable to the infinite number and the infinite variety of cases that will inevitably arise. This view of a code also exaggerates, or, to use Bentham's language, maximizes, the evils of case-law, and underrates or minimizes its advantages. It overlooks the fact that case-law is a permanent necessity. The judicial office will, at all times, under any possible code, have to deal with and determine questions and cases not possible to be provided for by any express statutory provision.[1] A well-constructed code may, and doubtless will, lessen the number of such questions and cases; but no code can do more. The rest must be left to the courts. M. Portalis, in a well-known paper relating to the French Civil Code, expresses this truth with clearness and force. "It is to jurisprudence [using the term in distinction from statute or positive law] that the legislator must abandon those rare and extraordinary cases which cannot enter into the scheme of a rational legislation; the variable, unaccountable details which ought never to occupy the attention of the legislator, and all of those objects which it would be in vain to attempt to foresee, and dangerous prematurely to define."

We have now, and for centuries have had, two wholly independent manufactories, so to speak, of law, — the legislature professedly making statute law, the courts silently making case-law; and this without any unity of conception, plan, or action. Statutes are piled upon statutes, and the law reports of Great Britain and America may be roundly put at eight thousand volumes, and are constantly multiplying.[2] This colossal body of case-law is wholly unorganized and even unarranged, except so far as digests and elementary treatises may be considered as an arrangement, which scientifically viewed they are not. The infinite details of this mountainous mass in its existing shape — bear me witness, ye who hear me! — no industry can master and no memory retain. The English portion of it has been aptly likened to

[1] See *ante* Lecture X., p. 268; Dillon, Munic. Corp. (4th ed.), vol. ii., § 934, *a;* Amos, "Science of Law," chap. v.

[2] See *ante* Lectures VIII., IX., X., *passim.*

" chaos tempered by Fisher's Digest." The American portion already exceeds in size and complexity the English portion, and as we attempt to survey it we are reminded of the dread and illimitable region described by Milton, where

> . . . " Chaos umpire sits,
> And by *decision* more embroils the fray
> By which he reigns."

I do not believe that it is practicable to codify it all, in the sense that the resulting code shall supersede for all purposes the law reports; but on many subjects, and to a very large extent in respect of all, codification is practicable, and so far as it is practicable, it is, if well done, desirable. Mark the qualification, *if well done*, not otherwise.

Any code that is made, whatever may be its scope, must be based upon the fundamental principle that the existing body of our law as it has been developed in the workings of our institutions and tested by our experience is in substance the law that is best fitted to our condition and wants; for all true law has its root in the life, spirit, ideas, usages, instincts, and institutions of the people. It springs from within; it is not something alien to the people, to be imposed on them from without. If a metaphor will not mislead, true law is a native, independent, natural growth, and not an exotic. Bentham did not deny this in principle, but he was too much inclined to look at laws logically rather than historically. It follows that a code must not be one imitated from or servilely fashioned after Roman or foreign models. On this subject Bentham had correct notions. His bold, original mind and his self-sufficient powers saw as little to admire in the Roman as in the English law. I repeat it as my judgment that our code must not pre-suppose that the Roman law as it anciently existed, or as it exists in the modern adaptations of it in the States of Continental Europe, is superior in matter, substance, or value, to the native, natural, indigenous product. It must assume precisely the contrary. Freeman puts a general truth epigrammatically when he says " that we, the English people, are ourselves

"and not somebody else. . . . Englishmen after all are "Englishmen." [1]

This is equally true of the American people. And both Englishmen and Americans want their own laws, and not those of some other people. It would be as impossible radically to change their legal systems as to change the nature of the people. The materials for such a code already exist. A period of development is at some time reached in the legal history of every people when it is necessary to restate and reconstruct their laws. It seems to me that we have reached that period. Our materials for such restatement and reconstruction, which we may, if you please, call a code, are ample. They surpass in extent, in abundance, in variety, in richness, and above all, in adaptation to our wants, any supply that can come from foreign sources. [2]

What Sir Henry Maine aptly calls "tacit codification" is a process which is in constant operation, through the labors of judges and text-writers. In this work elementary writers of learning and experience take an important part. In the scattered condition of our case-law their works are indispensable. When judges and text-writers deduce from the cases a principle and formulate it, and that formula is stamped with authority, either by long usage or judicial sanction, so that the courts do not go behind it to the cases from which it was deduced, there you have to this extent codification. This "stereotyping, as it were, of certain "legal rules, is," says Maine, "at this moment proceeding "with unusual rapidity, and is indeed one of the chief agen- "cies which save us from being altogether overwhelmed by "the enormous growth of our case-law." [3]

What is needed is the constructive genius and practical wisdom that can take these truly rich, invaluable, native but scattered materials, — using with a wise and generous eclecticism foreign materials only when the native do not

[1] Preface to lecture, "Chief Periods of European History."

[2] See *ante* Lecture VI., p. 174; Lecture X.

[3] "Village Communities" (Am. Ed.), pp. 368, 369. The subject of text-books as one of the literary authorities of our law, their office and use, the functions of text-book writers, and the nature of text-book law, I have seen nowhere so fully or well presented as in Professor Clarke's "Practical Jurisprudence," part ii., chaps. vii.-xii., inclusive.

exist or the foreign are manifestly superior, — and out of all these build an edifice of law, primarily designed and adapted to daily use, which shall be at once symmetrical, harmonious, simple, and commodious. There is here room and need for all. The institutional writer, the law teacher, the philosophic student, the scientific jurist, the experienced lawyer, the learned judge, the practical legislator, has each his place. They are not repellent and antagonistic agencies, but allies and co-laborers in the noblest work that can engage the attention, and draw forth and exemplify the highest powers of the human intellect. Toward the realization of this ideal let us press on with generous ardor, guided not by the motto of Ihering, prescribed for Continental action, — "Through the Roman law, but beyond it," — but rather by this other motto: "Through our own law, "and beyond it wherever it is plainly defective or incom- "plete."

16. PROGRESS IN THE ADMINISTRATION OF JUSTICE DURING THE VICTORIAN PERIOD[1]

By Charles Synge Christopher, Baron Bowen[2]

NO story can be more difficult to tell than that of the progress of reforms in the administration of the law during a period of fifty years. It consists for the most part of the history of countless changes of detail, many of which must remain absolutely unintelligible to the greater portion of the public. To comprehend their exact value would require a number of minute and technical explanations sufficient to fill, not merely one chapter, but several volumes. All that can be aimed at within the compass of a few pages is to endeavour to sketch in outline the broad features of a picture which it would be hopeless to attempt to render elaborate or complete. The recent fusion of the superior tribunals of the country into a single Supreme Court of Judicature is a landmark on which the attention of the lay world fastens, and which it in some measure can appreciate. Yet this change, important as it is, has only perfected and crowned a long course of simplification and reform, of which it is the logical consequence. Perhaps the best way of making the narrative understood by those who are not adepts in the language or the procedure of the law will be to explain briefly, even if it must of necessity be roughly, what the great English Courts of Justice were at the beginning of the reign,

[1] This essay was published as a chapter in "The Reign of Queen Victoria; a Survey of Fifty Years of Progress," 1887, volume I, pp. 281-329, edited by Thomas Humphrey Ward (London: Smith, Elder, & Co.).

[2] 1835-1894. B. A. Balliol College, Oxford, 1857, M. A. 1872, D. C. L. 1883; Barrister and Bencher of Lincoln's Inn; judge of the High Court, Queen's Bench Division, 1879; judge of the Court of Appeal, 1888; lord of appeal in ordinary, 1893.

and the kind of imperfection that existed in their constitution and their practice.

The ancient barrier which separated the several Courts of the Common Law from the Court of Chancery still subsisted in the year 1837. Two systems of judicature, in many respects at variance with each other, flourished side by side under the famous roof of Westminster Hall. The principle of a division of labour by which distinct machinery can be accommodated to special subject-matter is based upon reason and convenience. A large portion of the law business of the country is made up of litigation in the result of which no one is directly interested but the rival combatants. But there are many matters of which the law takes cognisance that necessitate a special and a more complicated mechanism for their adjustment. The property of infants, for example, requires to be protected — trusts to be managed day by day during a long period of years — the estates of deceased persons to be dealt with for the benefit of creditors, the assets to be collected and distributed, accounts to be taken, directions to be given, questions to be settled once for all that affect the interests of many. It is desirable that special tribunals should be armed with the particular organisation requisite for purposes such as these. The distinction between law and equity went, however, far beyond what was needed to carry out this natural division of labour. The two jurisdictions had no common historical origin, and the principles on which they administered justice were unlike. The remedies they afforded to the suitor were different; their procedure was irreconcilable; they applied diverse rules of right and wrong to the same matters. The common law treated as untenable claims and defences which equity allowed, and one side of Westminster Hall gave judgments which the other restrained a successful party from enforcing. The law had always cherished as its central principle the idea that all questions of fact could best be decided by a jury. Except in cases relating to the possession of land, the relief it gave took, as a rule, the shape of money compensation, in the nature either of debt or of damages. The procedure of the Court of Chancery, on the other hand, was little adapted

for the determination of controverted issues of fact, and it was constantly compelled to have recourse for that purpose to the assistance of a court of law. The common law had no jurisdiction to prevent a threatened injury; could issue no injunctions to hinder it; was incompetent to preserve property intact until the litigation which involved the right to it was decided; had no power of compelling litigants to disclose what documents in their possession threw a light upon the dispute, or to answer interrogatories before the trial. In all such cases the suitor was driven into equity to assist him in the prosecution even of a legal claim. The Court of Chancery, in its turn, sent parties to the Law Courts whenever a legal right was to be established, when a decision on the construction of an Act of Parliament was to be obtained, a mercantile contract construed, a point of commercial law discussed. Suits in Chancery were lost if it turned out at the hearing that the plaintiff, instead of filing his bill in equity, might have had redress in a law court; just as plaintiffs were nonsuited at law because they should have rather sued in equity, or because some partnership or trust appeared unexpectedly on the evidence when all was ripe for judgment. Thus the bewildered litigant was driven backwards and forwards from law to equity, from equity to law. The conflict between the two systems, and their respective modes of redress, was one which, if it had not been popularly supposed to derive a sanction from the wisdom of our forefathers, might well have been deemed by an impartial observer to be expressly devised for the purpose of producing delay, uncertainty, and untold expense.

The common law tribunals of Westminster Hall consisted of three great courts, each with a different history and originally different functions. In the growth of time, and by dint of repeated legislation, all, so far as the bulk of the litigation of the country was concerned, had acquired equal jurisdiction, and no practical necessity was left for the maintenance side by side of three independent channels of justice, in each of which the streams ran in a similar fashion and performed the same kind of work. First came the Queen's Bench, composed of a chief justice and four

puisne judges. Its authority was supreme over all tribunals of inferior jurisdiction. It took sovereign cognisance of civil and criminal causes alike — kept the Ecclesiastical Courts and the Admiralty within bounds, controlled magistrates and justices, supervised the proceedings of civil corporations, repressed and corrected all usurpations, all encroachments upon common right. It wielded two great weapons of justice over public bodies: mandamus, whereby, when no other remedy appeared available, it compelled them to fulfil the law; prohibition, by means of which it confined all inferior authorities strictly to their respective provinces and powers. The Court of Common Pleas, historically the most ancient of the three, which had retained, with no particular benefit to society, supervision over the few ancient forms of real actions that still survived, exercised also a general authority over personal actions. It was directed by a chief justice and four puisne justices. It laboured, however, under the disadvantage that, as far as the general bar of England was concerned, it was a 'champ clos.' Serjeants-at-law had exclusive audience in it during term time, and it was not till 1847 that this vexatious and injurious monopoly was finally abolished. The Court of Exchequer had been from early years the special tribunal for dealing with matters in which the king's revenue was interested. It still retained in revenue cases and some other matters a particular jurisdiction, though clothed by this time (like the Queen's Bench and the Common Pleas) with power over all actions that were personal. Besides these functions, it was also a Court of Equity, and took part from time to time in the Chancery business of the realm. A chief baron was at the head, assisted by four puisne barons, of whom two still remain and preserve to us a title which otherwise would be extinct, the present Baron Pollock and Baron Huddleston.

The procedure at the common law, as compared with the wants of the country, had become antiquated, technical, and obscure. In old days the courts at Westminster were easily able to despatch, during four short terms of three weeks each, together with the assizes and sittings at Guildhall, the mass of the business brought before them. But,

from the beginning of the century, the population, the wealth, the commerce of the country had been advancing by great strides, and the ancient bottles were but imperfectly adapted to hold the new wine. At a moment when the pecuniary enterprises of the kingdom were covering the world, when railways at home and steam upon the seas were creating everywhere new centres of industrial and commercial life, the Common Law Courts of the realm seemed constantly occupied in the discussion of the merest legal conundrums, which bore no relation to the merits of any controversies except those of pedants, and in the direction of a machinery that belonged already to the past. Frivolous and vexatious defences upon paper delayed the trial of a litigant's cause. Merchants were hindered for months and years from recovering their just dues upon their bills of exchange. Causes of action had become classified, as if they were so many Aristotelian categories — a system which secured learning and precision, but at the risk of encouraging technicality; and two causes of complaint could not be prosecuted in one and the same action unless they belonged to the same metaphysical 'form.' An action on a bond could not be joined with a claim upon a bill of exchange. A man who had been assaulted and accused of theft in the market-place of his town was obliged, if he wished redress for the double wrong, to issue two writs and to begin two litigations, which wound their course through distinct pleadings to two separate trials. If a surprise occurred at Nisi Prius or the assizes, the court was unable to adjourn the proceedings beyond a single day. Old fictions still survived, invented in bygone ages to assist justice — with no particular harm left in them, it is true, but which were well fitted to encourage the popular delusion that English law was a mass of ancient absurdity. In order to recover possession of any piece of land, the claimant began his action by delivering to the defendant a written statement narrating the fictitious adventures of two wholly imaginary characters called John Doe and Richard Roe, personages who had in reality no more existence than Gog and Magog. The true owner of the land, it was averred, had given John Doe a lease of the property in question, but John Doe had

been forcibly and wrongly ejected by Richard Roe, and had in consequence begun an action of trespass and ejectment against him. Richard Roe, meanwhile, being a "casual ejector" only, advised the real defendant to appear in court and procure himself to be made defendant in the place of the indifferent and unconcerned Richard Roe, otherwise the defendant would infallibly find himself turned out of possession. Till within the last twenty-six years, this tissue of invention of unreal persons and of non-existent leases preceded every investigation of the claim to possession of land. Nor was the trial itself of a common law cause productive of certain justice. Right was liable to be defeated by mistakes in pleading, by variances between the case as previously stated upon paper and the case as it stood ultimately upon the evidence, or by the fact that the right party to the suit had not been nominally joined, or that some wrong party had been accidentally joined with him. Perhaps the most serious blemish of all consisted in the established law of evidence, which excluded from giving testimony all witnesses who had even the minutest interest in the result, and, as a crowning paradox, even the parties to the suit themselves. 'The evidence of interested witnesses,' it was said, 'can never induce any rational belief.' The merchant whose name was forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer conjectures and beliefs as to the authenticity of the disputed signature from what they knew of his other writings. If a farmer in his gig ran over a foot-passenger in the road, the two persons whom the law singled out to prohibit from becoming witnesses were the farmer and the foot-passenger. In spite of the vigorous efforts of Lord Denman and others, to which the country owes so much, this final absurdity, which closed in court the mouths of those who knew most about the matter, was not removed till the year 1851.

In a strictly limited number of cases the decisions of the three courts could be reviewed in the Exchequer Chamber — a shifting body composed of alternate combinations of the judges, and so arranged that selected members from two of the courts always sat to consider such causes as came to

them by writ of error from the third. The House of Lords, in its turn, was the appointed Court of Error from the Exchequer Chamber. The modern system of appeal, rendered necessary in our day by the weakening of the Courts in Banc and the development of what has been called the single-judge system, had not yet come into existence. Nor, in truth, on the common law side of Westminster Hall was there any great necessity for it. The Queen's Bench, the Common Pleas, and the Exchequer — whatever the imperfection of the procedure — were great and powerful tribunals. In each of them sat a chief of mark, with three puisnes to assist him, and the weight of authority of four judges, amongst whom there could not well fail to be present one or more men of the first rank of intellect and experience, was sufficient as a rule to secure sound law and to satisfy the public. The prestige, again, of the Exchequer Chamber in such cases as were allowed to reach it upon error was of the highest order. But the principle upon which appeals were allowed by the law in some matters, and refused in others, was full of anomalies. Only matters of 'error' which were apparent on the record could be the subject of a hearing in the Exchequer Chamber. No appeal lay on subjects so important as a motion for a new trial or to enter a verdict or a nonsuit — motions which proceeded on the assumption of miscarriages in law by the judge or the jury who tried the cause. If the aggrieved party had not succeeded in complying at the trial with the difficult formalities of the rule as to bills of exceptions — an old-fashioned and often impracticable method of challenging the direction of a judge — no review of it was possible. Error lay from a special verdict, where the parties had arranged, or the judge directed at the trial, a special statement of the facts. No error lay upon a special case framed without a trial by consent. That is to say, no appeal was permitted unless the expensive preliminary of a useless trial had first been thrown away.

The technicalities which encumbered the procedure of the courts furnished one reason, no doubt, for the arrears which loaded the lists at the accession of her Majesty. Other accessory causes may be found in the survival till a late

date of the old-fashioned term of three weeks, recurring four times a year, at the end of which the courts ceased sitting to decide purely legal questions while the three chiefs repaired to jury trials at Nisi Prius. It was not till after the beginning of the reign that an Act of Parliament was passed which enabled the Queen's Bench, the Common Pleas, and the Exchequer to dispose in Banc sittings after term of business left unfinished on their hands. Under the old system, the last day of term was famous for the crowd of counsel and of solicitors solely intent upon having their pending rules 'enlarged,' or, in other words, adjourned till term should again begin. The Queen's counsel in the front benches spent the day in obtaining the formal leave of the court to this facile process, and in marking each brief in turn with a large 'E' as the token of a regular 'enlargement.' 'How do you manage to get through your business in the Queen's Bench?" said a spectator to the late Sir Frederick Thesiger (afterwards Lord Chelmsford). 'We find no difficulty,' said the eminent counsel; 'we do it always with great Ease.' At the beginning of 1837, the accumulation of arrears in the Queen's Bench, to which court the great bulk of business necessarily drifted, had been most formidable. Three hundred cases of various descriptions were waiting for argument in Banc. The *Law Magazine* of two years later still complained, in its notice of the current events of the quarter, that the Banc arrears had reached to such a pass that a rule *nisi* for a new trial could not in all probability be disposed of under two years and a half from the time of granting it, at the end of which time, if the application were even granted, the cause would still have to be reheard.

The Court of Chancery was both a judicial tribunal and an executive department of justice for the protection and administration of property, but the machinery that it employed for the two purposes was, unfortunately, not kept distinct. Its procedure in contentious business served as the basis of its administrative operations, and persons between whom there was no dispute of fact at all found themselves involved in the delays and the embarrassments of a needless

lawsuit. In its judicial capacity the Court of Chancery gave effect to rights beyond the reach of the common law, corrected the evils that flowed from the imperfect jurisdiction and remedies of the Common Law Courts, and dealt with whole classes of transactions over which it had acquired a special cognisance. The code of ethics which it administered was searching and precise — academical, perhaps, rather than worldly, the growth of the brains of great masters of learning and of subtlety, whose maxims and refinements had crystallised into a system. But its practice was as dilatory and vexatious as its standard of right and wrong was noble and accurate. For deciding matters of conflicting testimony it was but little fitted. It tossed about as hopelessly in such cases as a ship in the trough of the sea, for want of oral testimony — a simple and elementary method of arriving at the truth, which no acuteness can replace. It had no effective machinery at all for the examination or the cross-examination of witnesses, and (as we have seen) fell back upon the Common Law Courts whenever questions of pure law were raised, or as soon as depositions and affidavits became hopelessly irreconcilable. Oral evidence had always been at common law the basis of the entire system, although the common law perversely excluded from the witness-box the parties to the cause who naturally knew most about the truth. The Court of Chancery, on the other hand, allowed a plaintiff to search the conscience of the defendants, and the defendants, by a cross bill, to perform a similar operation upon their antagonist, but only permitted the inquiry to be on paper. A bill in a Chancery suit was a marvellous document, which stated the plaintiff's case at full length and three times over. There was first the part in which the story was circumstantially set forth. Then came the part which "charged" its truth against the defendant — or, in other words, which set it forth all over again in an aggrieved tone. Lastly came the interrogating part, which converted the original allegations into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up

every earth. No layman, however intelligent, could compose the 'answer' without professional aid. It was inevitably so elaborate and so long, that the responsibility for the accuracy of the story shifted, during its telling, from the conscience of the defendant to that of his solicitor and counsel, and truth found no difficulty in disappearing during the operation. Unless the defendant lived within twenty miles of London, a special commission was next directed to solicitors to attest the oath upon which the lengthy answer was sworn, and the answer was then forwarded by sworn messenger to London. Its form often rendered necessary a re-statement of the plaintiff's whole position, in which case an amended bill was drawn requiring another answer, until at last the voluminous pleadings were completed and the cause was at issue. By a system which to lawyers in 1887 appears to savour of the Middle Ages, the evidence for the hearing was thereupon taken by interrogatories written down beforehand upon paper and administered to the witnesses in private before an examiner or commissioner. At this meeting none of the parties were allowed to be present, either by themselves or their agents, and the examiner himself was sworn to secrecy. If cross-examined at all (for cross-examination under such conditions was of necessity somewhat of a farce), the witnesses could only be cross-examined upon written inquiries prepared equally in advance by a counsel who had never had the opportunity of knowing what had been said during the examination-in-chief. If the examination was in the country, it took place at some inn before the comissioner and his clerk, the process seldom costing less than 60*l.* or 70*l.* It often lasted for days or weeks, at the end of which its mysterious product was sealed up and forwarded to London. On the day of the publication of the depositions copies were furnished to the parties at their own expense; but, from that moment, no further evidence was admissible, nor could any slip in the proofs be repaired, except by special permission of the court, when, if such leave was granted, a fresh commission was executed with the same formalities and in the same secret manner as before. The expense of the pleadings, of the preparation for the hearing,

and of the other stages of the litigation may be imagined, when we recollect that it was a necessary maxim of the Court of Chancery that all parties interested in the result must be parties to the suit. If, for example, relief was sought against a breach of trust, all who were interested in the trust estate had to be joined, as well as all who had been privy to the breach of trust itself. During the winding journey of the cause towards its termination, whenever any death occurred, bills of review or supplemental suits became necessary to reconstitute the charmed circle of litigants which had been broken. On every such catastrophe the plaintiff had again to begin wearily to weave his web, liable on any new death to find it unravelled and undone. It was satirically observed that a suit to which fifty defendants were necessary parties (a perfectly possible contingency) could never hope to end at all, since the yearly average of deaths in England was one in fifty, and a death, as a rule, threw over the plaintiff's bill for at least a year. The hearing in many cases could not terminate the cause. Often inquiries or accounts were necessary, and had still to be taken under the supervision of a master. Possibly some issue upon the disputed facts required to be sent for trial at the assizes, or a point of law submitted to a common law court. In such cases, the verdict of the jury, or the opinions of the court so taken, in no way concluded the conscience of the Court of Chancery. It resumed charge of the cause again, when the intermediate expedition to the common law was over, and had the power, if it saw fit, to send the same issue to a new trial, or to disregard altogether what had been the result. In a case which was heard in February 1830, there had been seven trials, three before judges and four before the Chancellor, at the close of which the suit found its way upwards to the House of Lords. When a cause had reached its final stage — when all inquiries had been made, all parties represented, all accounts taken, all issues tried — justice was done with vigour and exactitude. Few frauds ever in the end successfully ran the gauntlet of the Court of Chancery. But the honest suitor emerged from the ordeal victorious rather than triumphant, for too

often he had been ruined by the way. Courts where ultimate justice is achieved, but where delay and expense reign supreme, became at last a happy hunting-ground for the fraudulent. The hour for reform has struck when the law can be made an instrument of abuse.

> We must not make a scarecrow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape till custom make it
> Their perch and not their terror.

With all its distinction and excellence, the Court of Equity was thus practically closed to the poor. The middle classes were alarmed at its very name, for it swallowed up smaller fortunes with its delays, its fees, its interminable paper processes. The application of such a procedure to the large class of transactions, where no fact was in dispute, and only the careful administration of an estate required, was a cruel burden upon property. A large portion of the cases before the Court of Chancery had "nothing of hostility and very little of contentious litigation in them." Trusts, it may be, had to be administered, obscure wills or deeds to be interpreted, assets of a deceased person to be got in, classes ascertained, creditors paid. Though nobody wished for war, yet all the forms of war had to be gone through — the plaintiff and the various defendants drew out the pleadings in battle array, interrogated and answered, took evidence upon commission, examined and cross-examined upon paper. "It is a matter of frequent occurrence in court," say the Chancery Commissioners of 1851, "to see cases encumbered with statements and counter-statements, evidence and counter-evidence, with which the parties have for years been harassing each other, although there has been throughout no substantial dispute as to the facts, and although the real question lies in a very narrow compass, and would probably have been evolved in the first instance if the court had had the power summarily to ascertain and deal with the facts.

The judges of the court were the Lord High Chancellor (who then, as now, was a political officer and changed with every change of Ministry); the Master of the Rolls stood

next in dignity; last came the Vice-Chancellor of England — a judge who in 1813 had been created to relieve the pressure. Some equity work was also done by the Chief Baron, or, in his stead, a puisne baron sitting on the equity side of the Exchequer; but this could only be during a limited portion of the year. The appellate system was defective in the extreme. The Chancellor sat singly on appeals from the Vice-Chancellor of England and from the Master of the Rolls (whose inferior in the science of equity he easily might be), and presided in the House of Lords over the hearing of appeals from himself — a position the less satisfactory inasmuch as, owing to the imperfect constitution of that august tribunal, the Chancellor was very often its ruling spirit. These appellate functions left him not too much time to bestow on his own duties as a Chancery judge of first instance. To a court so loaded with procedure and so undermanned in its judicial strength, the Chancery business of this kingdom, contentious or non-contentious, metropolitan or provincial, all flowed. A formidable list of arrears naturally blocked the entrance of the Temple of Equity. At the beginning of January 1839, 556 causes and other matters were waiting to be heard by the Chancellor and the Vice-Chancellor. Those at the head of the list, excluding all which had been delayed by accidental circumstances alone, had been set down and had been ripe and ready for hearing for about three years. Three hundred and three causes and other matters were in like manner waiting to come on before the Master of the Rolls. Those at the head of his list had been standing about a year and a half. The total amount of causes set down and to be heard was 859, and it was facetiously observed that a greater arrear would probably never appear in the lists of the Court of Chancery — seeing that it had become wholly useless to enter any cause which was not to be brought on out of its turn as a short or consent cause. Since in each suit there were on an average two hearings, each destined to be separated by a period of something like two years, it was obvious that, in even the most ordinary litigation — such, for example, as that which involved the payment of debts or legacies out

of a deceased man's estate — four years must be wasted in absolute inactivity, over and above any delays that might occur in taking accounts or prosecuting inquiries. If, as seemed possible to skilled observers of the day, the Chancellor should prove unable to do more than keep pace with his appellate work, it would be — so they calculated — six years before the last in the list of 1839 came on for hearing even on its first stage; if a second hearing was required, thirteen years or more would elapse before this was reached; while, if on the final hearing the master's report was successfully objected to, the long process must begin *de novo*. "*No man, as things now stand*," says in 1839 Mr. George Spence, the author of the well-known work on the equitable jurisdiction of the Court of Chancery, "*can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary.*"

Attached to the Court of Chancery, performing a large portion of its functions, responsible — if we are to believe the torrents of criticism directed against them during the earlier portions of the reign — for much of its delay, were the masters of the Court of Chancery, their offices, and their staff of clerks. One great blot upon this portion of the Chancery system was that it was for all practical purposes under the control and superintendence of nobody in particular. The office of master of the court was one of historical dignity and antiquity. His duty in 1837 was to act in aid of the judge, to investigate and report upon such matters as were referred to him, including the investigation of titles, to take complicated accounts, to superintend the management of property of infants and other incompetent persons within the jurisdiction, and to be responsible for taxation of costs. A considerable portion of these judicial and ministerial duties he discharged by deputy. The work was done in private with closed doors, removed from the healthy publicity which stimulates the action of a judge. There was little practical power to expedite proceedings or force on the procrastinating litigant. At the beginning of the reign, complaints were loud both as to the expense and the delays in the masters' offices; and one of the best

informed Chancery lawyers of that day recorded it as his opinion, in the year 1839, that, with proper regulations in those offices, nearly double the quantity of business might be done and with greater promptitude. The Chancery judges at this period only sat in open court, and did not despatch business at chambers, and the great pressure of arrears and the want of a chamber jurisdiction caused a good deal to be shunted upon the master's office with which the judge himself would have been the best person to deal. Much legal literature during the beginning of the reign was devoted to attacking and defending the institution of the masters in Chancery; but when at a later period it fell, it fell with the general assent of the legal world.

A system of payment of officials by fees is often synonymous with a system of sinecures, of monopolies, of work done by deputy, as well as of work protracted and delayed. To such an epoch of administrative laxity belonged the origin of the institution of the "the six clerks," whose places were worth about 1,600*l.* a year, and who were in theory at the head of a body of officers called the "clerks in court." Mr. Edwin Field, a well-known solicitor of position, in a pamphlet published in 1840, tells us, that although he had been almost daily in the "six clerks" office during a considerable part of twenty years, he had never to his knowledge seen any one of the "six clerks," nor could he conceive of a solicitor or a solicitor's clerk having any occasion to see one officially. He believed that most of the "clerks in court" did not know even by sight the "six clerks" to whom they were nominally attached. The "clerks in court" were officers who were supposed to be *πρόξενοι* of the suitor and of the suitor's solicitor. They were twenty-eight or thirty in number, and presided over the copying of records, the issue of writs, the signing of consents, the service of notices — for notices were served upon them by proxy, which they then sent on by post or by messenger to the solicitor in the cause. They also acted as mediators in taxing costs, for which they were paid by fees in proportion to the length of the bills to be taxed. Most of this work, however diligently performed, was useless, for it might have been done

by the suitor's own solicitor; but, useless as it was, it was lucrative to the clerks in court, and the chief clerk in each court received, it was said, an income varying from 3,000*l.* to 8,000*l.* The chief argument in favour of the institution was that the clerks in court were the repositories of the practice of the court. Whether they were the pundits their adherents represented it is difficult at this interval of time to decide; but an anecdote survives, according to which an eminent Chancery Queen's Counsel, being consulted on a point of practice, recommended his client to ask his "clerk in court," and to do exactly the opposite of what that official should advise.

Such, roughly speaking, were the salient defects of the Superior Courts of this kingdom, in the year 1837. To attempt on the present occasion to follow the changes as one by one they have been made, would be to lose oneself and to drown the reader in a sea of detail and of technicality. But, from the above outline, it will not be difficult for anyone to determine what kind of shape any legal reform was bound to take that was to be worthy of the name. In the first place, the distinction between the Chancery and Common Law Courts required to be swept away, except so far as it was founded on a natural division of labour. The Common Law and the Chancery Court each demanded to be clothed with complete and independent powers, and rendered competent to do in every individual instance full and perfect justice within its own four walls. The law and the equity which were to be administered needed to be made similar in each, the rights recognised by the one to be the same as those enforced by the other; the remedies given to be identical and in both final. The law of evidence at common law still laboured under the terrible absurdity which declined to permit of evidence from the parties to the action. A suit in Chancery had yet to be relieved of the mass of paper which swamped it, oral examination of parties and witnesses to be introduced, and both party and witness brought face to face with the judge who was to decide the cause. Technicalities on either side of Westminster Hall needed to be rooted out, and machinery provided to enable the opinion

of the courts to be promptly and expeditiously obtained, without useless preliminaries, whether they took the shape of pleadings, or commissions, or trial. The staff of Chancery judges was moreover hopelessly inadequate, and as every Chancery judge sits singly, a satisfactory system of appeal in Chancery was essential. The offices of the masters in Chancery and of the clerks wanted to be overhauled, the progress of references and accounts brought more directly under the eye and supervision of the judge, arrears dealt with, delays minimised. Law reformers looked forward, but not with too sanguine anticipations, to some coming time, when a sovereign of the land might say, in the language of Lord Brougham, that "he found law dear and left it cheap, found it a two-edged sword in the hands of craft and of oppression, left it the staff of honesty and the shield of innocence."

All of these evils, most of the requisite remedies — both for common law and for Chancery — were pointed out by the legal profession fifty years ago. But it was then the habit in England to advance slowly in the direction even of necessary change. By degrees, however, the horizon brightened, and improvement upon improvement became law. Six years after her Majesty's accession, Lord Denman — Chief Justice of the Queen's Bench and father of the present Mr. Justice Denman — carried an Act removing the archaic fetter by which persons interested in the result of an action or suit were disabled from becoming witnesses. Eight years later still, another statute rendered the parties to almost all civil proceedings competent and compellable to give evidence. Commissions sat to inquire into the procedure of the common law. Three Procedure Acts, the fruit of their labours, cleared it of its technicalities, improved its machinery, extended its remedies, and laid finally to rest most of the abuses above described. In connection with this invaluable work — which deserves from its importance to be called the Reformation of the English Common Law — a grateful country ought not to forget the names of Sir John Jervis (from 1850 to 1856 Chief Justice of the Common Pleas); of Mr. Baron Martin, with whom law was synonymous with shrewd common sense; of the late Sir Alexander Cockburn,

the versatile and eloquent Chief Justice of the Queen's Bench; of Lord Bramwell, a great lawyer who lives to survey the success of his own handiwork; of the late Mr. W. A. Walton; of Mr. Justice Willes, whose brilliant and subtle learning was lost to the nation by an untimely death.

Progress of no less moment was taking place in Chancery. Trustee Relief Acts, Acts to diminish the delay and cost, and to amend the practice and course of procedure, to abolish the circumlocution office of the masters, to enable the Chancery judges to sit in chambers so as to facilitate the management of estates, and to allow the opinion of the court to be obtained in a more summary and less expensive manner, followed in due course. Misjoinder of plaintiffs ceased to be a ground for dismissal of a suit; rules for classifying the necessary defendants, and for minimising their number, were laid down. The effete system of taking evidence disappeared; the pleadings, the taking of accounts, the progress of inquiries were simplified and subjected to control. The court was enabled to do speedy justice without the long preliminaries of a hearing. A code of orders was drawn up regulating the chamber practice. The Chancery Court was freed from the necessity of consulting the common law, and power was conferred upon it of giving damages in certain cases to avoid recourse to law. New Vice-Chancellors were appointed, and a Court of Appeal created, with two Lords Justices and the Chancellor at its head. The roll of names connected with this gigantic reformation is long. Upon it stand Lord Cottenham, her Majesty's first Lord Chancellor, and the other Chancellors of her reign. The council of the Incorporated Law Society occupy a conspicuous and honourable position in the van of other law reformers. In addition to these may be mentioned Lord Langdale and Lord Romilly, Sir J. Knight Bruce, Sir George Turner, Vice-Chancellor Parker, Mr. Justice Crompton, the late Mr. Edwin Field, the late Mr. W. Strickland Cookson, and the late Lord Justice James, whose broad and lucid mind was till recently an element of strength in our new Court of Appeal, and whose services in the cause of reform, both at law and in equity, if equalled, have certainly not been surpassed by

any lawyer of modern times. "Multi præterea, quos fama obscura recondit."

The sketch of English justice at Westminster Hall in bygone days would hardly be complete if no mention were made of three important courts which, during the present reign, found their way thither, and have since followed the fortunes of the common law — the Court of Admiralty, the Court of Probate, and the Court of Divorce. The Admiralty in 1837 did not enjoy its present powers or importance. Borrowing from abroad the procedure of the civilians and the rules of foreign maritime law, confined for centuries within the bounds of a narrow jurisdiction by the prohibition of the Court of Queen's Bench, the Admiralty Court had only been rescued from obscurity by the great wars of the reign of George III, by the prize cases for which it was the necessary tribunal, and by the genius of Lord Stowell. But its range still continued limited, and its rules occasionally conflicted with the rules of the common law. The spiritual or ecclesiastical courts of the country from an early period had exercised authority in matters of testacy and intestacy as regarded personal estate, had issued probates of the wills of those who died possessed of personalty, and letters of administration of the estates of those who died without a will. The bulk of the testamentary business of the Ecclesiastical Courts was chiefly non-contentious — formal representative proceedings where no dispute arose. If the validity of a will or the title to administer was challenged, a suit became necessary, and to this all parties interested were cited. A number of spiritual courts or chambers scattered through England took cognisance of this testamentary procedure — the courts of the Archbishops of Canterbury and York, the diocesan courts of the bishops, the archdeacons' courts, and other tribunals of still more limited jurisdiction. The Court of Arches, which belonged to the Archbishop of Canterbury, served as the appellate centre for the province of Canterbury, and from it a further appeal lay to the Judicial Committee of the Privy Council, a body that had been recently substituted for the Court of Delegates of Henry VIII. Doctors' Commons was the place

where the principal ecclesiastical proceedings were held, and a body of advocates and proctors enjoyed in it a monopoly by which the general profession was excluded from audience and practice. All judges and officers of the spiritual courts were appointed by the prelates, and the other functionaries over whose tribunals they presided. They were sometimes lawyers of position, sometimes lawyers of no position at all, sometimes clergymen, and were usually paid by fees. Many offices were granted in succession and reversion, deputies discharging the duties, of which the emoluments were considerable. The inefficiency of the judges, the variations of practice and procedure, the expense, the delay, the frequently inconsistent and mistaken views of law and of fact adopted by the different authorities, the anachronism of a system which permitted civil rights to be decided by judges not appointed by, nor responsible to, the Crown, and, finally, a general sense that these tribunals were a soil in which abuses grew and flourished, rendered their fall inevitable. The flavour, the air, the humorous absurdity of many abuses in many branches of the law have been preserved to us by the pen of Charles Dickens. Writers of sentimental fiction not unfrequently exercise their powers of sarcasm on the subject of the enormities of law by inventing for the law courts an imaginary procedure which never yet was seen, and then denouncing its iniquities. But the caricatures of English law, at the beginning of the reign, which Dickens has made immortal, are full of the insight of a great artist — come direct from the brain of one who has sat in court and watched — represent real scenes and incidents as they might well appear to the uninitiated in the "gallery." His pictures of the Chancery suit of "Jarndyce and Jarndyce;" of the common jury trial of "Bardell *v.* Pickwick;" of the debtors' prison, of the beadle, of the constable, of the local justice and of the local justice's clerk, contain genuine history, even if it is buried under some extravagance. In "David Copperfield" he has sketched with his usual felicity the fraternity of Doctors' Commons and the ecclesiastical officials who thronged its purlieus. Like so many other of the antiquated subjects of his satire, Doctors' Commons was soon

destined to decay. A royal Court of Probate was established in its place at Westminster Hall, with district registries throughout the kingdom; and the various ecclesiastical jurisdictions which the new court superseded ceased to exist thenceforward, so far as testamentary causes were concerned.

The creation in 1858 of a Court for Divorce and Matrimonial Causes has been a measure, necessary no doubt, but not productive of unmixed benefit. Divorce *a vinculo matrimonii*, fifty years ago, was unrecognised by English jurisprudence, except where it was the result of an Act of Parliament. The laxer law of an exceptional period which followed upon the English Reformation had long disappeared, and from the close of the seventeenth century down to the recent statutes of our own days no one could be divorced otherwise than by the Legislature. After the year 1798, Parliament had declined to grant the relief to any husband who had not previously obtained damages at law against the adulterer, and prosecuted a further suit in the Ecclesiastical Courts for a divorce *a mensâ et thoro*. When a Divorce Bill reached the Commons from the Lords, the question of adultery had thus been tried three times over. The practice was adopted in 1840 of referring such cases to a Select Committee of nine members, who heard counsel and examined witnesses. This was the fourth and not the least expensive inquiry of all. A divorce in 1837 was therefore a luxury of the wealthy — a *privilegium* beyond the reach of a poor man's purse. Its average cost in an ordinary case was estimated at from 1,000*l.* to 1,500*l.* An anecdote — timeworn among the bar — relates that the final stimulus to the change of public opinion which brought about reform was supplied by the caustic humour of the late Mr. Justice Maule. He was trying for bigamy a prisoner whose wife had run away with a paramour and left him with no one to look after his children and his home. "Prisoner at the bar," said the judge to the disconsolate bigamist, who complained of the hardship of his lot, "the institutions of your country have provided you with a remedy. You should have sued the adulterer at the assizes and recovered a verdict against him, and then taken proceedings by your proctor in the Ecclesiastical

Courts. After their successful termination, you might have applied to Parliament for a Divorce Act, and your counsel and your witnesses would have been heard at the Bar of the House." "But, my lord," pleaded the culprit, "I cannot afford to bring actions or obtain Acts of Parliament; I am only a very poor man." "Prisoner," said Mr. Justice Maule, "it is the glory of the law of England that it knows no distinction between the rich and the poor." The present Divorce Court, whatever the social evil it has revealed, at least has brought within reach of the humble that which was supposed to be for the public advantage in the case of the rich. The nation has been fortunate in this, that a branch of justice so difficult has been administered in succession by presidents of singular personal dignity, wisdom, and discretion.

To the practical arbitrament of the Courts of Common Law was transferred, after no long interval, another class of cases of much importance to the State — the trials of controverted election petitions. At the time when her Majesty succeeded to the throne, the cognisance of such matters belonged exclusively to the House of Commons. Through a moral blindness which party politics occasionally encourage, the election committees of the House had become a tribunal as untrustworthy as if they had been pecuniarily corrupt. The composition of each committee proceeded upon strictly party lines. On the day appointed for the ballot the friends of the respective litigants were collected by a "whip." Out of a House of a hundred members, thirty-three names were drawn, and these again reduced to eleven by repeated challenges — a process facetiously known as "knocking out the brains of the committee." The Parliament court so chosen had often to decide difficult matters of law, on which the validity of votes or the qualification of voters or of candidates in former days might depend; often to determine issues of fact as to bribery or intimidation. In the result, the sitting members were seated or unseated with more regard to the colour of their politics than to any merits of the case. "The tribunal," says Mr. Charles Buller in 1836, "is selected under a system by which those who have any professional acquirements, admitted abilities, proved industry or marked

consideration in the political world are too often studiously excluded from it." "We do not exaggerate," observes the *Law Magazine* of 1837, "when we say, that during the last two or three sessions none but the uninitiated ever dreamed of supposing that the right to a disputed seat would be decided by the merits of the case." In 1838, a writer in *Fraser* calculates that there had been ten Whig committees, and that they had decided in every case in favour of Whig members. In the session of 1838, twenty-four Whig committees, it was alleged, had defeated petitions against twenty Whigs and unseated six Tories, while they had only unseated two Whigs and dismissed two Whig petitions. During the like period, sixteen Tory committees appeared to have dismissed petitions against four Tories and unseated eight Whigs, while two Tories only were unseated and two Tory petitions were unsuccessful. Before the system was ultimately abolished a growing sense of public duty had substantially curtailed its gravest abuses, but the judicial vindication of electoral purity ought, like Cæsar's wife, to be above suspicion.

The House of Commons, while reserving to itself the formal shadow of supreme jurisdiction, has at last delegated to the judges of the land the duty of dealing with these election controversies; and, in addition to the exacter justice thus secured, it is some advantage to the public that election petitions are now tried in the locality where the transactions have occurred. A similar change as regards a variety of private Bills, whose success or failure ought to depend upon evidence alone, is only as yet in the air. Private Bills continue to be referred to Select Committees of five — an institution which has, however, undergone considerable improvements during the reign. There is reason to hope, that the functions imposed upon the judges of dealing with electoral petitions are destined as time progresses to became light. After the hotly contested election of 1886 only one single election petition was set down for trial in her Majesty's English courts, where the election turned upon a scrutiny. All these jurisdictions, all these scattered duties, as the reign progressed were gathered together by degrees and entrusted to courts sitting in Westminster Hall.

At last the final blow was given to the old system which had divided equity from law. In 1873, Lord Selborne, as Chancellor, with the assistance of Lord Cairns and aided by the Attorney-General and the Solicitor-General of the day (the present Lord Coleridge and the late Sir G. Jessel), carried successfully through Parliament a measure which, supplemented by still later legislation, has swept away the old divisions. A "Supreme Court" of Judicature — a modern variety of the ancient Aula Regia — has been substituted, each chamber or department of which administers the same principles of equity and law, and is governed by a common and simple code of procedure. Some older lawyers still cast back at times a "longing, lingering" look to the ancient courts of Westminster with their glories and their historical associations, and to the former Court of Chancery with all its genius and its faults; but by no less trenchant a revolution could the reforms of the reign have been completed and the organisation of the law adapted to the necessities of this great kingdom. The scheme in its outline was the outcome of the labour of a Commission of 1869, the names of whose members are appended below.[1] All imperfections of remedy, all conflicts of jurisdiction, were at last to cease, while such a classification of business was still retained in the different branches of the Supreme Court as common sense required. It took a few years of further legislative arrangement before the plan thus adopted ripened into its present precise form; but the details of this process may on the present occasion be passed by, in order to fix our attention on the broad result. The "Supreme Court" as constituted in 1887 is made up of the High Court of Justice and the Court of Appeal. The High Court contains several divisions. The largest in size is the Queen's Bench,

[1] Lord Cairns, Lord Hatherley, Sir W. Erle (Chief Justice of the Common Pleas), Sir Jas. Wilde (now Lord Penzance), Sir R. Phillimore, Mr. G. Ward Hunt, Mr. Childers, Lord Justice James, Mr. Baron Bramwell (now Lord Bramwell), Mr. Justice Blackburn (now Lord Blackburn), Sir Montague Smith, Sir R. Collier (afterwards Lord Monkswell), Sir J. Coleridge (now Lord Coleridge), Sir Roundell Palmer (now Lord Selborne), Sir John Karslake, Mr. Quain (afterwards Mr. Justice Quain), Mr. H. Rothery, Mr. Ayrton, Mr. W. G. Bateson, Mr. John Hollams, Mr. Francis D. Lowndes.

consisting of fourteen judges and the Lord Chief Justice of England. It represents the old Queen's Bench, Exchequer, and Common Pleas rolled into a single tribunal; for the Exchequer, with its Chief Baron, and the Common Pleas, with its Chief Justice, exist no more. The Queen's Bench tries, either by jury or by a single judge, any cause which does not belong to those special classes of business which for convenience are assigned to other departments. It conducts the assizes, civil and criminal, all over England; furnishes judges who preside at the Old Bailey; is, with unimportant exceptions, the final court of criminal jurisdiction; acts as a court of review on appeal from the judgments on matters of law of the county courts; controls the action of all inferior tribunals, wields all the powers and authority of the former Common Law Courts, and administers equity as well as law. A staff of fifteen to eighteen masters are attached to it, who exercise judicial functions in interlocutory matters, report on inquiries referred to them, preside at taxation of costs, and supervise the machinery of the central office and its clerks. The next branch of the High Court is the Chancery Division, consisting of five judges, who sit singly — a chief clerk and a body of clerks working under each. On the principle of division of labour, the Chancery Division attracts to itself administrative and other business, for which it has a special organisation and aptitude; but its jurisdiction is complete and not confined to any particular subject-matter, and it administers law as well as equity. Third comes the Probate, Admiralty, and Divorce Division (under a president and another single judge), independent in itself, managing the Admiralty, divorce, and probate business of the country and controlling the district registries throughout England. From the judgments and orders of all branches of the High Court alike an appeal (except in ordinary criminal matters) lies to the Court of Appeal, composed of the Master of the Rolls and five Lords Justices; the Lord Chancellor, the Lord Chief Justice of England, and the President of the Probate, Divorce, and Admiralty Division ranking as *ex-officio* members. The decisions of the Court of Appeal are only reviewable by the House of Lords — a tribunal that has been strength-

ened by the creation of law lords, and to which the appeal business of the Privy Council (at present the court of appeal from the colonies and the ecclesiastical courts) is destined in a few years to be virtually, though not perhaps nominally, transferred.

A complete body of rules — which possesses the great merit of elasticity, and which (subject to the veto of Parliament) is altered from time to time by the judges to meet defects as they appear — governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes — upon oral evidence or upon affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading, or proceeding that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move. Simultaneously with this culminating measure of reform, we have seen the creation of one central Palace of Justice for the trial of all civil causes. On December 4, 1882, the judges of the land, with the Chancellor at their head, bade good-bye, in long procession, to Westminster Hall, and followed in her Majesty's train as she opened in State the present Royal Courts of Justice. The old order was over and the new had begun. Taking farewell of a profession which he long adorned, the late Vice-Chancellor Bacon — who has himself been a partaker in the great movement we have endeavoured to narrate — thus summed up in last November his own experience of the legal achievements of the reign. "I have seen," he said, "many changes, all of which have had the effect of simplifying and perfecting the administration of the law, to the

great advantage of our ever-increasing community, to the protection of civil rights, to the encouragement of arts and commerce, and the general prosperity of the realm." The name of one happily still living, and the name of one who is deplored in more than one department of the State, will always be connected with the final consolidation of the English judicature. To the co-operation for the public weal of Lord Selborne and of the late Lord Cairns — rivals in politics, but fellow-workers in the reform of the law — is chiefly due the completeness of the contrast between the English judicial systems of 1887 and of 1837.

Justice would fail in one of her chief attributes if she concentrated all her attention upon the superior courts and made no effort to bring English law within the reach, so to speak, of every subject of the Crown. It is a striking reflection, that the system of county courts, which now forms so essential a part of our institutions under the management of a body of judges whose merits it would be presumptuous to praise, is entirely a growth of the present reign. The ancient county court of the common law (perhaps the oldest tribunal of the country) had long since fallen for all practical purposes into complete disuse. Since the time of James I, local "courts of request," designed for the recovery of trifling debts and created by local Acts of Parliament, with a limited jurisdiction only, had gradually become common, but were wholly inadequate to the wants of the public. At her Majesty's accession there was no tribunal in existence that discharged the duties or possessed the jurisdiction of the present county court. The year 1846 sounded the knell of the old-fashioned and comparatively useless courts of request. In their place was built up slowly, by a dozen or more successive statutes, the county court of to-day. Five hundred districts have been formed, with about fifty-nine circuits — a single judge, as a rule, being annexed to each circuit. Every judge in the matters submitted to his cognisance administers law and equity concurrently — is a judge of bankruptcy outside the jurisdiction of the London Bankruptcy Court, and in certain selected districts an Admiralty judge as well. The procedure has been rendered

simple and rapid; but its details and the limits of the jurisdiction to which it belongs, though matters of considerable practical importance, are beyond the range of this paper. If the population of the country are at last furnished at their very doors with justice, cheap, excellent, and expeditious, they have to thank the county court legislation of the last forty years, and the men who have carried out its provisions in the provinces.

The progress of the general law relating to the enforcement of debts is a subject interwoven with the administration of the law both in our supreme and in our provincial courts. Ancient and modern history are alike full of the record of hard codes pressing severely upon debtors. In England, down to within living memory, our law of debtor and creditor reposed upon the persistent notion that insolvency was a crime. Paramount necessities of trade and commerce had taught us, indeed, the distinction between the case of the insolvent trader who was unable to fulfil his commercial engagements, and that of the ordinary debtor who had no such mercantile excuse. To the debtor who was not in trade, and who failed to liquidate his debt, the English law applied the sharp, stern corrective of imprisonment. It sent him to gaol — till he found security or paid — before the debt was even proved, and on a mere affidavit by an alleged creditor that it was owing. After verdict and judgment, the unsatisfied party had an absolute option of taking, in satisfaction, the body of his debtor. Traders to whom the bankrupt law applied might escape by making full disclosure and complete surrender of their effects for distribution among their general creditors; and, owing to the demands of the commercial world, the law of bankruptcy since the reign of Henry VIII had been the subject of constant amendment. But the general law of insolvency continued in its barbarous condition, owing in part perhaps to the legal difficulty of enforcing money debts against landed property. Occasional Insolvent Acts from time to time were passed for the relief upon terms of insolvents who might apply for their discharge, and ultimately a permanent Insolvent Court was established to deal with their peti-

tions. Yet it was not till after the beginning of the reign that arrest upon mesne process was abolished, and imprisonment in execution of final judgments continued to be the law till a far more recent date. From October 1, 1838, to December 1, 1839 (a period of fourteen months), 3,905 persons were arrested for debt in London and the provinces, and of those 361 remained permanently in gaol in default of payment or satisfaction. Out of the 3,905 debtors so arrested, dividends were obtained in 199 cases only. The debtor who was left in durance vile shared a common prison with the murderer and the thief, and the spectacle of misfortune linked in this manner to the side of crime was as demoralising as it was cruel. The following[1] is the account given in 1844 by a Government inspector of the condition of the debtors lodged in Kidderminster Gaol, which was read to the House of Commons by Sir James Graham: —

"At the time when I visited the gaol there were six male debtors confined under executions from the Court of Requests. They occupied a single room paved with bricks, the extent of which is twelve feet in length by twelve in breadth, which is destitute of table, bed, seat, or any other species of furniture whatever; and there is no fireplace or any means of lighting a fire. A heap of straw is scattered over the floor of half the room, on which the prisoners sleep, for they have no other bedclothes, and from time to time the worst part of the straw is removed and better substituted for it. The privy occupies a corner of the room, but, from the oppressiveness of the stench, the prisoners have been allowed to close it with straw. The yard into which the room opens measures thirteen feet in length by twelve feet in breadth, and is so badly drained that in wet weather the water lies in it to such a degree as to confine the prisoners entirely to their room. This yard is closed in by a high wall, surmounted by an iron lattice. The prisoners are very dirty, as they never take off their clothes, and are allowed only two jugfuls of water per day for drinking and washing themselves. Their diet consists of an allowance of the quar-

[1] Hansard, vol. lxxvi, p. 1711.

ter part of a quartern loaf of bread per day, but their friends are permitted to bring them any other articles of food while the officer is there. In case of illness there is no means of getting assistance, for, though the prisoners might succeed in making themselves heard by the inhabitants of the neighbourhood, they could not afford any help without the beadle, who lives in a remote part of the town. Female prisoners, if confined there, were deprived of all separate accommodation, and cannot be visited by their own sex in cases of sickness, except while the officer is there."

The leading idea of the law in the case of the ordinary insolvent was to seize his person. The principle of the law of bankruptcy with reference to a trader is to confiscate his property for the benefit of creditors. But during the first thirty years of the century, the English bankruptcy law had been, and at the beginning of the present reign still was, a discredit to a great country whose fleets covered the seas and whose commerce ranged the globe. Scotland and several Continental nations were far in advance of us. England alone among her commercial rivals still kept to the mischievous doctrine that mercantile insolvency was to be rooted out as if it were an offence against society. The bankruptcy law down to within fifty years ago maintained, accordingly, a procedure the severity of which from this distance of time appears monstrous. The one mitigating feature about it lay in the fact that the great commercial world, alienated and scared by the divergence of the English bankruptcy law from their own habits and notions of right and wrong, avoided the court of bankruptcy as they would the plague. The important insolvencies which had been brought about by pure mercantile misfortune were administered to a large extent under private deeds and voluntary compositions, which, since they might be disturbed by the caprice or malice of a single outstanding creditor, were always liable to be made the instruments of extortion. "To the honest insolvent the bankruptcy court was a terror." To the evildoer it afforded means of endlessly delaying his creditors, while the enormous expenses of bankruptcy administrations rendered it the interest of few to resort to the remedy, except with

the object of punishing the fraudulent or vexing the unfortunate.

The legal illusion that a debtor *primâ facie* must be wicked, produced in the bankruptcy law, as indeed was natural, a curious procedure which began in secrecy and *ex parte* processes, and every stage of which was capable of being abused. The declaration in 1831 of a Lord Chancellor, made from his place in Parliament, that "ever since he had been acquainted with the profession he had uniformly heard two evils complained of, the state of the bankrupt law and the mode of its administration," was but the echo of general opinion. The adjudication, with which the performance opened, deprived the debtor (till it was reversed) of all his property, left him absolutely penniless, and pilloried his name as that of an insolvent in the *Gazette*. Yet this decree was granted *ex parte* in his absence, without the knowledge of anybody except the one *soi-disant* creditor who had chosen to put the law in motion. All that was needed was an affidavit of debt, coupled with a bond which bound the deponent to substantiate his allegation. Upon such material, a fiat issued to a group of commissioners, who assembled from their houses in town or country, as the case might be, met in private at a coffee-house or inn, and after an *ex parte* hearing declared the supposed debtor bankrupt. A warrant was thereupon delivered to a messenger, directing him to enter the bankrupt's house, to lay hand upon his furniture, ready money, property, and books of account, and to serve him with a summons to appear. The sight of the officer armed with this authority was the first notice to the trader of an occurrence which put at issue his whole commercial reputation. Under this system the first merchant in London or in Manchester was liable to suffer unspeakable annoyance, and the whole Royal Exchange, as it was said, might wake up one morning and find themselves in the *Gazette*.

An adjudication so obtained necessarily lacked the element of finality. It could be impeached by the bankrupt himself as well as by others before any other civil court, even after the whole estate of the bankrupt had been divided.

Its validity might be challenged in an action of trespass or of false imprisonment brought against the commissioners of bankruptcy, or against their messenger who had done nothing except execute his warrant, or against the assignee who had innocently dealt with the estate. The mere intimation on the part of the bankrupt that he disputed the propriety of the adjudication, and denied the alleged act of bankruptcy on which it was founded, was enough to paralyse the perplexed assignee, who thenceforward, if he distributed the assets, did so at his own risk. In the year 1825 a trader of the name of Campbell had been declared bankrupt on testimony that he had denied himself to a creditor. Campbell disputed the adjudication and the allegation upon which it was based. Thirteen years afterwards, in 1838, the question whether he had really denied himself to the creditor who called on him was still in controversy, and remained unsolved even after Campbell's imprisonment and death. During the interval 170,000*l.* of his property had been received by his assignees, but not one farthing of the amount in 1838 had yet reached the hands of his general creditors, while 50,000*l.* had been expended in costs.

The commissioners under whose directions an adjudication took effect were gentlemen appointed to perform this function, who lived at a distance perhaps from one another, who had to be convened on each occasion and to travel (in the days of the infancy of railways) perhaps thirty or forty miles to attend the rendezvous. Shortly before 1837, the metropolis had been relieved from this incubus, and the seventy commissioners of London replaced by a London Court of Bankruptcy, consisting of a chief judge and two colleagues (forming a court of review) and six commissioners. But the country districts still groaned under a judicial army of 700 commissioners divided into 140 courts. Each tribunal, as a rule, had five members (generally a couple of local barristers and three local solicitors), who taxed among other things the local practitioners' costs. During the years 1837-39 the number of fiats opened before the 700 country commissioners was, on an average, 780 per annum — nearly a judge to every fiat — while the fees paid for this process, and wrung out of

insolvent estates, amounted to between 34,000*l.* and 35,000*l.* But the paucity of provincial fiats was no indication of provincial prosperity. London creditors found the difficulty of proceeding against debtors in the country nearly insuperable, and hesitated to throw good money after bad. Finally, the giving or withholding of the bankrupt's certificate depended on his being able to procure the necessary number of creditors to sign his certificate of discharge. Secretion of traders' effects, bribery of creditors, manufacture of fictitious claims, were the natural consequence of such a system.

Several distinct endeavours have been made by Parliament since those days to create an ideal plan for the administration of bankruptcy and for the distribution of a bankrupt's property. The legislative pendulum has oscillated from one theory to another, as the imperfections of each were experienced in succession; and the pendulum will yet go on swinging. But the whole of the intolerable abuses above set forth have been swept away. Imprisonment for debt is gone, except in particular cases, where the non-payment of money is accompanied with fraud, misconduct, breach of trust or of duty, or disobedience to the order of a court, or where it is shown that the debtor can but will not pay. Courts of bankruptcy have been created, with a machinery the details of which require still to be watched with care, as they still belong to the category of legislative experiment; but traders and non-traders alike have been brought under a system which is as complete as the ingenuity of Parliament has hitherto been able to render it.

Meanwhile, the country had not stood idle in reference to the administration of the law for the repression of crime. As early as 1826, the late Sir Robert Peel initiated a course of legislation intended to consolidate and amend the criminal law, which till then had been scattered in fragments over the statute book, uncollected and unarranged. A commission had issued shortly before 1837 with the view of digesting the written and unwritten law into two monster Acts of Parliament, and the earlier portion of the reign produced a series of valuable reports of successive commissions upon the subject. But although a digest was prepared in 1848, it never became law. In 1852, Lord St. Leonards determined to attempt codi-

fication as an alternative expedient, but after two years of labour this project was also laid aside. Both digest and code appearing to be beyond the range of practical politics, the idea of consolidating and amending the existing law was revived again, and six Criminal Law Consolidation and Amendment Acts of much importance were passed in 1861, which now constitute the nucleus of our written criminal law. This is the greatest achievement of the reign in the branch of the law now under consideration. Mr. Justice Stephen has produced of late years a draft code that has not yet received the sanction of Parliament, but which in itself is an effort worthy to be remembered as one of the valuable pieces of industry of the last fifty years. Among the names that deserve to be recollected in connection with the amendment of the statute book stand pre-eminent those of Lord Campbell and Lord Cranworth, of Sir J. Jervis (the Chief Justice of the Common Pleas), and of the late Mr. Greaves. The law of libel has been corrected by enabling a plea of justification to be pleaded in matters where publication of the truth is for the public interest. In 1851 invaluable, though not unlimited, powers of amendment were conferred on criminal courts, and other practical changes in procedure enacted to prevent slips and miscarriages of justice. In 1865, the present Mr. Justice Denman introduced into Parliament an Act to rectify certain anomalies, chiefly in the law of evidence, and an Act due to the initiation of the late Mr. Russell Gurney contributed, two years afterwards, greater improvements to the procedure. The present Court of Crown Cases Reserved was created in 1848: a tribunal for which doubtful points of law may be reserved at the trial — reservations previously dealt with by the judges in a less public and general, and therefore a less satisfactory way. But the criminal procedure and practice has undergone less alteration than the civil, probably because ample protection for the prisoner was afforded even by the older law. Although miscarriages are but rare, the system of criminal pleading is still extraordinarily cumbrous and involved. Ten years ago, an indictment drawn by the present writer in an important Government prosecution, and settled in consultation with the present Lord Chancellor and the late

Lord Justice Holker, reached, when engrossed on parchment and presented at the Old Bailey, ninety yards in length. Nevertheless there is no place in the world where justice is more admirably done than in our great courts of criminal law. Many difficulties yet remain to be overcome in devising, if possible, some adequate system for the interrogation and examination of the accused, in equalising sentences throughout the kingdom, in bringing those passed at quarter sessions into more complete harmony with those inflicted by the judge at the assizes, and in graduating and adjusting with greater nicety as well as in lessening the severity of the longer sentences of penal servitude. As regards the procedure before justices, and all matters that relate to their jurisdiction, the reign has been fruitful of the best and most careful legislation. Jervis's Acts (drawn by Mr. Archbold and introduced by Sir T. Jervis when Attorney-General), the new Summary Jurisdiction Act of 1879, and a group of statutes that extend and regulate the summary powers of magistrates, have been of considerable benefit to society. At the beginning of the reign there were outside the metropolis but two or three stipendiary magistrates. The extension of their number has been a measure of unqualified good. Extradition statutes have been passed, which, together with a series of treaties, now enable justice to follow many English criminals beyond the seas, and to remit for trial to their own country many foreign culprits who have fled to seek an asylum here.

For some few years before 1837, the punishment of death had ceased to be inflicted except for the crime of murder. But the condition of the Statute-book in this respect had not kept pace with the humane practice of the Executive. Death was still the sentence for some lesser offences, though it was, as a rule, commuted. So lately as 1833, a poor little boy of nine pushed a stick through a broken window, and pulled out some painters' colours worth twopence. He was sentenced to death for burglary. The result of this condition of the law was twofold. In the first place, it led prosecutors and witnesses to abstain from pressing home the evidence of a prisoner's guilt, and to connive anxiously at his escape. In the second place, the deterring influence of the sentence was

destroyed, since it was not likely that it ever would be enforced. In the year 1836, the number so condemned to death was four hundred and ninety-four, only thirty-four of whom were hanged. The first year of her Majesty saw a series of Acts of Parliament limiting the number of capital sentences and graduating the secondary punishments. In 1861, a still further amelioration of the law took place, and now murder and treason, piracy with violence, and setting fire to her Majesty's dockyards, arsenals, ships, and naval stores are the only capital crimes. While the population of England and Wales has nearly doubled, the average number of executions, according to Sir Edmund Du Cane, has not increased at all, and the capital sentences have enormously decreased. The present reign, moreover, has seen the extinction of the savage custom of converting into a public spectacle the execution of the final sentence of the law. Down to 1837, the pillory was still a punishment for perjury and subornation of perjury. It ceased in that year; but public executions remained in fashion for thirty years longer. The scenes of licence and disorder which on such occasions might be witnessed outside the prison walls have been portrayed by the graphic pen of more than one great author of the age. Each unhappy criminal, as the fatal day drew near, became the object of sensational curiosity. In 1840, the Lady Mayoress of the day attended the funeral sermon preached in Courvoisier's presence on the last Sunday before his death. On the night preceding an execution, brutal crowds took up their station in the vicinity of the gaol, and parties of pleasure were organised to witness the scene of death — parties not composed only of the uneducated. Even down to 1868 English gentlemen might be seen occasionally at the adjacent windows which commanded a commodious view of the gallows and the drop. The barbarous ceremony which served to familiarise thousands with the agonies of a death struggle is now a thing of the past, and since 1868 the law inflicts its most terrible punishment in private.

Prevention and detection of crime are subjects which, like the subject of the execution of the law's judgments, may fairly rank under the head of its administration. Not the

least valuable of the reforms of the reign has been the perfecting throughout the country of a proper system of police organisation. The metropolitan police, to which not merely London but all England owes so much, are a still earlier institution; and, before the year 1836, legislation had provided a constabulary for the boroughs. A police force for the rural parts of the county palatine of Chester was also in existence, and many country districts had themselves raised voluntary associations to maintain officers of their own — a task in which they received valuable aid from the police of the metropolis. But, with these exceptions, the lesser towns and the rural districts were guarded, in 1837, from the depredations of the criminal by the effete institution of the parish constable and the watchman. It requires an effort of the imagination to realise the extent to which lawlessness then reigned in the suburbs of our large towns and in our country places. In the smaller towns and villages the constable was chosen from the humblest order of tradesmen, farmers, or even day-labourers. He was frequently the master of the ale house or the village shop, who for a trifling remuneration had accepted the office, or had it forced upon him in rotation; and the guardians of the public peace could not always read or write. The last thing such officials wished was to incur the trouble, the danger, or the odium of pursuing or arresting a culprit. Over a considerable portion of England, property was less secure than in any great European country, excepting only Italy and Spain. Commercial travellers were loth to travel after dark. One of them, who for twenty years had made the round of the south-eastern counties from Norfolk to Devonshire, states in the year 1838 that, although perfect security prevailed within five or six miles of the metropolis, it would be imprudent beyond that distance to venture out after nightfall; and that if he could travel where there were no police with the same freedom as he could within the police district, he should be able on his rounds to save perhaps five days in forty. Property was safe neither on the river, nor on the canal, nor upon the turnpike road. Commercial houses came forward in numbers to complain that whole lines of canal were absolutely unprotected, that bales were opened, and their

boxes and cases broken or abstracted. Along different lines of canal receivers of stolen goods set up regular establishments, and entire families in the neighbourhood lived on the receipt of the plunder. Silk, wine, spirits, flour, malt, groceries of every description disappeared wholesale. In the Enfield district, upwards of thirty gentlemen in the year 1838, during a period of twelve months, had their stables opened and large quantities of property carried away. Footpads lurked in the vicinity of the great manufacturing centres of the north; robbery with violence, murder itself, went often unpunished. Gangs from towns drifted into the country for the purposes of crime; the towns, in their turn, suffered from the bad characters who took up their residence in the country, with no apparent anxiety to avoid the presence of the parish constable. Vagrants perambulated the kingdom, living on their wits, and even the cottagers' dwellings were rifled while the inmates were working in the fields. The farmer who kept no private watchman, or who did not live within the radius of an association, was liable to lose great quantities of agricultural produce. If he lived near a town like Leeds, he hesitated before returning home after dark from the market or the fair, unless he was in the company of friends. The local constable was sometimes too stupid, sometimes too busy, often too timid, to attend to information given him. It was due to the same cause that wreckers at this date haunted the dangerous and desolate places on the coast. Rural crime, in fact, went unprevented, undetected, unprosecuted. The returns of prosecutions and convictions, to which the statesman and the philanthropist in our time have recourse as affording some clue to the prevalence or absence of crime, told absolutely nothing, for they bore no relation at all to the good conduct of the locality. Men abstained from prosecuting when there was no certainty of redress, and the absence of criminal statistics resulted frequently from the undisturbed immunity of the offenders. In two instances towards the beginning of the reign, in neighbourhoods where crime was remarkably prevalent, her Majesty's judges were presented with white kid gloves at the assizes, as emblematic of the purity of the district.

Even in country towns and places where a constabulary force was raised and paid by voluntary effort, the justice administered by it was rude. In one district, in 1838, the parish constables were under standing orders from the magistrates to tap with their staves the pockets of all labourers or other persons found abroad after nightfall, in order that the pheasants' or partridges' eggs therein, if any, might be broken! In conformity with the behest of the chief magistrate of one considerable town, the constables seized all vagrants found within their jurisdiction and took them to prison to have their heads shaved, after which operation they were set at liberty and went their ways. The superintendent of police was asked by what right he apprehended them and cut their hair. "The mayor," he replied, "who is a man of few words, says he crops them for cleanliness." In some rural districts the paid police were in the habit of dispensing altogether with the constitutional formality of a warrant. An officer interrogated on the subject frankly confessed the irregularity, but added, that "he chanced it." In another new borough the superintendent of police prided himself "on never waiting for a warrant. It was not his plan. It was a waste of time." "I am," he added, "for being prompt in everything. I say, 'If I can take him up with a warrant I can take him up without a warrant.'" In the year 1839, there were upwards of five hundred voluntary associations for promoting the apprehension and prosecution of felons — for performing, in fact, by individuals the first duty of a civilised government. Among the rules of some of them were rules for mutual insurance by payment of part of the loss caused by depredations. In some of the farmers' associations members were bound by their code, in case of horse-stealing, to mount and join themselves in pursuit of the thief upon an alarm given.

By Acts of 1839 and 1840 Parliament enabled bodies of police to be established for a county. But the English farmer and the English ratepayer hesitated, from fear of loading the rates, to put in force the permission which the Legislature had given. It was not till seventeen years afterwards that the establishment of county police was made compulsory in all

places where it had not been introduced, and that the organisation of what has been called our standing army against crime was placed upon its present footing. What requires to be done to perfect still further its efficiency, it would be beyond the limits of this paper to discuss. To what has already been accomplished is due the disappearance in the course of the present reign of a lawlessness and insecurity in our country districts which had become a disgrace to England.

The treatment of our criminal classes while undergoing sentence of imprisonment or penal servitude constitutes the last head of the present subject; and limits of space require that the notice of it should be brief. The darkest ages of English prisons had closed before 1837, but a prison system was as yet unorganised. Throughout our local gaols there was no uniformity of management — the hours of labour, the discipline, the diet varied in each; a separate system of confinement, a careful graduation of punishments, the classification of offenders, the construction and sanitation of the prison, all remained to be dealt with upon a natural and complete basis. The years 1840-43 began an epoch of improvement with the opening of Pentonville —a model establishment, with airy single cells and sanitary arrangements of the best kind, which has been the means of developing and perfecting in England the separate system, and been largely imitated abroad. Fifty-four new prisons were constructed on a similar method during the next six years. But prison reform still moved slowly, owing to the number of local gaols, each under a management of its own. Even in the year 1863, the food at one gaol was furnished from a neighbouring inn, while at another the inmates passed fifteen hours out of the twenty-four in bed. In some smaller prisons the prisoners slept two in a bed, in compartments which the warders were afraid to enter in the dark. Parliament in 1865 introduced the separate cell system, with rules for the discipline, health, diet, labour, and classification of the inmates; but the essential step towards complete uniformity was not adopted till 1877, when Government took over the local prisons of the country, and the Secretary of State and the Commissioners of Prisons became responsible for their management. A uniform code

now regulates them all, and prisoners awaiting trial are separated from those who have been found guilty. The Government convict prisons, where sentences of penal servitude are carried out, belong to a different category, and are under a different direction and distinct rules. The " hulks " have been abandoned as a receptacle for convicts, and transportation to the Australian colonies has ceased since 1867. Its evils had long been intolerable to our colonists. The four or five thousand persons who were sent out on an average, at the beginning of the reign, as convicts to New South Wales alone, were not absorbed in the population, but, to borrow the language of Lord John Russell, " formed a large and vicious separate class." The future of the convict depended on the character for humanity of the master to whom he was assigned, and flogging by colonial magistrates was a common and recognised punishment. Modifications of the system were tried between 1840 and 1850, but failed. At last, in 1853, penal servitude in England was substituted in the case of all crimes for which fourteen years' transportation had been previously a possible sentence, and in 1857 was legalised in every case. Since the year 1867 no convict has been sent to Australia. Reformatories and industrial schools are institutions that belong wholly to the present reign, and will hereafter be reckoned among not the least of its humane inventions.

A lawyer may perhaps be excused for mingling with his retrospect of a period some names that appear bound up with the honour of his profession. The public service is greater than the men who serve it, and no judge, fortunately, is indispensable to the law, any more than a single wave is indispensable to the sea. Of the living, this is not the time nor place to speak. But as regards the dead, no generation can complain of judicial mediocrity that has seen upon the woolsack, Cottenham, Lyndhurst, St. Leonards, Cranworth, Chelmsford, Westbury, Cairns; at the Rolls, Langdale, Romilly, and Jessel; among its Lords Justices, Knight Bruce, Turner, Mellish, James, Giffard, Thesiger; in its Court of Chancery, Wigram, Kindersley, Stuart, Hatherley, Wickens; in its Queen's Bench, Denman, Campbell, Cockburn, Williams, Wightman, Coleridge, Patteson, Crompton, Lush; at the

Common Pleas, Jervis, Erle, Maule, Willes; at the Exchequer, Abinger, Pollock, Kelly, Parke, Alderson; at the Privy Council, Kingsdown; Cresswell in the Probate and Divorce Court, Lushington at the Admiralty. Transplanted to the House of Lords, or raised to the Privy Council, Lords Penzance, Blackburn, Bramwell, Sir John Mellor, Sir Henry Keating, Sir Montague Smith, and Sir James Bacon remain to remind us of the glories of courts now extinct. Apart from the luminaries of the Bench, the Bar of England looks back with pride on the memory of Follett, Karslake, Benjamin. The roll of the legal heroes of the past is always healthily inspiriting. It nerves those who come after—in the language of the Poet Laureate — to

> Push off and, sitting well in order, smite
> The sounding furrows.

For much always is left to be accomplished. There is and can be no such thing as finality about the administration of the law. It changes, it must change, it ought to change, with the broadening wants and requirements of a growing country, and with the gradual illumination of the public conscience.

17. THE DEVELOPMENT OF JURISPRUDENCE DURING THE NINETEENTH CENTURY[1]

By Joseph Henry Beale, Jr.[2]

THE term "jurisprudence" has been used with so many meanings, and each meaning is so vague, that it is necessary at the outset of any discussion of it to limit in some way the meaning intended to be put upon it. By jurisprudence, as used in the programme of this Congress, I understand to be meant the whole body of law of the European and American nations, regarded as a philosophical system or systems; in short, the science of justice, as practised in civilized nations. My own topic, therefore, is to describe the changes in the law or in the understanding of the law in the civilized world during the past century.

So broad a subject cannot, of course, be treated exhaustively, nor can any part of it be examined in detail. My effort will be merely to suggest, in case of a few branches of law where the changes seem to be typical, the course and reason of those changes.

If we compare the condition of the law at the beginning of

[1] This essay was originally delivered as one of the principal addresses at the World's Congress of Arts and Science held in St. Louis at the Louisiana Purchase Exposition in 1904, and was published in the Proceedings of the Congress, volume VII, pp. 470-481 (Department of Jurisprudence), and also in the Harvard Law Review, 1904-5, volume XVIII, pp. 271-283.

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Other Publications: Cases on Criminal Law, 1894; Cases on Damages, 1895; Cases on Carriers, 1898; Criminal Pleadings and Practice, 1899; Cases on the Conflict of Laws, 1902; Cases on Public Service Corporations, 1902; Foreign Corporations, 1904; Innkeepers, 1906; Regulation of Railroad Rates, 1906.

the century with its present condition, we shall gain some idea of the amount of change in the law itself and its administration. In England conservatism and privilege and the dread inspired in the heart of the people by the excesses of the French revolution conspired to retain in the law the medieval subtleties and crudities, though the reason of them had been forgotten and the true application of them often mistaken. The criminal law was administered with ferocity tempered by ignorance; all the anomalies and mistakes which have disfigured its logical perfection are traceable to the period just before the beginning of the last century. Criminal procedure was still crude and cruel. The accused could neither testify nor be assisted by counsel; legally, death, actually, a small fine or at most transportation, was the punishment for most serious offenses. The amount of crime in proportion to the population was enormously greater than now; there were no preventive measures, no police, not even street lights. The law of torts occupied almost as small a place as it did in the proposed codes; the law of contracts was so unformed that it was not certain whether Lord Mansfield's doctrine that a written commercial agreement needed no consideration, would prevail or not. Business corporations were hardly known; almost the whole field of equity was hidden by a portentous cloud. Lord Eldon had just become chancellor. What the law of England was, such with little difference was the law of our own country. Its application to the complex life of the present was not dreamed of; and it had to be greatly changed before it could be adapted to the needs of to-day. Yet to say, as did Bentham, that it was rotten to the core and incapable of amendment was grotesquely incorrect; to say, as one of his latest disciples did, that it was the laughing-stock of the Continental nations is strangely to misread history. In 1803, with all its imperfections and crudities, it was probably the most just and humane system of law under which human beings were then living.

On the Continent, feudal rights characterized civil law; torture was the basis of the administration of criminal law. And in no country of any size had the people yet obtained what had been given to Englishmen by their great-

est king more than six hundred years before, — a common law. Each province throughout southern and western Europe had its custom, each land-owner his own jurisdiction. The rigor of the criminal law had been somewhat modified in France by the legislation of the revolution, and just at the beginning of our century the Civil Code, first of the French Codes, was adopted. These codes, temporarily or permanently impressed on a large part of Europe outside of France, constituted the beginning of modern legislative reform.

The spirit of the time molds and shapes its law, as it molds and shapes its manner of thought and the whole current of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man's conception of right changes from age to age, as his knowledge grows. The spirit of the age, therefore, affecting as it must man's conception of right, affects the growth both of the common and of the statute law. But the progress toward ideal right is not along a straight line. The storms of ignorance and passion blow strong, and the ship of progress must beat against the wind. Each successive tack brings us nearer the ideal, yet each seems a more or less abrupt departure from the preceding course. The radicals of one period become the conservatives of the next, and are sure that the change is a retrogression; but the experience of the past assures us that it is progress.

Two such changes have come in the last century. The eighteenth had been, on the whole, a self-sufficient century; the leaders of thought were usually content with the world as it was, and their ideal was a classical one. The prophets of individuality were few and little heeded. But at the end of the century, following the American and French revolutions, an abrupt change came over the prevailing current of thought throughout the civilized world; and, at the beginning of the period under discussion, the rights of man and of nations become subjects not merely of theoretical discussion but of political action. The age became one of daring speculation. Precedent received scant consideration. The American revolution had established the right of the common

people to a voice in the government. The French revolution had swept feudal rights from the civilized world. Although the French Republic was just passing into the French Empire, it was an empire which belonged to the people, and one of which they were proud. The Emperor was the representative and the idol, not of an aristocracy, but of his peasants and his common soldiers. The dreams of Napoleon himself, to be sure, were not of an individualistic paradise, where each man's personality should have free play and restraint on his inclinations be reduced to the minimum; but so far as he was able to put his centralizing ideals into execution he raised but a temporary dam, which first spread the flood of liberty over all Europe and was finally swept away by the force of the current.

Starting from this point, the spirit of the time for more than a generation was humanitarian and individualistic. In political affairs independence was attempted by almost every subordinate people in the civilized world, and was attained by the South American colonies, by Greece, and by Belgium. In religion freethinking prevailed, and every creed was on the defensive. In society women and children were emancipated. Slavery was abolished, and the prisons were reformed. It was a destructive rather than a constructive age, and its thinkers were iconoclasts.

But a change, beginning with the second third of the century, was gradually accomplished. The application of the forces of steam and electricity to manufacture and transportation has had a greater effect on human life and thought than any other event of modern times. The enormous power exerted by these forces required great collections of labor and capital to make them effective. Association became the rule in business affairs, and as it proved effectual there, the principle of association became more and more readily accepted in social and political affairs, until it has finally become the dominating idea of the time. The balance has swung; the men of our time are more interested in the rights of men than in the rights of man; the whole has come to be regarded as of more value than the separate parts. Beginning with the construction of railroads, the idea attained

a firm standing in politics in the sixties. Whereas before that time the movement had been toward separation, now it was toward consolidation. People felt the tie of nationality stronger than the aspiration for individual development. The unification of Italy and of Germany, the federation of Canada, the prevalence of corporate feeling in America which, first passionately expressed by Webster, prevailed in '65, mark the principle of association in political affairs. In business the great combinations of capital have been the salient features of the change.

Professor Dicey, in a most suggestive series of lectures a few years ago, pointed out many ways in which the English law had been affected by this progress of thought during the nineteenth century. Since the thought of the whole world has been similarly affected we should expect to find, and we do find, that not merely English law but universal jurisprudence has developed in the direction of the progress of thought, — during the first period in the direction of strengthening and preserving individual rights, both of small states and of individuals, during the second period in the direction of creating, recognizing, and regulating great combinations, whether of states or of individuals. Let us develop this line of thought by examining the progress of law in a few striking particulars.

The most striking development of the law of nations during the last century has been in the direction of international constitutional law, if I may so call it, rather than of the substantive private law of nations. At the beginning of the period the fundamental doctrine of international law was the equality of all states great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to force its ideas upon other nations. When, at the beginning of the century, France set up her absurd notions of her own national rights, other nations were powerless to restrain or to teach her. There was no international legislature or court, no method of declaring or of developing

the law of nations. Each state was a law to itself, giving little more than lip service to a vague body of rather generally accepted principles. The alliance to conquer Napoleon, to be sure, brought several great nations into a common undertaking; but this alliance, while of political importance, added nothing to the growth of the law.

In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern question, the Congress of Paris, the joint action of the Powers in the case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and the Hague conventions, are all proofs of the increasing readiness of the Great Powers to make, declare, and enforce doctrines of law; and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world. Perhaps the most striking change in the substance of international law has been the extraordinary development of the law of neutrality. A hundred years ago the rights and the obligations of neutrals were ill defined and little enforced. To-day they form a principal theme of discussion in every war, and the neutral nations, for the good of the whole world, force the belligerents to abate somewhat from their freedom of action.

It may be worth while, in order to see how far this constitutional change has progressed, to look for a moment at the present condition of the constitutional law of nations. We have a body of states known as the "Great Powers" which have assumed the regulation of the conduct of all nations. In this hemisphere the United States is sponsor for all the smaller independent nations. In Europe the Great Powers exercise control over the whole of Europe and Africa and a large part of Asia, while in the extreme Orient Japan

seems likely to occupy a position similar to our own in the western hemisphere. The constitutional position of this Confederation of Powers is not unlike that of the states of the American Confederation in 1780, and in certain ways it is even further developed. Its legislation is not in the hands of a permanent congress, but it is accomplished by mutual consultation. For action, as Lord Salisbury once informed the world, "unanimous consent is required," as was the case in our Confederation. Executive power has been exercised several times either by the joint show of force by two or more powers, or by deputing one power to accomplish the desired result. The judiciary, as a result of the Hague Convention, is much further developed than was that of the Confederation, even after 1781. All of this has been accomplished in fifty years, and the prospect of peace and prosperity for the whole world as a result of its further development is most promising.

The progress that has been described is well indicated by the course of the movement for codification.

Just a hundred years ago the first of the French Codes was adopted. These codes had two purposes: first, to unify the law which, before the adoption of the codes, had differed in every province and every commune of France; second, to simplify it so that every one might know the law. The first purpose appealed most strongly to lawyers and to statesmen. The second appealed to the people generally. Whatever reason weighed most with Napoleon, there is no doubt which made the codes permanent. The people of France, and of the other countries where they were introduced, hailed them as creating a law for the common people. They persisted in most countries where they had been introduced by Napoleon's arms in spite of the later change in government; whether the country on which they had been imposed was Flemish, German, Swiss, or Italian, it retained the codes after the defeat of Napoleon, and they have remained almost the sole relic of his rule, the only governmental affairs which retain his name, and, except Pan-Germanism, the only lasting monument of his labor. They persisted because they

were in consonance with the individualistic feelings of the times.

Bentham urged codification on England for the same reason:

"That which we have need of (need we say it?) is a body of law, from the respective parts of which we may each of us, by reading them or hearing them read, learn, and on each occasion know, what are his rights, and what his duties."

The code, in his plan, was to make every man his own lawyer, and the spirit of individualism could go no further than that. Conservative England would not take the step which Bentham urged, but a code prepared by one of his disciples upon his principles was finally adopted (by belated action) in Dakota and California, and was acclaimed as doing away with the science of law and the need of lawyers.

The result of the adoption of the French Codes and the Benthamite Codes has been far from what was hoped and expected. They were to make the law certain and thus diminish litigation and avoid judge-made law. That litigation has not been diminished by codification can easily be shown by comparing the number of reported cases in the states which have adopted the codes, and in states which have not adopted them. As a result of this comparison, we find that France has over fifteen volumes a year of reports of decisions on points of law, four of them containing over 2500 cases each; England has about ten volumes a year of reports of decisions on points of law, containing in all about 900 cases. California has from three to four volumes of reports of decisions on points of law each year; 100 since the adoption of the code in 1871; Massachusetts has two to three volumes of reports of decisions on points of law, 76 in all during the same period. As bearing on the avoidance of judge-made law, which Bentham, by a curious ignorance one is perhaps not quite justified in calling insane, regarded as inferior to legislature-made law, the result of the codes in one or two points will be instructive. The French Code provided that all actions *ex delicto* should be decided by the court as questions of fact, without appeal for error of law. Notwithstanding this provision, recourse has been had

to the Court of Cassation and a system of law has been built up on judicial decisions similar in character and comparable in amount to that built up in England in the same way during the same period. There is, for instance, a French law of libel which must be learned, not from the code but from the pages of Dalloz and the Pandectes Françaises, just as our law of libel must be studied in the law reports and the digests. Even if a point is apparently covered by an express provision of the code, judicial decisions may affix a meaning to the provision which can be known only to a student of law. Thus the French Code appears to lay down the proposition that capacity to contract is governed by the law of the party's nation, yet the French courts refuse to apply this principle, and instead of it apply the French law of capacity in each case where the other party to the agreement is a Frenchman who acted *bona fide* or where the party to be bound was commorant and doing business in France. These are two examples only out of many that might be cited of the failure of the code to fulfill the hopes of its individualist sponsor. If we leave the French Code and come to those in our own country, we shall find the same process going on. The law of California has been developed in much the same way since the adoption of the code as before, and the common law decisions of other states are as freely cited by her courts as authority as if her own law had never been codified. The uncertainty and confusion caused by the adoption of the New York Civil Code of Procedure is a well-known scandal.

It is true that Bentham objected to the French Code as imperfect and made upon the wrong principle, and that Field objected to the New York Code of Civil Procedure as finally adopted. These objections were most characteristic. Every codifier desires not merely a code but his own code, and will not be satisfied with any other. Hence it follows that no complete code can be adopted which would be satisfactory to many experts in law. Furthermore, no codifier will be satisfied to accept the judgment of a court or any body of other men upon the meaning of his code, nor to accept the interpretation of the executive department on the proper execution

of the law. It will follow that each codifier of the Benthamite type must be legislature, judge, and sheriff, and the logical result (like the logical result of all individualism carried to an extreme) is anarchy.

This failure of the hope of the individualistic codifiers and the change in the spirit of the age have affected our ideal of codification. The purpose of the modern codifiers is not to state the law completely, but to unify the law of a country which at present has many systems of law, or to state the law in a more artistic way. In other words, the spirit of the modern codifiers is not individualistic but centralizing. Thus the modern European codes of Italy, Spain, and Germany were adopted in countries where a number of different systems of law prevailed, and the purpose of codification in each state was principally to adopt one system of law for the whole country, and incidentally to make the expression of the law conform to the results of legal scholarship. The same purpose is at the basis of the American Commission for the Uniformity of Legislation. The purpose of the English codifiers appears to be merely an artistic one. It cannot be better expressed than by the last great disciple of Bentham, Professor Holland. The law expressed in a code, he says, "has no greater pretensions to finality than when expressed in statutes and reported cases. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at the precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular and 'the competition of opposite analogies' are as available for the decision of new cases under a code, as under any other form in which the law may be embodied. . . . It defines the terminus *a quo*, the general principle from which all legal arguments must start. . . . The task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was."

Such a code as he describes is really very far from the ideal of Bentham. It does not do away with judge-made law; it does not enable the individual to know the law for

himself; its only claim is that it facilitates the acquisition of knowledge by the lawyer by placing his material for study in a more orderly and logical form. The cherished ideals of the reformers of a hundred years ago have been abandoned, and an ideal has been substituted which is quite in accordance with the spirit of our own times.

The most striking characteristic of the progress of jurisprudence in the first half of the century was its increasing recognition of individual rights and protection of individuals. Humanity was the watchword of legislation; liberty was its fetich. Slavery was abolished, married women were emancipated from the control of their husbands, the head of the family was deprived of many of his arbitrary powers, and the rights of dependent individuals were carefully guarded. In the administration of criminal law this is seen notably. At the beginning of the century torture prevailed in every country, outside of the jurisdiction of the common law and the French Codes, but torture was abolished in every civilized state during this period. Many crimes at the beginning of the century were punishable with death. Few remained so punishable at the end of fifty years. The accused acquired in reality the rights of an innocent person until he was found guilty. He could testify, he could employ counsel and could be informed of the charge against him in language that he was able to understand; and, even after conviction, his punishment was inflicted in accordance with the dictates of humanity. Imprisonment for debt was abolished. Bankruptcy was treated as a misfortune, not a crime.

As with the emancipation of individuals, so it was with the emancipation of states. The spirit of the times favored the freedom of the oppressed nations as well as of individual slaves. The whole civilized world helped the Greeks gain their independence. The American people hailed with touching unanimity the struggles of Poland and of Hungary for freedom, and even the black republics of the West Indies were loved for their name, though they had no other admirable qualities.

While there has been little actual reaction in the last half-century against this earlier development of the law in the

direction of liberty, there have been few further steps in that direction. The zeal for emancipation has in fact spent its force, because freedom, quite as great as is consistent with the present state of civilization, has already been obtained. So far as there has been any change of sentiment and of law in the last generation, it has been in the direction of disregarding or of limiting rights newly acquired in the earlier period. France, which secured the freedom of Italy, threatens the independence of Siam; England, which was foremost in the emancipation of the slaves, introduces coolie labor into the mines of South Africa; America, which clamored for an immediate recognition of the independence of Hungary, finds objections to recognizing the independence of Panama and refuses independence to the Philippines. In the criminal law there has been no reform, though there has been much improvement, since 1850. Married women have obtained few further rights, principally because there were few left for them to acquire, and, while we have freed our slaves, we have encouraged trade unionism. In short, the humanitarian movement of two generations ago which profoundly affected the law of the civilized world for fifty years has ceased to influence the course of jurisprudence.

The most characteristic development of the law during the last fifty years has been in the direction of business combination and association. A few great trading companies had existed in the middle ages; the Hanse merchants, the Italian, Dutch, and English companies wielded great power. They were exceptional organizations, and almost all had ceased to act by 1860. The modern form of business association, the private corporation with limited liability, is a recent invention. Such corporations were created by special action, by sovereign or legislature, in small though increasing numbers all through the last century; but during the last generation every civilized country has provided general laws under which they might be formed by mere agreement of the individuals associated. Now the anonymous societies of the Continent, the joint-stock companies of England and her colonies, and the corporations of the United States, all different forms of the limited liability association for busi-

ness, have engrossed the important industries of the world. Different countries are competing for the privilege of endowing these associations with legal existence. Corporations are formed in one state to act in all other states or in some one other state, or (it may be) anywhere in the world except in the state which gave them being; and so in the last fifty years an elaborate law of foreign corporations has grown up all over the civilized world. But the corporation is only one form of business combination which has become important. Greater combinations of capital have been formed, that is, the so-called trusts; great combinations of laboring men have been formed, the so-called unions; and the enormous power wielded by such combinations has been exercised through monopolies, strikes, and boycotts. All these combinations have been formed under the law as it has been developed, and all are legal. Furthermore, the great business operations have come to depend more and more upon facilities for transportation, and great railroads and other common carriers have come to be equal factors with the trusts and the unions in the operations of modern business. The first effect, then, of the ideas of the present age upon the law is its development in the direction of forming great commercial associations into legal entities wielding enormous commercial power.

If such associations had been formed seventy-five years ago, the spirit of the age would have left them free to act as they pleased. Freedom from restraint being the spirit of the times, it would have been thought unwise to restrain that freedom in the case of a powerful monopoly as much as in the case of a poor slave. But at the present time we are more anxious for the public welfare than for the welfare of any individual, even of so powerful a one as a labor union or trust, and in accordance with the genius of our age the law has developed and is now developing in the direction of restraint upon the freedom of action of these great combinations, so far as such restraint is necessary to serve the public interest. For centuries innkeepers and carriers have been subject to such restraint, though little control was in fact exercised until within the last fifty years. To-day the

law not only requires every public service company to refrain from discrimination and from aggrandizing itself at the expense of the public, but the trusts and the unions also are similarly restricted. The principle of freedom of action, the courts in all questions now agree, rests upon the doctrine that the interests of the public are best subserved thereby, and applies only so far as that is true. When freedom of action is injurious to the public it not only may be, but it must be, restrained in the public interest. That is the spirit of our age, and that is the present position of the law when face to face with combinations such as have been created in the last generation. An interesting example of restriction is that almost universally placed upon foreign corporations. In the competition of certain states for the privilege of issuing charters, great powers have been conferred, which were regarded as against the public policy of the states in which the corporations desired to act. Strict regulations for the action of such corporations have resulted, imposed in the European countries usually by treaty, in England and America by statute.

A summary of the history of jurisprudence in the last hundred years would be incomplete without a consideration of legal scholarship during the period and of the results of the scientific study of law. The reformers of a hundred years ago were profoundly indifferent to the history of law. Bentham, the founder of so-called analytic jurisprudence, wished not to understand the existing law, but to abolish it root and branch, and to build a new system, the principles of which should be arrived at merely by deductive reasoning. It seems to us now almost impossible that such a man should have believed himself more capable of framing a practicable and just system of law than all his wise predecessors, but Bentham was a marvel of egotism and self-conceit, and his reasoning powers were far from sound. He seems to have been incapable of understanding the nature of law. "If," he said, "we ask who it is that the Common Law has been made by, we learn to our inexpressible surprise, that it has been made by nobody; that it is not made by King, Lords, and Commons, nor by anybody else; that the words of it are

not to be found anywhere; that, in short, it has no existence; it is a mere fiction; and that to speak of it as having any existence is what no man can do, without giving currency to an imposture." Employing the same reasoning, he would have concluded that justice, not being made by King, Lords, or Commons, nor by anybody else, had no existence; that truth, since the words of it are not to be found anywhere, is a mere fiction. But these defects are too often found in reformers. The humanitarian age brought enormous benefits to the world, but its ideas were often ignorant, crude, and impracticable, and needed to be modified by the better instructed minds of the present constructive age. While Bentham was at the height of his power, the Historical School of Jurists in Germany was beginning its great work. Savigny was already preaching the necessity of understanding the history of law before it was reformed. Mittermaier and Brunner were to follow and carry on the work of the master. The unity of the past and present, and the need of conforming the law of a people to its needs were among their fundamental principles. Bentham had said, "if a foreigner can make a better code than an Englishman we should adopt it." Savigny said, with greater truth and knowledge of human nature, that no system of law, however theoretically good, could be successfully imposed upon a people which had not by its past experience become prepared for it.

The impulse given to legal study by the work of Savigny and his school has in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers have followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age, here too, has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have

given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law.

18. THE EXTENSION OF ROMAN AND ENGLISH LAW THROUGHOUT THE WORLD[1]

By James Bryce[2]

I. The Regions Covered by Roman and English Law

FROM a general comparison of Rome and England as powers conquering and administering territories beyond their original limits, it is natural to pass on to consider one particular department of the work which territorial extension has led them to undertake, viz. their action as makers of a law which has spread far out over the world. Both nations have built up legal systems which are now — for the Roman law has survived the Roman Empire, and is full of vitality to-day — in force over immense areas that were unknown to those who laid the foundations of both systems. In this respect Rome and England stand alone among nations, unless we reckon in the law of Islam which, being a part of the religion of Islam, governs Musulmans wherever Musulmans are to be found.

Roman law, more or less modified by national or local family customs or land customs and by modern legislation, prevails to-day in all the European countries which formed part either of the ancient or of the mediaeval Roman Empire, that is to say, in Italy, in Greece and the rest of South-eastern Europe (so far as the Christian part of the population is concerned), in Spain, Portugal, Switzerland, France, Germany (including the German and Slavonic parts of the Austro-Hungarian monarchy), Belgium, Holland. The

[1] This essay appears as the second essay in "Studies in History and Jurisprudence," 1901, pp. 73-123 (New York: Oxford University Press, American Branch).

[2] A bibliographical note of this author is prefixed to essay No. 10, *ante*, p. 322.

only exception is South Britain, which lost its Roman law with the coming of the Angles and Saxons in the fifth century. The leading principles of Roman jurisprudence prevail also in some other outlying countries which have borrowed much of their law from some one or more of the countries already named, viz. Denmark, Norway, Sweden, Russia, and Hungary. Then come the non-European colonies settled by some among the above States, such as Louisiana, the Canadian province of Quebec, Ceylon, British Guiana, South Africa (all the above having been at one time colonies either of France or of Holland), German Africa, and French Africa, together with the regions which formerly obeyed Spain or Portugal, including Mexico, Central America, South America, and the Philippine Islands. Add to these the Dutch and French East Indies, and Siberia. There is also Scotland, which has since the establishment of the Court of Session by King James the Fifth in 1532 built up its law out of Roman Civil and (to some slight extent) Roman Canon Law.[1]

English law is in force not only in England, Wales, and Ireland but also in most of the British colonies. Quebec, Ceylon, Mauritius, South Africa, and some few of the West Indian islands follow the Roman law.[2] The rest, including Australia, New Zealand, and all Canada except Quebec, follow English; as does also the United States (except Louisiana, but with the Hawaiian Islands), and India, though in India, as we shall see, native law is also administered.

Thus between them these two systems cover nearly the whole of the civilized, and most of the uncivilized world. Only two considerable masses of population stand outside — the Musulman East, that is, Turkey, North Africa,

[1] There is scarcely a trace of Celtic custom in modern Scottish law. The law of land, however, is largely of feudal origin; and commercial law has latterly been influenced by that of England.

[2] In these West Indian islands, however, that which remains of Spanish law, as in Trinidad and Tobago, and of French law, as in St. Vincent, is now comparatively slight; and before long the West Indies (except Cuba and Puerto Rico, Guadeloupe and Martinique) will be entirely under English law. See as to the British colonies generally, C. P. Ilbert's *Legislative Methods and Forms*, chap. ix.

Persia, Western Turkistan and Afghanistan, which obey the sacred law of Islam, and China, which has customs all her own. It is hard to estimate the total number of human beings who live under the English common law, for one does not know whether to reckon in the semi-savage natives of such regions as Uganda, for instance, or Fiji. But there are probably one hundred and thirty millions of civilized persons (without counting the natives of India) who do: and the number living under some modern form of the Roman law is still larger.

It is of the process by which two systems which had their origin in two small communities, the one an Italian city, the other a group of Teutonic tribes, have become extended over nine-tenths of the globe that I propose to speak in the pages that follow. There are analogies between the forms which the process took in the two cases. There are also contrasts. The main contrast is that whereas we may say that (roughly speaking) Rome extended her law by conquest, that is, by the spreading of her power, England has extended hers by settlement, that is, by the spreading out of her race. In India, however, conquest rather than colonization has been the agency employed by England, and it is therefore between the extension of English law to India and the extension of Roman law to the Roman Empire that the best parallel can be drawn. It need hardly be added that the Roman law has been far more changed in descending to the modern world and becoming adapted to modern conditions of life than the law of England has been in its extension over new areas. That extension is an affair of the last three centuries only, and the whole history of English law is of only some eleven centuries reckoning from Kings Ine and Alfred, let us say, to A. D. 1900, or of eight, if we begin with King Henry the Second, whereas that of Roman law covers twenty-five centuries, of which all but the first three have witnessed the process of extension, so early did Rome begin to impose her law upon her subjects. To the changes, however, which have passed on the substance of the law we shall return presently. Let us begin by examining the causes and circumstances which induced the extension to the whole ancient

world of rules and doctrines that had grown up in a small city.

II. *The Diffusion of Roman Law by Conquest*

The first conquests of Rome were made in Italy. They did not, however, involve any legal changes, for conquest meant merely the reduction of what had been an independent city or group of cities or tribes to vassalage, with the obligation of sending troops to serve in the Roman armies. Local autonomy was not (as a rule) interfered with; and such autonomy included civil jurisdiction, so the Italic and Greco-Italic cities continued to be governed by their own laws, which in the case at least of Oscan and Umbrian communities usually resembled that of Rome, and which of course tended to become assimilated to it even before Roman citizenship was extended to the Italian allies. With the annexation of part of Sicily in A. D. 230 the first provincial government was set up, and the legal and administrative problems which Rome had to deal with began to show themselves. Other provinces were added in pretty rapid succession, the last being Britain (invaded under Claudius in A. D. 43). Now although in all these provinces the Romans had to maintain order, to collect revenue and to dispense justice, the conditions under which these things, and especially the dispensing of justice, had to be done differed much in different provinces. Some, such as Sicily, Achaia, Macedonia and the provinces of Western Asia Minor, as well as Africa (i. e. such parts of that province as Carthage had permeated), were civilized countries, where law-courts already existed in the cities.[1] The laws had doubtless almost everywhere been created by custom, for the so-called Codes we hear of in Greek cities were often rather in the nature of political constitutions and penal enactments than summarized statements of the whole private law; yet in some cities the customs had been so summarized.[2] Other provinces, such as

[1] Cicero says of Cicily, "Siculi hoc iure sunt ut quod civis cum cive agat, domi certet suis legibus; quod Siculus cum Siculo non eiusdem civitatis, ut de eo praetor iudices sortiatur." *In Verrem*, ii. 13, 32.

[2] The laws of Gortyn in Crete, recently published from an inscription discovered there, apparently of about 500 B. C., are a remarkable

those of Thrace, Transalpine Gaul, Spain, and Britain, were in a lower stage of social organization, and possessed, when they were conquered, not so much regular laws as tribal usages, suited to their rude inhabitants. In the former set of cases not much new law was needed. In the latter set the native customs could not meet the needs of communities which soon began to advance in wealth and culture under Roman rule, so law had to be created.

There were also in all these provinces two classes of inhabitants. One consisted of those who enjoyed Roman citizenship, not merely men of Italian birth settled there but also men to whom citizenship had been granted (as for instance when they retired from military service), or the natives of cities on which (as to Tarsus in Cilicia, St. Paul's birthplace) citizenship had been conferred as a boon.[1] This was a large class, and went on rapidly increasing. To it pure Roman law was applicable, subject of course to any local customs.

The other class consisted of the provincial subjects who were merely subjects, and, in the view of the Roman law, aliens (*peregrini*). They had their own laws or tribal customs, and to them Roman law was primarily inapplicable, not only because it was novel and unfamiliar, so strange to their habits that it would have been unjust as well as practically inconvenient to have applied it to them, but also because the Romans, like the other civilized communities of antiquity, had been so much accustomed to consider private legal rights as necessarily connected with membership of a city community that it would have seemed unnatural to apply the private law of one city community to the citizens of another. It is true that the Romans after a time disabused their minds of this notion, as indeed they had from a com-

instance. Though not a complete code, they cover large parts of the field of law.

[1] When I speak of citizenship, it is not necessarily or generally political citizenship that is to be understood, but the citizenship which carried with it private civil rights (those rights which the Romans call *connubium* and *commercium*,) including Roman family and inheritance law and Roman contract and property law. Not only the civilized Spaniards but the bulk of the upper class in Greece seem to have become citizens by the time of the Antonines.

paratively early period extended their own private civil rights to many of the cities which had become their subject allies. Still it continued to influence them at the time (B. C. 230 to 120) when they were laying out the lines of their legal policy for the provinces.

Of that legal policy I must speak quite briefly, partly because our knowledge, though it has been enlarged of late years by the discovery and collection of a great mass of inscriptions, is still imperfect, partly because I could not set forth the details without going into a number of technical points which might perplex readers unacquainted with the Roman law. It is only the main lines on which the conquerors proceeded that can be here indicated.

Every province was administered by a governor with a staff of subordinate officials, the higher ones Roman, and (under the Republic) remaining in office only so long as did the governor. The governor was the head of the judicial as well as the military and civil administration, just as the consuls at Rome originally possessed judicial as well as military and civil powers, and just as the praetor at Rome, though usually occupied with judicial work, had also both military and civil authority. The governor's court was the proper tribunal for those persons who in the provinces enjoyed Roman citizenship, and in it Roman law was applied to such persons in matters touching their family relations, their rights of inheritance, their contractual relations with one another, just as English law is applied to Englishmen in Cyprus or Hong Kong. No special law was needed for them. As regards the provincials, they lived under their own law, whatever it might be, subject to one important modification. Every governor when he entered his province issued an Edict setting forth certain rules which he proposed to apply during his term of office. These rules were to be valid only during his term, for his successor issued a fresh Edict, but in all probability each reproduced nearly all of what the preceding Edict had contained. Thus the same general rules remained continuously in force, though they might be modified in detail, improvements which experience had shown to be necessary being from time to time intro-

duced.[1] This was the method which the praetors followed at Rome, so the provincial governors had a precedent for it and knew how to work it. Now the Edict seems to have contained, besides its provisions regarding the collection of revenue and civil administration in general, certain more specifically legal regulations, intended to indicate the action which the governor's court would take not only in disputes arising between Roman citizens, but also in those between citizens and aliens, and probably also to some extent in those between aliens themselves. Where the provisions of the Edict did not apply, aliens would be governed by their own law. In cities municipally organized, and especially in the more civilized provinces, the local city courts would doubtless continue to administer, as they had done before the Romans came, their local civil law; and in the so-called free cities, which had come into the Empire as allies, these local courts had for a long time a wide scope for their action. Criminal law, however, would seem to have fallen within the governor's jurisdiction, at any rate in most places and for the graver offences, because criminal law is the indispensable guarantee for public order and for the repression of sedition or conspiracy, matters for which the governor was of course responsible.[2] Thus the governor's court was not only that which dispensed justice between Roman citizens, and which dealt with questions of revenue, but was also the tribunal for cases between citizens and aliens, and for the graver criminal proceedings. It was apparently also a court which entertained some kinds of suits between aliens, as for instance between aliens belonging to different cities, or in districts where no regular municipal courts existed, and (probably) dealt with appeals from those courts where they did exist. Moreover where aliens even of the same city chose to resort to it they could apparently do so. I speak of courts rather than of law, because it must be remembered that although we are naturally inclined to think of law as

[1] As to this see Essay XIV, p. 692 sqq. [in the Author's Studies, etc., cited above].

[2] In S. Paul's time, however, the Athenian Areopagus would seem to have retained its jurisdiction; cf. Acts xvii. 19. The Romans treated Athens with special consideration.

coming first, and courts being afterwards created to administer law, it is really courts that come first, and that by their action build up law partly out of customs observed by the people and partly out of their own notions of justice. This, which is generally true of all countries, is of course specially true of countries where law is still imperfectly developed, and of places where different classes of persons, not governed by the same legal rules, have to be dealt with.

The Romans brought some experience to the task of creating a judicial administration in the provinces, where both citizens and aliens had to be considered; for Rome herself had become, before she began to acquire territories outside Italy, a place of residence or resort for alien traders, so that as early as B. C. 247 she created a magistrate whose special function it became to handle suits between aliens, or in which one party was an alien. This magistrate built up, on the basis of mercantile usage, equity, and common sense, a body of rules fit to be applied between persons whose native law was not the same; and the method he followed would naturally form a precedent for the courts of the provincial governors.

Doubtless the chief aim, as well as the recognized duty, of the governors was to disturb provincial usage as little as they well could. The temptations to which they were exposed, and to which they often succumbed, did not lie in the direction of revolutionizing local law in order to introduce either purely Roman doctrines or any artificial uniformity.[1] They would have made trouble for themselves had they attempted this. And why should they attempt it? The ambitious governors desired military fame. The bad ones wanted money. The better men, such as Cicero, and in later days Pliny, liked to be fêted by the provincials and have statues erected to them by grateful cities. No one of these objects was to be attained by introducing legal reforms which theory might suggest to a philosophic statesman, but

[1] One of the charges against Verres was that he disregarded all kinds of law alike. Under him, says Cicero, the Sicilians "neque suas leges neque nostra senatus consulta neque communia iura tenuerunt;" *In Verr.* i. 4, 13.

which nobody asked for. It seems safe to assume from what we know of official human nature elsewhere, that the Roman officials took the line of least resistance compatible with the raising of money and the maintenance of order. These things being secured, they would be content to let other things alone.

Things, however, have a way of moving even when officials may wish to let them rest. When a new and vigorous influence is brought into a mixture of races receptive rather than resistent (as happened in Asia Minor under the Romans), or when a higher culture acts through government upon a people less advanced but not less naturally gifted (as happened in Gaul under the Romans), changes must follow in law as well as in other departments of human action. Here two forces were at work. One was the increasing number of persons who were Roman citizens, and therefore lived by the Roman law. The other was the increasing tendency of the government to pervade and direct the whole public life of the province. When monarchy became established as the settled form of the Roman government, provincial administration began to be better organized, and a regular body of bureaucratic officials presently grew up. The jurisdiction of the governor's court extended itself, and was supplemented in course of time by lower courts administering law according to the same rules. The law applied to disputes arising between citizens and non-citizens became more copious and definite. The provincial Edicts expanded and became well settled as respects the larger part of their contents. So by degrees the law of the provinces was imperceptibly Romanized in its general spirit and leading conceptions, probably also in such particular departments as the original local law of the particular province had not fully covered. But the process did not proceed at the same rate in all the provinces, nor did it result in a uniform legal product, for a good deal of local customary law remained, and this customary law of course differed in different provinces. In the Hellenic and Hellenized countries the pre-existing law was naturally fuller and stronger than in the West; and it held its ground more effectively than the ruder usages

of Gauls or Spaniards, obtaining moreover a greater respect from the Romans, who felt their intellectual debt to the Greeks.

It may be asked what direct legislation there was during this period for the provinces. Did the Roman Assembly either pass statutes for them, as Parliament has sometimes done for India, or did the Assembly establish in each province some legislative authority? So far as private law went Rome did neither during the republican period.[1] The necessity was not felt, because any alterations made in Roman law proper altered it for Roman citizens who dwelt in the provinces no less than for those in Italy, while as to provincial aliens, the Edict of the governor and the rules which the practice of his courts established were sufficient to introduce any needed changes. But the Senate issued decrees intended to operate in the provinces, and when the Emperors began to send instructions to their provincial governors or to issue declarations of their will in any other form, these had the force of law, and constituted a body of legislation, part of which was general, while part was special to the province for which it was issued.

Meantime — and I am now speaking particularly of the three decisively formative centuries from B. C. 150 to A. D. 150 — another process had been going on, even more important. The Roman law itself had been changing its character, had been developing from a rigid and highly technical system, archaic in its forms and harsh in its rules, preferring the letter to the spirit, and insisting on the strict observance of set phrases, into a liberal and elastic system, pervaded by the principles of equity and serving the practical convenience of a cultivated and commercial community. The nature of this process will be found described in other parts of this volume.[2] Its result was to permeate the original law of Rome applicable to citizens only (*ius civile*) with the law which had been constructed for the sake of dealing

[1] The *Lex Sempronia* mentioned by Livy, xxxv. 7, seems to be an exception, due to very special circumstances.

[2] See Essay XI, and Essay XIV, p. 706 [in the Author's Studies, etc., cited above].

with aliens (*ius gentium*), so that the product was a body of rules to be used by any civilized people, as being grounded in reason and utility, while at the same time both copious in quantity and refined in quality.

This result had been reached about A. D. 150, by which time the laws of the several provinces had also been largely Romanized. Thus each body of law — if we may venture for this purpose to speak of provincial law as a whole — had been drawing nearer to the other. The old law of the city of Rome had been expanded and improved till it was fit to be applied to the provinces. The various laws of the various provinces had been constantly absorbing the law of the city in the enlarged and improved form latterly given to it. Thus when at last the time for a complete fusion arrived the differences between the two had been so much reduced that the fusion took place easily and naturally, with comparatively little disturbance of the state of things already in existence. One sometimes finds on the southern side of the Alps two streams running in neighbouring valleys. One which has issued from a glacier slowly deposits as it flows over a rocky bed the white mud which it brought from its icy cradle. The other which rose from clear springs gradually gathers colouring matter as in its lower course it cuts through softer strata or through alluvium. When at last they meet, the glacier torrent has become so nearly clear that the tint of its waters is scarcely distinguishable from that of the originally bright but now slightly turbid affluent. Thus Roman and provincial law, starting from different points but pursuing a course in which their diversities were constantly reduced, would seem to have become so similar by the end of the second century A. D. that there were few marked divergences, so far as private civil rights and remedies were concerned, between the position of citizens and that of aliens.

Here, however, let a difference be noted. The power of assimilation was more complete in some branches of law than it was in others; and it was least complete in matters where old standing features of national character and feeling were present. In the Law of Property and Contract it had ad-

vanced so far as to have become, with some few exceptions,[1] substantially identical. The same may be said of Penal Law and the system of legal procedure. But in the Law of Family Relations and in that of Inheritance, a matter closely connected with family relations, the dissimilarities were still significant; and we shall find this phenomenon reappearing in the history of English and Native Law in India.

Two influences which I have not yet dwelt upon had been, during the second century, furthering the assimilation. One was the direct legislation of the Emperor which, scanty during the first age of the monarchy, had now become more copious, and most of which was intended to operate upon citizens and aliens alike. The other was the action of the Emperor as supreme judicial authority, sometimes in matters brought directly before him for decision, more frequently as judge of appeals from inferior tribunals. He had a council called the Consistory which acted on his behalf, because, especially in the troublous times which began after the reign of Marcus Aurelius and presaged the ultimate dissolution of the Empire, the sovereign was seldom able to preside in person. The judgements of the Consistory, being delivered in the Emperor's name as his, and having equal authority with statutes issued by him, must have done much to make law uniform in all the provinces and among all classes of subjects.[2]

III. The Establishment of One Law for the Empire

Finally, in the beginning of the third century A. D., the decisive step was taken. The distinction between citizens and aliens vanished by the grant of full citizenship to all subjects of the Empire, a grant however which may have been, in the first instance, applied only to organized communities, and not also to the backward sections of the rural

[1] Such as the technical peculiarities of the Roman *stipulatio*, and the Greek *syngraphe*.

[2] These *decreta* of the Emperor were reckoned among his *Constitutiones* (as to which see Essay XIV, p. 720 sqq.). There does not seem to have been any public record kept and published of them, but many of them would doubtless become diffused through the law schools and otherwise. The first regular collections of imperial constitutions known to us belong to a later time.

population, in Corsica, for instance, or in some of the Alpine valleys. Our information as to the era to which this famous Edict of Caracalla's belongs is lamentably scanty. Gaius, who is the best authority for the middle period of the law, lived fifty or sixty years earlier. The compilers of Justinian's *Digest*, which is the chief source of our knowledge for the law as a whole, lived three hundred years later, when the old distinctions between the legal rights of citizens and those of aliens had become mere matters of antiquarian curiosity. These compilers therefore modified the passages of the older jurists which they inserted in the *Digest* so as to make them suit their own more recent time. As practical men they were right, but they have lessened the historical value of these fragments of the older jurists, just as the modern restorer of a church spoils it for the purposes of architectural history, when he alters it to suit his own ideas of beauty or convenience. Still it may fairly be assumed that when Caracalla's grant of citizenship was made the bulk of the people, or at least of the town dwellers, had already obtained either a complete or an incomplete citizenship in the more advanced provinces, and that those who had not were at any rate enjoying under the provincial Edicts most of the civil rights that had previously been confined to citizens, such for instance as the use of the so-called Praetorian Will with its seven seals.

How far the pre-existing local law of different provinces or districts was superseded at one stroke by this extension of citizenship, or in other words, what direct and immediate change was effected in the modes of jurisdiction and in the personal relations of private persons, is a question which we have not the means of answering. Apparently many difficulties arose which further legislation, not always consistent, was required to deal with.[1] One would naturally suppose that where Roman rules differed materially from those which a provincial community had followed, the latter could not have been suddenly substituted for the former.

[1] See upon this subject the learned and acute treatise (by which I have been much aided) of Dr. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, Chap. VI.

A point, for instance, about which we should like to be better informed is whether the Roman rules which gave to the father his wide power over his children and their children were forthwith extended to provincial families. The Romans themselves looked upon this paternal power as an institution peculiar to themselves. To us moderns, and especially to Englishmen and Americans, it seems so oppressive that we cannot but suppose it was different in practice from what it looks on paper. And although it had lost some of its old severity by the time of the Antonines, one would think that communities which had not grown up under it could hardly receive it with pleasure.

From the time of Caracalla (A. D. 211-217) down till the death of Theodosius the Great (A. D. 395) the Empire had but one law. There was doubtless a certain amount of special legislation for particular provinces, and a good deal of customary law peculiar to certain provinces or parts of them. Although before the time of Justinian it would seem that every Roman subject, except the half-barbarous peoples on the frontiers, such as the Soanes and Abkhasians of the Caucasus or the Ethiopic tribes of Nubia, and except a very small class of freedmen, was in the enjoyment of Roman citizenship, with private rights substantially the same, yet it is clear that in the East some Roman principles and maxims were never fully comprehended by the mass of the inhabitants and their legal advisers of the humbler sort, while other principles did not succeed in displacing altogether the rules to which the people were attached. We have evidence in recently recovered fragments of an apparently widely used law-book, Syriac and Armenian copies of which remain, that this was the case in the Eastern provinces, and no doubt it was so in others also. In Egypt, for instance, it may be gathered from the fragments of papyri which are now being published, that the old native customs, overlaid, or re-moulded to some extent by Greek law, held their ground even down to the sixth or seventh century.[1]

[1] This is carefully worked out both as to Syria and to Egypt by Dr. Mitteis, *op. cit.* He thinks (pp. 30-33) that the law of the Syrian book, where it departs from pure Roman law as we find it in the *Corpus Iuris*, is mainly of Greek origin, though with traces of Eastern custom.

Still, after making all allowance for these provincial variations, philosophic jurisprudence and a levelling despotism had done their work, and given to the civilized world, for the first and last time in its history, one harmonious body of legal rules.

The causes which enabled the Romans to achieve this result were, broadly speaking, the five following:—

(1) There was no pre-existing body of law deeply rooted and strong enough to offer resistance to the spread of Roman law. Where any highly developed system of written rules or customs existed, it existed only in cities, such as those of the Greek or Graecized provinces on both sides of the Aegean. The large countries, Pontus, for instance, or Macedonia or Gaul, were in a legal sense unorganized or backward. Thus the Romans had, if not a blank sheet to write on, yet no great difficulty in overspreading or dealing freely with what they found.

(2) There were no forms of faith which had so interlaced religious feelings and traditions with the legal notions and customs of the people as to give those notions and customs a tenacious grip on men's affection. Except among the Jews, and to some extent among the Egyptians, Rome had no religious force to overcome such as Islam and Hinduism present in India.

(3) The grant of Roman citizenship to a community or an individual was a privilege highly valued, because it meant a rise in social status and protection against arbitrary treatment by officials. Hence even those who might have liked their own law better were glad to part with it for the sake of the immunities of a Roman citizen.

(4) The Roman governor and the Roman officials in general had an administrative discretion wider than officials enjoy under most modern governments, and certainly wider than either a British or an United States legislature would

He also suggests that the opposition, undoubtedly strong, of the Eastern Monophysites to the Orthodox Emperors at Constantinople may have contributed to make the Easterns cling the closer to their own customary law. The Syrian book belongs to the fifth century A. D., and is therefore earlier than Justinian (Bruns und Sachau, *Syrisch-römisches Rechtsbuch aus dem fünften Jahrhundert*).

delegate to any person. Hence Roman governors could by their Edicts and their judicial action mould the law and give it a shape suitable to the needs of their province with a freedom of handling which facilitated the passage from local law or custom to the jurisprudence of the Empire generally.

(5) Roman law itself, i. e. the law of the city, went on expanding and changing, ridding itself of its purely national and technical peculiarities, till it became fit to be the law of the whole world. This process kept step with, and was the natural expression of, the political and social assimilation of Rome to the provinces and of the provinces to Rome.

At the death of Theodosius the Great the Roman Empire was finally divided into an Eastern and a Western half; so that thenceforward there were two legislative authorities. For the sake of keeping the law as uniform as possible, arrangements were made for the transmission by each Emperor to the other of such ordinances as he might issue, in order that these might be, if approved, issued for the other half of the Empire. These arrangements, however, were not fully carried out: and before long the Western Empire drifted into so rough a sea that legislation practically stopped. The great Codex of Theodosius the Second (a collection of imperial enactments published in A. D. 438) was however promulgated in the Western as well as in the Eastern part of the Empire, whereas the later Codex and Digest of Justinian, published nearly a century later, was enacted only for the East, though presently extended (by re-conquest) to Italy, Sicily, and Africa. Parts of the Theodosian Codex were embodied in the manuals of law made for the use of their Roman subjects by some of the barbarian kings. It continued to be recognized in the Western provinces after the extinction of the imperial line in the West in A. D. 476: and was indeed, along with the manuals aforesaid, the principal source whence during a long period the Roman population drew their law in the provinces out of which the kingdoms of the Franks, Burgundians, and Visigoths were formed.

Then came the torpor of the Dark Ages.

IV. *The Extension of Roman Law after the Fall of the Western Empire*

Upon the later history of the Roman law and its diffusion through the modern world I can but briefly touch, for I should be led far away from the special topic here considered. The process of extension went on in some slight measure by conquest, but mainly by peaceful means, the less advanced peoples, who had no regular legal system of their own, being gradually influenced by and learning from their more civilized neighbours to whom the Roman system had descended. The light of legal knowledge radiated forth from two centres, from Constantinople over the Balkanic and Euxine countries between the tenth and the fifteenth centuries, from Italy over the lands that lay north and west of her from the twelfth to the sixteenth century. Thereafter it is Germany, Holland, and France that have chiefly propagated the imperial law, Germany by her universities and writers, France and Holland both through their jurists and as colonizing powers.

In the history of the mediaeval and modern part of the process of extension five points or stages of especial import may be noted.

The first is the revival of legal study which began in Italy towards the end of the eleventh century A. D., and the principal agent in which was the school of Bologna, famous for many generations thereafter. From that date onward the books of Justinian, which had before that time been superseded in the Eastern Empire, were lectured and commented on in the universities of Italy, France, Spain, England, Germany, and have continued to be so till our own day. They formed, except in England (where from the time of Henry the Third onwards they had a powerful and at last a victorious rival in the Common Law), the basis of all legal training and knowledge.

The second is the creation of that vast mass of rules for the guidance of ecclesiastical matters and courts — courts whose jurisdiction was in the Middle Ages far wider than it is now — which we call the Canon Law. These rules,

drawn from the canons of Councils and decrees of Popes, began to be systematized during the twelfth century, and were first consolidated into an ordered body by Pope Gregory the Ninth in the middle of the thirteenth.[1] They were so largely based on the Roman law that we may describe them as being substantially a development of it, partly on a new side, partly in a new spirit, and though they competed with the civil law of the temporal courts, they also extended the intellectual influence of that law.

The third is the acceptance of the Roman law as being of binding authority in countries which had not previously owned it, and particularly in Germany and Scotland. It was received in Germany because the German king (after the time of Otto the Great) was deemed to be also Roman Emperor, the legitimate successor of the far-off assemblies and magistrates and Emperors of old Rome; and its diffusion was aided by the fact that German lawyers had mostly received their legal training at Italian universities. It came in gradually as subsidiary to Germanic customs, but the judges, trained in Italy in the Roman system, required the customs to be proved, and so by degrees Roman doctrines supplanted them, though less in the Saxon districts, where a native law-book, the *Sachsenspiegel*, had already established its influence. The acceptance nowhere went so far as to supersede the whole customary law of Germany, whose land-rights, for instance, retained their feudal character. The formal declaration of the general validity of the *Corpus Iuris* in Germany is usually assigned to the foundation by the Emperor Maximilian I, in 1495, of the Imperial Court of Justice (Reichskammergericht). As Holland was then still a part of the Germanic Empire, as well as of the Burgundian inheritance, it was the law of Holland also, and so has become the law of Java, of Celebes, and of South Africa. In Scotland it was adopted at the foundation of the Court of Session, on the model of the Parlement of Paris, by King James the Fifth. Political antagonism to England and political attraction to France, together with the influence of the Canonists, naturally determined the King and the Court

[1] Other parts were added later.

to follow the system which prevailed on the European continent.

The fourth stage is that of codification. In many parts of Gaul, though less in Provence and Languedoc, the Roman law had gone back into that shape of a body of customs from which it had emerged a thousand years before; and in Northern and Middle Gaul some customs, especially in matters relating to land, were not Roman. At last, under Lewis the Fourteenth, a codifying process set in. Comprehensive Ordinances, each covering a branch of law, began to be issued from 1667 down to 1747. These operated throughout France, and, being founded on Roman principles, further advanced the work, already prosecuted by the jurists, of Romanizing the customary law of Northern France. That of Southern France (the *pays du droit écrit*) had been more specifically Roman, for the South had been less affected by Frankish conquest and settlement. The five Codes promulgated by Napoleon followed in 1803 to 1810.[1] Others reproducing them with more or less divergence have been enacted in other Romance countries.

In Prussia, Frederick the Second directed the preparation of a Code which became law after his death, in 1794. From 1848 onwards parts of the law of Germany (which differed in different parts of the country) began to be codified, being at first enacted by the several States, each for itself, latterly by the legislature of the new Empire. Finally, after twenty-two years of labour, a new Code for the whole German Empire was settled, was passed by the Chambers, and came into force on the first of January, 1900. It does not, however, altogether supersede pre-existing local law. This Code, far from being pure Roman law, embodies many rules due to mediaeval custom (especially custom relating to land-rights) modernized to suit modern conditions, and also a great deal of post-mediaeval legislation.[2] Some German jurists com-

[1] Among the States in which the French Code has been taken as a model are Belgium, Italy, Spain, Portugal, Mexico, and Chili. See an article by Mr. E. Schuster in the *Law Quarterly Review* for January, 1896.

[2] An interesting sketch of the "reception" of Roman law in Germany (by Dr. Erwin Grüber) may be found in the Introduction to Mr. Ledlie's translation of Sohm's *Institutionen* (1st edition).

plain that it is too Teutonic; others that it is not Teutonic enough. One may perhaps conclude from these opposite criticisms that the codifiers have made a judiciously impartial use of both Germanic and Roman materials.

Speaking broadly, it may be said that the groundwork of both the French and the German Codes — that is to say their main lines and their fundamental legal conceptions — is Roman. Just as the character and genius of a language are determined by its grammar, irrespective of the number of foreign words it may have picked up, so Roman law remains Roman despite the accretion of the new elements which the needs of modern civilization have required it to accept.

The fifth stage is the transplantation of Roman law in its modern forms to new countries. The Spaniards and Portuguese, the French, the Dutch, and the Germans have carried their respective systems of law with them into the territories they have conquered and the colonies they have founded; and the law has often remained unchanged even when the territory or the colony has passed to new rulers. For law is a tenacious plant, even harder to extirpate than is language; and new rulers have generally had the sense to perceive that they had less to gain by substituting their own law for that which they found than they had to lose by irritating their new subjects. Thus, Roman-French law survives in Quebec (except in commercial matters) and in Louisiana, Roman-Dutch law in Guiana and South Africa.

The cases of Poland, Russia and the Scandinavian kingdoms are due to a process different from any of those hitherto described. The law of Russia was originally Slavonic custom, influenced to some extent by the law of the Eastern Roman Empire, whence Russia took her Christianity and her earliest literary impulse. In its present shape, while retaining in many points a genuinely Slavonic character, and of course far less distinctly Roman than is the law of France, it has drawn so much, especially as regards the principles of property rights and contracts, from the Code Napoléon and to a less degree from Germany, that it may be described as being Roman "at the second remove," and reckoned as an outlying and half-assimilated province, so to speak, of

the legal realm of Rome. Poland, lying nearer Germany, and being, as a Catholic country, influenced by the Canon Law, as well as by German teaching and German books, adopted rather more of Roman doctrine than Russia did.[1] Her students learnt Roman law first at Italian, afterwards at German Universities, and when they became judges, naturally applied its principles. The Scandinavian countries set out with a law purely Teutonic, and it is chiefly through the German Universities and the influence of German juridical literature that Roman principles have found their way in and coloured the old customs. Servia, Bulgaria and Rumania, on the other hand, were influenced during the Middle Ages by the law of the Eastern Empire, whence they drew their religion and their culture. Thus their modern law, whose character is due partly to these Byzantine influences — of course largely affected by Slavonic custom — and partly to what they have learnt from France and Austria, may also be referred to the Roman type.

V. The Diffusion of English Law

England, like Rome, has spread her law over a large part of the globe. But the process has been in her case not only far shorter but far simpler. The work has been (except as respects Ireland) effected within the last three centuries; and it has been effected (except as regards Ireland and India) not by conquest but by peaceful settlement. This is one of the two points in which England stands contrasted with Rome. The other is that her own law has not been affected by the process. It has changed within the seven centuries that lie between King Henry the Second and the present day, almost if not quite as much as the law of Rome changed in the seven centuries between the enactment of the Twelve Tables and the reign of Caracalla. But these changes have not been due, as those I have de-

[1] In Lithuania the rule was that where no express provision could be found governing a case, recourse should be had to "the Christian laws." Speaking generally, one may say that it was by and with Christianity that Roman law made its way in the countries to the east of Germany and to the north of the Eastern Empire.

scribed in the Roman Empire were largely due, to the extension of the law of England to new subjects. They would apparently have come to pass in the same way and to the same extent had the English race remained confined to its own island.

England has extended her law over two classes of territories.

The first includes those which have been peacefully settled by Englishmen — North America (except Lower Canada), Australia, New Zealand, Fiji, the Falkland Isles. All of these, except the United States, have remained politically connected with the British Crown.

The second includes conquered territories. In some of these, such as Wales, Ireland, Gibraltar, the Canadian provinces of Ontario and Nova Scotia, and several of the West India Islands, English law has been established as the only system, applicable to all subjects.[1] In others, such as Malta, Cyprus, Singapore, and India, English law is applied to Englishmen and native law to natives, the two systems being worked concurrently. Among these cases, that which presents problems of most interest and difficulty is India. But before we consider India, a few words may be given to the territories of the former class. They are now all of them, except the West Indies, Fiji and the Falkland Isles, self-governing, and therefore capable of altering their own law. This they do pretty freely. The United States have now forty-nine legislatures at work, viz. Congress, forty-five States, and three organized Territories. They have turned out an immense mass of law since their separation from England. But immense as it is, and bold as are some of the experiments which may be found in it, the law of the United States remains (except of course in Louisiana) substantially English law. An English barrister would find himself quite at home in any Federal or State Court, and would have nothing new to master, except a few technicalities of procedure

[1] It has undergone little or no change in the process. The Celtic customs disappeared in Wales; the Brehon law, though it was contained in many written texts and was followed over the larger part of Ireland till the days of the Tudors, has left practically no trace in the existing law of Ireland, which is, except as respects land, some penal matters, and marriage, virtually identical with the law of England.

and the provisions of any statutes which might affect the points he had to argue. And the patriarch of American teachers of law (Professor C. C. Langdell of the Law School in Harvard University), consistently declining to encumber his expositions with references to Federal or State Statutes, continues to discourse on the Common Law of America, which differs little from the Common Law of England. The old Common Law which the settlers carried with them in the seventeenth century has of course been developed or altered by the decisions of American Courts. These, however, have not affected its thoroughly English character. Indeed, the differences between the doctrines enounced by the Courts of different States are sometimes just as great as the differences between the views of the Courts of Massachusetts or New Jersey and those of Courts in England.

The same is true of the self-governing British colonies. In them also legislation has introduced deviations from the law of the mother country. More than forty years ago New Zealand, for instance, repealed the Statute of Uses, which is the corner-stone of English conveyancing; and the Australian legislatures have altered (among other things) the English marriage law. But even if the changes made by statute had been far greater than they have been, and even if there were not, as there still is, a right of appeal from the highest Courts of these colonies to the Crown in Council, their law should still remain, in all its essential features, a genuine and equally legitimate offspring of the ancient Common Law.

We come now to the territories conquered by England, and to which she has given her law whether in whole or in part. Among these it is only of India that I shall speak, as India presents the phenomena of contact between the law of the conqueror and that of the conquered on the largest scale and in the most instructive form. What the English have done in India is being done or will have to be done, though nowhere else on so vast a scale, by the other great nations which have undertaken the task of ruling and of bestowing what are called the blessings of civilization upon the backward races. Russia, France, Germany, and now the

United States also, all see this task before them. To them therefore, as well as to England, the experience of the British Government in India may be profitable.

VI. English Law in India

When the English began to conquer India they found two great systems of customary law in existence there, the Musulman and the Hindu. There were other minor bodies of custom, prevailing among particular sects, but these may for the present be disregarded. Musulman law regulated the life and relations of all Musulmans; and parts of it, especially its penal provisions, were also applied by the Musulman potentates to their subjects generally, Hindus included. The Musulman law had been most fully worked out in the departments of family relations and inheritance, in some few branches of the law of contract, such as money loans and mortgages and matters relating to sale, and in the doctrine of charitable or pious foundations called Wakuf.

In the Hindu principalities, Hindu law was dominant, and even where the sovereign was a Musulman, the Hindu law of family relations and of inheritance was recognized as that by which Hindus lived. There were also of course many land customs, varying from district to district, which both Hindus and Musulmans observed, as they were not in general directly connected with religion. In some regions, such as Oudh and what are now the North-West provinces, these customs had been much affected by the land revenue system of the Mogul Emperors. It need hardly be said that where Courts of law existed, they administered an exceedingly rough and ready kind of justice, or perhaps injustice, for bribery and favouritism were everywhere rampant.

There were also mercantile customs, which were generally understood and observed by traders, and which, with certain specially Musulman rules recognized in Musulman States, made up what there was of a law of contracts.

Thus one may say that the law (other than purely religious law) which the English administrators in the days of Clive and Warren Hastings found consisted of —

First, a large and elaborate system of Inheritance and Family Law, the Musulman pretty uniform throughout India, though in some regions modified by Hindu custom, the Hindu less uniform. Each was utterly unlike English law and incapable of being fused with it. Each was closely bound up with the religion and social habits of the people. Each was contained in treatises of more or less antiquity and authority, some of the Hindu treatises very ancient and credited with almost divine sanction, the Musulman treatises of course posterior to the Koran, and consisting of commentaries upon that Book and upon the traditions that had grown up round it.

Secondly, a large mass of customs relating to the occupation and use of land and of various rights connected with tillage and pasturage, including water-rights, rights of soil-accretion on the banks of rivers, and forest-rights. The agricultural system and the revenue system of the country rested upon these land customs, which were of course mostly unwritten and which varied widely in different districts.

Thirdly, a body of customs, according to our ideas comparatively scanty and undeveloped, but still important, relating to the transfer and pledging of property, and to contracts, especially commercial contracts.

Fourthly, certain penal rules drawn from Musulman law and more or less enforced by Musulman princes.

Thus there were considerable branches of law practically non-existent. There was hardly any law of civil and criminal procedure, because the methods of justice were primitive, and would have been cheap, but for the prevalence of corruption among judges as well as witnesses. There was very little of the law of Torts or Civil Wrongs, and in the law of property of contracts and of crimes, some departments were wanting or in a rudimentary condition. Of a law relating to public and constitutional rights there could of course be no question, since no such rights existed.

In this state of facts the British officials took the line which practical men, having their hands full of other work, would naturally take, viz. the line of least resistance. They accepted and carried on what they found. Where there was

a native law, they applied it, Musulman law to Musulmans, Hindu law to Hindus, and in the few places where they were to be found, Parsi law to Parsis, Jain law to Jains. Thus men of every creed — for it was creed, not race nor allegiance by which men were divided and classified in India — lived each according to his own law, as Burgundians and Franks and Romanized Gauls had done in the sixth century in Europe. The social fabric was not disturbed, for the land customs and the rules of inheritance were respected, and of course the minor officers, with whom chiefly the peasantry came in contact, continued to be natives. Thus the villager scarcely felt that he was passing under the dominion of an alien power, professing an alien faith. His life flowed on in the same equable course beside the little white mosque, or at the edge of the sacred grove. A transfer of power from a Hindu to a Musulman sovereign would have made more difference to him than did the establishment of British rule; and life was more placid than it would have been under either a rajah or a sultan, for the marauding bands which had been the peasants' terror were soon checked by European officers.

So things remained for more than a generation. So indeed things remain still as respects those parts of law which are inwoven with religion, marriage, adoption (among Hindus) and other family relations, and with the succession to property. In all these matters native law continues to be administered by the Courts the English have set up; and when cases are appealed from the highest of those Courts to the Privy Council in England, that respectable body determines the true construction to be put on the Koran and the Islamic Traditions, or on passages from the mythical Manu, in the same business-like way as it would the meaning of an Australian statute.[1] Except in some few points to be presently noted, the Sacred Law of Islam and that of Brah-

[1] It is related that a hill tribe of Kols, in Central India, had a dispute with the Government of India over some question of forest-rights. The case having gone in their favour, the Government appealed to the Judicial Committee. Shortly afterwards a passing traveller found the elders of the tribe assembled at the sacrifice of a kid. He inquired what deity was being propitiated, and was told that it was a deity powerful but remote, whose name was Privy Council.

manism remained unpolluted by European ideas. Yet they have not stood unchanged, for the effect of the more careful and thorough examination which the contents of these two systems have received from advocates, judges, and text-writers, both native and English, imbued with the scientific spirit of Europe, has been to clarify and define them, and to develop out of the half-fluid material more positive and rigid doctrines than had been known before. Something like this may probably have been done by the Romans for the local or tribal law of their provinces.

In those departments in which the pre-existing customs were not sufficient to constitute a body of law large enough and precise enough for a civilized Court to work upon, the English found themselves obliged to supply the void. This was done in two ways. Sometimes the Courts boldly applied English law. Sometimes they supplemented native custom by common sense, i. e. by their own ideas of what was just and fair. The phrase "equity and good conscience" was used to embody the principles by which judges were to be guided when positive rules, statutory or customary, were not forthcoming. To a magistrate who knew no law at all, these words would mean that he might follow his own notions of "natural justice," and he would probably give more satisfaction to suitors than would his more learned brother, trying to apply confused recollections of Blackstone or Chitty. In commercial matters common sense would be aided by the usage of traders. In cases of Tort native custom was not often available, but as the magistrate who dealt out substantial justice would give what the people had rarely obtained from the native courts, they had no reason to complain of the change. As to rules of evidence, the young Anglo-Indian civilian would, if he were wise, forget all the English technicalities he might have learnt, and make the best use he could of his mother-wit.[1]

For the first sixty years or more of British rule there was accordingly little or no attempt to Anglify the law of

[1] For the facts given in the following pages I am much indebted to the singularly lucid and useful treatise of Sir C. P. Ilbert (formerly Legal Member of the Viceroy's Council) entitled *The Government of India.*

India, or indeed to give it any regular and systematic form. Such alterations as it underwent were the natural result of its being dispensed by Europeans. But to this general rule there were two exceptions, the law of Procedure and the law of Crimes. Courts had been established in the Presidency towns even before the era of conquest began. As their business increased and subordinate Courts were placed in the chief towns of the annexed provinces, the need for some regular procedure was felt. An Act of the British Parliament of A. D. 1781 empowered the Indian Government to make regulations for the conduct of the provincial Courts, as the Court at Fort William (Calcutta) had already been authorized to do for itself by an Act of 1773. Thus a regular system of procedure, modelled after that of England, was established; and the Act of 1781 provided that the rules and forms for the execution of process were to be accommodated to the religion and manners of the natives.

As respects penal law, the English began by adopting that which the Musulman potentates had been accustomed to apply. But they soon found that many of its provisions were such as a civilized and nominally Christian government could not enforce. Mutilation as a punishment for theft, for instance, and stoning for sexual offences, were penalties not suited to European notions; and still less could the principle be admitted that the evidence of a non-Musulman is not receivable against one of the Faithful. Accordingly a great variety of regulations were passed amending the Musulman law of crimes from an English point of view. In Calcutta the Supreme Court did not hesitate to apply English penal law to natives; and applied it to some purpose at a famous crisis in the fortunes of Warren Hastings when (in 1775) it hanged Nuncomar for forgery under an English statute of 1728, which in the opinion of many high authorities of a later time had never come into force at all in India. It was inevitable that the English should take criminal jurisdiction into their own hands — the Romans had done the same in their provinces — and inevitable also that they should alter the penal law in conformity with their own ideas. But they did so in a very haphazard fashion.

The criminal law became a patchwork of enactments so confused that it was the first subject which invited codification in that second epoch of English rule which we are now approaching.

Before entering on this remarkable epoch, one must remember that the English in India, still a very small though important class, were governed entirely by English law. So far as common law and equity went, this law was exactly the same as the contemporaneous law of England. But it was complicated by the fact that a number of Regulations, as they were called, had been enacted for India by the local government, that many British statutes were not intended to apply and probably did not apply to India (though whether they did or not was sometimes doubtful), and that a certain number of statutes had been enacted by Parliament expressly for India. Thus though the law under which the English lived had not been perceptibly affected by Indian customs, it was very confused and troublesome to work. That the learning of the judges sent from home to sit in the Indian Courts was seldom equal to that of the judges in England was not necessarily a disadvantage, for in traversing the jungle of Indian law the burden of English case lore would have too much impeded the march of justice.

The first period of English rule, the period of rapid territorial extension and of improvised government, may be said to have ended with the third Maratha war of 1817-8. The rule of Lord Amherst and Lord William Bentinck (1823-35) was a comparatively tranquil period, when internal reforms had their chance, as they had in the Roman Empire under Hadrian and Antoninus Pius. This was also the period when a spirit of legal reform was on foot in England. It was the time when the ideas of Bentham had begun to bear fruit, and when the work begun by Romilly was being carried on by Brougham and others. Both the law applied to Englishmen, and such parts of native law as had been cut across, filled up, and half re-shaped by English legal notions and rules, called loudly for simplification and reconstruction.

The era of reconstruction opened with the enactment, in

the India Charter Act of 1833, of a clause declaring that a general judicial system and a general body of law ought to be established in India applicable to all classes, Europeans as well as natives, and that all laws and customs having legal force ought to be ascertained, consolidated, and amended. The Act then went on to provide for the appointment of a body of experts to be called the Indian Law Commission, which was to inquire into and report upon the Courts, the procedure and the law then existing in India. Of this commission Macaulay, appointed in 1833 legal member of the Governor-General's Council, was the moving spirit; and with it the work of codification began. It prepared a Penal Code, which however was not passed into law until 1860, for its activity declined after Macaulay's return to England and strong opposition was offered to his draft by many of the Indian judges. A second Commission was appointed under an Act of 1853, and sat in England. It secured the enactment of the Penal Code, and of Codes of Civil and of Criminal Procedure. A third Commission was crated in 1861, and drafted other measures. The Government of India demurred to some of the proposed changes and evidently thought that legislation was being pressed on rather too fast. The Commission, displeased at this resistance, resigned in 1870; and since then the work of preparing as well as of carrying through codifying Acts has mostly been done in India. The net result of the sixty-six years that have passed since Macaulay set to work in 1834 is that Acts codifying and amending the law, and declaring it applicable to both Europeans and natives, have been passed on the topics following:—

Crimes (1860).

Criminal Procedure (1861, 1882, and 1898).

Civil Procedure (1859 and 1882).

Evidence (1872).

Limitation of Actions (1877).

Specific Relief (1877).

Probate and Administration (1881).

Contracts (1872) (but only the general rules of contract with a few rules on particular parts of the subject).

Negotiable Instruments (1881) (but subject to native customs).

Besides these, codifying statutes have been passed which do not apply (at present) to all India, but only to parts of it, or to specified classes of the population, on the topics following: —

Trusts (1882).
Transfer of Property (1882).
Succession (1865).
Easements (1882).
Guardians and Wards (1890).

These statutes cover a large part of the whole field of law, so that the only important departments not yet dealt with are those of Torts or Civil Wrongs (on which a measure not yet enacted was prepared some years ago); certain branches of contract law, which it is not urgent to systematize because they give rise to lawsuits only in the large cities, where the Courts are quite able to dispose of them in a satisfactory way; Family Law, which it would be unsafe to meddle with, because the domestic customs of Hindus, Musulmans, and Europeans are entirely different; and Inheritance, the greater part of which is, for the same reason, better left to native custom. Some points have, however, been covered by the Succession Act already mentioned. Thus the Government of India appear to think that they have for the present gone as far as they prudently can in the way of enacting uniform general laws for all classes of persons. Further action might displease either the Hindus or the Musulmans, possibly both: and though there would be advantages in bringing the law of both these sections of the population into a more clear and harmonious shape, it would in any case be impossible to frame rules which would suit both of them, and would also suit the Europeans. Here Religion steps in, a force more formidable in rousing opposition or disaffection than any which the Romans had to fear.

In such parts of the law as are not covered by these enumerated Acts, Englishmen, Hindus and Musulmans continue to live under their respective laws. So do Parsis, Sikhs, Buddhists (most numerous in Burma), and Jains, save that

where there is really no native law or custom that can be shown to exist, the judge will naturally apply the principles of English law, handling them, if he knows how, in an untechnical way. Thus beside the new stream of united law which has its source in the codifying Acts, the various older streams of law, each representing a religion, flow peacefully on.

The question which follows — What has been the action on the other of each of these elements? resolves itself into three questions: —

How far has English Law affected the Native Law which remains in force?

How far has Native Law affected the English Law which is in force?

How have the codifying Acts been framed — i. e. are they a compromise between the English and the native element, or has either predominated and given its colour to the whole mass?

The answer to the first question is that English influence has told but slightly upon those branches of native law which had been tolerably complete before the British conquest, and which are so interwoven with religion that one may almost call them parts of religion. The Hindu and Musulman customs which regulate the family relations and rights of succession have been precisely defined, especially those of the Hindus, which were more fluid than the Muslim customs, and were much less uniform over the whole country. Trusts have been formally legalized, and their obligation rendered stronger. Adoption has been regularized and stiffened, for its effects had been uncertain in their legal operation. Where several doctrines contended, one doctrine has been affirmed by the English Courts, especially by the Privy Council as ultimate Court of Appeal, and the others set aside. Moreover the Hindu law of Wills has been in some points supplemented by English legislation, and certain customs repugnant to European ideas, such as the self-immolation of the widow on the husband's funeral pyre, have been abolished. And in those parts of law which, though regulated by local custom, were not religious, some improvements

have been affected. The rights of the agricultural tenant have been placed on a more secure basis. Forest-rights have been ascertained and defined, partly no doubt for the sake of the pecuniary interests which the Government claims in them, and which the peasantry do not always admit. But no attempt has been made to Anglify these branches of law as a whole.

On the other hand, the law applicable to Europeans only has been scarcely (if at all) affected by native law. It remains exactly what it is in England, except in so far as the circumstances of India have called for special statutes.

The third question is as to the contents of those parts of the law which are common to Europeans and Natives, that is to say, the parts dealt by the codifying Acts already enumerated. Here English law has decisively prevailed. It has prevailed not only because it would be impossible to subject Europeans to rules emanating from a different and a lower civilization, but also because native custom did not supply the requisite materials. Englishmen had nothing to learn from natives as respects procedure or evidence. The native mercantile customs did not constitute a system even of the general principles of contract, much less had those principles been worked out in their details. Accordingly the Contract Code is substantially English, and where it differs from the result of English cases, the differences are due, not to the influence of native ideas or native usage, but to the views of those who prepared the Code, and who, thinking the English case-law susceptible of improvement, diverged from it here and there just as they might have diverged had they been preparing a Code to be enacted for England. There are, however, some points in which the Penal Code shows itself to be a system intended for India. The right of self-defence is expressed in wider terms than would be used in England, for Macaulay conceived that the slackness of the native in protecting himself by force made it desirable to depart a little in this respect from the English rules. Offences such as dacoity (brigandage by robber bands), attempts to bribe judges or witnesses, the use of torture by policemen, kidnapping, the offering of insult or injury to sacred places, have

been dealt with more fully and specifically than would be necessary in a Criminal Code for England. Adultery has, conformably to the ideas of the East, been made a subject for criminal proceedings. Nevertheless these, and other similar, deviations from English rules which may be found in the Codes enacted for Europeans and natives alike, do not affect the general proposition that the Codes are substantially English. The conquerors have given their law to the conquered. When the conquered had a law of their own which this legislation has effaced, the law of the conquerors was better. Where they had one too imperfect to suffice for a growing civilization, the law of the conquerors was inevitable.

VII. The Working of the Indian Codes

Another question needs to be answered. It has a twofold interest, because the answer not only affects the judgment to be passed on the course which the English Government in India has followed, but also conveys either warning or encouragement to England herself. This question is — How have these Indian Codes worked in practice? Have they improved the administration of justice? Have they given satisfaction to the people? Have they made it easier to know the law, to apply the law, to amend the law where it proves faulty?

When I travelled in India in 1888-9 I obtained opinions on these points from many persons competent to speak. There was a good deal of difference of view, but the general result seemed to be as follows. I take the four most important codifying Acts, as to which it was most easy to obtain profitable criticisms.

The two Procedure Codes, Civil and Criminal, were very generally approved. They were not originally creative work, but were produced by consolidating and simplifying a mass of existing statutes and regulations, which had become unwieldy and confused. Order was evoked out of chaos, a result which, though beneficial everywhere, was especially useful in the minor Courts, whose judges had less learning

and experience than those of the five High Courts at Calcutta, Madras, Bombay, Allahabad and Lahore.

The Penal Code was universally approved; and it deserves the praise bestowed on it, for it is one of the noblest monuments of Macaulay's genius. To appreciate its merits, one must remember how much, when prepared in 1834, it was above the level of the English criminal law of that time. The subject is eminently fit to be stated in a series of positive propositions, and so far as India was concerned, it had rested mainly upon statutes and not upon common law. It has been dealt with in a scientific, but also a practical common-sense way: and the result is a body of rules which are comprehensible and concise. To have these on their desks has been an immense advantage for magistrates in the country districts, many of whom have had but a scanty legal training. It has also been claimed for this Code that under it crime has enormously diminished: but how much of the diminution is due to the application of a clear and just system of rules, how much to the more efficient police administration, is a question on which I cannot venture to pronounce.[1]

No similar commendation was bestowed on the Evidence Code. Much of it was condemned as being too metaphysical, yet deficient in subtlety. Much was deemed superfluous, and because superfluous, possibly perplexing. Yet even those who criticized its drafting admitted that it might possibly be serviceable to untrained magistrates and practitioners, and I have myself heard some of these untrained men declare that they did find it helpful. They are a class relatively larger in India than in England.

It was with regard to the merits of the Contract Code that the widest difference of opinion existed. Any one who reads it can see that its workmanship is defective. It is neither exact nor subtle, and its language is often far from lucid. Every one agreed that Sir J. F. Stephen (afterwards Mr. Justice Stephen), who put it into the shape in which it was

[1] The merits of this Code are discussed in an interesting and suggestive manner by Mr. H. Speyer in an article entitled *Le Droit Pénal Anglo-indien*, which appeared in the *Revue de l'Université de Bruxelles* in April, 1900.

passed during his term of office as Legal Member of Council, and was also the author of the Evidence Act, was a man of great industry, much intellectual force, and warm zeal for codification. But his capacity for the work of drafting was deemed not equal to his fondness for it. He did not shine either in fineness of discrimination or in delicacy of expression. Indian critics, besides noting these facts, went on to observe that in country places four-fifths of the provisions of the Contract Act were superfluous, while those which were operative sometimes unduly fettered the discretion of the magistrate or judge, entangling him in technicalities, and preventing him from meting out that substantial justice which is what the rural suitor needs. The judge cannot disregard the Act, because if the case is appealed, the Court above, which has only the notes of the evidence before it, and does not hear the witnesses, is bound to enforce the provisions of the law. In a country like India, law ought not to be too rigid: nor ought rights to be stiffened up so strictly as they are by this Contract Act. Creditors had already, through the iron regularity with which the British Courts enforce judgements by execution, obtained far more power over debtors than they possessed in the old days, and more than the benevolence of the English administrator approves. The Contract Act increases this power still further. This particular criticism does not reflect upon the technical merits of the Act in itself. But it does suggest reasons, which would not occur to a European mind, why it may be inexpedient by making the law too precise to narrow the path in which the judge has to walk. A stringent administration of the letter of the law is in semi-civilized communities no unmixed blessing.

So much for the rural districts. In the Presidency cities, on the other hand, the Contract Code is by most experts pronounced to be unnecessary. The judges and the bar are already familiar with the points which it covers, and find themselves — so at least many of them say — rather embarrassed than aided by it. They think it cramps their freedom of handling a point in argument. They prefer the elasticity of the common law. And in point of fact, they seem to make

no great use of the Act, but to go on just as their predecessors did before it was passed.

These criticisms may need to be discounted a little, in view of the profound conservatism of the legal profession, and of the dislike of men trained at the Temple or Lincoln's Inn to have anything laid down or applied on the Hooghly which is not being done at the same moment on the Thames. And a counterpoise to them may be found in the educational value which is attributed to the Code by magistrates and lawyers who have not acquired a mastery of contract law through systematic instruction or through experience at home. To them the Contract Act is a manual comparatively short and simple, and also authoritative; and they find it useful in enabling them to learn their business. On the whole, therefore, though the Code does not deserve the credit which has sometimes been claimed for it, one may hesitate to pronounce its enactment a misfortune. It at any rate provides a basis on which a really good Code of contractual law may some day be erected.

Taking the work of Indian codification as a whole, it has certainly benefited the country. The Penal Code and the two Codes of Procedure represent an unmixed gain. The same may be said of the consolidation of the statute law, for which so much was done by the energy and skill of Mr. Whitley Stokes. And the other codifying acts have on the whole tended both to improve the substance of the law and to make it more accessible. Their operation has, however, been less complete than most people in Europe realize, for while many of them are confined to certain districts, others are largely modified by the local customs which they have (as expressed in their saving clauses) very properly respected. If we knew more about the provinces of the Roman Empire we might find that much more of local custom subsisted side by side with the apparently universal and uniform imperial law than we should gather from reading the compilations of Justinian.

It has already been observed that Indian influences have scarcely at all affected English law as it continues to be administered to Englishmen in India. Still less have they

affected the law of England at home. It seems to have been fancied thirty or forty years ago, when law reform in general and codification in particular occupied the public mind more than they do now, that the enactment of codes of law for India, and the success which was sure to attend them there, must react upon England and strengthen the demand for the reduction of her law into a concise and systematic form. No such result has followed. The desire for codification in England has not been perceptibly strengthened by the experience of India. Nor can it indeed be said that the experience of India has taught jurists or statesmen much which they did not know before. That a good code is a very good thing, and that a bad code is, in a country which possesses competent judges, worse than no code at all — these are propositions which needed no Indian experience to verify them. The imperfect success of the Evidence and Contract Acts has done little more than add another illustration to those furnished by the Civil Code of California and the Code of Procedure in New York of the difficulty which attends these undertakings. Long before Indian codification was talked of, Savigny had shown how hard it is to express the law in a set of definite propositions without reducing its elasticity and impeding its further development. His arguments scarcely touch penal law, still less the law of procedure, for these are not topics in which much development need be looked for. But the future career of the Contract Act and of the projected Code of Torts, when enacted, may supply some useful data for testing the soundness of his doctrine.

One reason why these Indian experiments have so little affected English opinion may be found in the fact that few Englishmen have either known or cared anything about them. The British public has not realized how small is the number of persons by whom questions of legal policy in India have during the last seventy years been determined. Two or three officials in Downing Street and as many in Calcutta have practically controlled the course of events, with little interposition from outside. Even when Commissions have been sitting, the total number of those whose hand is felt has never exceeded a dozen. It was doubtless much

the same in the Roman Empire. Indeed the world seldom realizes by how few persons it is governed. There is a sense in which power may be said to rest with the whole community, and there is also a sense in which it may be said, in some governments, to rest with a single autocrat. But in reality it almost always rests with an extremely small number of persons, whose knowledge and will prevail over or among the titular possessors of authority.

Before we attempt to forecast the future of English law in India, let us cast a glance back at the general course of its history as compared with that of the law of Rome in the ancient world.

VIII. Comparison of the Roman Law with English Law in India

Rome grew till her law became first that of Italy, then that of civilized mankind. The City became the World, *Urbs* became *Orbis*, to adopt the word-play which was once so familiar. Her law was extended over her Empire by three methods: —

Citizenship was gradually extended over the provinces till at last all subjects had become citizens.

Many of the principles and rules of the law of the City were established and diffused in the provinces by the action of Roman Magistrates and Courts, and especially by the Provincial Edict.

The ancient law of the City was itself all the while amended, purged of its technicalities, and simplified in form, till it became fit to be the law of the World.

Thus, when the law of the City was formally extended to the whole Empire by the grant of citizenship to all subjects, there was not so much an imposition of the conqueror's law upon the conquered as the completion of a process of fusion which had been going on for fully four centuries. The fusion was therefore natural; and because it was natural it was complete and final. The separation of the one great current of Roman law into various channels, which began in the fifth century A. D. and has continued ever since,

has been due to purely historical causes, and of late years (as we shall see presently) the streams that flow in these channels have tended to come nearer to one another.

During the period of more than four centuries (B. C. 241 to A. D. 211-7), when these three methods of development and assimilation were in progress, the original law of the City was being remoulded and amended in the midst of and under the influence of a non-Roman population of aliens (*peregrini*) at Rome and in the provinces, and that semi-Roman law which was administered in the provinces was being created by magistrates and judges who lived in the provinces and who were, after the time of Tiberius, mostly themselves of provincial origin. Thus the intelligence, reflection, and experience of the whole community played upon and contributed to the development of the law. Judges, advocates, juridical writers and teachers as well as legislators, joined in the work. The completed law was the outcome of a truly national effort. Indeed it was largely through making a law which should be fit for both Italians and provincials that the Romans of the Empire became almost a nation.

In India the march of events has been different, because the conditions were different. India is ten thousand miles from England. The English residents are a mere handful. The Indian races are in a different stage of civilization from the English. They are separated by religion; they are separated by colour.

There has therefore been no fusion of English and native law. Neither has there been any movement of the law of England to adapt itself to become the law of her Indian subjects. English law has not, like Roman, come halfway to meet the provinces. It is true that no such approximation was needed, because English law had already reached, a century ago, a point of development more advanced than Roman law had reached when the conquest of the provinces began, and the process of divesting English law of its archaic technicalities went on so rapidly during the nineteenth century under purely home influences, that neither the needs of India nor the influences of India came into the matter at all.

The Romans had less resistance to meet with from religious diversities than the English have had, for the laws of their subjects had not so wrapped their roots round religious belief or usage as has been the case in India. But they had more varieties of provincial custom to consider, and they had, especially in the laws of the Hellenized provinces, systems more civilized and advanced first to recognize and ultimately to supersede than any body of law which the English found.

There is no class in India fully corresponding to the Roman citizens domiciled in the provinces during the first two centuries of the Roman Empire. The European British subjects, including the Eurasians, are comparatively few, and they are to a considerable extent a transitory element, whose true home is England. Only to a very small extent do they enjoy personal immunities and privileges such as those that made Roman citizenship so highly prized, for the English, more liberal than the Romans, began by extending to all natives of India, as and when they became subjects of the British Crown, the ordinary rights of British subjects enjoyed under such statutes as Magna Charta and the Bill of Rights. The natives of India have entered into the labours of the barons at Runnymede and of the Whigs of 1688.

What has happened has been that the English have given to India such parts of their own law (somewhat simplified in form) as India seemed fitted to receive. These parts have been applied to Europeans as well as to natives, but they were virtually applicable to Europeans before codification began. The English rulers have filled up those departments in which there was no native law worthy of the name, sometimes, however, respecting local native customs. Here one finds an interesting parallel to the experience of the Romans. They, like the English, found criminal law and the law of procedure to be the departments which could be most easily and promptly dealt with. They, like the English, were obliged to acquiesce in the retention by a part of the population of some ancient customs regarding the Family and the Succession to Property. But this acquiescence was after

all partial and local; whereas the English have neither applied to India the more technical parts of their own law, such as that relating to land, nor attempted to supersede those parts of native law which are influenced by religion, such as the parts which include family relations and inheritance. Thus there has been no general fusion comparable to that which the beginning of the third century A. D. saw in the Roman Empire.

As respects codification, the English have in one sense done more than the Romans, in another sense less. They have reduced such topics as penal law and procedure, evidence and trusts, to a compact and well-ordered shape, which is more than Justinian did for any part of the Roman law. But they have not brought the whole law together into one *Corpus Iuris*, and they have left large parts of it in triplicate, so to speak, that is to say, consisting of rules which are entirely different for Hindus, for Musulmans, and for Europeans.

Moreover, as it is the law of the conquerors which has in India been given to the conquered practically unaffected by native law, so also the law of England has not been altered by the process. It has not been substantially altered in India. The uncodified English law there is the same (local statutes excepted) as the law of England at home. Still less has it been altered in England itself. Had Rome not acquired her Empire, her law would never have grown to be what it was in Justinian's time. Had Englishmen never set foot in India, their law would have been, so far as we can tell, exactly what it is to-day.

Neither have those natives of India who correspond to the provincial subjects of Rome borne any recognizable share in the work of Indian legal development. Some of them have, as text-writers or as judges, rendered good service in elucidating the ancient Hindu customs. But the work of throwing English law into the codified form in which it is now applied in India to Europeans and natives alike has been done entirely by Englishmen. In this respect also the more advanced civilization has shown its dominant creative force.

IX. The Future of English Law in India

Here, however, it is fit to remember that we are not, as in the case of the Romans, studying a process which has been completed. For them it was completed before the fifth century saw the dissolution of the western half of the Empire. For India it is still in progress. Little more than a century has elapsed since English rule was firmly established; only half a century since the Punjab and (shortly afterwards) Oudh were annexed. Although the Indian Government has prosecuted the work of codification much less actively during the last twenty years than in the twenty years preceding, and seems to conceive that as much has now been done as can safely be done at present, still in the long future that seems to lie before British rule in India the equalization and development of law may go much further than we can foresee to-day. The power of Britain is at this moment stable, and may remain so if she continues to hold the sea and does not provoke discontent by excessive taxation.

Two courses which legal development may follow are conceivable. One is that all those departments of law whose contents are not determined by conditions peculiar to India will be covered by further codifying acts, applicable to Europeans and natives alike, and that therewith the process of equalization and assimilation will stop because its natural limits will have been reached. The other is that the process will continue until the law of the stronger and more advanced race has absorbed that of the natives and become applicable to the whole Empire.

Which of these two things will happen depends upon the future of the native religions, and especially of Hinduism and of Islam, for it is in religion that the legal customs of the natives have their roots. Upon this vast and dark problem it may seem idle to speculate; nor can it be wholly dissevered from a consideration of the possible future of the religious beliefs which now hold sway among Europeans. Both Islam and Hinduism are professed by masses of human beings so huge, so tenacious of their traditions, so apparently inaccessible to European influences, that no consider-

able declension of either faith can be expected within a long period of years. Yet experience, so far as it is available, goes to show that no form of heathenism, not even an ancient and in some directions highly cultivated form like Hinduism, does ultimately withstand the solvent power of European science and thought. Even now, though Hinduism is growing every day, at the expense of the ruder superstitions among the hill-folk, it is losing its hold on the educated class, and it sees every day members of its lower castes pass over to Islam. So Islam also, deeply rooted as it may seem to be, wanes in the presence of Christianity, and though it advances in Central Africa, declines in the Mediterranean countries. It has hitherto declined not by the conversion of its members to other faiths, but by the diminution of the Muslim population; yet one must not assume that when the Turkish Sultanate or Khalifate has vanished, it may not lose much of its present hold upon the East. Possibly both Hinduism and Islam may, so potent are the new forces of change now at work in India, begin within a century or two to show signs of approaching dissolution. Polygamy may by that time have disappeared. Other peculiar features of the law of family and inheritance will tend to follow, though some may survive through the attachment to habit even when their original religious basis has been forgotten.

In the Arctic seas, a ship sometimes lies for weeks together firmly bound in a vast ice-field. The sailor who day after day surveys from the masthead the dazzling expanse sees on every side nothing but a solid surface, motionless and apparently immoveable. Yet all the while this ice-field is slowly drifting to the south, carrying with it the embedded ship. At last, when a warmer region has been reached and the south wind has begun to blow, that which overnight was a rigid and glittering plain is in the light of dawn a tossing mass of ice-blocks, each swiftly melting into the sea, through which the ship finds her homeward path. So may it be with these ancient religions. When their dissolution comes, it may come with unexpected suddenness, for the causes which will produce it will have been acting simultaneously and silently over a wide area. If the English are then still the

lords of India, there will be nothing to prevent their law from becoming (with some local variations) the law of all India. Once established and familiar to the people, it will be likely to remain, whatever political changes may befall, for nothing clings to the soil more closely than a body of civilized law once well planted. So the law of England may become the permanent heritage, not only of the hundreds of millions who will before the time we are imagining be living beyond the Atlantic, but of those hundreds of millions who fill the fertile land between the Straits of Manaar and the long rampart of Himalayan snows.

We embarked on this inquiry for the sake of ascertaining what light the experience of the English in India throws upon the general question of the relation of the European nations to those less advanced races over whom they are assuming dominion, and all of whom will before long own some European master.[1]

These races fall into two classes, those which do and those which do not possess a tolerably complete system of law. Turks, Persians, Egyptians, Moors, and Siamese belong to the former class; all other non-European races to the latter.

As to the latter there is no difficulty. So soon as Kafirs or Mongols or Hausas have advanced sufficiently to need a regular set of legal rules, they will (if their European masters think it worth while) become subject to the law of those masters, of course more or less differentiated according to local customs or local needs. It may be assumed that French law will prevail in Madagascar, and English law in Uganda, and Russian law in the valley of the Amur.

Where, however, as is the case in the Musulman and perhaps also in the Buddhist countries belonging to the former class, a legal system which, though imperfect, especially on the commercial side, has been carefully worked out in some

[1] Among the "less advanced races" one must not now include the Japanese, but one may include the Turks and the Persians. The fate of China still hangs in the balance. It is not to be assumed that she will be ruled, though she must come to be influenced, and probably more and more influenced, by Europeans.

directions, holds the field and rests upon religion, the question is less simple. The experience of the English in India suggests that European law will occupy the non-religious parts of the native systems, and will tend by degrees to encroach upon and permeate even the religious parts, though so long as Islam (or Brahmanism) maintains its sway the legal customs and rules embedded in religion will survive. No wise ruler would seek to efface them so far as they are neither cruel nor immoral. It is only these ancient religions — Hinduism, Buddhism, and especially Islam — that can or will resist, though perhaps only for a time, and certainly only partially, the rising tide of European law.

X. Present Position of Roman and English Law in the World

European law means, as we have seen, either Roman law or English law, so the last question is: Will either, and if so which, of these great rival systems prevail over the other?

They are not unequally matched. The Roman jurists, if we include Russian as a sort of modified Roman law, influence at present a larger part of the world's population, but Bracton and Coke and Mansfield might rejoice to perceive that the doctrines which they expounded are being diffused even more swiftly, with the swift diffusion of the English tongue, over the globe. It is an interesting question, this competitive advance of legal systems, and one which would have engaged the attention of historians and geographers, were not law a subject which lies so much outside the thoughts of the lay world that few care to study its historical bearings. It furnishes a remarkable instance of the tendency of strong types to supplant and extinguish weak ones in the domain of social development. The world is, or will shortly be, practically divided between two sets of legal conceptions or rules, and two only. The elder had its birth in a small Italian city, and though it has undergone endless changes and now appears in a variety of forms, it retains its distinctive character, and all these forms still show an

underlying unity. The younger has sprung from the union of the rude customs of a group of Low German tribes with rules worked out by the subtle, acute and eminently disputatious intellect of the Gallicized Norsemen who came to England in the eleventh century. It has been much affected by the elder system, yet it has retained its distinctive features and spirit, a spirit specially contrasted with that of the imperial law in everything that pertains to the rights of the individual and the means of asserting them. And it has communicated something of this spirit to the more advanced forms of the Roman law in constitutional countries.

At this moment the law whose foundations were laid in the Roman Forum commands a wider area of the earth's surface, and determines the relations of a larger mass of mankind. But that which looks back to Westminster Hall sees its subjects increase more rapidly, through the growth of the United States and the British Colonies, and has a prospect of ultimately overspreading India also. Neither is likely to overpower or absorb the other. But it is possible that they may draw nearer, and that out of them there may be developed, in the course of ages, a system of rules of private law which shall be practically identical as regards contracts and property and civil wrongs, possibly as regards offences also. Already the commercial law of all civilized countries is in substance the same everywhere, that is to say, it guarantees rights and provides remedies which afford equivalent securities to men in their dealings with one another and bring them to the same goal by slightly different paths.

The more any department of law lies within the domain of economic interest, the more do the rules that belong to it tend to become the same in all countries, for in the domain of economic interest Reason and Science have full play. But the more the element of human emotion enters any department of law, as for instance that which deals with the relations of husband and wife, or of parent and child, or that which defines the freedom of the individual as against the State, the greater becomes the probability that existing divergences between the laws of different countries may in

that department continue, or even that new divergences may appear.

Still, on the whole, the progress of the world is towards uniformity in law, and towards a more evident uniformity than is discoverable either in the sphere of religious beliefs or in that of political institutions.

PART V.

BENCH AND BAR FROM NORMAN TIMES TO THE NINETEENTH CENTURY

19. THE FIVE AGES OF THE BENCH AND BAR OF ENGLAND[1]

By John Maxcy Zane[2]

IT is a singular fact that but two races in the history of the world have shown what may be called a genius for law. The systems of jurisprudence, which owe their development to those two races, the Roman and the Norman, now occupy the whole of the civilized world. Our common law is peculiarly the work of the Norman element of the English people. There is no English law, nor English lawyer, before the Norman Conquest. Just as the Saxons with their crude weapons and bull-hide shields broke before the Norman knights at Senlac, so their barbarous system of *wer*, *wite*, and *bot*, their ridiculous ordeals in the criminal law, their haphazard judicial tribunals, and their methods of proof, which had no connection with any rational theory of evidence, were certain to yield to the Norman organization, its love of order and of records, its royal inquisition for establishing facts, its King's Court to give uniformity to the law. The Norman Conquest was more than a change of dynasty. It produced a revolution in jurisprudence.

The history of our legal development furnishes ample

[1] Hitherto unpublished, except that the first part appeared in the Illinois Law Review, volume II, p. 1, June, 1907. All five parts were publicly read as lectures, in February and March, 1906, in the Law School of Northwestern University.

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Other Publications: Law of Banks and Banking, 1900; Determinable Fees, and other articles in the Harvard Law Review; A Mediæval Cause Célèbre, Illinois Law Review, 1907.

proof of this. Our huge mass of legal literature is a treasure that no other race possesses. Our records and reports of cases, many of them still imperfectly known, carry our legal history back almost to the Conquest. There the law can be seen in its growth, taking on new forms to meet new conditions. The genius of the Norman lawyer has developed our legal system from one precedent to another. Beginning with the barbarous legal ideas of the Anglo-Saxon, the Norman in the course of two centuries produced a rational coherent system of law, and a procedure capable of indefinite expansion. The growth and changes in our law have followed Lord Bacon's rule: "It were good, therefore, that men in their innovations would follow the example of time itself; which, indeed, innovateth greatly, but quietly, and by degrees, scarce to be perceived." The further fact, that this system of law has been applied by practically but one court, has rendered the common law uniform. It represents the slow and patient work of generation after generation of able men. To use a fine figure of Burke's, our legal system has never been at any one time "old, or middle-aged, or young. It has preserved the method of nature; in what has been improved, it was never wholly new; in what it retained, it was never wholly obsolete." Like some ancient Norman house, "it has its liberal descent, its pedigree and illustrating ancestors, its bearings and ensigns armorial, its gallery of portraits, its monumental inscriptions, its records, evidences, and titles."

The design of these essays is to survey "the gallery of portraits" that belongs to the English law. It will not be possible to advert to legal doctrines further than may be necessary to illustrate the acts of eminent lawyers. An attempt will be made to describe the men who have assisted in the growth and development of our jurisprudence. Unlike France, England has never had a *noblesse* of the robe. Lawyers have found their rewards in the same honors that England has given to her admirals and her generals. The peerage is a fair standard by which to judge of the honors that have been attained by excellence in the law. While great soldiers are represented in the House of Lords by the

Dukes of Marlborough and Wellington, the Marquis of Anglesey, Viscounts Hardinge, Wolseley and Kitchener, and Lords Napier of Magdala and Raglan, while great admirals are represented by Earl Nelson, the Earl of Effingham and Earl Howe, Viscounts Exmouth, St. Vincent, Bridport, and Torrington, and Lords Rodney and Vernon, the representatives of lawyers almost fill the benches of the Lords. Lord Thurlow's famous reply to the Duke of Grafton asserted: "The noble duke can not look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this House to his successful exertions in the profession to which I belong." The King himself is king of Scotland through his descent from Lord Chief Justice Bruce. The Dukes of Beaufort, Devonshire, Manchester, Newcastle, Norfolk, Portland, Northumberland, Rutland and St. Albans are all descended from English judges. Chief Justice Catlin was an ancestor of the Spencer, who married the Marlborough title. The Marquises of Abergavenny, Ailesbury, Bristol, Camden, Ripon and Townsend, the Earls of Aylesford, Bathurst, Bradford, Buckinghamshire, Cadogan, Cairns, Carlisle, Cottenham, Cowper, Crewe, Eldon, Egerton, Ellesmere, Fortescue, Guildford, Hardwicke, Harrowby, Leicester, Lonsdale, Macclesfield, Mansfield, Sandwich, Selborne, Shrewsbury, Suffolk, Stamford, Verulam, Westmoreland, Nottingham and Winchelsea, and Yarborough, represent names great in English law. Other titles among the barons, such as Abinger, Bolton, Brougham, Erskine, James of Hereford, Le Despencer, Mowbray and Segrave, Northington, Redesdale, Romilly, St. Leonards, Campbell, Tenterden, Walsingham, Thurlow, and many others, were gained by great lawyers.

The fable of the ancients, which school boys read in Ovid's Metamorphoses, divided the history of the world into a golden, a silver, a bronze and an iron age. The golden age "*sine lege fidem et rectum colebat.*" This is in a measure true of the common law. Its first age, without statutes, out of its own ample powers, gave a remedy for every wrong. There followed a silver age, "*auro deterior,*" when new remedies could be devised only by statute. Then

a bronze or plastic age, by fictions, bent old remedies to suit new conditions. Later, an iron age, harsh and rigid, owing to the jury system, left a large part of jurisprudence to the courts of chancery. The golden age ends with the death of Bracton; the silver age is that of the three Edwards; the bronze age covers the Lancastrian and Yorkist kings to the death of Littleton; the iron age ends with the Revolution of 1688. Then a period of improvement and reform, slowly feeling its way by statutes of jeofails to the great reforms of our century, began; the end of that great effort is now almost attained, and perhaps the golden age is about to return.[1]

I. The Golden Age of the Common Law: From the Norman Conquest to the Death of Bracton[2]

The period of the Norman kings is one of gradual growth. The Norman lawyers, building upon what they found, made no violent changes. The Conqueror, under the wise guidance of Lanfranc, made no attempt to change existing laws and customs. Beyond taking ecclesiastical matters out of the jurisdiction of the county court, and protecting his Norman followers by special laws and tribunals, his reign was occupied in establishing the king as the ultimate owner of the conquered land and in the division of the spoil. But even in that troubled time, one capable man rose to eminence as a lawyer. The Italian Lanfranc, Archbishop of Canterbury, learned in the civil law, by his study of Anglo-Saxon laws prevailed in the one great lawsuit of this reign. The Domes-

[1] [A Table of Regnal Years is prefixed to this volume. — Eds.]

[2] The authorities for this period, beside the well-known works of Pollock and Maitland, Foss, Lord Campbell, Stubbs, Hallam and the other historians, include Bigelow's Placita Anglo-Normannica, Freeman's William Rufus, Burke's Dormant and Extinct Peerages, Dugdale's Baronage, Maitland's Domesday, Pollock's King's Justice (12 Harv. L. Rev.), Pollock's King's Peace (13 Harv. L. Rev.), Foss' Memories of Westminster Hall, Hall's Court Life Under the Plantagenets, Mrs. Green's Henry II., Pulling's Order of the Coif, Beale's Introduction to his edition of Glanville, Maitland's Register of Writs (3 Harv. L. Rev.), Maitland's Introduction to Bracton's Note Book, Maitland's Bracton and Azo, Select Pleas of the Crown (Selden Society), Select Civil Pleas (Selden Society), and numerous sources of general history, such as William of Malmesbury, Matthew Paris, etc.

day Survey, which enumerated all the lands in England, and ascertained the status of each subject, and the ownership of the land with its burdens and the rents and the services due from tenants of the land, was probably superintended by this great lawyer.

William Rufus had for his chief minister a man whom the annalist calls "*invictus causidicus*," an ever successful pleader. This Ranulf Flambard was learned in the civil and the canon law, and is the first of that long line of trained lawyers, whose duty it was to fill the royal treasury. He worked out the legal principles of relief and wardship. Ecclesiastic though he was, he laid his hands upon the broad lands of the church. All church lands held of the king devolved, upon the death of bishop or abbot, according to Ranulf, upon the king as feudal lord. The great revenue to be derived from farming out these lands was an obvious temptation, but Flambard devised a further improvement. Since the bishop or abbot could not be inducted into office without the king's consent and the payment of a relief, the candidate for high clerical honors was compelled to wait a number of years before receiving his office and at the same time was compelled to pay an ample relief before he received investiture of the lands. It is needless to say that the monkish chroniclers have loaded Ranulf's memory with a mass of obloquy.

In Rufus' time an event occurred which every lawyer recalls with peculiar interest. The King contemplated a new palace at Westminster, but only that part of it which constitutes Westminster Hall was built. It is true that the Hall has been twice rebuilt, once in Henry III.'s reign, and again under Richard II., but the Hall itself, saving for its higher roof, its windows, and higher walls, is what it was when finished in 1099. In this Hall the courts of England were held for many centuries. As soon as the Court of Common Pleas was fixed *in certo loco*, it continuously sat there. Later the King's Bench took a portion of it. At one end of the Hall was fixed the marble seat and table of the Chancellor, where his court was held. Thus it happened that for centuries the courts of England were in plain sight of each other. When

Sir Thomas More was being inducted as chancellor under Henry VIII., he stopped in his progress to the marble chair and knelt to receive a blessing from his father, a judge sitting in the Common Pleas. There is but one other building in the world that offers such a flood of legal memories. The old Palais de Justice in Paris has been the scene of many a great legal controversy, but Westminster Hall has listened to the judgments of Pateshull and Raleigh and Hengham. Here Gascoigne, Fortescue, Brian, Littleton, Dyer, Coke and Bacon sat. Here Hale and Nottingham, Hardwicke and Mansfield did their work for jurisprudence. The great forensic contests of England, the arguments in the case of Ship-Money, the trial of the Seven Bishops, Erskine's perfect oratory in Hardy's case, and Brougham in the Queen's case, are among the memories that make this solid Norman edifice to lawyers the most interesting spot in England.

In the reign of Henry I., a man splendidly educated for that time, surnamed Beauclerk, the Scholar, we begin to see the growing interest in the law. Wearied of the oppressions of the Conqueror and Rufus, men looked back to the good old times of the Saxon. The King had married a princess of the Saxon royal house. Himself a usurper he looked to his Saxon subjects for support. They won for Stephen the Battle of the Standard against the Scotch, celebrated by Cedric in Ivanhoe. In the Saxon enthusiasm a large crop of Saxon laws appeared, some of them actual translations from old laws, some of them palpable forgeries. The King even promised to restore the old local courts of the Saxons; had he done so, we should have had no common law. It was by this time apparent that the king's court was supplanting the old tribunals. The great lawsuits, being among the magnates, necessarily came before the king's courts. That court was stronger than any other, and suitors instinctively would turn to it. The criminal jurisdiction of the king's court was growing. Its jurisdiction was extended to suitors in civil causes first as a matter of favor. The bishop had been taken out of the county court and given a separate jurisdiction in ecclesiastical matters, among which were numbered the administration of estates of decedents and matters of marriage

and divorce. Now under Henry I. began the practice of sending trained lawyers throughout the realm to take pleas of the crown and to hear civil causes. At the same time Roger of Salisbury, who was the legal adviser of Henry I., developed the exchequer portion of the king's court. A group of men, some of them trained lawyers, gathered in the exchequer tribunal. They did incidental justice in civil controversies and traveled the circuit. Indeed, Pulling in his "Order of the Coif" dates his first serjeant at law from 1117; but this must be a printer's error. Otherwise, Pulling's first serjeant is as wild a piece of history as Chief Justice Catlin's descent from Lucius Sergius Catiline.

Besides Roger of Salisbury we know of one very celebrated lawyer in this reign — a man then renowned in the law, named Alberic de Vere. He is described by William of Malmesbury as *causidicus* and *homo causarum varietatibus exercitatus*. Where he gained his legal education is not known. He was a son of one of the Conqueror's chief barons, the Count of Guynes, in Normandy. One of the chiefs of that house marched with Godfrey of Bouillon to the rescue of the Holy Sepulchre. The lists of the men who acted as judges in the king's courts show the names of many well-known Norman families during this reign. The educated lawyers were generally churchmen, yet the Norman barons had a natural taste for litigation. After a hundred years, scions of the great houses were to become the trained lawyers of the profession; but at this time the ecclesiastics did most of the technical legal work. They issued the writs from the chancery; they were needed to keep whatever records were kept. Alberic de Vere was not an ecclesiastic like Roger or Nigel of Salisbury, yet he was high in the confidence of Henry I., who granted to him and his heirs the dignity of Lord Great Chamberlain of England, — the only great office of state that by a regular course of inheritance has descended to its present holder.

When Henry I. died, the interregnum caused by the contest between Henry's daughter Matilda and his nephew Stephen covered the land with misgovernment and oppression. Roger of Salisbury's son, euphemistically called his nephew — and

it was by no means an uncommon thing for bishops to have sons in those days — became chancellor, but he soon fell under the displeasure of King Stephen, and in consequence the aged Bishop Roger and his family received the harshest treatment. The churchmen complained of the King's conduct, and a great council was called by the Bishop of Winchester to examine into the matter. King Stephen selected Alberic de Vere to represent him at the council. Alberic seems to have successfully defended the King, and either he or his son was rewarded with the earldom of Oxford.

Coke, following a saying of Fortescue, makes the quaint observation that "the blessing of Heaven specially descends upon the posterity of a great lawyer." Certainly the high position of the posterity of Alberic de Vere may be adduced as proof of the saying. Earls of Oxford of the house of Vere were great figures in English history until after the Revolution of 1688. The third earl was one of the barons who extorted Magna Charta from King John. The well-known seal of the Earl of Oxford is on the charter. The next earl, who had as a younger son been brought up as a lawyer, was head of the Common Bench under Henry III. The seventh earl was in high command at Crecy under Edward III. and at Poitiers under the Black Prince. The ninth earl was a favorite of Richard II. and became Marquis of Dublin and Duke of Ireland. Although his honors were forfeited by Parliament, his uncle, another Alberic (or Aubrey) regained the earldom and the estates under Henry IV. The thirteenth earl was the chief of the party of the Red Rose and during the Yorkist reigns wandered over the continent. Scott's romance, Anne of Geierstein, tells his story while in exile. He came back with Henry VII. and led the Lancastrians at the battle of Bosworth. The seventeenth earl, a courtier and poet, at the court of Elizabeth, did not disdain to introduce gloves and perfumes into England. When the eighteenth earl died without issue, a noted lawsuit ensued over the Oxford peerage; the judgment of Chief Justice Crewe[1] is an oft quoted specimen of judicial eloquence:

[1] W. Jones Rep. 101.

"I have laboured to make a covenant with myself, that affection may not press upon judgment; for I suppose there is no man, that hath any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it. And yet, Time hath his revolutions. There must be a period and an end of all temporal things, — *finis rerum*, — an end of names and dignities and whatsoever is terrene; and why not of De Vere? For, where is Bohun? Where's Mowbray? Where's Mortimer? Nay, which is more, and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality."

But the end of the house was not yet. The nineteenth earl died on the continent while fighting for Protestantism. The twentieth earl, "the noblest subject in England," man of loose morals though he was, was too much a Protestant to follow James II. in his attempt to restore Roman Catholicism. When this twentieth earl died, the male posterity of Aubrey de Vere was extinct; but his daughter and heiress, Diana, was married to Nell Gwynn's son by Charles II., the Duke of St. Albans. This son had been given the name of Beauclerk, and until recently the name of this family was de Vere Beauclerk. Topham and Lady Di Beauclerk will be remembered as friends of Dr. Johnson. But the present holder of the title seems to wish to forget his name Beauclerk and is well content to be simply de Vere. Heraldry, which is called "the short-hand of history," shows this descent in the coat of arms of the St. Albans family; in the first and fourth quarters are the royal arms, debruised by a baton sinister to show illegitimate descent, while in the second and third quarters is the ancient cognizance of the Earls of Oxford, indicating a marriage with the heiress of the Veres.

Another stout judicial baron of this time is Milo of Gloucester, whose estates enriched in after times the house of Bohun. His exploit in marching to the relief of the widow of Richard de Clare, besieged in her castle by the Welsh after the murder of her husband, may have furnished Sir Walter Scott with his story of "The Betrothed,"

where he tells of the succor of the Lady Eveline Berenger in the Garde Doloreuse. In fact, if we may judge from Ivanhoe, Scott must have taken many of his names from the judicial barons. Fronteboeuf, Grantmesnil and Malvoisin are names on the rolls of the courts. Segrave, a noted lawyer in Henry III.'s reign, was, like Ivanhoe, a Saxon who attained high position.

In the reign of Henry II., who succeeded Stephen, we begin to get a glimpse of an organized legal profession. This king was a great organizer and lawyer. His statutes of novel disseisin and mort dancester, his assize *utrum* and of last presentment were drawn by lawyers. In his reign the royal inquisition took a great step toward the modern jury. All litigation about land was thrown into the king's courts. Many new writs and forms of action were invented. A fixed court made up of trained lawyers sat at Westminster. At the same time the country was divided into circuits, itinerant justices traveled the circuit and adapted the county court to the regular progresses of the king's judges. The grand jury was now brought into form, and all the important criminal business came before the royal justices.

In the king's court Henry himself often sat. He is surrounded by his council, but every now and then he retires to consult with a special body. The judges take sides and on one occasion the King orders Geoffrey Ridel, who seems too zealous for one party, from the room. The King peruses the deeds and charters, and when certain charters are produced we hear him swearing that "by God's eyes" they cost him dearly enough. On another occasion two charters of Edward the Confessor, wholly contradictory, are produced. The King, nonplussed, says: "I don't know what to say, except that here is a pitched battle between deeds."

Now began the keeping upon parchment of the records of cases. The best picture of a lawsuit in this reign is the extraordinary litigation of Richard de Anesty. He claimed certain lands as heir of his uncle. An illegitimate daughter of the uncle was in possession. The question was as to her legitimacy and that depended for solution upon the issue

of marriage or no marriage. Richard begins by sending to the King in Normandy for a writ of mort dancester. Then the issue of marriage must be directed by writ from the king's court to the ecclesiastical court. The war in France intervenes, and Richard follows the King to France for a writ to order the court Christian to proceed. Three times he appeared in the latter court. Then he appealed from that court to the Pope, and for this he needed the King's license. Finally the Pope decided in his favor. Thereupon Richard came back and followed the King until two justices were sent to hear his case, and at last he had judgment. Everywhere he had lawyers in his pay. His friends and advocates, among them Glanville, appeared for him in the secular court. In the ecclesiastical courts and before the Pope he hired lawyers, who were canonists, some of them learned Italians. After many years he obtained his uncle's lands; but by that time, as he pathetically writes, he had become a bankrupt.

There are noted names among the king's judges in this reign. Richard Lucy, Henry of Essex, William Basset, and Reginald Warenne were among the judges who went the circuit. Roger Bigot and Walter Map, the satirist, were of the itinerant judges. Ranulf Glanville and the three famous clerks, Richard of Ilchester, John of Oxford, and Geoffrey Ridel, sat at Westminster. The zeal with which the Norman barons attended to their judicial duties is amazing. The list of judges is almost an index of the great baronage. Marshalls, Warennes, Bigots, Bohuns, Bassets, Lucys, Laceys, Arundels, Fitz Herveys, Mowbrays, Ardens, Bruces, de Burghs, Beaumonts, Beauchamps, Cantilupes, Cliffords, Clintons, Cobbehams, de Grays, de Spensers, Fitz Alans, de Clares, Berkeleys, Marmions, de Quinceys, Sackvilles and Zouches are all among the itinerant judges.

The lawyers of this reign include both priests and laymen. Here begin the serjeants at law. Of the thirteen whom Pulling ascribes to this reign, are Geoffrey Ridel and Hugh Murdac, both priests, and such names as Reginald Warenne, William Fitz Stephen, William Basset and Ranulf Glanville, all laymen. It is a matter worthy of notice that the date at

which each of the thirteen serjeants received the degrees of the coif is the date at which he began service as a judge. It is probable that the "*status et gradus servientis ad legem*," in the writ calling a serjeant, was merely a nomination of the man to be a king's justice. The matter is too obscure to admit of positive statement. But there must have been some reason for the rule that obtained for so many centuries, that no man could become a judge until he had been called to the degree of serjeant.

The first name among these lawyers is Glanville's. Whether he wrote our first law book, which is called Glanville, is sharply debated. But he was at any rate a great judge with considerable legal learning. He probably received his legal training in the exchequer. But he was no less a warrior. As sheriff of Yorkshire he gathered an army and defeated the Scottish King and took him prisoner. King Henry entrusted to Glanville the custody of his wife, Elinor, whom he guarded for sixteen years. When in 1179 most of the King's justices were removed, Glanville was continued in office and took his place in the court at Westminster. In the next year he became Chief Justiciar. One slanderous story of his judicial conduct has come down to us, but it is no more than idle gossip. Under Richard the Lion Hearted, Glanville took the vow of a crusader and preceded King Richard to the Holy Land, where he died under the walls of Acre.

It may be that Glanville did not write the book that passes under his name. Perhaps Hubert Walter, his nephew, a learned civil lawyer, who became Archbishop of Canterbury, put it together. It shows traces of the Roman influence, and Glanville was no partisan of Rome. There is on record a writ of prohibition issued by Glanville against the Abbot of Battle. On the hearing Glanville said to the priests: "You monks turn your eyes to Rome alone, and Rome will one day destroy you." The prophecy came true after three hundred years.

Far more noted in this reign is the name of Becket. He was a trained lawyer educated in the canon and the civil law at Paris. He may very well have devised some of

Henry's statutes upon legal procedure, while he was chancellor. In the struggle that went on between the warring jurisdictions of courts ecclesiastical and secular courts, he boldly espoused the clerical side. The Chief Justiciar before Glanville, Richard Lucy, drew up the constitutions of Clarendon, which defined the jurisdiction of the king's courts over priests, and brought on the struggle between Henry II. and Becket. Lucy was twice excommunicated by Becket, but he does not appear to have been seriously affected; yet, singularly enough, at the end of his life, he founded an abbey and assuming the cowl of a monk retired to the cloister and passed his remaining years in the works of piety.

The King, astute lawyer that he was, fought the Archbishop with the very best weapons. The chronicler records that Henry II. kept in his pay a gang of "bellowing legists" (ecclesiastical lawyers) whom he "turned loose" whenever he was displeased at an Episcopal election. In his controversy with Becket, Henry used the expert clerks, John of Oxford, Richard of Ilchester, and Geoffrey Ridel. John received as his reward the see of Norwich, Geoffrey was made bishop of Ely. Both of them, priests though they were, admirably served their royal client. They represented the King upon appeals to the Pope. Becket used a weapon against them that would hardly be in the power of a modern chancellor. Both lawyers and judges were excommunicated by the sainted archbishop. But the curse of Heaven and the reprobation of the faithful did not avail. At last, the murder of Becket ended the controversy, and while the victory remained with the King, it gave to Becket the peculiar honor of being one of the only two English chancellors who are numbered as saints in the canon of the church.

When the Conqueror took the bishop out of the county court and established church tribunals for ecclesiastics (a step which was taken at the demand of the priests), it could not have been foreseen what a tremendous influence this regulation would exert upon the history of English law. Yet the struggle which soon began between these warring jurisdic-

tions is probably the real reason why the Roman law exerted so little influence upon the common law or its procedure. At Oxford there was a school of the civil and the canon law. Ecclesiastics educated under that system were constantly filling high judicial positions, yet these men were all faithful to the king's courts and hostile to the ecclesiastical procedure. Practically all the trained lawyers were priests, yet they uniformly upheld the English law. In after times the canon law was to mold the procedure in the chancery courts; but the secular courts were not affected. No doubt the rational conceptions learned by these ecclesiastical lawyers from the civil law had no little effect upon the substance of their decisions; but the Roman law never affected the secular courts' procedure.

An interesting figure among clerical judges is that noted Abbot Samson of St. Edmund's Bury, who was made one of Henry II.'s justices. The priestly chronicler records with pride that a rich suitor cursed a court where neither gold nor silver could confound an adversary. The same chronicler tells us that Osbert Fitz-Hervey, a serjeant at law, the ancestor of the Marquises of Bristol, who was twenty-five years a judge at Westminster, said: "That abbot is a shrewd fellow; if he goes on as he begins, he will cut out every lawyer of us." In a case where the Abbot was a party, Jocelyn says that five of the assize (jury) came to the Abbot to learn how they should decide, meaning to receive money, but the Abbot would promise them nothing, and told them to decide according to their consciences. So they went away in great wrath and found a verdict against the abbey. The juror who regards his place as an opportunity for pecuniary profit seems to be as old as the common law.

The intractability of the academic theorist in the person of Walter Map, the celebrated writer, crops out in his judicial experience. He once went the circuit, but was not called upon the second time, since he insisted on excepting from his oath to do justice to all men, "Jews and white monks," both of which classes he detested. So he went back to his more congenial work of denouncing the whole body

of the clergy, from Pope to hedge priest, as all of them busy in the chase for gain. But while that work is forgotten, we still are delighted by his tales of King Arthur and his knights and table round.

Under Richard and John, sons of Henry II., the regular enrolled records of the courts begin. Soon two sets of records are developed, those of the regular tribunal sitting at Westminster and those made in the presence of the king. The first are the records of what became the court of Common Pleas, the second of what became the King's Bench. In John's reign and that of his son Henry III. the learned lay lawyer appears in increasing numbers. First among them is Geoffrey Fitz Peter, who appears in the famous scene in the first act of King John, where the Faulconbridge inheritance is in question. Shakespeare cites the oldest English case on the orthodox rule of the English law, *pater quem nuptiae demonstrant*. Chief Justice Hengham in the next reign cites this case in the Year Book. It is needless to say that if Shakespeare had had the legal knowledge which has been by some lawyers ascribed to him, he could never have made the flagrant errors as to procedure which are found in King John.

Geoffrey Fitz Peter was the son of an itinerant justice of Henry II.'s reign, who had well upheld the dignity of civil justice against the church tribunals. A certain canon of Bedford was convicted of manslaughter in a bishop's court, and was sentenced merely to pay damages to the relatives of the deceased. In open court the judge denounced the canon as a murderer; the priest retorted with insulting words, whereupon the King ordered the priest indicted. Perhaps at this time contempts of court were not punished by the court itself in a summary way. Geoffrey Fitz Peter inherited from his father, the judge, large possessions. With his wife he obtained the title and part of the estates of the Mandeville Earls of Essex. He was a learned lawyer, if we may believe Matthew Paris. He made a ruling which probably had the most far-reaching effect of any judicial decision. The last Mandeville earl, when he found that death was approaching, attempted to atone for a somewhat ora-

gious life by devising a large portion of his lands to the church. Fitz Peter as the husband of one of the co-heiresses was directly interested in the case. Yet he is said to have ruled that a will of lands was invalid. From that day to the passage of the Statute of Wills, a devise of lands was impossible, except by virtue of some local custom. And so it is to-day that the realty devolves upon the heir, the personalty upon the executor. Fitz Peter served as a justice itinerant; he was a serjeant at law and upon John's accession became Chief Justiciar. He held the place of head of the law for fifteen years, and with Hubert Walter, the chancellor, was able to keep King John under some restraint. The King joyfully exclaimed when he heard of his death: "He has gone to join Hubert Walter in hell. Now, by the feet of God, I am, for the first time, king and lord of England." John at once entered upon the course that brought him into conflict with his baronage and ended with Magna Charta.

The long reign of John's son, Henry III., may fairly be claimed as the golden age of the common law. The regular succession of the judges is now settled. John had promised in Magna Charta that he would appoint as judges only those men who knew the law. The judges whom the rolls show as sitting at Westminster establish the character of the court. The judges are promoted in regular order. The head of the court during the first years of this reign was William, Earl of Arundel; then for two years it is Robert de Vere, Earl of Oxford; then for seven years Pateshull, who had been a puisne, was head of the court. He is succeeded by Multon, who served for a long term. Raleigh, the second man in the court, followed Multon. In regular order follow Robert de Lexington, Thurkelby, Henry de Bath, Preston, and Littlebury. Thus it appears that the character of this court, a tribunal filled with trained lawyers, has become fully established.

The Earl of Arundel, who was Henry III.'s Chief Justiciar, belongs to a legal family whose successive marriages with other great legal families form a curious study in history. In the days of Henry I. a certain William de Albini was the son of the king's butler or pincerna. He married

Queen Adeliza, the young widow of Henry I., and with her obtained the castle and earldom of Arundel, the only earldom by tenure. The heiress of the de Albinis in the time of Henry II. married the son of John Fitz Alan, a judge in the king's court, and thus the earldom and castle of Arundel passed to the Fitz Alans. Later, in the time of Edward III., the then Earl of Arundel by marriage acquired the title of Earl of Surrey and the estates of the Norman family of Warenne, whose first chief was the companion of the Conqueror and one of his chief justiciars. The great Earl of Arundel, who went to the block in Richard II.'s time, was the head of this mighty house. Still later the heiress of the Arundels married the Howard Duke of Norfolk. Singularly enough the Howards were descended from William Howard, a celebrated English serjeant at law, who, when the Year Books open, was in large practice in the courts. He rose to the bench (though he was not, as his tombstone records, a chief justice). His descendant, Sir Robert Howard, married the heiress of the Mowbrays, who held the Earl Marshalship of England hereditary in the Marshals. The sons of the great regent William Marshal, Earl of Pembroke, dying without male heirs, the dignity passed by marriage to the Bigots, Earls of Norfolk. From them by a special deed of the lands under the then new statute *De Donis*, these estates and dignities became vested in Edward I.'s son, Thomas of Brotherton. His heiress married a Mowbray; the heiress of the Mowbrays married Sir Robert Howard; and when the Howards obtained by marriage the titles and estates of the Arundel family in the reign of Elizabeth, all these honors of Warennes, de Albinis, Fitz Alans, Plantagenets, and Mowbrays had become united in the Howards. Perhaps we may credit this remarkable acquisitiveness through judicious marriages to the legal strain in the Fitz Alan Howards. Not only the Duke of Norfolk, premier peer of England, but the Earl of Suffolk and Berkshire, the Earl of Effingham, the Earl of Carlisle, and Lords Howard de Walden and Howard of Glossop, thus represent to-day the serjeant at law of Edward I.'s reign.

To return to the judges of Henry III.'s reign. Two of

them, Pateshull and Raleigh, have been canonized by Bracton's treatise. Bracton cites these two judges' decisions almost as his sole authority. Other well-known judges of the time he notices merely to remark that they committed error, — not by any means a failing confined to mediæval judges. The greatest of these lawyers, Martin de Pateshull, was a priest, — as was indeed Raleigh also, and Bracton himself. Pateshull's origin was humble, but he became a justice itinerant in John's reign and for many years he vigorously performed his duties. One of his brother justices in a letter to the King plaintively begs to be excused from going the York circuit, "for," he says, "the said Martin is strong and in his labor so sedulous and practiced that all his fellows, especially William Raleigh, and the writer, are overpowered by the work of Pateshull, who labors every day from sunrise until night." The Raleigh just spoken of was Bracton's master. He managed to survive Pateshull, and succeeded him as head of the court. He first served as Pateshull's clerk; his high character is shown by his election over the King's uncle to the rich see of Winchester. Raleigh was ingenious in devising many new writs, and his name is of frequent occurrence in the Register of Writs.

The bravery of these judges in the performance of their duties is shown by a characteristic story. Fawkes de Breauté, a powerful baron and noted swashbuckler of the time, had so oppressed his neighbors that they proceeded against him in the king's court. Three judges, Pateshull, Multon and Braybroc, went up from London to try the cases at Dunstable. Thirty verdicts were found against Fawkes and large fines imposed in all the cases. He was so incensed that he sent his followers under his brother's leadership to seize the judges. He captured and imprisoned one of the court; but this conduct called out the royal power, then wielded by Hubert de Burgh. The brother and thirty of Fawkes' retainers were hanged, but he himself escaped to lifelong exile.

Other judges like Hubert de Burgh, Thomas de Multon, Hugh Bigot, Earl of Norfolk, Humphrey de Bohun, Earl of Hereford, must be passed over. But Robert de Bruce

deserves more than a passing mention. The first Robert de Bruce had come over with the Conqueror and had received ninety-four lordships as his share of the spoil. A cadet of the house, a grandson of the first Robert, had gone to the court of the Scottish King and had married the heiress of the lordship of Annandale. The fourth Robert in Scotland was Robert the Noble, lord of Annandale, the husband of a daughter of Prince David (the Knight of the Leopard in Scott's Talisman).

The fifth Robert, a son of the princess, though a Scotch magnate, was educated for the law at Oxford. He practiced in Westminster Hall. He became Chief Justice and held the office until Henry III.'s death. Edward I. passed him by, and he retired in disgust to Scotland. But when the daughter of Alexander III. of Scotland died, the heirs to the throne were the descendants of Prince David's daughters. This Robert, the Chief Justice, preferred his claim. He argued his own case before Edward I., the referee, but the decision on good legal grounds was given for John Balliol. But Robert's grandson, another Robert, the national hero of Scotland, made good his title at Bannockburn.

Other judges of this reign are interesting figures, — like the Percy, whose family is the one so celebrated in ballad and story as the Percys of Northumberland, or like Gilbert Talbot, who married a Welsh princess, and whose descendant was the stout warrior John Talbot, the first of the Earls of Shrewsbury, among whose descendants appeared Lord Chancellor Talbot in the reign of George II. But the real lawyer of this reign is the man whom we know as Bracton. His book on the laws and customs of England is the finest production of the golden age of the common law. Bracton's father was vicar of the church at Bratton, of which Raleigh was the rector. The rector took an interest in the boy. There is a tradition that he put him to school at Oxford. When Raleigh became a judge, he made Bracton a clerk. In due time Bracton was promoted to a justiceship in eyre, when he became in 1245 a serjeant at law. From 1245 to 1265 he traveled the circuit, but part of that period he sat at Westminster with Henry de Bath, Thurkelby and Preston.

During this time he made a large collection of precedents (known as his Note-Book) out of the decisions of Pateshull and Raleigh. A fortunate inference by Vinogradoff, confirmed by the lamented Maitland, has identified this collection of precedents with a manuscript in the British Museum, and the work of Bracton, long considered a mere attempt to apply the civil law to our common law, has been shown to be a careful statement of the decisions of the notable judges, who preceded him.

That the general conceptions, the arrangement, and the classification of Bracton's work should have been taken from a writer on the civil law is not at all strange. There was no other source to consult. The Roman and the canon law had been taught by Vacarius in England, and he had written a book for his students. Manuscripts of the Roman law no doubt were brought to England. The flourishing school "*utriusque juris*" at Oxford must have had many scholars. Ricardus Anglicus, an Englishman, gained celebrity in the law in Italy. Italian lawyers came to England, and the King had in his service the renowned Hostiensis. Simon Normannus, Odo de Kilkenny, Roger de Cantilupe, and Alexander Saecularis belonged to this band of "Romish footed" legists of the King. English students went to Bologna and studied under Azo, "lord of all the lords of law." Azo's book Bracton had constantly with him as he was writing his "De Legibus et Consuetudinibus Angliae." Yet the substance of Bracton's book is a careful statement of the actual law administered by the courts. A priest himself, he everywhere shows his loyalty to the secular tribunals. Like Henry de Bath, he was dismissed from the king's court on account of his leanings toward the party of the barons; yet he continued a justice in eyre. The barons at one time sent him on a judicial errand to redress grievances. Perhaps Bracton had felt the rough edge of the King's tongue. We are told that to William of York, a distinguished predecessor of Bracton, the King said: "I raised you from the depths, you were the scribbler of my writs, a justice and a hireling." Bracton well knew the great patriot Simon de Montfort, and no doubt sympathized with his cause. We know not

what he was doing when the Barons' War was raging, but it is probable that he was quietly attending to his judicial duties.

In Bracton's book we find that the rules of law are fixed and settled. They bind even the king. The sympathies of Bracton with the party of freedom and progress here and there appear. "While the king does justice," says Bracton, "he is the vicegerent of the Eternal King, but when he declines to injustice, he is the minister of the devil." He had a noble ideal of the office of the lawyer and the judge. Using the phrase of the Digest he says of his profession, *namque justitiam colimus et sacra jura ministramus*, "We are the ministers at the altar of justice and feed its sacred flame." [1]

The greatness of Bracton's work is best proven by the reflection that five centuries were to pass away before another English lawyer, in the person of Blackstone, was to appear, competent to write a treatise upon the whole subject of English law. Fortescue's De Laudibus is a panegyric, Littleton's Tenures covers a small field, Coke's Institutes are so poorly arranged and badly written as to be unfit to rank with the clear, precise, and flowing language of Bracton or of Blackstone.

The long period from the Conquest in 1066 to Bracton's death in 1267 had been a period of marvelous growth. It began with a varied assortment of local courts lacking settled rules, and ends with a highly organized system of courts administering a settled and rational system of law. It begins with a barbarous procedure, and ends with a rationalized method of ascertaining the facts. In the criminal law it begins with a system where the criminal makes redress to the injured party or his kin, it ends in a direct punishment of crime for the benefit of the whole society. Succeeding ages have merely amplified and glossed the distinctive rules of Bracton. The common law by its very form was made capable of indefinite expansion.

In addition, the general progression of the justices, hold-

[1] The above free translation is more than a reminiscence of Coleridge's lines.

ing the assizes through the different counties, distributed the royal justice throughout the country. The different local tribunals were subjected to a close scrutiny. In fact, the holding of an eyre was regarded by the inhabitants rather as an oppressive thing. The justices inquired into all the affairs of the counties and into all the acts of the local tribunals, into the enforcement of the criminal law and into the judgments rendered in civil causes. The numerous fines imposed made royal justice the source of an imposing revenue.

About this time the clergy were forbidden by the Pope to study the temporal law, and were inhibited from sitting in lay tribunals. The lawyer ecclesiastics, like Raleigh, Pateshull, William of York, Robert de Lexington, and Bracton, were soon to pass away. While ecclesiastical chancellors remained for centuries, the common law was about to become the heritage of laymen. The lay lawyers are learned men. Fitz Peter, Segrave, Braybroc, Multon and Thurkelby are all cases in point. But the most noticeable thing is that a class of advocates, who practice in the courts, has grown up, and that the judges are uniformly selected from among the profession. The serjeants at law and the apprentices at law now form a distinct body of men, devoting themselves solely to the practice. This separate class needed but schools of law to make it a closed body of men, admission to which required special attainments. This want was soon to be supplied by the Inns of Court, where the common law was taught as at a university. Everywhere the need of retaining good lawyers was felt. This is enforced by the judges. In one of the first Year Books, the reporter makes the Chief Justice say: "B loses his money because he hadn't a good lawyer." A few remarks of this sort from the bench would soon prevent an appearance in court by any one except a trained lawyer.

The division of the profession into barristers and attorneys had already appeared — a distinction that endures to our own day in England.[1] The barrister appears only for

[1] The origin of this distinction, taking us back to the more primitive Germanic ideas and the contrast between an *attornatus* or *anwalt* and a

a client already present in court by himself or by an attorney. The effect of this division in the profession may be indicated in a later place. At present it is enough to note the influence that is bound to be exerted by the body of professional lawyers. Their judgment upon legal matters is sure to be of controlling importance, and their influence upon the selection of judges has invariably caused in England the promotion to judgeships of men who have proved their ability by the attainment of leadership in the practice. The great advantage of appointive judges over elective is that the influence of professional opinion can be more easily brought to bear upon the appointing power than upon an untutored electorate.

But the growing power of Parliament was making itself felt upon the growth of the law. Perhaps the conservatism of the profession assisted. It was now no longer possible to devise new writs to meet new conditions and to offer new remedies. Parliament was insisting that the grant of new writs and the creation of new remedies was the making of new laws, a power which belonged to the nation's representatives in Parliament. Thus the growth of the law was hindered by the growth of representative government. The English law is now ready to enter upon its second period, which began with the legislative activity of Edward I.'s reign.

The peculiar feature of the development of the common law is that its moving force did not come from the mass of the people, but was imposed upon a population constantly demanding a return to old and barbarous methods. The universal jurisdiction of the king's courts, the most valuable institution in the history of the law, was looked upon with the greatest jealousy. The extinction of the old ordeals — a measure which began with the sneers of William Rufus and was finished under John — was not demanded by

vorsprecher, causidicus, or *conteur,* has been once for all set forth in Professor Heinrich Brunner's essay on "*Die Zulässigkeit der Anwaltschaft im französischen, normannischen, and englischen Rechte des Mittelalters,*" first printed in the *Zeitschrift für vergleichende Rechtswissenschaft*, I, 321, and afterwards abbreviated in § 100 of his *Deutsche Rechtsgeschichte* (1892, vol. II).

any large portion of the nation. The palladium of our liberties, that jury which grew out of the royal inquisition, was wholly foreign to the English race, and was imposed upon the nation by the Norman and Angevin kings. The grand jury in its inception was to most of the people little better than an engine of royal oppression.

The Norman baronage represents the element of power among the makers of this jurisprudence. In spite of individual exceptions who were cruel and oppressive, the mass of the Normans insisted upon law and order. They demanded men learned in the law for judges, and insisted that the judges should be independent of royal dictation. They asked for their own rights, but in Magna Charta insisted upon the rights of their humblest followers. In the years when the baronage was fighting John or Henry III., when civil war was distracting the land, practically the same judges went on holding court at Westminster, uninfluenced by the varying fortunes of barons or of king. Many a tale has been told to the discredit of the Normans; the *jus primae noctis* superstition is still an article of faith. But the legal historian knows that English liberty and law, even representative government, was the work of the Norman. William, Earl of Pembroke, well answered the king in the spirit of the Norman lawyer: "Nor would it be for the king's honor that I should submit to his will against reason, whereby I should rather do wrong to him and to that justice, which he is bound to administer towards his people; and I should give an ill example to all men in deserting justice and right in compliance with his mistaken will. For this would show that I loved my worldly wealth better than justice." It was not until the Norman baronage was broken by the wars of the Roses that England was ready to submit to the tyranny of the Yorkist and Tudor sovereigns — a tyranny that found its support in the mass of the nation. And when the struggle was resumed against the Stuart kings, the words of Bracton and of William of Pembroke were eagerly cited to prove that the king himself was not above the law of the land.

II. The Silver Age of the Common Law: From the Accession of Edward I. to the Death of Edward III.[1]

The succession of Edward I. in 1272 was practically contemporaneous with Bracton's death in 1268. A dictum of Sir William Herle, Chief Justice under Edward III. (delivered from the bench), asserts that, "he (Edward I.) was the wisest king that ever was." Hale and Blackstone have repeated this language, and have called him the English Justinian. But Edward was no codifier or founder of legal institutions. He simply had the singular good judgment always to keep at hand the best legal advice, and to follow it. He had constantly by his side a very great Italian lawyer, Francis of Accursii. His closest friend was his chancellor, the English lawyer, Robert Burnel.[2] The leading advocates of the bar were kept in his service. Burnel drew the code of laws called the Statute of Wales, which projected the English law over Wales. Chief Justice Hengham (whom Coke calls Ingham) drew the Statute De Donis and the provision that created the bill of exceptions. Other noted advocates like Inge, Lowther, and Cave drew the other well-known statutes, such as Quia Emptores, Coroners, Merchants, etc., which supplied the deficiencies of the existing law and procedure.

During his reign the reports of cases, called Year Books, open. There was for centuries a tradition that the Year Books were official. Plowden guardedly says that he had heard that four reporters were originally appointed by the king. Bacon is somewhat more positive. Coke swallows the

[1] General references for this period: The Year Books of Horwood and of Pike; Maitland's Year Books of Edward II, Selden Society; the Liber Assisarum; Maitland's Conveyancer in the Thirteenth Century; Select Pleas in Manorial Courts (Selden Society); Placita de Quo Warranto; Mirror of Magistrates (Selden Society); Thayer's Preliminary Treatise on Evidence; Ames' History of Assumpsit (3 Harv. L. Rev.); Maitland's Register of Writs (3 Harv. L. Rev.); Baldwin's Introduction to his edition of Britton; Fleta; Burke's Dormant and Extinct Peerages; Jenks' Edward I; Pike's History of Crime; the works of Foss, Campbell and Stubbs; Reeves' History of English Law is reliable only in regard to the statute book.

[2] The last English Papal bishop who left a family of acknowledged children.

tradition entire, and says that "four discreet and learned professors of the law" were appointed by the king. He even asserts that they were "grave and sad men." Blackstone knows all about them, who they were, how they were paid, and how often the reports were published. But this is simply a growing legal myth. The reports show that they were not official. The reporter chooses among the cases as he pleases. Statements of well-known counsel are inserted as authority. The rulings of the judges are frankly criticized. One decision is said to have been "for the King's profit rather than in accordance with law." In another place the reporter contemptuously says of a judge's dictum: "This is nothing to the purpose." Even the dicta of Chief Justice Hengham are condemned as wrong. Of one ruling the reporter says that the court held the contrary at the Michaelmas term (this practice the courts have continued until the present day). The reporter makes certain judges say that a decision cited was obtained by favor and therefore was not authority. Finally, the reporter nicknames a precipitate judge, Hervey the Hasty. It is, of course, ridiculous to call such reports official, but they are all the more valuable.

The Year Books show us the legal profession in full bloom. The leaders of the bar are the serjeants, but they have not as yet a monopoly of the Common Pleas practice. Other counsel appear in the reports. There is the body of students of law, attending upon the courts; they are sometimes referred to by the judges. The leaders of the bar are few in number, but the weight of professional opinion is apparent. The reporter does not hesitate to say that the opinion of the serjeants against any decision is sure proof that it is erroneous.

The very fact that the Year Books appear shows the influence of professional opinion. The dry Latin records of the cases were sufficient for Bracton, but now there was a demand for the many things which never got on the record, — the arguments of counsel, the remarks of the judges during argument, the skilful plea of the one lawyer, the

adroit shift of the other, in fact, the whole picture of the lawsuit as it progressed.

These Year Books were written in Norman French, the language of the courts and lawyers. One of the manuscripts shows us what was probably a lawyer's library in the early thirteen hundreds. Besides the reports of cases, it contains a number of statutes of Edward I. and Edward II., Bracton's treatise, another treatise on quashing writs, another on the duties of justices, another on pleas of the crown, Metingham's work on Essoins, and Hengham's treatise called Magnum and Parvum. These works, with Britton and the Register of Writs, would be an ample legal library; and all these books could be tied together in one manuscript volume.

The influence of the profession is apparent in the legislative activity of the opening years of Edward I. The statutes then passed were all remedial. Wherever a case was unprovided for, wherever a remedy was defective, wherever the law seemed insufficient, the existing law was supplemented by statutes. Take the statute creating the bill of exceptions. It enjoined upon the trial judge the duty of sealing a bill of exceptions tendered to any of his rulings, and made the bill a part of the record, which could be examined upon error. We know, without any proof of the fact, that this statute was procured by professional opinion. It brought all rulings to the supreme test of an appellate tribunal. Henceforth there could be but one rule of law for all Englishmen. The fact that these statutes, such as Westminster II. and Westminster III., are still law in almost every state in this Union, is the best proof of the sagacity of those long forgotten lawyers of Edward's reign. Nowhere is better shown the wise conservatism of the true lawyer, whose instinct is not to commit waste upon the inheritance, but to repair the splendid edifice of which he is but the life tenant.

Still another indication of the growing influence of the profession is given by the impeachment of all the judges before Parliament in the year 1289. Some of the judges impeached bore honored names in the profession. Ralph de Hengham, Chief Justice of the King's Bench, upon trivial charges was fined in a small sum, dismissed from office, and

not reinstated until ten years had passed. Weyland, Chief Justice of the Common Bench, after a prosperous career as a lawyer and a long service as judge, was found guilty of heinous offences and abjured the realm. But with lawyer-like skill he had made his wife and children co-foeffees of several of his manors, which were not forfeited. Other judges were fined in large amounts ranging from 4,000 to 2,000 marks, — immense sums, when we reflect that a Chief Justice's salary was then but forty pounds. Lovetot, Rochester, and Sadington are not heard of again. Boyland busied himself in building a splendid mansion and left a large fortune. Hopton and Saham returned to the practice. It will be seen that only after a bitter experience did England learn the necessity of paying large salaries to judges.

Two judges were "faithful found among the faithless," — Elias de Beckingham and John de Metingham. The latter was promoted to the headship of the common bench. There he presided for twelve years. His memory is kept alive by the prayer directed to be made at Cambridge *pro animo Domini* John de Metingham, as one of the benefactors of the University. He was a learned and just judge. His treatise on Essoins was a valued law book. He in one of his opinions cites Porphyrius to a definition of surplusage, as something "which may be present or absent without detriment to the subject." Once he ruled against the opinion of all the serjeants, putting his decision on the ground of convenience. In another case he ruled in Mutford's favor, and the gratified counsel burst forth with a quotation from Holy Writ: "Blessed is the womb that bare thee." In another case he patiently listened to many objections to a verdict and then dryly said: "Now it is our turn," and made short work of the objections. A counsel, not a serjeant, who had pleaded badly and lost his client's case, he addresses pityingly as "My poor friend," and explains to him his hopeless error. Metingham in another case thought it no objection to a verdict that the prevailing party had entertained the jury at a tavern. We are reminded that the jury has hardly as yet attained a judicial function.

Hengham came back to the bench as the successor of

Metingham. He was also a legal author. His treatise was a work on the method of conducting actions, divided into Magnum and Parvum. His predecessor in the King's Bench, Thornton, had written an abridgment of Bracton. Britton and Fleta belong very close to this period, and it is plain that there was a demand for law books. Hengham is a great authority on writs, and issues instructions to the clerks from the bench. He sometimes delivers long dicta, but the reporter adds in one case that Hengham is wrong. He was firm with the lawyers. In one case he said to Friskeney and his associates: "We forbid you to speak further of that averment on pain of suspension," and, adds the reporter, "they obeyed." Sometimes Hengham lost his judicial poise, as when he says to pertinacious counsel: "Leave off your noise, and deliver yourself from this account." One of his rebukes is on a much higher plane. To a lawyer who offered a plausible but unsound argument Hengham said: "That is a sophistry, and this place is designed for truth."

But the greatest character on the bench is William de Bereford, who succeeded Hengham as Chief Justice of the Common Bench. He served thirty-four years as a judge. We can sit in court and hear Bereford's oaths, "By God" and "By Saint Peter." He says to an absurd plea: "In God's name, now, this is good!" One day he was sitting with Mutford and Stonor, associate judges. Stonor held a lively debate with counsel. Mutford then said: "Some of you have said a good deal that runs counter to what has hitherto been accepted as law." "Yes," interjected Bereford, "that is very true and I won't say who they are." The reporter naively adds, "Some thought he meant Stonor." Bereford is sometimes cutting to counsel: "We wish to know," he once exclaimed, "whether you have anything else to say, for as yet you have done nothing but wrangle and chatter." One day Serjeant Westcote disputed Bereford's law: "Really," Bereford sarcastically rejoined, "I am much obliged to you for the challenge, not for the sake of us who sit on the bench, but for the sake of the young men who are here." He despised the ridiculous Anglo-Saxon wager of law. "Now God forbid," he

says from the bench, "that any one should get to his law about a matter of which the jury can take cognizance, so that with a dozen or a half dozen rascals, he could swear an honest man out of his goods." He even corrects in open court statements of his fellow judges as to the law. One day he corrects a ruling of Hervey the Hasty in spite of that judge's protests. He is sharp with the lawyers. To Malberthorpe, counsel in great practice, he says: "You talk at random." To Passeley, a leader of the bar, he says in an action to quiet title: "There are forty fools here who think that, as soon as one has in such case acknowledged, there is nothing more to do, although he claims more than he has. Answer by what title you claim in fee." He sometimes jokes from the bench. The law was that a villein who had gone to a city and remained there for a year became free, but Metingham had ruled that if the villein returned to his villein tenement again he lost his freedom. Bereford illustrates this point by a joke. "I have heard tell of a man who was taken in a brothel and hanged, and if he had stayed at home, it would not have happened. So here, if he was a free citizen, why didn't he remain in the city?" Some of Bereford's jokes are too broad for quotation. Even if the reporters were "grave and sad men," as Coke says, they always record Bereford's highly seasoned anecdotes with apparent zest.

Hervey de Staunton, who is called the Hasty, is quick to answer. Mutford, a leader of the bar, asserted that a female serf who became free by marrying a free man, returned to her servile status as soon as her husband died. "That is false," said one judge. "Worse than false, it is a heresy," added Staunton. In another case a younger lawyer was reproved by Staunton for a poor plea, and was told to go and seek advice of counsel. Instead of being angry, the lawyer went out and came back with two eminent counsel, Willoughby and Estrange. But this is the ordinary thing. Whenever an attorney or a young lawyer attempts to plead without a serjeant, he is quickly detected in an error and told to go out and get counsel. On the circuit Staunton is reproved by his fellow judges for making a ruling before

he consulted them. The retorts of the judges are quick enough. "Why," asks Asseby, "did the other side plead that they were seized?" "Because they are rather foolish," said Hertford, Justice, shortly, "answer over." Berewick, a judge, says to the great Howard: "If you wish to cite a case, cite one in point." One almost forgets in reading this that he is back in the Middle Ages. Sometimes a lawyer is fined for contempt. Lisle paid a fine of 100 shillings, yet soon afterward was made a justice of assize.

The most striking phenomenon is the smallness of the bar in active practice. A few names are constantly recurring. The fees of a leader must have been enormous. Most of them died rich. The case of William Howard, from whom flows "all the blood of all the Howards," has been already instanced in describing the first period. Another great lawyer, a rival of Howard's, is Hugh de Lowther. He is king's serjeant, and appears in quo warranto proceedings, which Howard often defends. He was of an ancient family in Westmoreland. His lineal descendant became Viscount Lonsdale in 1689, and Lowther Castle (where the present Earl of Lonsdale so magnificently entertained the German Emperor) stands in the midst of the widespread domain of 35,000 acres which Edward I.'s attorney-general left to his descendants.

The largest fee of that day paid to a lawyer was £133 6s. 8d., paid by Edward II. to Herle, the king's serjeant, and this was supplemented by a seat on the bench. After a long service on the bench Herle was permitted to retire; and it may be of interest to note that the permission spoke of "his approved fidelity, the solidity of his judgment, the gravity of his manner, and his unwearied service in his office."

One of the names that often recurs is that of John Stonor. As a serjeant in large practice, and then as king's serjeant, he no doubt made a fortune. He first served in the Common Pleas, then in the King's Bench, then he was returned to the Common Pleas. Later he was chief Baron of the Exchequer, then Chief Justice of the Common Pleas, superseding Herle; but later Herle was reinstated, and Stonor

took second place, but became Chief Justice again. Such is the remarkable record of this judicial maid-of-all-work. The one decision for which he is noted is a holding that an act of Parliament was invalid.

Throughout the Year Books of the three Edwards, it is noticeable that the judges are uniformly selected from the leaders of the bar. If a serjeant appears in large practice, he is almost certain to appear later on the bench. So noticeable is this that there are few great lawyers who do not reach a judicial position. Simon de Trewithosa was evidently a Cornishman. He was in immense practice, was a serjeant at law, but was never a judge. His statements of law are found in the Year Books quoted as of evident value. Another lawyer named Pole did not reach the bench. His practice was very large, and the singular fact is that he was not made even a serjeant at law. But such names as Howard, Lowther, Heyham, Hertford, Inge, Herle, Estrange, Westcote, Warrick, Passeley, Lisle, Touthby, Willoughby, Malberthorpe, Mutford, the two Scropes, Friskeney, Scotre and many others, show that professional eminence found a sure reward in a judgeship. No lawyer is elevated to the higher courts who is not a counsel in large practice.

The judges are no respecters of persons. Magnate and serf are equal before the law. Beauchamp, Earl of Warwick, pleading his own case and showing considerable technical knowledge, is treated like an ordinary counsel. Roger Bigot, Earl of Norfolk and Earl Marshal, son-in-law of the King, receives the same treatment as the humblest suitor. A poor man wrongly seized as a villein is given £100 damages, a verdict equal to ten thousand dollars at the present day. Yet we see the law's delay, for four years elapsed between the awarding of the venire and the verdict.

The judges are skilful, tactful men. In a case where the plaintiffs failed in detinue of a charter on a variance, Berewick, the justice, said to the defendant: "What will this avail you? they can bring a new action and get it, so you may as well give it up," and the charter was surrendered. In another case Howard has reached a difficult place and refuses

to plead, but Berewick, the judge, calls up the client, takes him away from his counsel, and questions him so as to get replies which are taken as pleadings. Pleading was at that day a voluntary act. A criminal trial showed one of these judges at his best. Hugh, a man of importance, is arraigned upon an indictment for rape. He asked for counsel. "You ought to know," the Judge replies, "that the king is party here *ex officio*, and you cannot have counsel against him, though if the woman appealed you, you could." The prisoner's counsel were then ordered to withdraw and did so. Hugh was then called upon to plead. Hugh replied that he was a clerk (a priest), and ought not to answer without his bishop. Then he was claimed for the bishop as a clerk. Thus it appears that the bishop had his representative sitting in court ready to claim the trial of any one who said he was a clerk. But the Judge was evidently informed, for he replied: "You have lost your clergy, because you married a widow." Under the statute De Bigamis a priest who had married twice or had married a widow lost his right to be tried in the ecclesiastical court. "Answer," said the Judge, "whether she was a widow or a virgin, and be careful, for I can call upon the jury here to verify your statement." We note that a jury is sitting in court ready to decide, by the knowledge of its members, controverted questions of fact. Hugh replies: "She was a virgin when I married her." The Judge calls upon the jury, who say that she was a widow. Then the Judge rules that he must answer as a layman, and asks him to consent to a jury trial. It is noticeable that the defendant in a criminal case must consent to a jury, a reminiscence of which is the question, and the answer of the prisoner, for centuries to come: "How will you be tried?" "By God and my country," i. e. by the jury. But the prisoner objected that he was accused by the jury. (It is curious to note that the same jurymen acted as grand and petty jurors.) He further claimed that he was a knight, and the prisoner added: "I ought to be tried by my peers." The Judge gave him a jury of knights, who were called, and the defendant was asked if he had any challenges. But Hugh still refused to consent to a jury trial, and the Judge warned him of close confinement

on bread and water, if he did not consent. So Hugh consented, and asked that his challenges be heard. The Justice: "Freely, read them." Then Hugh makes a slip: "I don't know how to read." The Justice: "How is this, you claim the privilege of clergy, and don't know how to read?" Then the prisoner stands much confused; but the Judge calls on a bystander to read the challenges to the prisoner, who speaks them. The challenged jurors are excused. Then the judge states the charge to the jury and the jury say that the woman was ravished by Hugh's men. The Justice: "Did Hugh consent?" The jury: "No." The Justice: "Did the woman consent?" The jury: "She did," and thereupon Hugh was acquitted. But who can say whether he was acquitted because the woman consented, and yet would have been considered liable criminally for the acts of his servants?

The counsel, however eminent, cannot wheedle the judges. In one case, Howard and Lowther on the same side urged a certain form of judgment. To Howard, Berewick replied: "We tell you that you never saw any other judgment under these circumstances, and you will get no other judgment with us." Then Lowther argued with the Court, but Berewick was firm: "You will get no other judgment from us." Again, Howard is on the bench, and Asseby says: "I think you would not give judgment in this wise, if you were in the case," but Howard mildly replies: "I think you are wrong, wherefore answer." But sometimes indulgence is shown. To a count challenged as bad, the Court say: "It would have been formal to have done this, but we will forgive him this time; but let everyone take care in the future, for whoever shall count in this manner, his writ shall abate, for it behooves us to maintain our ancient forms."

In those days the counsel stated the proposed pleadings orally, and if held good by the Court they were reduced to legal form by the clerks. To the present day our pleadings still speak as if the party were in open court stating his pleadings. At this earlier stage of the common law the pleadings were necessarily all true. Whenever counsel in his pleading reaches a point as to which he is not advised, he imparls and seeks his client or the attorney for further

information. The advocates show acuteness and ingenuity. The pleading is technically correct. All pleas must follow in their regular order, — pleas in abatement before pleas to the merits; there was, however, no such rule as (for example) that the judgment upon a plea in abatement was *quod recuperet*. At this sensible stage of the law there was no need for statutes to allow pleading over. Sometimes counsel get stubborn and refuse to plead further, and then say that they will do so merely to oblige the court. Touthby, a very good lawyer, in one case tries to plead without binding his client, Isolde. "I say for Gilbert de Touthby but not for Isolde," he begins. Whenever the pleadings come to a point where the party whose turn it is to plead cannot deny or avoid, judgment is given at once. The clerks enter up the technical forms of pleadings. The glorious *absque hoc* is present in large numbers. In an action of assault the counsel says orally, in answer to a justification: "He took him of malice and not as he has said, ready, etc." The clerk enters this up as the regular replication *de injuria sua propria absque tali causa*, etc.

In almost every case there are two counsel on each side. In some cases there is a great array. Thus Heyham, Hertford, Howard, and Inge are for the defendant and Lisle and Lowther for the plaintiff. No one seems to lead, but all speak. Sometimes different counsel appear at different terms. In a great case of replevin, Estrange, Scrope, and Westcote are for the defendant and Herle and Hertepol for the plaintiff at one time. At the next term Westcote and Huntingdon are for the defendant and Herle and Hertepol for the plaintiff. At the next term Westcote and Huntingdon are for the defendant, while the plaintiff has Kyngesham, Warrick, and Passeley. The lawyers who are practicing at Westminster are also found on the circuit at the assizes. These men must have kept in mind an enormous amount of procedural rules. There were four hundred and seventy-one different original writs, each showing a different form of action and requiring its own special procedure.

The useful law book was Britton, a sort of epitome of Bracton. Chief Justice Prisot in Henry VI.'s time said that Britton was written under the orders of Edward I., and fixes

its date as 1275. It supplanted Bracton, so that judges in after ages would say with singular fatuity that Bracton was never accepted as an authority in English law. Certainly Bracton's Roman law was not understood by his immediate successors; for in Britton the *actio familiae herciscundae* of the Roman law has become an action about the lady of Hertescombe, who probably had estates in Devonshire. Yet Passeley, one of these lawyers, was a civilian, for the judge says to him from the bench: "Passeley, you are a legist, and there is a written law that speaks of this subject," quoting from the Code.

It is noteworthy that no complaints are heard of the practitioners in the higher courts. There is a single case of a lawyer being bribed by the opposing counsel. But the leading lawyers were faithful and zealous. Even against the king they fought well for their clients. Both Edward I. and Edward III. made determined assaults upon the private jurisdictions of various lordships, and in all the cases the defendant's counsel was zealous against the king. But in the lower courts, municipal, local and seigniorial, the legal "shyster" was as brazen and disgraceful as he is to-day. In 1280 the mayor and aldermen of London lamented the ignorance and ill manners of the pleaders and attorneys, who practiced in the city courts. It was ordained that no advocate should be an attorney; and thus it is apparent that the separation of the two branches of the profession, which happily endured in England, was at that early time in full effect. The city fathers were compelled to threaten with suspension the pleader who took money from both sides or reviled his antagonist.

There is an occurrence in the Abbot of Ramsey's court for the fair at St. Ives, which shows the local pettifogger at his worst. William of Bolton is the name of the "shyster." He was lurking around the fair, looking for victims. Simon Blake of Bury was charged with using a false ell for measuring cloth. William, eager for business, rushed in and became surety for Simon's appearance. Then to make certain of his fee he induced Simon's friend John Goldsmith to retain him to defend Simon, and to

promise him four shillings as a fee. William agreed to defend, provided Simon would swear that he got the false ell from a merchant of Rouen. Although Simon did so state and vouched the Rouen merchant to warranty, yet he withdrew his voucher of the Rouen merchant. The scheme, of course, was to fleece the rich foreign merchant; but Simon lost heart or was bought off. Then William had the effrontery to sue John Goldsmith for the four shillings retainer and ten pounds damages because John had induced Simon to withdraw the said voucher of the said merchant of Rouen, "out of whom," William brazenly avers, "the said William had hoped to get a large sum of money." The damages arose because the pettifogger was deprived of an opportunity for levying blackmail. Surely William was thrown away on that early time. He belonged to the "justice shop" of one of our large cities.

The evils of these local courts are manifest. In one case Bereford asks Malberthorpe, "Why did you not plead this exception in the county court?" "Because," replied the counsel, "we thought it would have more chance before you than in that court." In the same year Margery brought a writ of false judgment against the suitors of the court baron of Fulk Fitz Warin, lord of the manor, for failing to record her plea against Fulk in his own court. The suitors appeared in the king's court before Bereford to answer the writ. Bereford, Justice: "Good people, Margery brings her writ, etc. What have you to say?" Heydon, retained for the suitors: "I will tell you all about the business." Bereford: "You shall not say a word about it, but they out of their own mouths shall record it." The suitors then said that they feared to record the woman's plea out of fear of Fulk, who had beaten one of them and overawed them by force, so that they were compelled to come to the king's court under protection. Bereford: "Go aside by yourselves and take a clerk with you and have him write down your record, taking care that Robert Heydon comes not near you." Bereford was determined to get at the exact truth and that the suitors should make their record without the aid of counsel. The record made, Bereford issued a writ

against Fulk. The king was far wiser than his subjects when he attempted by his writs of quo warranto to destroy these local courts.

The greatest lawsuit of this reign was not tried in any of the regular courts; for the Kingdom of Scotland was at stake, and the litigants were the claimants of the throne. The contestants referred the matter to the arbitration of Edward I. But Edward at once set his lawyers at work to devise by means of this arbitration some method by which he could extend his sovereignty over Scotland. Burnel, the chancellor, and Roger le Brabazon, a skilled lawyer and one of the puisne judges of the King's Bench, prepared the case. Out of the records and the monkish chronicles, acts of fealty by former Scottish sovereigns were produced, especially that of William the Lion to Henry II. after his capture by Ranulf Glanville. They were careful to suppress Richard Coeur de Lion's cancellation of his rights over Scotland for a large sum of money. Soon a parliament of English and Scotch was convened at Berwick. Brabazon opened the proceedings by a speech in which he adduced his proofs, and required, as a preliminary, that the contestants and all the Scotch swear fealty to Edward as their feudal suzerain. The contestants of course could not offend the court. The Scottish nobles murmured, but after seeing Brabazon's proofs acquiesced. The Scottish commons, however, refused. A trial was then had, and Burnel, for the King, correctly adjudged the throne to Balliol. Then the King tried to extend the jurisdiction of his courts over Scotland. But Wallace, and afterwards Robert the Bruce, kept alive the resistance, until under Edward II. the crushing defeat of the English at Bannockburn ruined Edward I.'s dream of a kingdom of Great Britain. Brabazon, as Chief Justice of the King's Bench, lived to see the fugitives from Bannockburn.

One of the results of the years of warfare was to scatter over England lawless characters called trailbaston men. To suppress these marauders special justices, fearless knights and barons, were sent throughout England. One of these justices in 33 Edward I. was John de Byrun, a lineal descendant of the Norman Ralph de Burun of the Domesday survey.

In regular descent from the justice came Sir John Byron, the devoted adherent of Charles I., who was made Lord Byron. His descendant, the sixth Lord Byron, was the poet, who next to Shakespeare has been the greatest intellectual force in English literary history. Byron's friend, the poet Shelley, was descended from William Shelley, a justice of the Common Pleas under Henry VIII. Even Shakespeare belongs on his mother's side to the Norman Ardens, who furnished at least three justices under the Plantagenets; while Francis Beaumont, the collaborator of Fletcher, was the son and grandson of English judges belonging to the Norman Beaumonts.

The troubles of Edward II's reign had little effect on the courts. Malberthorpe, Chief Justice of the King's Bench, pronounced sentence of death on the Earl of Lancaster. When Edward II. was seized by his wife Isabella and her paramour Roger Mortimer, and put to death, Malberthorpe was brought to trial for his judgment against the Earl of Lancaster; but he proved by prelates and peers the fact that he gave that judgment by command of the King, whom he dared not disobey. Such is the disgraceful entry upon his pardon. But Malberthorpe was removed and went back to the practice. We pass by the two Scropes; Bourchier, who founded a distinguished family; and Cantebrig, who gave most of his property to endow that great institution which is now Corpus Christi at Cambridge. They were all great lawyers.

The most celebrated lawyer of Edward III.'s reign, however, was Robert Parning. The Year Books show him to be a man of remarkable erudition. He came to the Common Pleas as a judge at a rather early age. In a remarkable case Parning is sitting with Stonor, Shareshulle and Shardelowe. He takes issue with Shareshulle and a great debate is held between the judges on the bench, which is accurately reported. In the end Parning was overruled, but a few months later he became Chief Justice of the King's Bench and then Chancellor.

This is the first instance of a great common lawyer attaining the marble chair. By reference to the Register, it will

be found that in his two years' service he provided a number of new remedies. Had the chancellors continued to be professors of the common law, there would have been no separate chancery system. But after Parning's death the chancellorship was again bestowed upon an ecclesiastic. The growing opposition to the church is shown, however, by the Commons' petition to the king in 1371 that only laymen should be appointed to the higher offices. Thereupon Robert de Thorpe, Chief Justice of the Common Pleas, was made chancellor. On his death John Knivet, Chief Justice of the King's Bench, succeeded to the head of the chancery; but he remained for only five years, when the office was given to an ecclesiastic. No other layman held the office until Sir Thomas More. It is interesting to note that Parning, after he became chancellor, would return to sit in the law courts, and in 1370 there is the following entry in the Year Book: "*Et puis Knivet le chanc. vyent en le place, et le case lui fuit monstre par les justices et il assenty.*" [1]

Some of the happenings of the time give us some light on contemporary manners. Chief Justice Willoughby in 1331 was captured by outlaws and compelled to pay a ransom of ninety marks, — more than one year's salary. Seton, a judge under Edward III., sued a woman who called him in his court "traitor, felon and robber." The inference is that he had decided a case against the lady, but had not impressed her with the correctness of his decision. He recovered damages, but he was given a jury of his peers, that is, a jury of lawyers. The quaint simplicity of those times is shown by Thorpe and Green, two judges, going in state to the House of Lords and asking them what was meant by a statute lately passed. It would not occur to our judges

[1] "And then Knivet the Chancellor came into the court and the case was explained to him by the judges and he concurred."

The words of the last entry show that knowledge of French is passing away. About this time was passed the statute which required all pleadings and judgments in the courts to be couched in English. But the lawyers calmly ignored the statute until the middle of the seventeen hundreds. The reporter of Edward II.'s Year Book was a much better French scholar than the men who reported under Edward III. Serjeant Maynard said that Richard de Winchester reported under Edward II. but he tells us no fact in regard to him, and the name nowhere else appears.

to seek for such an explanation of an absurd law. Green once pronounced judgment against the Bishop of Ely for harboring one of the latter's men who had committed arson and murder. For this judgment the Judge was cited before the Pope, and on his refusal to appear he was excommunicated. About this time there was considerable friction between the lawyers, called "gentz de ley," and the churchmen, called "gentz de Sainte Eglise." The "gents of law" probably instigated the petition that only laymen should be chosen to hold such offices as chancellor. But in the next Parliament the "gents of Holy Church" retorted by obtaining a petition from Parliament praying that henceforth "gentz de ley," practicing in the king's courts, who made the Parliament a mere convenience for transacting the affairs of their clients, to the neglect of public business, should no longer be eligible as knights of the shire. It is likely that the real ground of hostility to the church was its great possessions. Just as to-day the mass of people look with hatred and envy upon the possessors of great fortunes, so then many people turned to the broad lands of the church for relief against the taxation growing out of the French wars.

But the reign of Edward III. produced a ministerial ecclesiastic worthy to rank with Lanfranc, Flambard, Roger of Salisbury, and Robert Burnel. The career of William of Wykeham is one of the glories of the English church. Of humble birth, educated at Winchester, he attracted the attention of the bishop, who employed Wykeham's truly wonderful architectural talents in the improvements of Winchester cathedral. Here he took the clerical tonsure. A little later he entered the service of the king, and at Windsor, on the site of an old fortress of William the Conqueror, he built the keep and battlemented towers, which are yet the noblest portion of one of the magnificent royal residences of the world. He was rapidly advanced to the bishopric of Winchester and the chancellorship. His declining years were taken up with the foundation of Winchester School, and with the far greater endowment of his college of St. Mary at Oxford, now called New College. Wykeham's foundation

still renders it a wealthy institution. After the lapse of five hundred years the buildings remain as they were designed by this greatest of art-loving prelates.[1]

It is sad to turn to the closing years of the king, whose reign began with the triumph of Cressy. He had had a long and in many ways glorious reign. His court had been the most splendid in Europe. The pageantry of knighthood had thrown its glamour over his reign. The spoil of France had enriched his people. But the ravages of the plague had almost ruined the nation. In the domain of law the prospect was dark. The king's mistress, Alice Perrers, openly intrigued to influence the court's decision. She caused a general ordinance against women attempting the practice of the law. The heavy fees charged for writs in the chancery were the cause of bitter complaint. The royal council was accusing men and trying them without indictment. Justice was delayed by royal writs. The very judges of the land, it was charged, condescended to accept robes and fees from the great lords. One judge was convicted of taking bribes in criminal cases. The inefficacy of appeals was a crying evil, and it was complained that the judges heard appeals against their own decisions. All these various evils were to cause a grim reckoning in the next reign. But here we must close the period which began with the legislation of Edward I. and ended in such ignominy with his grandson's death in 1377.

III. The Bronze Age of the Common Law: From the Death of Edward III. to the Death of Littleton[2]

The period in legal history that reaches from the death of Edward III., in 1377, to the death of Littleton in 1481, may

[1] New College is equalled by Merton at Oxford, founded by Walter de Merton, Henry III.'s chancellor. Its exquisite chapel and noble hall are the work of that chancellor. Even Christ Church, which was long the most splendid college foundation in the world, is the work of Henry VIII.'s chancellor, Cardinal Wolsey. Magdalen, too, the loveliest of them all, is the work of William of Waynflete, "the right trusty and well beloved clerk and chancellor" of Henry VI. To these may be added Wadham at Oxford, founded from the estate left by a celebrated English judge, and Corpus Christi at Cambridge.

[2] The Year Books for this period must be read in the Norman French (so called). Bellewe's Reports are Richard II.'s Year Books so

be called the age of bronze, on account of the efforts which the law was making to mold itself to fit new conditions. The amplification of the action of trespass, the invention of common recoveries, the dawning action of ejectment, were phenomena that characterize this age. The common law was showing little indication of its coming helplessness in the next age, when the developed jury system was to render it incapable of granting any relief but a sum of money or the recovery of specific real or personal property. And in the realm of constitutional law this Lancastrian age reached higher ground than the law was to again occupy for two hundred years.

The reign of Richard II. opens with a frightful tragedy. The effects of the great plague in 1349, the unrest caused by the repressive statutes, the insistence of the landholders upon the villein-services, and the growth of the renting system, resulted in a widening chasm between farmer and laborer, which culminated in Wat Tyler's rebellion. The populace rose over England, and mobs marched on London. The demand was that all serfdom be abolished, and that all vellein services and rentals be commuted for four pence per acre. In London the mob burst into the Tower and murdered the chancellor, Archbishop Sudbury, one of the greatest scholars of his time. But the bitterness was deepest against the lawyers, on account of the parchment records and the actions that had forced many a villein to perform his services. The Temple, the new school of the lawyers, was sacked and its records destroyed. In Shakespeare's Henry VI., Dick the Butcher cries: "The first thing we do, let's

far as printed. Stubbs, Campbell and Foss are, of course, necessary reading. Further general references are: Select Cases in Chancery (Selden Society), Wambaugh's edition of Littleton's Tenures, Plummer's Introduction to Fortescue's Monarchy, Lord Clermont's Fortescue's De Laudibus, Pulling's Order of the Coif, Herbert's Antiquities of the Inns of Court, Pierce's Inns of Court, Douthwaite's Gray's Inn, Loftie's Inns of Court and Chancery, Dillon's Laws and Jurisprudence, Kerly's Equitable Jurisdiction, Ames' History of Assumpsit, Thayer's Preliminary Treatise, Wigmore on Evidence. Ames' Notes to De Laudibus may be read in addition. Reeves now becomes more reliable. Dugdale's Origines Juridiciales has much curious information. Walsingham's Chronicle is valuable. Mr. Holdsworth is to write on The Legal Profession in the 14th and 15th centuries, in the Law Quarterly Review for 1907.

kill all the lawyers." Cade: "Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment; that parchment being scribbled o'er should undo a man." It is, perhaps, needless to say that Shakespeare is here completely astray in chronology, for this hatred of lawyers belongs to the revolt of Wat Tyler in 1381, not to Cade's rebellion in 1450.

Out in Suffolk was living the venerable Chief Justice Cavendish. The mob attacked his domain, and finding the Chief Justice, they dragged him forth, gave him a mock trial, and then beheaded him. This fine old lawyer was from the Norman house of De Gernum. Under the name Candish he was in immense practice in the Year Books of Edward III., along with Belknap, Charlton, and Knivet. After serving as a puisne in the Common Pleas he became Chief Justice of the King's Bench. One of his dicta from the bench is a gallant utterance upon the appearance of women: "*Il n'ad nul home en Engleterre*," he says in barbarous French, "*que puy adjudge a droit deins age ou de plein age, car ascun femes que sont de age xxx ans voilent apperer de age de xviii.*"[1] When he was murdered he had just been made Chancellor of the University of Cambridge, after a service on the bench for over ten years, with a great reputation for learning and fair dealing. His descendants in the elder line were Earls of Devonshire, now Dukes of Devonshire. Another descendant in the younger line was the celebrated commander in the Civil War, who became Marquis and Duke of Newcastle; but the estates of this line now belong to the Dukes of Portland, who are Cavendish-Bentincks.

The successor of Chief Justice Cavendish was Robert Tresilian. He had sat as Cavendish's only puisne; and when he held the assizes after Wat Tyler's rebellion, he made a record that was never equaled until Jeffreys held the "Bloody Assizes" after Monmouth's rebellion. Later in the reign of Richard II., Tresilian became involved in the political troubles. Parliament had practically supplanted

[1] "There is no man in England who can tell whether she is within age or of full age, for some women who are thirty years old will appear to be only eighteen."

the King, by appointing eleven commissioners to administer the government. The King at first tried to elect a more favorable parliament. When the election proved unfavorable, Tresilian called the judges together, among them Belknap, Chief Justice of the Common Pleas, Fulthorpe, Burgh, and Holt (Skipwith excused himself), and by violent threats induced the judges to sign a series of prepared answers, holding the act of Parliament invalid. Poor Belknap as he signed the paper said: "Now here lacketh nothing but a rope, that I may receive a reward worthie for my desert." This is an early instance of a practice that became common under the Stuarts, and was put into use as late as 1792 by Lord Eldon; while it has often been used in some of our States. Fulthorpe, one of the judges, at once communicated the matter to Parliament. The judges were appealed of high treason. Tresilian was beheaded, and the other judges were banished. Belknap had been a great advocate and an excellent judge; but he lacked courage, for in 1381 when he went the circuit, the rioters broke up his court and made him swear to hold no more sessions. His banishment caused a very remarkable ruling. Gascoigne held that Belknap's wife could be sued as a feme sole, although her husband was living. The decision was certainly wrong. Chief Justice Markham at a later time made a rhymed couplet over this decision:

> Ecce modo mirum, quod femina fert breve regis
> Non nominando virum, conjunctum robore legis.[1]

Belknap was allowed to return, the judgment against him was reversed, and his property that had not been alienated was restored.

The year 1388, when the judges were banished, was, of course, marked by a total change in the courts, — the first instance in English history when the whole bench was changed for political reasons. Even in 1399, when Henry of Bolingbroke supplanted Richard II. and the reigning king

[1] 'Tis a marvel indeed that a wife brings her writ,
Not joining her husband, as law maketh fit.

But the learned Markham was mistaken. The wife did not bring the writ; she was made defendant.

was compelled to sign an abdication, there was no change in the judiciary. The whole proceeding was in strict legal form, for Chief Justice Thirning yielded up the fealty, homage, and allegiance of all the English people, declared the King deposed, and announced Henry IV. to be his successor. The deposition took place in the midst of a splendid pageant in Westminster Hall. The Hall had just been remodeled in the last two years of the King's reign. The Chancellor's court and the King's Bench, toward the end of Edward III.'s reign, had joined the Common Pleas in the Hall. King Richard, who had a keen appreciation of architectural beauty, had restored and remodeled the Hall after designs by William of Wykeham. The walls were built higher, the pillars in the hall were removed, and the magnificent timber roof, still one of the wonders of architecture, was thrown over the wide hall. Sadly enough, the first use made of the King's structure, after he had rendered it so imposing, was the coronation of his usurping kinsman, Henry IV.

Revolutions or changes in dynasty in England have rarely affected the courts. The two Chief Justices and their colleagues continued to sit in the courts after the new King's accession. One judge, Rickhill, was called upon to answer for a share in the murder of the late King's uncle, the Duke of Gloucester, while in prison at Calais. But Rickhill proved that he had no part in the murder, and was allowed to resume his seat upon the bench. This judge, in attempting to draw his own deed, made some memorable law, which is still common learning. By his deed he attempted to anticipate the law by two centuries, and to settle his lands upon his sons successively in tail, but added a contingent limitation that if any son aliened in fee or in tail, the same lands should go over to the next son in tail. The contingent limitation was held bad as the creation of a remainder, which did not await the natural devolution of the preceding estate, but cut it short by the creation of a freehold beginning *in futuro*. English law was to await the Statute of Uses before such a limitation became good in a deed, and the Statute of Wills before it became possible by will.

Clopton, Chief Justice of the King's Bench, vacated his seat to become a friar of the Minorites, and his successor was the celebrated William Gascoigne, whose surname the ingenious scribes of that day were able to spell in twenty-one different ways. The legend as to his firmness in committing the Prince of Wales for contempt of court is wholly mythical; but it is true that when, in 1405, he was commanded by the king to pronounce sentence of death upon Archbishop Scrope and the Earl Marshal, rebels taken in battle, he resolutely refused, saying: "Neither you, my Lord, nor any of your subjects, can, according to the law of this realm, sentence any prelate to death, and the Earl has a right to be tried by his peers."

Throughout this period the regular succession from eminence at the bar to a judgeship was a constantly recurring process. In the Year Books we notice some interesting interpolations. Thus Hull, a judge, "said secretly," of a decision of Chief Justice Thirning, "that it was never before this day adjudged to be law." Another judge, Hill, passing upon a "stayout" agreement, where a dyer had bound himself by a bond not to pursue his trade for half a year, ruled that the covenant was against the common law, adding: "And by God, if the plaintiff was here, he should go to prison till he paid a fine to the King." The learned Foss thinks this the only reported oath on the bench, but he is greatly in error. Bereford, Brumpton, Staunton and other judges in the older Year Books frequently invoke the Almighty. Henry II.'s favorite oath while sitting on the bench was, "by God's eyes;" King John swore "by God's feet"; and the Conqueror's favorite oath was "by the splendor of God." Archbishop Arundel, who as Chancellor presided in 1407 over the trial of a Lollard priest, William Thorpe, accused of heresy, swore freely from the marble chair, "by God" and "by St. Peter." The accused priest upon this trial made a most felicitous Biblical quotation in answer to the Archbishop; the latter having said that God had raised him up even as a prophet of old to foretell the utter destruction of the false sect of the priest, the priest retorted with the words of Jeremiah: "When the word that

is the prophecy of a prophet is known and fulfilled, then it shall be known that the Lord sent the prophet in truth." [1]

But the most curious circumstance of that age is a performance of Judge Tirwhit, who affords ample proof that no man, not even a judge, can be his own lawyer. Tirwhit had brought an action against the tenants of the manor of Lord de Roos. Both sides were afraid to trust a jury, so the cause was referred to the arbitration of Chief Justice Gascoigne. The Judge thereupon appointed a day, called in the record somewhat cynically, "a loveday," for the parties to come before him with their evidences, limiting the witnesses to a few friends of either party. But Tirwhit assembled four hundred men, who lay in wait for Lord de Roos to do him "harme and dishonure." Lord de Roos avoided the ambuscade, but complained to the king. Tirwhit was arraigned before Parliament and acknowledged that "he hath noght born him as he sholde have doon." The suit, by the award of the Archbishop of Canterbury and Lord de Grey, the Chamberlain, was again referred to Gascoigne, while Tirwhit was required to send two tuns of Gascony wine to Melton Roos, the manor-house of Lord de Roos, and to take there "two fatte oxen, and twelfe fat sheepe to be dispensed in a dyner to hem that there shall be," and Tirwhit was to attend the feast with all "the knights and esquires and yomen" that had made his forces on the "forsaid loveday." There he was to offer a full speech of apology, which concluded: "forasmuche as I am a justice, that more than a comun man scholde have had me more discreetly and peesfully, I know wele that I have failed and offended yow, my Lord the Roos, whereof I beseke yow of grace and mercy and offer you 500 mark to ben paid at your will." But Lord de Roos was to refuse the 500 marks and forgive the judge and all his party. What happened at the feast, how much of the two hogsheads of heady wine were consumed, whether heated with the good cheer the parties fell to fighting over the legal issue, and how many good men fell (under

[1] Our version has it: "When the word of the prophet shall come to pass, then shall the prophet be known, that the Lord hath truly sent him." Jer. 28 : 9.

the table) in the great hall of Melton Roos, history has not told us. But an archbishop who could prescribe a feast and two hogsheads of wine as a peace offering certainly cannot be accused of any prejudice in favor of sobriety.[1]

This was the age of noted lawyers. Such names as Hankford, Markham and Danby, Norton, Prisot, Hody, Moyle, Choke and Brian are great names in the Year Books. Hody, according to Coke, was "one of the famous and expert sages of the law." He and Prisot, a Chief Justice of the Common Pleas, are said to have greatly assisted Littleton in writing his work on Tenures. Hody tried and condemned Roger Bolingbroke, "a gret and konnyng man in astronomye," for attempting "to consume the king's person by way of nygromancie." The unfortunate scientist was sentenced to death and executed. Markham furnishes the first instance, for generations, of the removal of a judge for an unsatisfactory decision. It happened in this wise: Sir Thomas Cooke, lately Lord Mayor of London, was possessed of vast landed wealth. The Yorkists in 1469 brought him to trial for loaning money to Margaret of Anjou, the wife of the deposed king, Henry VI. The cormorants surrounding Edward IV., the hungry relatives of his wife, had condemned Cooke beforehand and considered his estate as their lawful prey. But Markham charged the jury that the act proven was merely misprision of treason, and thus the Lord Mayor was saved from forfeiture of his estate. Markham was immediately superseded as Chief Justice.

Another name celebrated in the Year Books is that of Skrene. He is a favorite with the reporters, for many of his deliverances are noted with the same approval as those of the judges. In later times such men as Coke deemed all statements of law as of equal value, and cited indiscriminately the arguments of counsel and the words of the judges, as entitled to equal credit. Skrene never attained a judicial position, but he left a fine estate called Skrenes which was many years afterwards purchased by Chief Justice Brampston.

[1] The grandson of a noted lawyer of that time, by name Rede, afterwards endowed Jesus College at Oxford with a fellowship and a brewery. The brewery for the use of undergraduates is a startling commentary on our Puritanical practices.

Both Brian and Danby are sages of the law often cited by Coke as high authority. Choke, a contemporary, served on the bench for many years. His contribution to the law is composed of two erroneous and troublesome dicta. One asserts that if land be granted to a man and his heirs so long as John A'Down has heirs of his body, and John A'Down dies without heir of his body, the feoffment is determined. John Chipman Gray, with an amplitude of learning that has been wasted on a perverse generation, has demonstrated that Coke and Blackstone are in error in following Choke's deliverance. Not less erroneous is Choke's second dictum as to the reversion of the property of a corporation upon its dissolution, but the courts have long disregarded this latter proposition.

Another judge, Walter Moyle, who sat through the wars of the Roses, is notable as the progenitor of a most distinguished legal family. His granddaughter and heiress married Sir Thomas Finch, descended from an old Norman family. Their son, Henry Finch, was a celebrated serjeant at law. His son, John Finch, was Attorney General, then Chief Justice of the Common Pleas, and later Lord Keeper under Charles I., as Lord Finch of Daventry. Another grandson of the Moyle heiress was Heneage Finch, a celebrated lawyer. His son, another Heneage, was the celebrated chancellor, Lord Nottingham, the Father of Equity and the author of the Statute of Frauds. His son, a third Heneage, became celebrated by his valiant defence of the Seven Bishops and was made Earl of Aylesford. Three earldoms, Winchelsea, Nottingham, and Aylesford, were the rewards of this legal family.

About the middle of the fourteen hundreds, just before the wars of the Roses, it became apparent that the salaries paid to the judges were wholly inadequate. In 1440 William Ascough, who was rapidly advanced, was appointed a justice in the Common Pleas. He petitioned the king representing that "ere he had been two years a serjeant, he was called by your Highness to the bench and made justice, whereby all his earnings, which he would have had, and all the fees that he had in England, were and be ceased and expired to

his great impoverishment, for they were the substance of his livelihood." He modestly requested, since he was the poorest of the justices, a life estate in lands of £25 12*s.* 10*d.* per year. Even the summons to serjeantcy was sometimes refused, since it might result in an elevation to the bench. It is certain that prior to this time the serjeants had a monopoly of the Common Pleas, for in 1415, William Babington, John Juyn, John Martyn, and William Westbury were called to the degree of the coif. These four with several others declined to qualify and thereupon complaint was made in Parliament that there was an insufficiency of serjeants to carry on the business of the courts. Parliament responded by imposing a large penalty upon any one who refused a summons to become a serjeant. So the persons called assumed the degree, and the four named above afterwards became judges.

A judge who served under Henry VI. in the trying time of Cade's rebellion has served for centuries to add to the gayety of nations. Sir John Fastolf, who held the Kent assizes in 1451, was a gallant soldier and a lover of learning. For some reason Shakespeare pictured him, under the name of Falstaff or Fastolfe, in his Henry VI., as a contemptible coward and craven. Later, in his Henry IV., when he changed the name of the fat knight Oldcastle so as not to offend Puritan prejudices, Shakespeare substituted the name of the character in his older play. In this way the blameless Fastolf has been handed down by the plays of Henry IV. and the Merry Wives of Windsor as the richest comic character in dramatic literature. The real man left a will, of which Judge Yelverton was an executor. It is said in the Paston letters that in a suit over the will Yelverton came down from the bench and pleaded the matter!

But this extraordinary conduct of Yelverton was surpassed by that of Serjeant Fairfax. On one occasion he was employed to prosecute certain defendants; but he declared at the bar that he knew that the men were not guilty, that he would labor their deliverance for alms, not taking a penny, whereupon the prosecutor naturally retained other counsel. It is to be hoped that this professional betrayal

was not common at that day, though doubtless the foolish people who prate about the iniquity of a lawyer's advocacy of a bad cause would find in such conduct much to approve. This Fairfax's great-great-grandson was made Lord Fairfax in 1637, and in still later times the then Lord Fairfax, smarting under some court beauty's disdain, buried himself in the Virginia wilderness, and added to history by befriending the young surveyor, George Washington. Washington was sent to survey his friend's vast domain beyond the Blue Ridge, and there gained the knowledge that gave him his first military employment.

The fame of all the Lancastrian and Yorkist lawyers is eclipsed by that of Fortescue and Littleton. Both of them were legal authors and very successful practitioners. Fortescue, the Lancastrian judge, survived Littleton, the Yorkist judge, and will therefore be noticed after him.

Thomas Littleton came of a family that since the days of Henry II. had occupied an estate at South Littleton in Worcestershire. Although he was the eldest son he was bred to the bar at the Inner Temple. He became reader for his Inn, and the subject of his public reading, the Statute *De Donis*, shows the early tendency of his legal studies. He was in practice as early as 1445, for in that year a litigant named Hauteyn petitioned the Lord Chancellor to grant him Littleton as counsel in a case against the widow of Judge Paston, for the reason that none of the men of the court were willing to appear against the widow of a judge and her son, who was an advocate. This would seem to indicate that Littleton's practice lay in the chancery and not in the law courts. In 1452 Littleton received a handsome fee, the grant of a manor for life *pro bono et notabili consilio*. In 1453 he became a serjeant, and in the next year was made king's serjeant. In 1460 he was one of the king's serjeants who successfully evaded an answer to the question asked by Parliament as to whether the Lancastrian King Henry or the Yorkist Duke Richard had the better title to the throne. In fact, from 1455 to 1466 Littleton practiced his profession, refusing to mingle in the political disputes. He even took the lawyer-like precaution in 1461, when Edward IV.

supplanted Henry VI., to sue out a general pardon for acts done under the deposed monarch. In 1466 he was made a justice of the Common Pleas, and so remained, even under the short return of Henry VI. He died a judge in 1481. He assisted in fixing the legal landmark of Taltarum's case, which held that a common recovery suffered by a tenant in tail barred not only the issue in tail, but also any remainder limited thereafter, as well as the reversion in fee. His tomb, in the form of an altar of white marble, still remains in Worcester Cathedral. His will, among other curious bequests, gallantly provides for prayers to be said for the good of the soul of his wife's first husband. Gentle sarcasm has little in common with the treatise on Tenures; but it may be that, after an experience with the widow of the deceased, Littleton felt that the unfortunate man deserved the prayers. The will shows Littleton to be a pious soul fully persuaded of the efficacy of prayers to prevent the "long tarying" of the soul in purgatory.

While Littleton's treatise was put into its final form in the latter part of his life, it is probable that the Tenures is an amplification of his reading on *De Donis* and represents the collected work of a lifetime. It is a marvel to find a work on the law into which no apparent error has crept. This book has remained the classic treatise on estates, and its words to-day are cited as the undoubted common law. Following Fortescue's saying that "from the families of judges often descend nobles and great men of the realm," it may be noted that Littleton's eldest son married one of the coheiresses of Edmund Beaufort, Duke of Somerset, and by right of that descent, Littleton's descendants, who are Viscounts Cobham, quarter the royal arms of the house of Lancaster. The descendant of Littleton's second son is Lord Hatherton, while the great-grandson of Littleton's third son was Lord Lyttleton, Lord Keeper under Charles I. Another descendant was a baron of the Exchequer under Charles II.

The traditional portrait of Littleton is unfortunately not authentic. He is shown wearing the collar of SS, still worn by the Lord Chief Justice of England, but absolute

discredit is thrown on the portrait by the portcullis of the Tudors, next to the clasp of the collar, which was not introduced until Henry VII.'s time. The Elizabethan ruff is hardly the attire we should expect in the Yorkist age. Coke, however, who knew nothing about it, says that the picture is a very good likeness. But the monumental effigy of Littleton, possibly authentic, shows a kneeling figure. Out of his mouth issues the motto *ung dieu et ung roy*, and the face has the smooth look of a Yorkist courtier, but indicating the keenness of intellect required for the systematizer of the nice discriminations of the law of real estate.

Littleton was simply a great lawyer and judge, but his greatest contemporary was more than a great lawyer and judge; he was an enlightened statesman, a gallant soldier, a writer of transcendent merit upon constitutional law, and a scholar whose words upon his profession possess a peculiar charm even for men wholly unacquainted with legal lore. John Fortescue was a lineal descendant of the knight (Le Fort Escu) who bore the shield of William the Conqueror at Hastings. Educated at Exeter College, Oxford, Fortescue was trained for the bar at Lincoln's Inn, of which he was a governor from 1425 to 1429. In the latter year he was made a serjeant, and is shown in the Year Books as in immense practice, until in 1442 he became Lord Chief Justice of the King's Bench. His salary in that office was £120 a year, with an allowance of two robes and two tuns of Gascony wine per year. His yearly salary was afterwards increased to £160. He served as Chief Justice until 1461. During his term occurred Cade's rebellion, and one of the charges against Fortescue and Prisot, the Chief Justices, was that of "falseness." No sooner suppressed was this rebellion, where Cade took the significant name of Mortimer, than the Duke of York set up his claim to the throne, as descended through the Mortimers from the third son of Edward III. The judges, the king's counsel, the serjeants at law, were all asked for legal opinions on the title to the throne, but all declined to give an opinion. Both parties took up arms. Chief Justice Fortescue vindicated his descent from a long line of knightly ancestors by taking the field.

He was in almost every one of the battles; and after Towton, the bloodiest battle in English history, he went into exile with the Lancastrians. He returned and fought at Tewkesbury, the last battle of the war, and was taken prisoner.

During his exile he had written the work which we call De Laudibus Legum Angliae. The book was written to instil into the young Prince of Wales, Henry VI.'s son, whose education was entrusted to Fortescue, a proper knowledge of English institutions. The book is invaluable as showing not only a profound appreciation of the free and liberal principles of the common law, but also the condition of the English law at that epoch. Fortescue also wrote a tract in support of the Lancastrian title to the throne, which he based upon the solemn declaration of Parliament and the nation's acceptance. When Fortescue found that the Lancastrian cause was ruined, he prayed for a pardon from the Yorkist king. There had been little change in the bar or the courts during Fortescue's exile. Fortescue himself had been succeeded by Markham, and Prisot, another avowed Lancastrian, was displaced by Danby; but all the other judges had remained. The courts had gone on in regular fashion during the fierce wars, and the bar was composed of many of the men who had practiced before Fortescue. Billing, a subservient wretch who had succeeded Markham, although one of the first of a long line of the disgraceful judicial tools of Yorkist, Tudor and Stuart kings, kept up the traditional kindliness of the English bar by intervening strongly for Sir John Fortescue, and obtained for him a pardon with the restoration of his estates. But by a curious whim of Edward IV., Fortescue was required to write, in favor of the Yorkist title, a refutation of his book demonstrating the validity of the Lancastrian title to the throne. The two treatises appear in Fortescue's works, and each of them constitutes the best argument for the respective opposing claims.

If one were asked to name in English law an equal to Fortescue, he could point to but three names — Bacon, Somers and Mansfield. Just as Bacon and Somers were impeached, and Mansfield bitterly denounced, so we find,

here and there in the Paston letters, hints that Fortescue was an object of hatred. A correspondent during Cade's rebellion says: "The Chief Justice hath waited to be assaulted all this sevennight nightly in his house, but nothing come as yet, the more pity." It is not uncommon for Fortescue to be represented as more of a politician than a lawyer; but the Year Books of Henry VI. show him to be a consummate master of the common law, whom even Coke mentions with reverence. One decision of his, in the case of Thorpe, Speaker of the House of Commons, is written in our Federal and all our State constitutions.

In his books "De Laudibus" and "Monarchy" he shows that he is the first of England's great constitutional lawyers. He points out to his young prince that the Roman maxim, "*quidquid principi placuit, habet legis vigorem,*" has no place in English law; that the king's power is derived from the people and granted for the preservation of those laws, which protect the subjects' persons and property; that the king cannot change the laws without the consent of the three estates of the realm, the baronage, clergy and commons; that the Parliament has power because it is representative of the whole people; that the king's power of pardon and the whole domain of equity is the king's for the good of his subjects; that the limitations upon kingly power are not a humiliation to, but for the glory of the king; that righteous judgment is his first duty, that the courts of law are his, but he does not act personally in judgment; that the laws of England are better than those of France, because they recognize no torture, because they provide the institution of the jury, carefully regulated courts, a legal profession trained in the great legal university, the Inns of Court, and because all men's rights are equally protected by law. Certainly no nobler picture of a constitutional system has ever been put forth by any English lawyer. It is the precocious development of the three Henries, a system far ahead of the times; under a strong king like Henry V., England was the first power in Europe; but a weak king like Henry VI., kindly, just, temperate, humane, gentle in his methods, pure and upright of life, the best man who ever

sat on the English throne, found himself ruined and dethroned. The nation which voluntarily abandoned this system deserved the Yorkist, Tudor, and Stuart tyranny. And every step that since was gained in England was obtained by restoring some principle of this theory of government so boldly sketched by Fortescue.

It is a pleasure to know that the manor which the Chief Justice bought and transmitted to his posterity gave a title to his descendants as Viscounts Ebrington, and that the head of the family, as Earl Fortescue, sits in the House of Lords, while three Fortescues since his time have sat as judges in Westminster Hall.

Here at this period, when modern history is just beginning, when the use of printing was about to multiply books and legal treatises, when the law itself was passing through a great transformation, when the growth of the chancellor's jurisdiction by means of conveyances to uses was to suffer a great expansion, when chancery was to gain its control over common law actions by injunctions, when land was to become again alienable, when the actions of ejectment, of trespass, of trover and of assumpsit were developing and the older actions passing away, when the jury was becoming a body of men which heard evidence only in open court under the control of the judge, when the great advocate with his skill in eliciting evidence and in addressing the jury now first found a place in the practice, and all court proceedings, except formal declarations, were transacted in the English tongue, we have in Fortescue's work a picture of the English legal system. But the most interesting portion of his work is the description of the system of legal education at the Inns.

The origin of the Inns of Court is lost in antiquity; but it is practically certain that there was a body of law students older than any of the Inns. One set of students in Edward II.'s reign, or soon thereafter, obtained quarters in the Temple and soon divided into the Middle and the Inner Temple. Another body of students probably obtained from that ill-starred woman, the heiress of the deLacys, the town-house of the Earls of Lincoln, and became Lincoln's

Inn. Still later another body obtained the mansion of the Lords Gray de Wilton, and became Gray's Inn. Connected with the larger Inns were ten smaller Inns of Chancery, having no connection with the court of chancery, but so called because they were the preparatory schools where the students studied the original writs, which were issued out of the chancery.

But there was, of course, some reason why, on the edge of the city, just beyond the city wall, all these students should have found a lodging place. Fortescue explains that the laws of England cannot be taught at the university, but that they are studied in a much more commodious place, near the king's court, where the laws are daily pleaded and argued and where judgments are rendered by grave judges, of full years, skilled and expert in the laws. The place of study is near an opulent city, but in a spot quiet and retired, where the throng of passers-by does not disturb the students, yet where they can daily attend the courts.

In the smaller Inns the nature of writs is studied. The students come there from the universities and grammar schools, and as soon as they have made some progress they pass into the larger Inns. At each of the smaller Inns are about a hundred students, while none of the larger Inns has less than two hundred. These four larger Inns were wholly voluntary institutions. The older and better known barristers of an Inn became the benchers, and they were self-perpetuating. They alone had and still retain the exclusive privilege of calling to the bar, but upon their refusal an appeal lay to the judges. In these four Inns the students studied the cases in the Year Books, the legal treatises called Fleta and Britton, read the statutes, and attended at court in term time.

Instruction was given by arguing moot cases before a bencher and two barristers sitting as judges, and by lectures called readings delivered by some able barrister belonging to the Inn. These readings were often cited as authority. Littleton's was on De Donis, Bacon's was on the Statute of Uses, Dyer's upon the Statute of Wills, Coke's upon the Statute of Fines. It was a high honor to be selected as

reader, and the expense of readers' feasts at the Inns became very great. After a student had studied for seven years (afterwards reduced to five), he was eligible to be called to the bar. The barristers before becoming serjeants were probably called apprentices, although that term was sometimes applied to the students. Whether an examination was required is problematical, but possibly that part of the ceremony of instituting a serjeant, which requires the serjeant to plead to a declaration, points to an examination of some perfunctory sort.

While the students were pursuing their studies in the law, they were instructed in various other branches of learning, if we may believe Fortescue. Singing, all kinds of music, dancing, and sports were taught to the students in the same manner as those who were brought up in the king's household were instructed. The revels and masques of the law students became a great feature of court life. On week days the greater part of the students devoted themselves to their legal studies, but on festival days and Sundays after divine service, they read the Holy Scriptures and profane history. In the Inns of Court every virtue is learned and every vice is banished, says Fortescue; the discipline is pleasant, and in every way tends to proficiency. Such is the reputation of these schools that knights, barons, and the higher nobility put their children here, not so much for the purpose of making them lawyers as to form their manners and bring them up with a sound training. The constant harmony among the students, the absence of piques or differences or any bickerings or disturbances, which Fortescue asserts, taxes our credulity. But he claims that an expulsion from an Inn was feared more by the students than punishments are dreaded by criminals.

The high social position of the students, a phenomenon that is always noticeable in the English barrister, is warmly commended by Fortescue. The expense of the residence at an Inn, which is twenty-eight pounds a year (equal to almost twenty times that amount at present money values), restricts the study of the law to the sons of gentle folk. The necessity of a servant doubles this expense, and the poor and

common classes are not able to bear so great a cost, while the mercantile people rarely desire to deplete their capital by such an annual burden. "Whence it happens that there is hardly a skilled lawyer who is not a gentleman by birth, and on this account they have a greater regard for their character, their honor and good name."

After a barrister had been called, he generally practised on the circuit. Fortescue himself traveled the western circuit. He narrates how he saw a woman condemned and burned for the murder of her husband, and at the next assizes he heard a servant confess that he had killed the husband and that the wife was entirely innocent. From this occurrence Fortescue draws a justification for the law's delay. "What must we think," he says, "of this precipitate judge's prickings of conscience and remorse, when he reflects that he could have delayed that execution. Often, alas, he has confessed to me that he could never in his whole life cleanse his soul from the stain of this deed." In another place Fortescue makes the remark that has been so often quoted: "Indeed one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be executed."

The barrister after sixteen years' service may be called upon to take the degree of serjeant at law. Then he dons a white silk cap, which a serjeant does not doff even while talking to the king. After much solemn and stately ceremonial and feasting, the new serjeant is assigned his pillar at the Parvis of St. Paul's, where he consults his clients and attorneys. The orthodox rule, which became a custom in England, that it is unprofessional for a barrister to receive his instructions or fee from the client, did not then exist. Even in much later times Wycherly, who had been a law student, sees no incongruity in the client consulting a barrister. In his exceedingly filthy, but witty play, The Plain-dealer, the litigious Widow Blackacre is consulting her counsel, Serjeant Ploddon, and says to him: "Go then to your Court of Common Pleas and say one thing over and over again; you do it so naturally, that you will never be suspected for protracting time."

As in after times, the judges were selected only from the serjeants. Fortescue describes the oath which the judges take, — to do justice to all men, to delay it to none, even though the king himself command otherwise, that he will take no gift or reward from any man having a cause before him and will take no robes or fees except from the king. Lovingly Fortescue tells of the life of leisure and study of the judges, how the courts sit only in the morning, from eight until eleven. Then the judges go to their dinner. At Serjeants' Inn the judges dined and met the serjeants there. Fortescue himself had chambers in the old Serjeants' Inn.[1] From Clifford's Inn one may now enter the old building where Fortescue lodged, but it is no longer used by the serjeants, for that ancient order is extinct. After their dinner the judges spent the rest of the day in the study of the laws, reading of the Scriptures, and other studies at their pleasure. It is a life rather of contemplation than of action, says Fortescue, free from every care and removed from worldly strife. Proudly he tells his prince that in his time no judge was found that had been corrupted with gifts or bribes.

Fortescue's De Laudibus is the unique production of that age. Here we see the legal system set forth, from the day the student enters an Inn of Chancery through his studies in an Inn of Court, his service at the bar, until his elevation and work upon the bench. It is fully described by one of the greatest of common lawyers, "this notable bulwark of our laws," as Sir Walter Raleigh calls Fortescue. But we ought not to part from this great lawyer without remarking his serene and steadfast faith in God's direct government of the world, — that wonderful faith of the Middle Ages. Fortescue feels that the good man is blessed. The fact that upright judges leave behind them a posterity is to him

[1] The serjeants at law had their lodgings in the Old Serjeants' Inn, which stands in Chancery Lane. But it is likely that the lodgings were occupied only during term time. The Paston Letters tell us how the good wife at home sent up from the country hams, chickens and cheese. But as soon as court adjourned for the long vacation the serjeants and judges hurried to their homes in the country. The arrangement of the terms with the long vacation at harvest time proves the country residence of the judges and lawyers.

one of God's appropriate blessings upon just men. It is a fulfillment of the Prophet's word that the generation of the righteous is blessed, that their children shall be blessed, and that their seed shall endure forever. Perhaps Fortescue, after the fatal field of Tewkesbury, when he lay a prisoner in the Tower, found consolation in the promise of the Psalmist: "The steps of a good man are ordered by the Lord; though he fall, yet shall he not be utterly cast down, for the Lord sustaineth him with his hand." For once at least the promise came true. Fortescue lived his last years in peace and honor. He saw the bloody tyrant, Richard of Gloucester, on Bosworth field, pay the penalty of his many crimes, and when the great Chief Justice passed away, a Lancastrian king was in undisturbed possession of the throne.

IV. The Iron Age of the Common Law: From Henry VII. to the Revolution of 1688[1]

The Yorkist kings had betrayed a tendency to use the courts for the furtherance of tyrannical ends; but Henry VII., who had been trained in the Lancastrian tradition of the independence of the judiciary, made absolutely no change in the judges after his victory at Bosworth. The avarice of this king was, however, so great that we have an instance of a melancholy practice which became common under the Stuarts. The king sold to Robert Read, a very good law-

[1] General references for this period: Foss and Campbell now become much fuller in detail. The State Trials are invaluable for the whole period. Besides these may be named: Fitzherbert's Abridgement, New Natura Brevium and Diversity of Courts, Lynwoode's Provinciale, St. Germain's Doctor and Student, Select Cases from the Court of Requests (Selden Society), Select Cases from the Star Chamber (Selden Society), Reeves' History of English Law, Spedding's Life of Bacon, Anderson's, Dyer's, Popham's and Plowden's Reports, Pollock's Land Laws, Dugdale's Origines, Staunforde's Pleas of the Crown, Coke upon Littleton, Coke's Institutes, Coke's Reports with the Introductions, Whitelocke's Memorials, Hale's Introduction to Rolle's Abridgement (in Hargrave's Collecteana Juridica), Saunders' Reports, North's Life of Lord Keeper North, Irving's Life of Jeffreys, Roscoe's Lives of Eminent Lawyers. Hale's Pleas of the Crown and History of the Common Law are not critical. For the historical development of the rules of evidence consult Wigmore on Evidence under the particular rule.

yer, the chiefship of the Common Pleas, for four thousand marks.

There are no names of great lawyers in this reign. The worthy Fineux, who became Chief Justice, had an immense practice. He was steward to 129 manors and counsel for 16 noblemen. His industry was marvelous, for he left 23 folio volumes of notes of 3,502 cases that he had managed. The growing importance of the mercantile class is shown by the elevation of Frowick, a member of a London family of goldsmiths. He succeeded Brian as Chief Justice of the Common Pleas. Thomas Whittington, a baron of the Exchequer, was a grand nephew of the famous Richard Whittington, who walked to London and who while sitting discouraged at the foot of Highgate Hill heard the prophecy of Bow Bells, and lived to become the banker of kings and the greatest of merchant princes.

Another celebrated lawyer of this time was Richard Kingsmill. A letter still extant says: "For Mr. Kingsmill it were well doon that he were with you for his authority and worship, and he will let for no maugre, and yf the enquest passe against you he may showe you summ comfortable remedy, but, sir, his coming will be costly to you." The childlike confidence in the high-priced lawyer is touching. But the fees seem ridiculously small. We know that the Goldsmiths' Company of London paid a retainer of ten shillings. "A breakfast at Westminster spent on our counsel" cost one shilling sixpence. Serjeant Yaxley's retainer from the litigious Plumpton for the next assizes at York, Notts, and Derby, was five pounds, and a fee of forty marks, if the Serjeant attended the assizes.

Two interesting features of this time are the beginning of our modern law of corporations, as applied to merchant guilds and trading corporations, and the growth of law book printing. Caxton printed no law book; but Wynken de Worde printed Lynwoode's Provinciale, and Lettou and Machlinia, trained under Caxton, printed in 1480 Littleton's Tenures, an edition supposed to have been superintended by the author. This book was most frequently reissued; and two famous printers, Pynson and Redman, got into a

savage dispute over the merits of their respective editions. In a few years the demand for law books caused the printing of some of the Year Books, and the publication of the Abridgments or Digests of Statham and Fitzherbert. The New Natura Brevium, St. Germain's Doctor and Student, Fitzherbert's Diversity of Courts, and Perkins' Profitable Book, soon appeared. The Year Books grow more and more scrappy, until under Henry VIII. they pass away. But in these latter years they are sad productions. The reporters have lost their French. Such words as "hue and cry," "shoes," "boots," and "barley," are not turned into French. The law French degenerated until it resembled modern phonetic script. A learned lawyer wrote in this wise: "Richardson, C. J. de C. B., at Assizes at Salisbury in summer 1631, fuit assault per prisoner la condemne pur felony; que puis son condemnation ject un brickbat a le dit justice que narrowly mist. Et pur ceo immediately fuit indictment drawn pur Noy envers le prisoner et son dexter manus ampute et fixe al gibbet sur que luy mesme immediatement hange in presence de court." The matter of reporting, however, was now taken up by well-known lawyers and judges. Anderson, Dyer, Owen, Dalison, Popham, Coke, Plowden, Bendloe, Keilway, and Croke have left valuable reports, all in Norman French.

The evidence all points to a complete breakdown in the jury system at this time. The Star Chamber court merely continued a jurisdiction long existent in the king's council; but some portion of the jurisdiction, such as that over corruptions of sheriffs in making jury panels and in false returns, over the bribery of jurors, and over riots and unlawful assemblies, was now put into statutory form. Yet the court would not allow even Serjeant Plowden to argue that it was confined in its jurisdiction by the words of the statute. The court was at first a most excellent engine for particular cases, and filled a great public necessity, but under the later Tudors and the Stuarts it became an engine of tyranny.

This period was characterized in the criminal law by most shameless oppression in all political cases. The unrestrained

rule of Henry VIII. and Elizabeth shows many a cruel instance of judicial sycophancy. Yet it is a fact that both these rulers were always popular among the lawyers. Even to-day, on every state occasion at Gray's Inn, "the glorious, pious, and immortal memory" of Queen Elizabeth is toasted by the benchers, the barristers, and the students rising, three at a time, and taking up the toast in succession. Yet it was Henry VIII. who reduced to an infallible system the art of murder by the forms of law. The judges certified Anne Boleyn to be guilty of high treason, because she was reported to have said the king never had her heart. A jury found the Earl of Surrey guilty of high treason, because he quartered the arms of Edward the Confessor; it is needless to say that Edward never had a coat of arms. The grey-haired, blameless Countess of Salisbury was executed, because her son Reginald Pole had become a Roman cardinal. The king adopted the ingenious methods of Chinese justice, by which, if the offender is not available, his nearest relative suffers in his stead. The judges certified that Catherine Howard, Henry's fifth queen, was guilty of high treason, because she was not a virgin when she espoused the elderly and battered rake. Cromwell, Earl of Essex, committed high treason, because he had not warned Henry that Anne of Cleves, the king's fourth bride, was hideously ugly.

Even torture was resorted to in criminal trials. Fox, in his Book of Martyrs (which is embellished by numberless falsehoods), says that Sir Thomas More tortured a prisoner. Elizabeth ordered Campion the Jesuit to be put upon the rack; and Chief Justice Wray presided over the trial. Throgmorton was convicted on confessions obtained by threats of torture. The evidence, where any was taken, was often worthless hearsay. The trial of Sir Thomas More was a travesty on justice. But the conviction of Fisher, Bishop of Rochester, stamps the judges with infamy. In that trial it appeared that Bishop Fisher, mindful of the act of Parliament which made it high treason to dispute the king's headship of the Church, had steadily refused either to admit or deny the king's supremacy. At last the Attorney General, Richard Rich, who by the most degrading subservi-

ency to the humors of the king had gained preferment, was sent to Fisher in the Tower. He told the Bishop that he came from the King, who desired to know for his own information Fisher's real opinion upon the disputed point. The Bishop spoke of the danger arising from the act of Parliament, but Rich assured him that no advantage would be taken of him and gave him the promise of the King that his answer would never be divulged. Thereupon, the Bishop stated that he thought an act of Parliament could no more declare the King head of the church than it could declare that God was not God. Fisher was at once brought to trial; Rich gave the sole evidence against him; and the judges allowed the Bishop to be convicted and executed. It is said that the judges shed tears when the saintly old man was condemned; but that conduct simply adds to their infamy. Sir Thomas More was convicted and brought to the block upon the very same kind of testimony.

Yet during this whole period the law provided even-handed justice as between one private citizen and another. The reports of Chief Justice Dyer, Chief Justice Anderson, and Serjeant Plowden, during the reign of Elizabeth, abundantly prove the fact. In ordinary criminal trials the law was growing much more lenient. It was only when the government was urging the prosecution that the tyranny of the Tudors and Stuarts left the individual no hope against the Crown. Judicial tenure became dependent upon subserviency to the wishes of the executive. Judicial appointments were given solely to those who pledged themselves to the royal designs. The real history of the law is found in the bloody records of the State Trials. The processes of law are used by the government with almost cynical indecency. The baronage was destroyed, and the great mass of the people, the cities and the country gentry, eagerly supported the royal authority.

Before passing from the reign of Henry VIII. we should notice Lord Chief Justice Montague, who founded a powerful family, and is now represented by the Duke of Manchester, the Earl of Sandwich, and the Earl of Wharncliffe. Another of Henry VIII.'s judges was John Spelman, the grand-

father of the celebrated antiquary, Henry Spelman. He is not specially noted for his judicial utterances, but he became by one wife the father of twenty children.

Under Elizabeth, those unfortunate gentlemen upon whom the Queen had showered her favors were in peculiar peril. Anyone of her numerous lovers who had the temerity to take a furlough suffered for high treason. The Earl of Hertford was so misguided as to marry a wife. Although he prudently went abroad, the bride was thrown into the Tower, and when the Earl returned, he also was imprisoned. The Queen had the marriage declared void, and fined the Earl fifteen thousand pounds. The young Earl of Arundel had a similar but more trying experience, when he became reconciled to his wife after having been Elizabeth's favorite. He was condemned to death, but was saved by the Queen's ministers. Hatton, who became chancellor through the graces of his person, had the good sense to remain unmarried; and the Earl of Leicester kept his royal mistress' favor by forgetting his duties as a husband. The Duke of Norfolk was convicted because he was suspected of a desire to marry the Queen of Scots. That Queen was executed after an absurd trial before the judges. The Secretary Davidson, who at the command of Queen Elizabeth had issued the warrant for the execution of the Queen of Scots, was savagely prosecuted and imprisoned for life.

The religious controversies fanned the cruel instincts of the age. Under Henry the faithful Catholics suffered the worst oppressions. The chief tool of Henry VIII. in these matters was Thomas Audley, who was a trained lawyer and succeeded More as Lord Chancellor. He devised those laws which imposed upon every man's conscience the most contradictory oaths. It was a penal offence to acknowledge the Pope, yet it was no less penal to deny a single article of the Romish faith. Whoever was for the Pope was beheaded and whoever was against him was burned. The legislation that plundered the church was Audley's work, and he selected for himself a rich portion of the spoil. The priory of Christ Church in Aldgate became his town house. He claimed the wealthy monastery of Walden, representing that

he had sustained great damage and infamy in serving the King. On the ruins of that abbey his grandson Thomas Howard erected the stately Elizabethan mansion of Audley End.

When the Catholics returned to power under Mary, the Protestants in their turn suffered the penalties of heresy. One trial, however, stands out in this reign as the only instance where, under the Tudors, a prosecution for high treason resulted in a verdict of not guilty. Sir Nicholas Throckmorton was prosecuted by the learned Dyer, then Attorney General. The defendant completely outtalked the Attorney General, and made him appear something of a simpleton. He modestly compared himself to the Savior, and pictured Dyer in the character of Pilate. His self-confidence enabled him to interrupt Chief Justice Bromley's charge to the jury. Throckmorton craved "indifferency" from the judge, and helped out the judge's poor memory by his own recital of the facts. The jury that acquitted Throckmorton was imprisoned and heavily fined.

The judges, who were Protestants, on the accession of Mary conveniently became Roman Catholics; one of them, Sir James Hales, had scruples but was induced by his associate, Judge Portman, to recant. This act so worked on Hales' conscience that he drowned himself. The coroner's jury returned a verdict of suicide; and in two cases[1] a number of hair-splitting subtleties were uttered by the court as to the effect of the suicide in forfeiting the Judge's estates. Shakespeare makes the learned gravediggers in Hamlet discourse over Ophelia in words that are almost a literal parody on the arguments of the judges.

Elizabeth's reign produced one very great judge. James Dyer was really appointed to the bench under Mary, but the most of his judicial service was under Elizabeth. He presided in the Common Pleas for twenty-three years. He took no part in the disgraceful political trials of this reign, but directed his court with efficiency and learning. The poet Whetstone has these lines upon Dyer:

[1] Bishop of Chichester v. Webb, 2 Dyer 107; Lady Hales v. Pettit, Plowden 253.

> He ruled by law and listened not to art;
> These foes to truth — love, hate, and private gain
> . . . his conscience would not stain.

John Popham offers a remarkable contrast to Dyer. Of high birth, educated at Oxford, he fell into evil ways while at the Middle Temple. He even resorted to the calling of a highwayman to replenish his purse. He reformed, however, and became a consummate lawyer; he was made Solicitor General and Speaker of the House of Commons. In regular order he became Attorney General, and as such took the lead in many state trials. He prosecuted Tilney, and caused Chief Justice Anderson, one of the greatest lawyers of the reign, to charge the jury on wholly insufficient evidence that the defendant was guilty of an attempt upon the Queen's life. He attempted to prosecute Mary Queen of Scots; but Hatton, the Chancellor, took the work out of Popham's hands. Both Elizabeth and Hatton were violently inflamed against the Stuart Queen, on account of the ridicule she had heaped on the love affair of the Virgin Queen and her Chancellor. Even the learned but apologetic Foss is compelled to say that the warmth of Elizabeth's letters to Hatton "would be fatal to the character of a less exalted female." On the trial of Knightley, a Puritan, who in temperate language had published some observations on the due observance of the Sabbath, Popham contended that the defendant, though guilty only of a technical violation of a royal proclamation and for that reason not guilty of an indictable offence, could yet be prosecuted in the Star Chamber. He sagely observed as to the defendant's excuse for publishing his pamphlet: "Methinks he is worthy of greater punishment for giving such a foolish answer as that he did it at his wife's desire." When Popham became Lord Chief Justice he showed his prejudice against his former calling by an unexampled severity against highwaymen. On the trial of Essex he curiously mingled the functions of witness and judge, and in his summing up out of his own knowledge furnished the jury with statements of fact that had not been testified to by any witness. By his exertions at the bar he accumulated an immense estate amounting to ten thousand

pounds a year; but it was all squandered by his son, another John Popham.

One court — the Court of Requests — that fulfilled a very important function during this period has long been forgotten. It was a court for civil causes — a companion court to the Star Chamber (which devoted itself to criminal cases). Its duty was to hear the causes of those suitors who were denied justice in the common law courts. Wolsey established one branch of the court at Whitehall, while another branch followed the sovereign. Wolsey's fame as a churchman has wholly obscured his high reputation as a judge. In the court of chancery, in spite of his manifold duties as Prime Minister, he was regular and punctual, and his decrees were invariably sound. He made the Court of Requests emphatically a court to redress the injustice of jury trials. Those who failed before juries on account of the corruption of the panel or the power of their adversaries found themselves protected in the Court of Requests, which followed the chancery practice and was not hampered by a jury. Here the tenants of land appealed for justice against their landlords, here the copyholders sought relief against the enclosures of the commons and waste lands of the manors. The Protector Somerset owed his fall to his active intervention against the landholders; and the strict impartiality of Wolsey's justice and the sternness with which he repressed the lawlessness of powerful nobles aided in his destruction. The Court of Requests was in continual collision with the common law courts. Coke invented certain imaginary judgments in order to destroy it. But the court held on, and in 1627 Henry Montague, a grandson of the Chief Justice, a very able lawyer, came to preside in this court, and gave it such a high reputation that it had almost as many suits and clients as the chancery. Blackstone[1] tells us that this court was abolished in 1640; but he is mistaken, for in 1642, in sixteen days' sittings, the court made 556 orders. It passed away in the turmoils of the civil war.

The jealousy of the common law courts toward the chancery culminated in Henry VIII.'s Statute of Uses, which

[1] 3 Com. 50.

attempted to convert every use or trust in land into a legal estate in the beneficiary; this was followed by the Statute of Enrollments requiring all conveyances of freehold by bargain and sale to be recorded in a public office. But the chancery judges and lawyers soon "drove a coach and four" through this act of Parliament; and by means of a bargain and sale for a lease, which the statute executed, followed by a release, which did not require recording, they abolished livery of seisin, as well as the recording of deeds. The Statute of Uses also abolished all uses to be declared by the feoffor's will. The uses declared in the will had been sedulously protected by the chancery court. But when this method of devising lands was abolished by the Statute of Uses, it became necessary to pass the Statute of Wills. Both Coke and Bacon thought that the Statute of Uses abolished all devises except those that would have been good at common law as conveyances. But the statute was construed otherwise, and the chancery lawyers imported into wills all these conveyances to uses, and thus let in the various kinds of executory devises — estates that in wills rendered nugatory all the common law rules as to remainders. All this history shows the futility of attempting to control a natural development, by means of statutes.

In many ways the years of the first two Stuart kings are the saddest in the history of the law. The servility of the judges was no less marked than under the Tudors. As an added evil, judicial offices were openly made the subject of bargain and sale. Henry Montague gave to Buckingham's nominee the clerkship of the court, worth four thousand pounds a year.[1] Coventry paid Coke two thousand angels for his influence in securing a judicial appointment. The chiefship of the Common Pleas cost Richardson seventeen thousand pounds. Sir Charles Caesar paid fifteen thousand pounds for the mastership of the rolls. Henry Yelverton gave the King four thousand pounds for the office of attorney-general, — a place for which Ley, afterwards Chief

[1] Perhaps we ourselves have as yet no right to condemn this, when we still see in some regions masterships in chancery turned over to the successful political party to be filled.

Justice, vainly offered ten thousand pounds. Judge Nichols refused to pay for his place, and James I. always referred to him as "the judge that would give no money." The fifteen serjeants called in 1623 each paid the King five hundred pounds. Under Cromwell, the pious Lord Chief Justice St. John had the granting of all pardons to delinquent lawyers, which netted him forty thousand pounds; nor did he scruple to receive bribes for places under the Protector. Under James II., the young daughters of the leading citizens of Salisbury, who had strewed flowers before the rebel Monmouth, being technically guilty of high treason, obtained pardons by paying money to the Queen's maids of honor, to whom the King had given the pardons. That great and good man William Penn acted as the agent of the needy ladies in collecting the tribute.

The tone of adulation used by lawyers and judges toward the sovereign is almost incredible. Rich compared Henry VIII. "for justice and prudence, to Solomon; for strength and fortitude, to Samson; and for beauty and comeliness, to Absalom." Bacon in a learned treatise felicitates James I. (who was little better than a drooling idiot), upon the deep and broad capacity of his mind, the grasp of his memory, the quickness of his apprehension, the penetration of his judgment, his lucid method of arrangement, and his easy facility of speech. The virtuous Coke claimed that King James was divinely illuminated by the Almighty. But this was the tone of the age. To Shakespeare, Elizabeth was "a fair vestal" and "a most unspotted lily."

The vices of the age are summed up in the rivalry of its two greatest lawyers, Bacon and Coke, — the latter, the most learned of lawyers, but narrow, cruel, and unscrupulous; the other, of large insight, capacious intellect, but also little troubled by scruples.

Coke, the elder of the two men, was Solicitor-General, with a large practice and ample fortune, when Bacon, with his great family advantages, tried to gain the office of Attorney-General against him. Coke stood in the line of preferment. He bitterly resented Bacon's nickname of the "Huddler" — not an undeserved name for the author of

a book like Coke upon Littleton. Next they became rivals for the hand of the widow of Sir William Hatton, a beautiful woman, only twenty years old, with an immense fortune and great pretensions to fashion. The old and wrinkled Coke, a six months' widower, prevailed. But while the lady was willing to marry Coke, she refused to espouse such an elderly scarecrow at a church wedding. So Coke married her in a private house, and thereby violated the law. His plea when prosecuted was ignorance of the statute. Perhaps this is the real reason for Coke's oft quoted statement as to statute law. But Bacon made a fortunate escape, and had the satisfaction of enjoying Coke's domestic infelicities. Lady Hatton refused, after several quarrels, to live with Coke; she further refused to take his name, which she insisted on spelling "Cook." She refused even to let Coke see the daughter she had borne him, and turned him away from her door.

Then Essex's trial came on. Coke surpassed even himself in brutality, while Bacon deserted his benefactor. The two men soon had a public altercation in the Exchequer Court. To curry favor with the new king, James, Coke prosecuted Raleigh so savagely that even the judges sickened. The remorseless Popham protested, and such a sycophant as Lord Salisbury rebuked Coke. Thereupon Coke sat down in a chafe and sulked, until the judges urged him to go on. Lord Mansfield said long afterwards: "I would not have made Sir Edward Coke's speech against Sir Walter Raleigh to gain all Coke's estate and reputation." When Coke prosecuted the Gunpowder Plot conspirators, he showed to the full his cowardly method of insulting the prisoners. Other trials were no less disgraceful. Yet, all through, worse than Coke's brutality, is his pharisaical self-satisfaction, his pitiable, snivelling, hypocritical piety. The best excuse for Bacon is that he was engaged in a rivalry with such a man.

Coke became Lord Chief Justice of the Common Pleas in 1606, and used his place to humble and coarsely insult Bacon. But Bacon's suppleness was ingratiating him with the King. Coke had become so puffed up that he was growing independent. Bacon induced James to put Coke at the head of the

King's Bench. Coke bitterly reproached Bacon, who replied: "Ah, my Lord, you have grown all this while in breadth; you must needs grow in height, or else you would be a monster." Coke on the bench was fully as brutal as at the bar. In one case he told the jury that the defendant, Mrs. Turner, had the seven deadly sins, — that she was a whore, a bawd, a sorcerer, a witch, a papist, a felon and a murderer.

At last Coke engaged in his famous controversy with Lord Chancellor Ellesmere, over the power of the Chancery to enjoin proceedings at law, and drew forth the masterly opinion in the famous case of the Earl of Oxford.[1] Coke threatened to imprison everybody concerned; but Bacon persuaded the King that Coke was in the wrong, and the King's Bench submitted. Bacon finally caused Coke to be suspended from office, and to be ordered to correct his book of reports, "wherein be many extravagant and exorbitant opinions set down and published for positive and good law."

Bacon now succeeded Ellesmere as Lord Chancellor. But Coke, at the age of sixty-six, was not yet defeated. He had a young and pretty daughter; her he offered as a bride to Sir John Villiers, the brother of Buckingham. Coke's wife fled with her child; but Coke pursued her, tore the child from her mother's arms, and carried her off to London. Bacon was unable to help Lady Hatton. The mother in prison was compelled to submit, and the child, after a splendid marriage, was handed over to Sir John Villiers. The marriage turned out as might have been expected. The young wife eloped with Sir Robert Howard. Her only son was declared illegitimate, and did not receive the name of Villiers.

Coke received no reward for his unexampled baseness. He tried to make his peace with the King by a number of disgraceful judgments in the Star Chamber. But when his efforts met no return, he had himself returned to Parliament as a patriot. Dr. Johnson must have had Coke in mind when he made his famous definition of patriotism as "the last refuge of a scoundrel." Thirsting for revenge on Bacon, Coke caused his impeachment and ruin. Coke lived on to be a very old man. Lady Hatton lent humor to the situation by

[1] 2 White and Tudor Lead. Cas. Equity 601.

constantly complaining of her husband's good health. At last he died, watched over by his unfortunate daughter. He made an exceedingly pious end, — thus exhibiting his total unconsciousness of his own true character.

Under Charles I., some ably conducted trials took place over the King's attempt to raise a revenue without recourse to Parliament. The bar was independent enough to hold out against the power of the Crown. The judges ruled that a commitment specifying no offense was bad. Another decision prohibited torture of prisoners. The rules of evidence were not yet settled; but in the ordinary criminal trials, a defendant was now held not bound to give evidence against himself. Shakespeare seems to think the rule a bad one, not to be followed in the Court of Heaven; for

> "In the corrupted currents of this world,
> Offence's gilded hand may shove by justice;
> And oft 'tis seen the wicked prize itself
> Buys out the law; but 'tis not so above;
> *There* is no shuffling, there the action lies
> In his true nature; and we ourselves compell'd,
> Even to the teeth and forehead of our faults,
> To give in evidence."

In the famous Ship Money case of Hampden there was a great forensic display. The Solicitor General spoke for three days, the defendant's leader spoke four days, Oliver St. John for the defense took two days, and the Attorney-General replied in three days. St. John's argument was considered the finest that had ever been heard in Westminster Hall. But this speech was soon surpassed by the noble and pathetic plea of Strafford in his own behalf. At last the King himself was put upon trial. The leading Parliamentary lawyers, Rolle, St. John, and Whitelock, refused to sit in the court. Bradshaw, an able lawyer, was made Lord President of the illegal tribunal. The King's line of defense was laid out for him by Sir Matthew Hale. Bradshaw tried to bully the King, but was overwhelmed by acute reasoning, a royal dignity, and a noble presence, by the King's liberality of thought and real eloquence. In other trials, such as those of the Duke of Hamilton, the Earl of Holland, Lord Capel,

and Sir John Owen, the defendants were convicted by conduct as arbitrary as anything under the Tudors. Serjeant Glyn at the trial of the gallant Penruddock rivalled Coke at Sir Walter Raleigh's trial. The Protector Cromwell cared little for courts or law. The very men who had declaimed against ship money saw Cromwell's arbitrary taxation. Chief Justice Rolle and the judges attempted to try the legality of such a tax; but Cromwell sent for them and severely reprehended their license, speaking with ribaldry and contempt of their Magna Charta. He dismissed the judges, saying that they should not suffer lawyers to prate what it would not become them to hear. Serjeant Maynard, who had argued against the tax, was committed to the Tower, while Prynne suffered a fine and imprisonment. Sir Matthew Hale was threatened by Cromwell's government for his strong defense of the Duke of Hamilton and Lord Capel, but Hale replied that he was pleading in support of the law, was doing his duty to his clients, and was not to be daunted by threatenings. During the Cromwellian ascendency, Hale, at the solicitation of the Royalist lawyers, accepted a judgeship. On the circuit he tried and condemned one of Cromwell's soldiers for the murder of a Royalist, and had the prisoner hanged so quickly that Cromwell could not grant a reprieve. He quashed a panel of jurors when he found that it had been returned at Cromwell's orders. The Protector, on Hale's return to London, soundly berated him, telling him that he was not fit to be a judge.

Many legal reforms were projected during the Commonwealth, but they came to naught at the Restoration. An attempt was made (among others) to substitute the law of Moses for the common law. There was an earnest attempt to abolish the Court of Chancery, but it was frustrated by St. John. An act was passed regulating chancery practice, but it was found to be impracticable. Most of the better class of lawyers were Royalists and ceased court practice. Confiscation and seizures were the order of the day. But the Royalist conveyancers, Orlando Bridgman and Jeffrey Palmer, while they would not appear in court, enjoyed an immense chamber practice and by their new devices of family

settlements, superseding entails, preserved many a Royalist estate.

The Inns of Court during the Tudor and earlier Stuart reigns had continued to enjoy great prosperity. From Fortescue's time to Charles I., it is almost impossible to point to a single lawyer of standing who had not been preliminarily educated at Oxford or Cambridge. In the reign of Queen Mary attorneys and solicitors were forever excluded from the Inns. Henceforth only barristers were trained in those institutions, and attorneys became objects of contempt. In fact, in an order in 16 Charles II., an attorney is called "an immaterial person of an inferior character." The instruction in the Inns continued to be the same as in Fortescue's time. The law was now all case-law. Fitzherbert says that the whole Court agreed that Bracton was never taken for an authority in our law. In social entertainments the Inns shone. Costly feasts, magnificent revels, masks, and plays, where the royal family attended, the splendid celebrations of calls of serjeants, the feasts given by the readers, are all fully described in contemporary annals. We read of "spiced bread, comfits and other goodly conceits, and hippocras," and the bill of supply of one of the feasts, comprising "twenty-four great beefs," "one hundred fat muttons," "fifty-one great veales," "thirty-four porkes," "ninety-one piggs," through endless capons, grouse, pigeons and swans to three hundred and forty dozen larks, shows that the vice of the time was gluttony.

It was found necessary during this period to restrain the students. Some of the regulations are curious, — the prohibition of beards of over a fortnight's growth, of costly apparel, of the wearing of swords; and the restraints on sports point to unruly members in the Inns. It was found necessary to make attendance at the moots compulsory. The standard of attainment was raised. Ten years' attendance was required before a call to the bar; this was afterwards put back to five years, and then raised to seven; and for three years after his call, a barrister was not permitted to practice before the courts at Westminster.

The Commonwealth time was almost destructive of the

Inns, but at the Restoration they started on a new career of splendor. All the old ceremonies and practices were revived. Heneage Finch, afterwards Lord Nottingham, revived the readers' feasts of former days. He saved the Temple walk from being built upon; and his daily consumption of wine offered an admirable example to the deep drinking young blades of the Restoration.

The two great lawers of Charles II.'s reign were almost exact opposites. Finch, born of an ancient family, of ample fortune, living in magnificent style, princely in his expenditures, a genuine cavalier, was the very antithesis of the Puritanism of Hale. His is one of the noted names on the roll of Christ Church at Oxford. He is the second of our great forensic orators. Ben Jonson has told us of Bacon's impressive and weighty eloquence, but it could not be compared with the silver-tongued oratory and the graceful gestures of the "English Roscius." Finch passed through the grade of Solicitor-General, to the Attorney-General's place, and then became Lord Chancellor, with the title of Lord Nottingham. He was a model of judicial decorum, calm and patient in hearing, prompt in the business of his court, sitting to decide cases while racked with the pain of gout. Careful in the framing of his judgments, and at the same time, a finished man of the world, he stands unrivaled except by Lord Mansfield.

When he came to the marble chair, equity jurisprudence was a confused mass of unrelated precedents. While he invented nothing new, he introduced order into the chaos and settled the great heads of equity in their enduring form.

> "Our laws that did a boundless ocean seem,
> Were coasted all, and fathomed all by him."

He settled, finally, the restraint upon executory interests, by his great ruling in the Duke of Norfolk's case.[1] It has been forgotten that Nottingham overruled the three chiefs of the common law courts — North, Pemberton and Montague — sitting with him. North, becoming Chancellor, reversed the case, but the House of Lords, at the instance of Lord

[1] 3 Ch. Cas. 1.

Jeffreys (as great a lawyer as Nottingham), restored the first ruling, and reëstablished the rule against perpetuities.

Sir Matthew Hale is not such an engaging figure. He was rather a Puritan, and for thirty-six years never missed attendance at church on Sunday. He was Lord Chief Baron after the Restoration, and then Lord Chief Justice. In mere learning he was without a rival. Lord Nottingham has generously spoken of Hale's "indefatigable industry, invincible patience, exemplary integrity, and contempt for worldly things," and Nottingham adds, in his stately way: "He was so absolutely a master of the science of law, and even of the most abstruse and hidden parts of it, that one may truly say of his knowledge in the law what Saint Augustine said of Saint Jerome's knowledge of the divinity — "Quod Hieronymus nescivit, nullus mortalium unquam scivit." Hale's preface to Rolle's Abridgment contains the most helpful words ever addressed to students of law. The criticism, however, was urged against him that he dispatched business too quickly. And it is almost incredible that he believed in witchcraft with the utmost ignorant superstition, and tried and caused to be executed two poor old women, whom a foolish jury under his direction convicted of diabolical possession.[1] It was but a few years later that another woman was tried for witchcraft before Judge Powell, a merry and witty old gentleman. Her offence was that she was able to fly. "Can you fly?" asked the judge. The crazy woman replied that she could. "Well, then," he said, "you may, for there is no law against flying." And so ended the trial.

A character of those times was the learned Prynne, an able lawyer, a great antiquarian authority. He assaulted everything, from long hair and actresses to bishops. First he lost his ears, then he was disbarred and condemned to the pillory. Again he lost what little of his ears had been left from the first shaving. He attacked the Quakers, then he suffered imprisonment under Cromwell; next he advocated the proceeding against the regicides, even against those who were dead, and at last rounded out his career as keeper of the records in the Tower. Equal to Prynne in fearless constancy

[1] 6 State Trials 647.

was Judge Jenkins, the author of Jenkins' Centuries, — a most curious series of reports.

It is customary to represent the succession of judges under James II. to the time of the Revolution of 1688 as a most ignorant, depraved, and worthless set of men. But this picture is badly overdrawn. It is true that the stately and dignified Cavaliers, like Lord Clarendon or Nottingham, were passing away, and that their successors were hardly their equals. Scroggs, the first Chief Justice, owed his elevation to his ability as a forensic orator. Once from the bench he told the listening mob that "the people ought to be pleased with public justice, and not justice seek to please the people. Justice should flow like a mighty stream, and if the rabble, like an unruly wind, blow against it, the stream they made rough will keep its course." And so Scroggs rolled out his periods, making a splendid plea for judicial independence. It is a sign of the times that high prerogative rulings, which seemed perfectly natural under Elizabeth, should arouse such violent public resentment. Scroggs lost all influence with juries; so he was dismissed, and Francis Pemberton took his place. This man, born to a large fortune, had squandered it within a few years after attaining his majority, and awoke one day to find himself imprisoned under a mass of judgments. But in his five years' imprisonment he made himself a consummate lawyer. He obtained a release from prison, and soon acquired eminence and wealth at the bar.

But not long after Pemberton's elevation to the bench, it was determined to forfeit the charters of the City of London, so as to gain control of the panels of jurors, who were selected by a sheriff, elective under the charters. This advice had been given to the King by the noted special pleader, Edmund Saunders. This remarkable man had had a singular career. Born of humble parents, he had run away from home, drifted to London, and found shelter as an errand boy at Clement's Inn. He learned to write, became a copying clerk, and in this way gained an insight into special pleading. The attorneys induced him to enroll himself at an Inn of Court. In due time a barrister, he made

himself the greatest master of common law pleading that system has ever known. He had no political opinions, nor did he seek riches or advancement. Witty, genial and gay, he had always around him a crowd of students, with whom he was putting cases, answering objections and debating abstruse points. His physical appearance was repulsive. Brandy was his constant drink, varied by a pot of ale always near him. Drunkenness and gluttony had caused a general decay of his body. Hideous sores and an offensive stench made his presence an affliction. Yet the government had such need of his services that North, the Lord Keeper, actually asked him to dinner. Saunders drew the pleadings in the great Quo Warranto case, and caused the attorneys for the City of London to plead upon a point where they were sure to be defeated. Thereupon Saunders drew up an ingenious replication, to which the city demurred. Just as the cause was about to be argued Pemberton was removed and Saunders was appointed, and (incredible as it may seem) he then heard argument upon his own pleadings. The cause was argued for two terms, but when, at the third term, judgment was delivered, Saunders lay dying in his lodgings. His best memorial is his book of reports, the most perfect specimen of such work in our legal literature.

Saunders was succeeded, after an interval, by the noted Jeffreys, popularly considered the worst judge that ever sat in Westminster Hall. But this popular belief cannot be taken in place of the sober facts. He was of an ancient family in Wales. He received the usual education of his time, and attended at Trinity College, Cambridge. He studied at the Middle Temple, and was admitted to the bar at the age of twenty. He at once leaped to a commanding position. He was made Common Serjeant, and later Recorder of London. This was due to his splendid legal talents. He had one of those rare minds which under great masses of evidence seize upon the real issue. He had a marvellous skill in advocacy, and a flowing, impassioned, magnetic eloquence. Added to this was an overwhelming bitterness of denunciation that sometimes appalled his hearers. We know that Sir Matthew Hale was a good judge of lawyers, and we are told that

Jeffreys gained as great an ascendency over Hale as ever counsel had over a judge.

To his intellectual gifts, Jeffreys added a noble and stately presence. There are three portraits of him; the first represents him when thirty years old, the next is of Jeffreys in his full robes as Lord Chief Justice, the last shows us the man in his robes as Chancellor. It is a very noble, delicate, and refined face that looks out from Kneller's canvas. There is birth, breeding, distinction in every line. He must have been a great lawyer; for to Hale's testimony we may add that of the accomplished judge, a confirmed Whig, Sir Joseph Jekyll; of Speaker Onslow, who bears testimony to his ability and uprightness in private matters; of Roger North, who hated Jeffreys but was forced to admit: "When he was in temper and matters indifferent came before him, he became his seat of justice better than any other I ever saw in his place." But best witnesses of all are his recorded judgments. The incomparable stupidity of Vernon, the reporter, has destroyed the value of Eustace vs. Kildare and of Attorney General vs. Vernon;[1] but his decision in the East India Company's case is admitted by all lawyers to be a marvel of close legal reasoning. In the House of Lords he saved the Duke of Norfolk's case, and even his political enemies after the Revolution did not reverse his cases. A master of the common law, he was yet a great chancellor. He promulgated a set of rules in chancery, the best since Bacon's time. Other of his decisions can be found in the reports of Sir Bartholomew Shower, an excellent lawyer.

No doubt Jeffreys was a hard drinker. So was Lord Eldon, so were many able lawyers in our own country. He was no doubt savage and overbearing at times. He rode roughshod over defendants and their counsel. He hated Puritans and all their works. He was often cruel and remorseless. But even Lord Hale enlivened trials by breaking forth upon witnesses: "Thou art a perjured knave, a very villain! Oh, thou shameless villain!" Jeffreys' "Bloody Assizes" is the greatest stain on his memory; but no innocent person was punished in those trials. The worst that can be

[1] 1 Vernon 419, 369.

said of Jeffreys may be read in Macaulay's History. Much of it is true; some of it is untrue; but it all belongs to the spirit of that age of savage disputes and rancorous political hatreds. Yet, after all, Jeffreys was but one of the five judges who sat together on that circuit.

To see Jeffreys at his best, we should see him in the trial of Lord Grey de Werke. Jeffreys' skill and adroitness in putting in the evidence against the great Whig lord, the brazen seducer of his own wife's sixteen-years-old sister; his gentleness and exquisite suavity toward his witnesses, his few words of apology to the court for the tears of the victim's mother, are models of forensic decorum. In his tact, his delicate management, never a word too much, now and then putting a question to bring out some point that had been overlooked, Jeffreys shows throughout the skill of the master.

He prosecuted Lord William Russell and convicted him. His great arts of advocacy simply overwhelmed the defendant; for Russell had a fair trial, and the jury was calmly charged by Pemberton. Jeffreys as judge tried Algernon Sidney, who was convicted upon evidence. Nothing in Jeffreys' career can compare with Coke's conduct at Raleigh's trial, or with Glyn's when he judicially murdered Penruddock. Even in Lady Lisle's case, she was condemned on actual, credible testimony, offered in accordance with the rules of evidence.

When Jeffreys returned from his campaign in the west he was made Lord Chancellor and given a peerage. Wright succeeded as Lord Chief Justice, and before him came on the famous trial of the Seven Bishops. The besotted King attempted to abolish the Test Acts by proclamation. Both dissenters and churchmen united against a declaration which would tolerate Roman Catholics. The bishops remonstrated, and the King, against Jeffreys' advice, caused the bishops to be indicted. The trial came on before the King's Bench. The defense mustered a great array of counsel. Pemberton, a cashiered chief justice, Levinz, another dismissed judge, who had gone the bloody circuit with Jeffreys, Heneage Finch, son of Lord Nottingham, and Somers, after-

wards the great Chancellor, appeared for the defense. Such a throng never appeared again at a trial in Westminster Hall, until Warren Hastings came back from India to meet an impeachment. The bishops were acquitted, and Wright and his fellows were disgraced.

The King filled up his court again; and the legality of martial law in the army then came on for trial before Chief Justice Herbert. At that day in England, in case of a desertion or mutiny, the army officers were powerless, unless they called in the sheriff. But Chief Justice Herbert refused to yield to the King's wishes, and held that the army could not be governed by martial law. Again the King cleaned out his court. One of his new tools was Christopher Milton (a brother of the poet). The King called upon his judges to hold that the King by proclamation could dispense with acts of Parliament. Jones, the Chief Justice, refused. He told the King that he was mortified to think that his Majesty thought him capable of a judgment which none but an ignorant or dishonest man could give. The King said that he was determined to have twelve lawyers for judges, all of his way of thinking. Jones replied: "Your Majesty may find twelve judges of your mind, but never twelve lawyers." But the King had now exhausted the public indulgence and he was soon in flight to France.

It would perhaps seem, from the record of this period, that little good could have been accomplished in the development of the law. But this inference would be an error. We have noticed, at the opening of this epoch, a general feeling that jury-trial was worthless. The work accomplished by this age was to improve the methods of jury trials so as to make them promotive of justice. The first thing done in this later period was to make the jury independent, by establishing the rule that they could not be fined or imprisoned for what was conceived to be a false verdict. The second improvement was to give the courts power to grant new trials, and thus to place the verdict under the control of the judge. The final improvement was to establish the rules of evidence. These rules were so framed and moulded as to exclude from the jury all testimony which

would improperly influence them, or which did not depend for its credibility upon the veracity of a sworn witness. Above all, the jury was required to proceed solely upon evidence offered in open court, which had been subjected to the test of a cross-examination. It was in the bad times of the Stuarts that these rules were settled. Singularly enough, the first case that is authentic, in excluding hearsay, is a decision by Lord Jeffreys. Although the rules of evidence were amplified by Lord Mansfield, they have not been changed, except by statute, from that day to this. The greatest of forensic orators said in Hardy's case: "The rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." Surely, a generation of lawyers which created and formulated these rules is entitled to some grateful remembrance, and of that generation, the greatest common lawyer was, undoubtedly, the outlawed Jeffreys.

V. The Period of Reform: From William III. to Victoria[1]

As soon as the judges who had served under James II. had been removed, after the Revolution of 1688, a return was made to the old Lancastrian doctrine that judges hold their office during good behavior, not during the pleasure of the crown. Some of the judges who had refused to obey the mandates of the King, and in consequence had suffered dismissal, were now restored. Since the Revolution there has never been a removal of a judge by the executive power,

[1] The authorities for this period are too numerous to be named here. Lord Campbell's Lives, both of Chief Justices and of Lord Chancellors, are very full. His lives of Mansfield and Eldon are excellent; but his Brougham and Lyndhurst are pitiable. Foss is reliable. Welsby's Lives of Eminent English Judges, Roscoe's Lives of Eminent Lawyers, Cooksey's Life of Somers, Twiss' Life of Eldon, Brougham's Autobiography, Arnould's Memoir of Denman, Martin's Life of Lyndhurst, Atlay's Victorian Chancellors, and Woolrych's Lives of Eminent Serjeants, may be consulted. A Century of Law Reform summarizes the changes made in the law, while Dicey's Law and Opinion in England shows the spirit underlying the legal changes. There are, of course, endless other authorities for this period, including almost innumerable magazine articles. Bowring's edition of Bentham's works, with his Memoirs prefixed, is valuable.

nor a single known instance of a corrupt decision. The overwhelming importance of the House of Commons has since 1688 given the great prizes of the profession to lawyers who have been useful to their party in Parliament. The regular preferment for an able lawyer has been from a seat in the Commons to the solicitor-generalship, then to the attorney-general's place, and finally to the chiefship of one of the law courts or to the office of Lord Chancellor. But the professional and political preferment has invariably come as the reward, not the cause, of professional eminence. Lord Somers, Sir John Holt, Lord Talbot, and Lord Hardwicke were very great lawyers before they received any political reward. Later Mansfield, Thurlow, Eldon, Erskine, Loughborough, Melville, and Ellenborough had become leaders of the bar, before they entered upon a parliamentary career. In the last century, Lyndhurst, Brougham, Tenterden, Cottenham, Denman, Campbell, Westbury, Cockburn, Selborne, Cairns, Coleridge, and Russell all gained their professional and judicial preferment by great legal attainments. The office of Master of the Rolls has been considered one of the great professional rewards; but the puisne judges in the various common law courts, and later the vice-chancellors, and still later the lords justices of appeal, have not had any immediate connection with parliamentary life.

The wealth of information which we have in regard to lawyers and judges after the Revolution enables us to see far more clearly than in the case of the older judges the characters of the various great lawyers.[1] But no doubt the same phenomena are noticeable in the preferment of lawyers to the bench that we should find in the earlier centuries if we had more accurate information. The race has not always been to the swift nor the battle to the strong. Often a leather-lunged, heavy-witted mediocrity, distancing brilliant competitors, has gained a seat upon the bench. Among the judges and lawyers, the same traits we notice to-day were prevalent in these former times. The jealousies among lawyers, the favoritism of judges toward some chosen

[1] No attempt will be made here to do anything more than indicate the attitude of great lawyers toward reforms in the law.

member of the bar, are continually appearing. A mediocre individual, uttering dull wooden platitudes from the bench, has gained the reputation of a great judge, because his mind was on a level with that of a majority of the bar, although to the ablest lawyers his stupidity has been a constant irritation. The celebrated advocate, on the other hand, in certain instances, when he has reached the bench, has known too much law for the ordinary practitioner; he has been too quick, has leaped to conclusions, has taken one side or the other, and, unconscious of partiality, has been practically unfit to properly weigh conflicting evidence or authorities. The laborious lawyer, who has attained the bench, has often begun a hunt for foolish and irrelevant matters, and has impeded business by a morbid inability to formulate his own conclusions. The haughty, impatient, arbitrary, and overbearing judge, insolent to the bar and savage toward the witnesses, has not been wanting. The judge who has proclaimed his desire for less law and more justice, who has brayed about the people's and the poor man's rights, and has violated settled principles and become a judicial demagogue, has needed the rebuke and correction of higher tribunals. Through all judicial history, it is apparent that the true judicial mind, which hears the whole case before it decides, which is capable of suspending judgment until in possession of every consideration of value, which is absolutely unaffected by mere temporary or irrelevant matters, which looks at every case both from the standpoint of the general, fixed, and settled rules of law, but at the same time with an acute sense for right and a real desire to advance justice, is the rarest type of the human intellect.

But one fact about lawyers is a noticeable one. For centuries the common-law lawyers had been a race of men who took little interest in any science outside the common law itself. Noticing this narrowness of mind joined to acute understanding and wide learning in their own field, the great scholar Erasmus had remarked of the lawyers of Henry VII. and Henry VIII., that they were "*doctissimum genus indoctissimorum hominum.*" So far as we can ascertain, few of

them knew anything of any other system of law. But a change was beginning to appear. Chief Justice Vaughan in Charles II.'s reign was once sitting in his court between his two puisnes, when a question of canon law arose. Both puisnes with some pride at once disclaimed any knowledge of that learning, but the Chief Justice, holding up his hands, exclaimed: "In God's name, what sin have I committed, that I am condemned to sit here between two men, who openly admit their ignorance of the canon law?" Lord Nottingham had illustrated many of his decisions by references to the civil law. Holt obtained the reputation of enormous learning, by his knowledge of the Roman law. In short, from the Revolution onwards it will be found that the greatest of English lawyers are turning to the Roman jurisprudence and grafting its rules upon the indigenous law. Even Bracton comes into his own again, as the one worthy writer upon our jurisprudence.

As we have noted in preceding essays, the law had hitherto attempted its own reform. Without the aid of statutes, the immense array of common-law actions had been transformed into the few actions which we have in contract, in tort, and for the recovery of specific property. The whole chancery system was a natural, not a legislative growth. Even where statutes had attempted some interference with the law, they had produced little result. A fact that is most difficult for the lay mind, or for the inadequately informed legal mind, to comprehend, but is proven by the history of the law, is that the distinctions between law and equity, the distinctions between forms of action, inhere in the very nature of duties and rights and cannot be obliterated by legislation. While the procedure may be generalized, while the forms of actions may be reduced to one general form, while but one tribunal may be provided for applying to a controversy all the relevant rules furnished by the law, nevertheless we must still talk of contract and tort, of law and equity, of damages and specific relief.

The Revolution produced no changes in the legal procedure, except two. The first gave to persons charged with high treason the benefit of counsel and the right to produce

witnesses; but as to all defendants prosecuted for felony the age was content to believe that the government would produce all the witnesses and that the presiding judge would act as counsel for the prisoner. The second was a statute of jeofails proposed by the new Chancellor, Lord Somers. Many of the original provisions of the bill were cut out by amendments, but as it passed it contained some improvements. It required a special demurrer to reach errors of form, but the procedure was practically already in that condition. It saved the statute of limitations from running in favor of persons absent from the realm. It gave the creditor the right to sue upon the bond given to the sheriff for the release of the debtor. It prohibited the issuance of process in chancery until the filing of the bill. This last requirement merely enacted a chancery rule of Lord Jeffreys. But a really important feature of the new law was that a defendant was given the right to plead to the declaration as many pleas as he had defences. Another provision enabled the grantee of land to sue a tenant in possession without proving an attornment. There were other provisions of the law, but the foregoing show its general scope. After its passage the energies of reform were exhausted, and all future changes and improvements, until the Benthamite agitation, were made by the judges themselves.

The new Chief Justice, Sir John Holt, had carefully studied the civil law. He was able to introduce much of the law merchant under the guise of custom. Holt's decisions became a part of the common law, although the form in which the change was made rendered it necessary in many of our States to provide by statute for the rights of the indorsee of negotiable paper. Under other heads of the law, the same judge was able to assist the narrow rules of the common law by the enlightened distinctions of the civil law. In Coggs vs. Bernard[1] the mediæval law of assumpsit, shown in the opinions of the puisnes, met the civil law in the opinion of Holt, and Bracton was rehabilitated by the Chief Justice as an authority in the English law.

The beginnings of a law of agency are apparent in the

[1] Ld. Raym. 909.

decisions upon the new business of banking. During the Middle Ages and up to the Restoration, the strong boxes of the merchants and landowners and their bailiffs provided the only banking facilities; but the practice adopted by goldsmiths of keeping the money of depositors, and the use of orders upon goldsmiths, which are our modern bank checks, came into vogue. The notes of goldsmiths began circulating as money, while the Bank of England, which was founded soon after the Revolution, began to issue its notes. The Childs' banking house, originally a goldsmith's shop, still remains as the oldest banking business in England.

The earlier cases[1] treat all questions of agency in the terms of the law of master and servant. Historically, of course, it is impossible to separate the law of servants from that of agents; yet we now recognize the plain distinction in legal usage that the word "servant" is used only in regard to a liability in tort, while the word "agent" is used as to a liability arising out of a contract or its correlative, deceit. The word "agent," borrowed from the continental jurisprudence, gradually came into common use, but the manner of the development of the law of agency has much to do with the confusion which arises even to-day from the failure to discriminate between an agent and a servant, in the above sense.

In 1733, during the chancellorship of Lord King, the lawyers were finally compelled to use their mother tongue. The record now spoke in English instead of in Latin, and the declaration and subsequent pleadings entered upon the roll now became literal translations of the old Latin forms. The advocates of the bill were forced to overcome a strong opposition from the judges. Lord Chief Justice Raymond on behalf of all the judges opposed the change. In later times both Blackstone and Ellenborough regretted the Act. Ellenborough asserted that it had a tendency to make attorneys illiterate; but surely a man must be misguided, indeed, who considers "law Latin" a literary language.

[1] Ward vs. Evans, 2 Salk. 442; Thorald vs. Smith, 11 Mod. 71, 87; Nickson vs. Brohan, 10 Mod. 109.

The influence of the civil law was constantly increasing. Lord Talbot, the best beloved of all the English chancellors, was learned in the civil law. Lord Hardwicke studied the Corpus Juris Civilis and the Commentaries of Vinnius and of Voet. Lord Camden pursued the same systematic study of the civil law. Many of Thurlow's judgments are adorned by illustrations taken from the civil law; though it is said that those portions of his opinions were supplied by the learned Hargrave, who acted as Thurlow's "devil" for some years.

Yet none of these men did anything for law reform. Hardwicke, as great a chancellor as Nottingham or Eldon, never proposed a single reform. Henry Fox, speaking of Hardwicke, said: "Touch but a cobweb of Westminster Hall, and the old spider of the law is out upon you, with all his younger vermin at his heels." Lord Camden spent his energies in an attempt to make the jury judges of both law and fact in prosecutions for libel. In our helplessness in the presence of unjustifiable libels on every sort of person, we are to-day much inclined to regret his work and the subsequent legislation. Camden's insistence upon punitive damages has made a large figure in the subject of our damage law. Lord Thurlow invented and perfected the equitable doctrine as to the separate estate of married women, which is the basis of to-day's married-women statutes. Lord Loughborough's attitude toward law reform is defined by his undisguised horror of Bentham; while Lord Eldon steadily set his face against every proposal of reform.

The eighteenth century in Europe was the age of a benevolent autocracy in politics and a cultivated optimism in literature. The latter trait is markedly apparent in England in the legal sphere.

The great mass of the nation and of the lawyers was amply satisfied with the English constitution and its laws. The language used by the worshippers of our own constitution is apparently borrowed from the older worship of the English constitution. Blackstone delivered his famous lectures at Oxford in 1763, and published them from 1765 to 1769. In a broad and comprehensive way, with ample

learning, he sketched the whole field of the law. The literary charm of his easily flowing periods made his Commentaries general reading among even laymen. Criticism had not demonstrated any of Blackstone's errors or fallacies. Englishmen, reading the lectures, swelled with pride to hear that "of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is so justly and severely its due." After a description of its solid foundations, its extensive plan, the harmony of its parts, the elegant proportion of the whole, Blackstone with impressive eloquence exhorted his countrymen: "To sustain, to repair, to beautify this noble pile, is a duty which Englishmen owe to themselves, who enjoy it, to their ancestors, who transmitted it, to their posterity, who will claim at their hands this the best birthright and the noblest inheritance of mankind."

But even as Blackstone was writing these sonorous periods, two great reformers were at work. One of them, Lord Mansfield, was working by the slow and careful method of judicial legislation. The other, Jeremy Bentham, was storing up that great supply of reforming material, which was to supply Brougham and Romilly in the next generation. Mansfield's work is not found in the statutes; it is recorded in the law reports. Bentham derided the judge-made law, and maintained that all the law should be written on the statute books. Mansfield followed the traditional practice of the English lawyer; Bentham turned to the continental codifiers. Mansfield extended and transformed old principles, building up whole branches of the law by the expansion of accepted rules. Bentham's idea of a change was to wipe out all existing law, by a set of codes whose words should be the sole rule of decision.

William Murray, the first Earl of Mansfield, was born in 1705. The fates conspired to make him the greatest of lawyers. His family was almost the oldest in Scotland. Compared with these de Moravias or Murrays, the Bourbons, the Hapsburgs, and the Hohenzollerns are things of yesterday; even the house of Savoy is not older. A younger branch of the Murray family had the title of Viscount Stor-

mont, and the Chief Justice was a younger son of that house. Early in life he was sent to England, to be educated, and Dr. Johnson always accounted for his marvellous capacity by saying that "much may be made of a Scotchman, if he is caught young." The youth was carefully educated at Winchester School, and then at Christ Church, Oxford. He was entered at Lincoln's Inn, and while there carefully studied the civil law; he always maintained it to be the foundation of jurisprudence. He studied with no less care the common law, but he had no particular reverence for it. Its oracle, Coke, he disliked; but he took pleasure in Bracton and Littleton. He was thoroughly conversant with the commercial code of France. His knowledge of ancient and modern history was singularly accurate and profound. At the same time he cultivated his literary taste by intimate association with men of letters. His physical constitution became robust and enabled him to sustain great labor. His mental faculties were acute and well-trained, his industry untiring, his memory capacious. When we add to these qualifications a marvellous talent for oratory and a voice of silvery clearness, we have described the best qualified man who ever undertook the profession of law.

Eminence at the bar was assured. He rapidly achieved the highest professional and pecuniary success. He passed from the office of Solicitor General to that of Attorney General, and became leader of his party in the House of Commons. He chose as his reward in 1756 the post of Lord Chief Justice, and held the place until his retirement in 1788. His career upon the bench is common knowledge. The law of shipping, of commerce, and of insurance was molded by him. The common-law action of assumpsit was expanded until it embraced a recovery upon almost every sort of pecuniary obligation. The law of evidence he amplified and illustrated, leaning strongly to the view that objections to testimony went rather to the credibility than to the competency of witnesses. By one decision he created the whole law of *res gestae* in evidence. His broad cultivation gave him a singularly free and open mind. He could not endure the laws against dissenters or Roman Catholics. He would not

permit a priest to be convicted of celebrating the mass. In the "no popery riots" his mansion was burned by a Protestant mob. Yet Lord George Gordon, who was tried for high treason in assembling the mob, voluntarily chose to be tried before Lord Mansfield. His calm, colorless charge to the jury, no less than Erskine's defense, caused the prisoner's acquittal.

As a trial judge, his demeanor was blameless. His keenness of mind, his great experience, his firm but courteous manner, his great patience, his impartial treatment of all lawyers, his want of passion and enthusiasm, his power of dispatching business, his absolute freedom from all influence, made him an ideal judge. His decisions, with their fine literary finish, combining the polish of the scholar with the learning of a profound lawyer, make the reports of Burrow and Douglas the great repository of leading cases. In the thirty-three years he served on the bench, no bill of exceptions was ever tendered to one of his rulings; counsel being perfectly satisfied that when the motion for a new trial came before the full bench, the evidence would be fairly stated. Another singular fact is that he had but two judgments reversed, either in the Exchequer Chamber or in the House of Lords. Most rarely, too, did he allow a reargument of a case, and generally his decisions were made upon the conclusion of the arguments.

Lord Mansfield was singularly free from one fault that has characterized some of the greatest judges. He showed neither favoritism nor envy toward any of the leaders of the bar. Sir Matthew Hale had Jeffreys for his favorite, while he hated such men as Scroggs and Wright. Jeffreys, while he had no favorite, displayed violent antipathies. Lord Macclesfield took under his patronage Philip Yorke, afterwards Lord Hardwicke, and made his fortune at the chancery bar. Lord Kenyon had his fortune made by Thurlow, for whom he acted as "devil," and by Dunning, many of whose opinions he signed in Dunning's name. Kenyon while Lord Chief Justice was completely under the sway of Erskine, who induced him to charge the jury in one case that the question of libel or no libel was for the jury. Kenyon

hated Law (afterwards Lord Ellenborough), and did whatever he could to oppose and humiliate that most accomplished advocate. Law retorted by sneering at Kenyon's bad Latin, his cheap clothes, his parsimonious habits and general lack of gentlemanly accomplishments. Law delighted in addressing Latin quotations to Kenyon on the bench, and the judge, not understanding the Latin, was always in a quandary, whether to be gratified at the tribute to his learning or to resent the quotation as ridiculing some of his defects. Ellenborough while Lord Chief Justice reserved his most caustic utterances for Campbell; but Campbell revenged himself by writing a life of the judge. Lord Eldon had no favorite, but his kindest demeanor was shown, singularly enough, toward Romilly. Lord Tenterden made Scarlett an especial recipient of his favors, and lost no opportunity to put down Copley (afterwards Lord Lyndhurst). Lyndhurst on the bench was without any partiality or enmity among the lawyers. Brougham, himself never any judge's favorite, hated Sugden, afterwards Lord St. Leonards, and missed no opportunity to sneer at his prosiness.

Had there been a succession of judges like Mansfield, the law would not have needed much statutory reforming. But Mansfield was succeeded by Kenyon, a very narrow-minded lawyer, while in the chancery court Lord Eldon was soon to rule supreme. Both of them were accustomed to talk slightingly of the "late loose notions" that had prevailed in Westminster Hall. Not the least debt the profession owes to Mansfield is his persuasion of Blackstone to deliver his lectures at Oxford. Afterwards Mansfield secured Blackstone a place in the Common Pleas. Yet even Blackstone was the chief factor in the Exchequer Chamber in reversing Mansfield's ruling, where he laid his reforming hand upon the ark of the covenant of the real-estate lawyers, and attempted to make the rule in Shelley's case yield to the clearly expressed intent of the testator.

It was after Mansfield's retirement that the echoes of the French Revolution caused those State prosecutions which furnished the opportunity to Erskine to demonstrate his greatness as a forensic orator. It is a singular fact that

the greatest English judge and the greatest English advocate were both Scotchmen of high descent. Erskine was a member of the house of the earls of Mar, the oldest title in Europe which has survived to our times. But he had not the fine training of Mansfield. The poverty of his father, the Earl of Buchan, caused Erskine at an early age to enter the army, and it was not until he was twenty-seven that he turned to the law. Again the profession has Mansfield to thank for his advice to the young subaltern. The uninterrupted career of Erskine at the bar justified Mansfield's judgment. Perhaps the world may see again as perfect a forensic orator, but doubtless up to our time the Roman Cicero is the only advocate who can be found to rank with Erskine.

While Mansfield was on the bench, Jeremy Bentham had been writing his epoch-making works. He was the son and grandson of attorneys, members of the inferior grade of the profession. He was educated at Westminster School and at Queen's College, Oxford. At twenty-five he entered Lincoln's Inn. He attended the court of King's Bench and listened, as he tells us, with rapture to the judgments of Lord Mansfield. He heard Blackstone's lectures at Oxford, but he says that he immediately detected the fallacies underlying those smooth periods. Fortunately, he was the possessor of an ample fortune which gave him leisure for study. Becoming disgusted with the profession, and willing to disappoint the wishes of his father, who had hoped that his son's great talents would at last place him in the marble chair, Bentham voluntarily relinquished all effort to take an active part in life, either as a lawyer or legislator, and devoted himself to the study of the subjects upon which legislation ought to act and the principles upon which it ought to proceed. His ample means to employ secretaries saved him from a life of drudgery. He gathered around him a small but brilliant company; prominent among his circle were Romilly, Mackintosh, and Brougham, the exponents of his views of legal reform.

Bentham's legal reforms were but a small part of his activity. He was a philosopher, who claimed by his one

principle to have solved the puzzle of human life and destiny. His utilitarian formula of the greatest happiness of the greatest number is but a restatement of the tenet of a Grecian school of philosophy. The lawyers for centuries had been applying the principle under the form of their maxim, "*salus populi est suprema lex.*" It was this dogma that gave a practical aspect to Bentham's views of law reform. He is one of the few reformers of law who was widely read and instructed in the matter he was trying to reform. He had the capacity of the jurist to grasp legal principles, but with keen logic and inventive mind, he threw a flood of new light upon old stock notions in the law. Having mastered the practical doctrines of the law he took (in Brougham's phrase) "the mighty step of trying the whole provisions of our jurisprudence by the test of expediency." He tested its rules and arrangements by the circumstances of society, the wants of men, and above all by the promotion of human happiness.

Long years of study are contained in Bentham's writings on legislation. In 1776, at the age of thirty-two, he published his Fragment on Government, of which Lord Loughborough said that it formulated a dangerous principle. His Principles of Morals and Legislation came out in 1789. His Art of Packing was published in 1821. His Rationale of Judicial Evidence saw the light in 1827, when he was seventy-nine. These works give but a small part of his labors on the law; bold and hardy indeed is the man who will undertake to read all that Bentham wrote upon the deficiencies of our legal system.

He had little respect for the law as he found it. The separate jurisdictions of law and equity were to him an absurdity. A bill in chancery he characterized as a volume of notorious lies. The technical common law procedure and the occult science of special pleading were relics of barbarism. He assaulted the rules excluding the testimony of parties and interested witnesses. His zeal to moderate the criminal law was a matter of humanity. The jury system did not meet his entire approval. He advocated local courts presided over by a single judge trained to judicial work,

without a jury, except when specially demanded, and then only as a security against class feeling, governmental oppression or corruption. At first he was ignored by the profession as a foolish and visionary man, who put his ideas in very bad English. He did manage to secure an act against cruelty to animals, and this was all. Yet when he died in 1832 he was revered as the founder of modern legislation.

His disciples devoted themselves to his practical reforms on the side of the most important part of the law, — the means which it provides for the enforcement of rights and the redress of wrongs.[1] Easily accessible courts, a cheapening of legal remedies, and the prevention of delays, were proposed as matters of the first moment. Judicial evidence was to be regulated, so that it would be certain that all the testimony could be heard. Pleadings were to be curtailed and simplified, fictions were to be abolished, sham pleadings made impossible, and all distinctions in forms of actions and in the jurisdiction of courts were to be swept away. For "glittering generalities" Bentham's mind had no tolerance. He dissected with more or less severity the fallacies of our Declaration of Independence. He refuted the so-called self-evident truths that all men are created equal, that they are endowed with certain inalienable rights, among them the right to life, liberty, and the pursuit of happiness.

The struggle for reform had been initiated by Sir Samuel Romilly, in his effort to mitigate the penal code. Year after

[1] One change in the law, which once seemed a very important matter in England, had been made before the reformers set to work. The judges of England had uniformly held that in a prosecution for libel the jury passed upon the facts, the court upon the law. The construction of the written document, whether it was libellous or not, was according to well-settled principles a question for the court. The matters of fact, as to whether the defendant had published the libel and whether its references were to the persons and things stated in the indictment or information, were for the jury. But as long as the jury rendered a general verdict of not guilty, there was presented a chance to the jury to find a verdict of not guilty, upon the ground that, although the publication was found and the innuendoes proven, the document was in fact no libel. The judges had tried to escape this dilemma by putting to the jury the question of publication and of the truth of the innuendoes, but Fox's Libel Act provided, in effect, that the jury should pass upon both fact and law.

year Romilly passed his bill through the Commons; but it always failed in the Lords before the opposition of Eldon and Ellenborough. Eventually he must have succeeded, but his wife's death in 1818 plunged him into such profound grief that in a moment of madness he took his own life. His practice at the bar was solely in the chancery court. The favor of Lord Eldon made him the leading chancery barrister. We have preserved to us the substance of his argument in a great leading case.[1] Lord Cottenham, afterwards, speaking from the bench[2] of Romilly's celebrated reply, said: "From the hearing of it, I received so much pleasure, that the recollection of it has not been diminished by the lapse of more than thirty years." Romilly's winning personality, his charming manners, his uprightness and love of humanity, his really marvellous eloquence, make him one of the most interesting figures at the English bar. His son Lord Romilly, the well-known Master of the Rolls, has made the name a noted one in the judicial records.

A greater than Romilly now took up the burden of reform. Henry Brougham was, perhaps, at certain times, the most effective orator of the first half of the nineteenth century; but he was never a close and accurate lawyer. He had nothing like the success at the bar of Law, the defender of Warren Hastings, or of Erskine. He had neither steadiness nor application in ordinary practice. But he was the foremost figure in the most celebrated trial of the century. When George IV. attempted to rid himself of his wife, Caroline of Brunswick, by a bill of pains and penalties, she was defended by Brougham, Denman, and Wilde, while John Singleton Copley assisted in the prosecution. All of them attained the highest honors; three of them were chancellors and one a lord chief justice. Both Brougham and Denman on that trial made splendid speeches, but the finest argument from a lawyer's standpoint was Copley's.

Romilly, Brougham, and Mackintosh found the greatest obstacle to their work for law reform to be the presence of Lord Eldon in the House of Lords. Eldon himself

[1] Hugenin v Baselee, 14 Ves. 273.
[2] Dent v. Russell, 4 Myl. & Cr. 277.

had smarted under the attempts to reform his own court of chancery. His long chancellorship had witnessed a great increase in the business of the chancery court. His excessive deliberation clogged the calendar with unheard cases. Many suitors in despair abandoned their cases. Even when a cause had been heard, the decision was long in coming, while the vast expense of chancery proceedings was frightfully oppressive. Regularly, at the opening of each Parliament, Michael Angelo Taylor made his motion for an investigation of Eldon's court. After Taylor gave up the fight, a barrister named John Williams took up the annual motion. In the debates the chancery court was roughly handled, although Eldon, as a judge, received every man's praise. Lord Eldon was much annoyed at the complaints, but he resolutely opposed all change in his own court as well as in the common law courts. It perhaps is to his credit that he actually concurred in abolishing trial by battle; but he contested the statute taking away the death penalty for larceny. He opposed all changes in the law of real property. He lamented the bill abolishing fines and common recoveries, and even Sugden, the great authority on real-estate law, pronounced the new plan impossible. The bill abolishing sinecure offices in the chancery and simplifying certain chancery proceedings caused Eldon such anguish that he wrote that he would not go down to Parliament again. Railroads he denounced as dangerous innovations. The abolishment of rotten boroughs was to him a shocking invasion of vested rights. He exclaimed over the Reform bill: "'Save my country, Heaven,' is my morning and evening prayer, but that it can be saved, cannot be hoped." The proposal to abolish the difference between wills of real and personal property excited Eldon's greatest alarm. He frustrated the efforts of Romilly to mitigate the penal code. He resented reforms in the common law procedure as encroachments upon equity. In the general domain of politics Eldon was the same sort of obstructionist. He bitterly opposed the repeal of the Test Act, and when it was proposed to remove the disabilities of Roman Catholics, he declared in the House of Lords: "If I had a voice that

would sound to the remotest corner of the Empire, I would re-echo the principle that, if ever a Roman Catholic is permitted to form part of the legislature of this country, or to hold any of the great executive offices of the government, from that moment the sun of Great Britain is set forever." Such was the attitude toward reform of the man who, if we look alone at the substance of his decisions, must be called the greatest English chancellor.

After Brougham had quarreled with his party, the burden of passing the bills for the promised legal reforms fell upon Sir John Campbell. The ablest opponent of many of these measures was the Conservative leader, Lord Lyndhurst. This great man was born in Boston just before the Revolution. His father was the painter Copley, his mother a daughter of that unfortunate Boston merchant whose cargo of tea was dumped into Boston harbor.[1] Lyndhurst was taken to England, educated at Cambridge, and called to the bar from Lincoln's Inn; he slowly worked his way to the head of the profession. On the Queen's trial he summed up the evidence in a speech which as a piece of legal reasoning far excels Brougham's or Denman's. As a judge he demonstrated that he was gifted with the finest judicial intellect that England can show in the nineteenth century. We are interested here solely in his attitude toward reforms in the law.

When Attorney General he had proposed a bill for reforming the chancery court, which as all parties were compelled to admit, stood in need of reform. In 1826 he made a great speech against allowing counsel for the accused in trials of felony to address the jury; but a few years later he concurred in such a change in the law. It should be remembered that Justice Park threatened to resign if a bill allowing counsel to the accused were passed, and that twelve of the fifteen judges strongly condemned the enactment. Most of the judges opposed the provision allowing defendants in criminal cases to produce witnesses.

In the debates on the Reform Bill there appears a practice in one of the rotten boroughs which throws a curious light

[1] This act of larceny is usually described as an outburst of patriotism.

on prevalent political morality. Lyndhurst, amidst the laughter of his hearers, read that part of the evidence which showed that Campbell, the eminent reformer, had paid for his election by the Stafford constituency, to five hundred and thirty-one out of five hundred and fifty-six electors, the sum of three pounds ten shillings for a single vote, and six pounds for a plumper. Campbell's defence was that, "this could not properly be called bribery, for he had simply complied with the well-known custom of paying 'head money,' and the voter received the same sum on whichever side he voted." During another debate Lyndhurst condemned the practice of chancery counsel in going from one court to another, and being actually engaged in carrying on causes of importance in two courts at the same time. But this sort of evil was no less marked in the common law courts.

Lyndhurst opposed the original county court bill, which after many changes and improvements has proved of such value in England; yet Lyndhurst appointed both the commission to enquire into the law of real property and another commission to investigate common law procedure. In 1852, when the Common Law Procedure Act was under discussion, both Lyndhurst and Brougham opposed the bill because it did not sweep away all written allegations. As a general rule, Lyndhurst was a friend to reasonable changes in the law, and most of the later reforms had his able advocacy.

Gradually the chancery court was reformed. Its fees and expenses were first reduced. In accordance with the report of a Chancery Commission composed of such lawyers as Lord Romilly, Turner, James, Bethell, and Page-Wood, the masters in chancery were abolished. Later, issues of law were done away with, and the evidence was required to be taken orally before examiners. Finally, examiners were abandoned for a system of evidence given in the form of affidavit for certain proceedings, or given orally before the judge.

As early as 1843 the law of evidence was changed by Lord Denman's act so as to permit interested witnesses to give testimony. In 1851 a party, as well as the husband

or wife of a party, became a competent witness in a civil case. All the common law judges and the Chancellor, Lord Truro (better known as the barrister, Wilde, who appeared with Brougham and Denman for Queen Caroline), opposed the bill. Even Lord Campbell, who gave the act its first trial, said: "It has made a very inauspicious start; one party, if not both parties, having hitherto been forsworn in every cause." Finally, in 1898, the defendant in a criminal case was made a competent witness on his trial.

The original changes in the rules of pleading at common law were made under rules formulated by the judges. In 1860 all common law courts were given equity powers as to all questions at issue before them. This bill was violently opposed by Lord St. Leonards, but was supported by all the common law judges. Power was given to all the common law courts to examine witnesses *de bene esse*, to order the discovery of documents, and to compel an examination of a party by his opponent. In this way the whole distinctive auxiliary jurisdiction of equity was swept away.

Finally, the Judicature Commission made its report, and the two great lawyers, Lord Selborne for the Liberals and Lord Cairns for the Conservatives, proposed and carried the Judicature Act of 1873. All the historical courts of England were combined in a single High Court of Justice. It was given a Chancery Division, a King's Bench Division, a Probate, Divorce and Admiralty Division.[1] Above the High Court of Justice was constituted a Court of Appeal, and from the Court of Appeal a further appeal lay to the House of Lords. All branches of the High Court of Justice were given power to administer both legal and equitable relief, and wherever there was any conflict between the rules of equity and the rules of law, equity was to prevail. Power was given to transfer a cause from one division to another, so that Lord Cairns could say:[2] "The court is not now a court of law or a court of equity, but a court of complete jurisdiction." The result of the Act, it

[1] The two additional Divisions of the original Act, Common Pleas and Exchequer, were shortly afterwards abolished.

[2] 7 App. Cas. 237.

was asserted, "has been in the highest degree satisfactory, and has resulted in flexibility, simplicity, uniformity, and economy of judicial time." The final result of the legislation is said by Lord Bowen to be, "that it is not possible in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step, in his litigation." It is curious to note that the learned Foss mournfully recorded the Judicature Act. He deplored it as a restoration of the old Norman *Aula Regis*.

Thus we see that practically the whole of the Benthamite series of reforms has been carried out. In the course of a century, step by step, the whole face of the formal portion of the English law has been changed. And yet, as one looks back on the history of the law, he is compelled to admit that at any given time the system of law was fully as good as was merited by the people whom it governed. The highest and best index to the steady progression of the race is the continued improvement in jurisprudence. To the formalism of the old law we owe it that our substantive law is what it is. The growing rigidity of the common law procedure produced that equity system which borrowed so heavily from the Roman jurisprudence. To the differing jurisdictions of law and equity we are indebted for a progress which was achieved by the careful weighing of the one system against the other. Even the rules of evidence which excluded the testimony of interested witnesses and of parties to the litigation have borne their full fruit in assisting in the growing veracity of our race. The cruelties of the criminal law did their work in making our criminal law the most mercifully administered system of public punishment.

It is more than a coincidence that the reorganized procedure should begin its career in a new home. In 1882 Westminster Hall was finally abandoned for the new Courts of Justice. The lawyer who loves the traditions of his profession cannot refrain from regret when he parts with Westminster Hall, or when he sees the extinction of that ancient Order of the Coif which had endured for seven hundred years. Appropriately enough the new Courts stand in the

midst of the ancient legal university. To the north rise the towers of Lincoln's Inn, and across the Strand to the south stand the Middle and Inner Temple. Surrounded by so many legal memories, dense, indeed, must be the lawyer who is not moved to be worthy of that science of administering justice which has written the most glorious pages of English history.

20. A CENTURY OF ENGLISH JUDICATURE, 1800 - 1900 [1]

By Van Vechten Veeder [2]

I. From the Beginning of the Century to the Common Law Procedure Act of 1852

FAR into the nineteenth century the administration of English law was characterized by methods and aims which belonged to the past. The traditional division between law and equity, in courts having no common historical origin and administering justice on principles essentially unlike, went far beyond the requirements of a rational division of labor. Law and equity applied divers rules to the same subject matters, and afforded different remedies for similar wrongs. In consequence of the refusal of the common law courts to recognize claims and defences which equity allowed, judgments obtained at common law were often nullified by injunctions obtained in equity. Theoretically the two jurisdictions were well defined, but in practice there was often uncertainty as to the proper forum. Suits in chancery were constantly dismissed because it appeared at the hearing that there was a remedy at law, while plaintiffs were non-suited at law because they should have sued in equity. Even when he found himself in the right forum, the perplexed litigant was driven backward and forward from law to equity in order to obtain complete redress.

[1] This essay was first published as a series of articles in the Green Bag, volume XIII. (1901), pp. 23 *et seq*, and volume XIV. (1902), 27 *et seq.;* it has been revised by the author for this collection.

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Other Publications: "Lord Bowen," "Lord Westbury," "Sir Alexander Cockburn," Harvard Law Review (1897-1900); Legal Masterpieces (1903); and two other essays reprinted in the present collection.

Whenever it was sought to prevent a threatened injury, to preserve the subject matter of litigation intact, or to discover documents, the common law was compelled to resort to equity to support even a legal claim. In consequence of its recognized incapacity for the determination of questions of fact, the court of chancery, in turn, constantly availed itself for such purposes of the assistance of the common law courts.

The three ancient superior courts of common law flourished side by side, although by various devices they had gradually acquired concurrent jurisdiction over personal actions. The Court of King's Bench still maintained jurisdiction of civil and criminal cases alike, and had supreme authority over all inferior tribunals with its weapons of mandamus and prohibition. The Court of Common Pleas retained jurisdiction over the remaining forms of real action, and the Court of Exchequer still retained in revenue, equity and a few other matters a separate jurisdiction. Notwithstanding the pressure of a rapidly increasing volume of litigation, these courts, in accordance with an antiquated system, sat during only four short terms of three weeks each. Their procedure was based upon the system of special pleading, which, however admirable as a species of dialectic, inevitably promoted excessive technicality and absorption in mere forms. A system which based its claims to consideration upon its precision, it was nevertheless honeycombed with fictions. Just claims were liable to be defeated by trivial errors in pleading, by infinitesimal variances between pleading and proof, and by the absence or presence of merely nominal parties. The arbitrary classification of actions was another pitfall into which the most wary sometimes fell. If a surprise occurred at nisi prius, the court was unable to adjourn the proceedings a single day. And, as a crowning paradox, a fundamental rule of evidence excluded absolutely the testimony of all witnesses who had the remotest interest in the result. "The rules of evidence were so carefully framed to exclude falsehood that very often truth itself was unable to force its way through the barriers thus created."

The lofty standard of right which chancery held out to suitors was apt to be an *ignis fatuus* luring them on to further expense and delay. In consequence of its application of a uniform procedure to contentious and administrative business alike, persons between whom there was really no dispute were compelled to engage in useless contests. Equity pleadings, like those at common law, were marvelous specimens of tautology and technicality. Evidence was gathered by means of written interrogatories, and throughout the whole contest the litigants groped after one another in the dark. No litigant entering into a chancery suit with a determined adversary could have any reasonable hope of living to witness its termination. Everybody even remotely interested was a necessary party, and whenever one of these parties died pending suit, bills of review or supplement bills were necessary to restore the symmetry of the litigation.[1]

(*a*) *Chancery Courts*

During the first quarter of the century Lord Eldon (1801-6; 1807-27) reigned supreme in chancery. Time has been so busy with Eldon's shortcomings that there is danger of losing sight of his eminent abilities. He possessed in a degree seldom surpassed some of the highest qualities of judicial excellence: quick apprehension, retentive memory, vast technical learning, a judgment which neither perplexity nor sophistry could confound, and an industry never enervated by luxury nor disturbed by passion. His understanding was capable of feats of metaphysical acumen and subtlety that would have enlisted the admiration of the schoolmen by whom equity was originally administered; but this was not in his case an advantage. Beyond his profession he was ill read, untraveled and without knowledge of the world. Aside from the performance of the political duties attached to his high office, he devoted

[1] See Lord Justice Bowen's graphic description of the technicalities, confusions and obscurities which beset litigation at the beginning of Queen Victoria's reign, in the collection of essays published by Thos. Humphrey Ward in honor of the Queen's Jubilee. [Lord Bowen's essay is reprinted as No. 16 of this Collection. — Eds.]

himself to the law with entire singleness of purpose and indefatigable industry.

The vast arrears in chancery which accumulated during his administration is the most serious blot on his reputation. It would be an injustice to the memory of a really noble character to fix upon him the sole responsibility for that monstrous denial of justice. The chancery system had never been distinguished by despatch, and the rapid and sustained increase in litigation during Eldon's time accentuated the delay which has come to be associated with his name. The arrears in chancery were due, in part, to the state of the law, to the insufficiency of the time applied to judicial business, and to the want of an adequate number of courts. Lord Eldon was a powerful political officer as well as a judge, and during his time the quasi-political duties of his office were particularly onerous. The investigation of the Berkeley and Roxburghe peerage claims and the trial of Queen Caroline are illustrations of the extra-judicial demands made upon his time. Slight relief was eventually afforded by the appointment of a deputy speaker of the House; but the ultimate establishment of a vice-chancellor's court was not an immediate success, and it was many years before the master of the rolls was enabled to render any effective assistance. Considering the vast political power that Lord Eldon exercised in the cabinet councils, it is, however, a deep and permanent reproach upon his reputation that he did practically nothing to remedy the chancery system. And it must be admitted that Lord Eldon's judicial methods were dilatory in the extreme. No one was ever better qualified by nature and by training to arrive at a speedy decision. Indeed, during his short term in the Court of Common Pleas he showed a capacity for prompt decision which contrasts curiously with his marked indecision in chancery. His delay was really due, not so much to want of readiness in reaching a decision, as to dilatoriness in formulating his opinion. The fact that this delay was due in large measure to his extreme conscientiousness does not affect the result, although it does to some extent relieve his memory.

It may be well to quote his own justification as given in his diary:

"During my chancellorship I was much, very much, blamed for not giving judgment at the close of the arguments. I persevered in this, as some thought from obstinacy, but in truth from principle, from adherence to a rule of conduct, formed after much consideration, as to what course of proceeding was most consonant with my duty. With Lord Bacon, 'I confess I have somewhat of the cunctative mind,' and with him I thought that 'whosoever is not wiser upon advice than upon the sudden, the same man is no wiser at fifty than he was at thirty.' I confess that no man had more occasion than I had to use the expression which was Lord Bacon's father's ordinary word, 'You must give me time.' I always thought it better to allow myself to doubt before I decided, than to expose myself to the misery of doubting whether I had decided rightly and justly. It is true that too much delay before decision is a great evil. But in many instances delay leads eventually to prevent delay: that is, the delay which enables just decision to be made accelerates the enjoyment of the fruits of the suit; and I have some reason to hope that in a great many cases final decision would have been much longer postponed if doubts as to the soundness of original judgments had led to rehearings and appeals, than it was postponed when much and anxious and long consideration was taken to form an impregnable original decree. The business of the court was also so much increased in some periods of my chancellorship that I never could be confident that counsel had fully informed me of the facts or of the law of many of the cases. There may be found not a few instances in which most satisfactory judgments were pronounced which were founded upon facts or instruments with which none of the counsel who argued the cases were acquainted, though such facts and instruments formed part of the evidence in the case."

Accordingly, he was given to reviewing a case in all conceivable aspects long after he had in fact exhausted the actual issue; and the reports are full of instances where in matters of difficulty he laboriously examined the whole

volume of cases connected with the topic under consideration.[1] Hence his decrees and opinions are so overlaid with fine distinctions and limitations that the *ratio decidendi* is not always easy to find. At no stage of his career did he ever display any evidence of the perspicuities, much less the graces, of literary style. So inextricably parenthetical and over abundant in qualifications is all his work that one can appreciate the feelings of Horne-Tooke when he declared that he would "rather plead guilty on a second trial than listen to a repetition of John Scott's argument" for the prosecution. This is certainly a serious defect in any judge; and if the guiding principles of Eldon's judgments had been as clearly enunciated and in as general terms as those of Hardwicke, the volume of his decisions, the care with which he considered them, the weight of his authority and the force of his example, would have gone far to remove the blight of uncertainty which rested upon the law in his day.

But with all their involution in mere phraseology Lord Eldon's decisions, which extend through thirty-two volumes of reports, are, in substance, monuments of learning, acumen and practical application of equity. His judgments were seldom appealed from and hardly ever reversed; and, except where the law has since been altered by statute, time has not materially impaired their authority. Out of the vast body of his work, covering the whole equitable jurisdiction, it will suffice to call particular attention to the refinement and precision which he gave to the administration of estates in chancery and in bankruptcy, to the equities of mortgagors and mortgagees, to the remedy of specific performance, and the exemplary liberality with which he construed charitable bequests. Like many of his contemporaries, Eldon had very crude ideas of trade; the extent to which he pushed the ancient doctrines of forestalling and regrating seems, in this day, ridiculous. Nevertheless, his historical position must always remain conspicuous, for he definitely brought to a conclusion the work of binding down the chancellor's discre-

[1] 6 Vesey 263; 14 do. 203; 1 Ves. & B. 59; 1 Rose 253; 1 Glyn & J. 384; 2 Swanst. 36; 2 Bligh P. C. 402.

tion. "The doctrines of this court," he said in Gee *v.* Pritchard, 2 Swanst. 414, "ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict or give me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." From his time onward the development of equity has been effected mainly by strict deduction from the principles of decided cases, and the work of succeeding chancellors has been practically confined to the elaboration of these principles by repeated review and definition.[1]

The first competent successor to Eldon was Cottenham. Lyndhurst (1827-30; 1834-35; 1841-46) was a consummate orator, but he had no training in equity and shone principally in politics. Brougham's chancellorship (1830-34) was only an incident in his varied career. As a statesman he has left an abiding mark on the English legal system. For nearly fifty years he struggled with indefatigable industry and extraordinary ability in the cause of reform. The vast scheme of law reform which he laid before parliament in 1828 bore ample fruit in after times. The overthrow of the cumbrous and antiquated machinery of fines and recoveries, the abolition of the Court of Delegates and the substitution for it of the Judicial Committee of the Privy Council, the institution of the Central Criminal Court and the Bankruptcy Act, are a few of his herculean labors. Although he always

[1] Lord Eldon's leading cases are: Ellison *v.* Ellison, 6 Ves. 656; Mackreth *v.* Symmons, 15-329; Murray *v.* Elibank, 10-84; Aldrich *v.* Cooper, 8-382; Brece *v.* Stokes, 11-319; Howe *v.* Dartinouth, 7-137; Huguenen *v.* Baseley, 14-273; Ex parte Pye, 18-140; Seton *v.* Slade, 7-265; Agar *v.* Fairfax, 17-533; Murray's Benbow, 4 St. N. 1410; Lucena *v.* Crawford, 2 Bos. & P. (N. R.) 317; Duffreld *v.* Elwes, 1 Bligh (Ns.) 499; Jeeson *v.* Wright, 2 Bligh, 54; Evans *v.* Bicknell, 6 Ves. 174; Booth *v.* Blundell, 19 Ves. 494; Callow *v.* Walker, 7-1; Southey *v.* Sherwood, 2 Meriv, 435; Wykham *v.* Parker, 19 Ves. 21; Gee *v.* Pritchard, 2 Swanst. 414; Davis *v.* Duke of Marlborough, 2 Swanst. 162; Atty. Gen. *v.* Forstes, 10 Ves. 342; Landsdowne *v.* Lansdowne, 2 Bligh, 86; Gordon *v.* Majoribanks, 6 Dow, 111.

upheld the cause of liberty and humanity, his character carried little moral force. As chancellor he worked with extraordinary energy, and expedited the work of the court in marked contrast with Eldon. But he had been trained in the common law, and was little fitted either by learning or by temperament for the judicial duties of the office. "If he had known a little law," said the caustic St. Leonards, "he would have known a little of everything.[1] Waring *v.* Waring, 6 Moo. P. C. 341, is a characteristic specimen of his judicial style.

Cottenham (1836-41; 1846-50) brought to the discharge of his duties a complete mastery of the existing principles and practice of the court of chancery, which he regarded as the perfection of human wisdom. Outside this sphere his learning was limited; and his mind was vigorous and sound rather than broad and subtle. He was an able and painstaking, if somewhat cautious, judge.[2] His successor, Truro (1850-52), a learned but plodding lawyer, left the Court of Common Pleas, where he was serving with credit, to assume the chancellorship, for which he had no particular qualifications. He sacrificed his life in attempting to cope with the work. Lord St. Leonards (1852), who next held the seals for a brief period, within his limits realized as nearly as possible the ideal of an infallible oracle of the law. In complete contrast to Brougham, who knew a little of everything, St. Leonards knew a great deal of one thing and little besides. In comprehensive and accurate knowledge of the

[1] Ferguson *v.* Kinnoul, 9 Cl. & F. 250; Stokes *v.* Herron, 12 do. 163; Birtwhistle *v.* Vardell, 2 do. 581; 7 do. 895; Cookson *v.* Cookson, 12 do. 121; O'Connell's case, 11 do. 155; R. *v.* Millis, 10 do. 534; Atwood *v.* Small, 6 do. 232; Wright *v.* Tatham, 5 do. 670; Purves *v.* Landell, 12 Cl. & F. 97; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Greenough *v.* Gaskell, 1 Myln. & K.; McCarthy *v.* De Caix, 2 Russ. & Mylne; Cooper *v.* Bockett, 4 Notes of Cases, 685.

[2] Auchterarder case, 6 Cl. & F. 46; O'Connell's case, 11 do. 155; Tullett *v.* Armstrong; Scarborough *v.* Borman, 4 Myln & Cr. 120; Cookson *v.* Cookson, 12 Cl. & F. 121; Atwood *v.* Small, 6 do. 232; Shore *v.* Wilson, 9 do. 353; R. *v.* Millis, 10 do. 534; Stokes *v.* Heron, 12 do. 163; Dunlop *v.* Higgins, 1 H. L. Cas. 351; Wilson *v.* Wilson, 1 do. 538; Faun *v.* Malcomson, 1 do. 637; Thynne *v.* Earl of Glengall, 2 do. 131; Duke of Brunswick *v.* King of Hanover, 2 do. 1; Foley *v.* Hill, 2 do. 28; Piers *v.* Piers, 2 do. 331; Charlton's case, 2 Myln & Cr. 316; Pym *v.* Locker, 5 do. 29.

law of real property he stood for forty years without a rival. His judgments were always delivered promptly, without notes, and were seldom reversed. Yet it must be admitted that, from the technical character of the subject and his apparent lack of general culture, they are dry reading.[1] St. Leonards was more competent than any of his contemporaries to reform the law of real property, but he seems to have been quite contented with it as it was. He literally lived in the law during his lifetime and bequeathed to it a leading case upon his death. His will could not be found, and its contents were established by oral evidence. Cranworth (1852-58), whose professional training had been in chancery, came to the woolsack after his long experience as a baron of the Exchequer. He thus combined a large acquaintance with both systems. He was a man of high character and a sound and acute judge. His extreme caution and timidity, however, limited the influence which his learning and experience would otherwise have exerted.[2] Cranworth was followed by two common law chancellors, Chelmsford and Campbell. Chelmsford (1858-59; 1866-68) had shared with Sir William Follett the honors of the bar, and it has been customary to decry his judicial service, on the general theory, apparently, that an eloquent lawyer is not apt to be a profound judge. Undoubtedly he would have taken a higher position on the common law bench; but a fair examination of his work shows that he was a very respectable judge. Certainly he discharged his duties with assiduity, and his numerous judgments are often instructive in consequence of his habit of reviewing prior authorities.[3] Lord Camp-

[1] Egerton *v.* Brownlow, 4 H. L. Cas. 203; Maunsell *v.* White, 4 do. 1037; Jeffreys *v.* Boosey, 4 do. 842; Lumley *v.* Wagner, 5 De G. & S. 485; Grey *v.* Pearson, 6 H. L. Cas. 61; Brook *v.* Brook, 9 do. 195; Colyer *v.* Finch, 5 do. 905; Savery *v.* King, 5 do. 627; Bargate *v.* Shortridge, 5 do. 297; Jordan *v.* Money, 5 do. 185.

[2] Cox *v.* Hickman, 8 H. L. Cas. 267; Egerton *v.* Brownlow, 4 do. 1; Jeffreys *v.* Boosey, 4 do. 842; Oakes *v.* Turquand, 2 do. 369; Brook *v.* Brook, 9 do. 195; Ranger *v.* Great Western Ry. 5 do. 72; Ricket *v.* Metropolitan Ry. 2 E. & I. App. 174; Rylands *v.* Fletcher, 3 do. 330; Shaw *v.* Gould, 3 do. 55; Startup *v.* Macdonald, 12 L. J., Ex. 477; Clift *v.* Schwabe, 17 L. J., C. P. 2; Money *v.* Jorden, 2 De G. M. & G., 318; Hills *v.* Hills, 8 M. & W. 401; Jones *v.* Lock, 1 Ch. App. 25.

[3] Chasemore *v.* Richards, 7 H. L. Cas. 360; Peek *v.* Gurney, 6 E. & I. App. 377; Bain *v.* Fothergill, 7 do. 170; Hollins *v.* Fowler, 7 do.

bell's brief chancellorship (1859-61) is really a minor feature of his career, owing to the advanced age at which he reached the woolsack. With his strong intellect and untiring industry he made a respectable equity judge, but his overbearing nature caused much friction where steady co-operation was needed.

The inferior chancery tribunals were the Rolls Court and the Vice-Chancellor's Court. The judicial standing of the Rolls Court was established by Sir William Grant (1801-18). Kenyon, the most prominent prior incumbent of the office, discharged the duties of the office with his customary ability and expedition, but he was not really in sympathy with the equitable jurisdiction and habitually decided his cases on the narrowest grounds, avoiding the enunciation of general principles. Grant dignified the office with his high character and eminent abilities. He was unquestionably the most eminent judge sitting in this court until the time of Jessel. Calm, deliberate, patient in hearing, and clear, luminous, subtle and comprehensive in judgment, his powerful intellect made a deep impression upon his contemporaries. This reputation was enhanced by his parliamentary service, which was even more distinguished than his service as a judge. His opinions, which are comparatively few in number, are mostly brief but comprehensive statements of his conclusions, giving slight indications of that masculine reasoning which was the principal feature of his parliamentary oratory. The office was at this time a modest one. The master of the rolls simply supplied the place of the chancellor when the latter's political duties required his presence elsewhere. On other occasions, when requested by the chancellor, the master of the rolls sat with the chancellor to give advice and assistance in cases argued before both. In order that he might assist the chancellor when present and supply his place during occasional absence, it was arranged that during

762; Robinson *v.* Mallett, 7 do. 802; Rankin *v.* Potter, 6 do. 83; Overend *v.* Gurney, 5 do. 480; Daniel *v.* Metropolitan Ry., 5 do. 49; Knox *v.* Gye, 5 do. 656; Duke of Buccleuch, 5 do. 418; Ricket *v.* Metropolitan Ry., 2 do. 174; Shaw *v.* Gould, 3 do. 55; Hammersmith Ry. *v.* Brand, 4 do. 171; Lister *v.* Perryman, 4 do. 521; Gilbin *v.* McMullen, 2 P. C. 318; Steele *v.* No. Met. Ry., 15 W. R. 597.

the sitting of the chancellor the separate business of the master of the rolls should be transacted in the evening. Accordingly, during the greater part of the judicial year, the sittings of the master of the rolls in his own court were held in the evening.

The office at its best under Grant was not to be compared with its position in later times when the master ceased to sit as adviser to the chancellor, and was invested with a separate and, in some respects, independent judicial authority in his own court. This system continued with but little change during the short terms of Grant's immediate successors, Plumer (1818-24), Gifford (1824-26), Copley (1826-27) and Leach (1827-34). The office probably reached its lowest point under Leach, who was fitted neither by learning nor by temperament for judicial office. Much was expected from the appointment of Pepys (1834-36); but he was soon advanced to the woolsack as Lord Cottenham. Improvement is noticeable soon after the advent of Lord Langdale (1836). From his time the decisions of the Rolls Court have been regularly reported in a separate series of reports, first by Keen (1836-38) and afterwards by Beavan (1838-66). Lord Langdale administered the duties of the office, at a time when its scope had been considerably enlarged, with industry and ability, as the few successful appeals from his judgments attest. If his reputation as a judge fell somewhat below the expectations raised by his distinguished professional career, his lucid and methodical exposition of the facts with which he had to deal gave perfect satisfaction to those who were most interested in a just decision. His lofty character and absolute impartiality inspired the utmost confidence.

The unbearable arrears in chancery during Lord Eldon's administration finally led to the appointment of a vice-chancellor in 1813. But as constituted, the new court failed for many years to give satisfaction. The first incumbent, Plumer (1813) was slower than Eldon himself; while his successor, Leach (1818-27), disposed of his cases with such speed that a witty barrister comparing Leach's court with that of the chancellor, characterized the former as *terminer sans oyer* and the latter as *oyer sans terminer*, and suggested

that Leach employ his spare time in setting his decided cases back on the calendar and hearing the other side. Shadwell (1827-50) was an improvement upon his immediate predecessors; but the most efficient assistance in chancery came with the appointment of Knight-Bruce (1841-51) and Wigram (1841-51) as additional vice-chancellors. At the same time the equitable jurisdiction of the Court of Exchequer was taken away. Knight-Bruce was a judge of great capacity who afterwards distinguished himself as a lord justice of appeal in chancery. Wigram was profoundly learned in technical equity, and his opinions have always been held in high esteem for their lucid exposition of equitable principles.

(*b*) *Common Law Courts*

During the first quarter of the century the Court of King's Bench practically monopolized common law litigation. Lord Ellenborough, the chief justice of this court at the beginning of the century (1802-18), was unquestionably the ablest judge among Lord Mansfield's immediate successors. He was a man of more general force than his predecessor, Kenyon, and his store of practical knowledge was quite as large. Although a judge of unquestioned integrity, he was nevertheless in many ways a reactionist. His strong political and religious opinions, which often influenced his judgment in criminal causes, savored of the past, and he sturdily opposed the rapidly rising sentiment for reform. In ordinary civil litigation, however, he gave great satisfaction, and his clear and concise opinions are still held in high esteem. He served at a time when the Napoleonic wars gave rise to novel and intricate problems in commercial law, and the skill and judgment with which he determined these questions may be studied to advantage in Campbell's *nisi prius* reports.[1]

[1] See also Higham *v.* Ridgeway, 1 East. 109; Elwes *v.* Mawe, 3 do. 98; Wain *v.* Warlters, 5 do. 10; Vicars *v.* Wilcocks, 8 do. 1; Godsall *v.* Boldero, 9 do. 72; Horn *v.* Baker, 9 do. 215; Disbury *v.* Thomas, 14 do. 323; Roe d. Earl of Berkeley *v.* Archbishop of York, 6 do. 101; Erle *v.* Rowcroft, 8 do. 133; Tanner *v.* Smart, 6 Barn. & Cress, 604. His political prepossessions may be studied in the numerous state prosecutions over which he presided, reported in the collection of

It is noticeable that the popularity of the King's Bench during this period was due almost entirely to the energy and ability of its chief justice. His sole associate of first-rate ability was Bayley (1808-30), whose opinion in commercial cases carried great weight. During the tenure of Lord Ellenborough's successor, Charles Abbott, afterwards Lord Tenterden (1818-32), this condition of affairs was reversed; the reputation of the court was then due in large measure to the puisnes. Tenterden was inferior to his predecessor in force of intellect, and was surpassed by some of his associates in acuteness and learning. But he was a judge of liberal tendencies, moderation and good sense. These qualities are most conspicuous in his clear and practical opinions, which, particularly in commercial cases, still command respect. During this period the court was highly efficient. "I do not believe," says Lord Campbell, "that so much important business was ever done so rapidly and so well before in any other court that ever sat in any age or country." The labors of three distinguished puisnes, Bayley, Holroyd (1816-28), and Littledale (1824-41), contributed materially to this high standing. These three judges represent the best fruits of the system of special pleading, and their labors, so far as they are capable of separation from an antiquated procedure, have stood the test of time.

The wave of reform precipitated by the Reform Bill stirred even the stagnant waters of the law. The Court of Exchequer Chamber was made a regular and permanent intermediate court of appeal from each of the superior courts of common law. The ancient and anomalous High Court of Delegates, which had been established in the reign of Henry VIII to take up the appellate jurisdiction in ecclesiastical matters theretofore exercised by the pope, was at length abolished, and its appellate jurisdiction was conferred upon the Judicial Committee of the Privy Council, which was now made a definite and serviceable tribunal with a well-defined jurisdiction. By the Uniformity of Procedure Act the con-

State Trials, volumes twenty-three to thirty-one. The most important of these are the trials of Peltier, Hardy, Horne-Tooke, Stone, Despard, Johnson, Hunt, Lambert and Watson.

current jurisdiction of the three superior courts of common law was officially recognized, and a central criminal court was established. The antiquated and cumbrous machinery of fines and recoveries was finally abolished, and a general bankruptcy act ameliorated the condition of insolvent debtors. But the movement in favor of legal reform was not widespread, and comparatively little was accomplished. In fact, the quarter century following the Reform Bill is significant only because it marks the limits of the influence of Baron Parke in the common law courts.

The Queen's Bench at the beginning of this period was still the ablest as well as the most prominent of the three courts of common law. Of the two chief justices during this time, Lord Denman (1832-50), the first, was a great and good man, whose predisposition to individual liberties was a new departure in a chief of this court. His judgment in Stockdale *v.* Hansard is a monument of learning and independence.[1] Compared with his immediate predecessors he could not be called a great lawyer or a strong judge, but his high character and attractive personality won universal esteem. "To have seen him on the bench, in the administration of justice," said Charles Sumner, "was to have a new idea of the elevation of the judicial character." Campbell (1850-59), his successor, whose character is much less to be admired, surpassed him in learning and efficiency. With a strong intellect, wide knowledge and untiring industry, Campbell made during his short term a lasting reputation.[2]

Of the prominent puisnes during this period, Littledale

[1] See also R. *v.* O'Connell, Cl. & F., 155, R. *v.* Millis, 10, do. 534; Wolveridge *v.* Steward, 3 L. J., Ex. 360; Neal *v.* Mackenzie, 6 do. 263; Nepean *v.* Knight, 7 do. 335; Muspratt *v.* Gregory, 7 do. 385; Rhodes *v.* Smethurst, 9 do. 330; Davies *v.* Lowndes, 12 do. 506; McCallum *v.* Mortimer, 11 do. 429.

[2] Hochster *v.* De la Tour, 2 E. & B. 678; Queen *v.* Bedfordshire, 4 do. 535; Levy *v.* Green, 8 do. 575; Brass *v.* Maitland, 6 do. 70; Humphries *v.* Brogden, 20 L. J., Q. B. 10; Harrison *v.* Bush, 25 do. 25; Wheelton *v.* Hardisty, 26 do. 265; In re Alicia Race, 26 do. 169; Humfrey *v.* Dale, 26 do. 137; Thompson *v.* Hopper, 26 do. 18; Queen *v.* Munneley, 27 do. 345; Lewis *v.* Levy, 27 do. 282; Knight *v.* Faith, 19 do. 509; Morton *v.* Tibbett, 19 do. 382; De Haber *v.* Queen of Portugal, 20 do. 488; Shallcross *v.* Palmer, 20 do. 367; Boosey *v.* Jeffries, 20 L. J. Ex. 354; Lynch *v.* Knight, 9 H. L. Cas. 580; Gibson *v.* Small, 4 do. 352; Brook *v.* Brook, 9 do. 195.

(1824-41), a learned but scholastic lawyer, held over from earlier time, and Parke (1828-34) spent a few years in this court before going to the scene of his more distinguished labors in the Exchequer. During the latter part of the period the court was further strengthened by the accession of Wightman (1841-63) and Erle (1846-59). Wightman was one of the last of the great school of special pleaders; but he was besides a man of broad and practical views, and made an admirable judge. He sat in the Queen's Bench twenty-three years, the trusted colleague of three chief justices.[1] According to the unanimous voice of his contemporaries, Erle was one of the best of the earlier judges. He had that power of quickly grasping the essential features of a case which marks the legal mind; and, although his mind lacked flexibility and subtlety, and he was extremely tenacious of his own views, the common sense which generally characterized his work made him a safe judge.[2] But the ablest associate throughout the period was Patteson (1830-52). He sat in this court twenty-one years; he was the strongest man in the court, and largely influenced its action. It was due mainly to his vigorous intellect and great learning that the court was able to maintain its standing during this period, in the face of the rapidly increasing reputation of the Exchequer.[3] Coleridge (1835-58) was a very competent lawyer and a man of scholarly attainments. His opinions are among the most finished to be found in the earlier reports.[4] His opinion in the case of Lumley *v.* Gye, upon the

[1] Clift *v.* Schwabe, 17, L. J., C. P., 2; Howard *v.* Gossett, 14 L. J. Q. B., 373; Chasemore *v.* Richards, 7 H. L. Cas. 360; Jeffreys *v.* Boosey, 4 do. 842; Lumley *v.* Gye, 2 E. & B. 216.

[2] Kennedy *v.* Brown, 13 C. B. (N. S.) 677; Ionides *v.* Universal Marine Association, 14 do. 259; R. *v.* Rowlands, 5 Cox Cr. Cas. 406; R. *v.* Rowton, 10 do. 25; Thompson *v.* Hopper, 25 L. J., Q. B., 240; Wheelton *v.* Hardisty, 26 do. 265; Ricket *v.* Metropolitan Ry. 34 do. 257; Ex parte Fernandez, 30 L. J., C. P. 321; Brand *v.* Hammersmith Ry. 36 L. J., Q. B. 139; Gibson *v.* Small, 4 H. L. Cas. 352; Jeffreys *v.* Boosey, 4 do. 842; Lumley *v.* Gye, 2 E. & B. 216; Kay *v.* Wheeler, L. R. 2 C. P. 302.

[3] R. *v.* O'Connell, 11 Cl. & F. 155; Startup *v.* Macdonald, 12 L. J., Ex. 477; Clift *v.* Schwabe, 17 L. J., C. P. 2; East Counties Ry. *v.* Broom, 20 L. J., Ex. 196; Wright *v.* Tatham, 5 Cl. & F. 670; R. *v.* Rowlands, 5 Cox Cr. Cas. 406.

[4] Some of his best efforts are Lumley *v.* Gye, 2 E. & B. 216; Mennie *v.* Blake, 225, L. J., Q. B. 399; Blackmore *v.* B. & E. Ry. Co., 27 do.

malicious procurement of a breach of contract, is a good specimen of his style.

The work of the Court of Common Pleas was limited in amount during this period. Until 1841 it was a closed court, and only sergeants could argue cases there. It enjoyed the services, however, of some very able lawyers. Of its three chiefs, Tindal (1829-46), Wilde (1846-50) and Jervis (1850-56), Tindal and Jervis take high rank as magistrates. Clear sighted, sagacious and quick of apprehension, they were masters at *nisi prius*. Tindal was furthermore a profound lawyer, and his numerous opinions in this court and in the Exchequer Chamber display grasp of principle, accuracy of statement, skill in analysis and wide acquaintance with precedents.[1] Wilde was a learned but plodding lawyer whose subsequent elevation to the woolsack only served to detract by comparison from his superior reputation as a common law judge.

Of the puisnes, Maule (1839-55), who served through most of this period, was probably the most highly endowed. No one ever had a finer sense of the anomalies and incongruities of English law, and he never missed an opportunity to bring to bear on them his unrivalled powers of sarcasm and caustic humor. "As the rule is well established by decisions," he ironically remarks in Emmens *v.* Elderton, 4 H. L. Cas. 624, "it is not necessary to give any reasons in its support, or to say anything to show it to be a good and useful one." His subtle mind was balanced by good sense and entire freedom from technicality.[2] But his mental gifts were smothered in

167; Wilson *v.* Eden, 19 do. 104; R. *v.* Scott, 25 L. J., Mag. Cas. 128; Egerton *v.* Brownlow, 4 H. L. 1; Jeffreys *v.* Boosey, 4 do. 842; Wright *v.* Tatham, 5 Cl. & F. 670; Shore *v.* Wilson, 9 do. 353.

[1] Acton *v.* Blundell, 13 L. J., Ex. 289; Marston *v.* Fox, 8 do. 293; Panton *v.* Williams, 10 do. 545; James *v.* Plant, 6 do. 260; Hitchcock *v.* Cocker, 6 do. 266; Scarborough *v.* Saville, 6 do. 270; Howden *v.* Simpson, 8 do. 281; Chanter *v.* Leese, 9 do. 327; Sadler *v.* Dixon, 11 do. 435; Whyte *v.* Rose, 11 do. 457; Collins *v.* Evans, 13 L. J., Q. B. 180; R. *v.* Frost, 4 St. Tr. 130; Charge to Grand Jury, do. 1411; R. *v.* O'Connell, 11 Cl. & F. 155; R. *v.* Millis, 10 do. 534; Shore *v.* Wilson, 9 do. 353; Coxhead *v.* Richards, 2 C. B. 569; Flight *v.* Booth, 1 Bing. N. C. 377; Cook *v.* Ward, 4 M. & P. 99; Kemble *v.* Farren, 3 do. 425; Margetson *v.* Wright, 5 do. 606.

[2] R. *v.* Burton, 1 Dears. C. C. 282; Borrodaile *v.* Hunter, 5 M. & G. 639; M'Naghten's case, 10 Cl. & F. 199; Shore *v.* Wilson, 9 Cl. & F. 353.

indolence, and he is chiefly remembered for his cynical humor. It was he who, while reading a novel in bed by candle light, set fire to his chambers and burned down a large section of the Temple. Cresswell (1842-58) and E. V. Williams (1846-65) were the strong judges in this court during the latter part of the period. Cresswell was an accomplished lawyer who afterwards added to his reputation in the probate and matrimonial court. He was essentially a broad-minded judge. Williams, the second generation in a line of great lawyers of that name, was profoundly learned in the common law, and his concise and accurate if somewhat technical opinions have always been respected. He was somewhat labored in expression, but he had great influence with his associates during his twenty-two years' service.[1]

The Court of Exchequer came into great prominence during this period. The first two chief barons, Lyndhurst (1831-34) and Abinger (1834-44), failed to sustain on the bench the great reputations they had made at the bar. Both were men of great gifts, but their success as advocates was due rather to their knowledge of men than to any mastery of legal principles. Pollock (1844-56), on the other hand, who succeeded them, brought to the bench the industry and general ability which had characterized his distinguished forensic career. There have been many more learned but few more useful judges. His high-toned personality is reflected in his scholarly and felicitous opinions, which, whether right or wrong in the result, are always interesting.[2] Under his administration, with Parke (1834-55) and Alderson (1834-57) as associates, the Exchequer reached its greatest influence.

[1] Earl of Shrewsbury *v.* Scott, 6 C. B. (N. S.) 1; Behn *v.* Burness, 1 B. & S. 877; Ex parte Swan, 7 C. B. (N. S.) 400; Johnson *v.* Stear, 15 C. B. (N. S.) 30; Spence *v.* Spence, 31 L. J., C. P. 189; Hall *v.* Wright, E., B. & E. 1; Cooper *v.* Slade, 6 E. & B. 447; Anderson *v.* Radcliffe, 29 L. J., Q. B. 128; Bamford *v.* Turnley, 31 do. 286; Penhallow *v.* Mersey Docks Co., 30 L. J., Ex. 329; Shore *v.* Wilson, 9 Cl. & F. 353; Wright *v.* Tatham, 5 do. 670; Roddam *v.* Morley, 1 De G. & J. 1; Hounsell *v.* Smith, 7 C. B. (N. S.) 731.

[2] Clift *v.* Schwabe, 17 L. J., C. P. 2; Attorney General *v.* Sillem, 33 L. J., Ex. 92; Hall *v.* Wright, 29 L. J., Q. B. 43; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Gibson *v.* Small, 4 do. 352; Jeffreys *v.* Boosey, 4 do. 842; Wood *v.* Wand, 3 Ex. 774; Molton *v.* Caurraux, 4 do. 17; Bellamy *v.* Major, 7 do. 389; Hudson *v.* Roberts, 6 do. 697; R. *v.* Abbott, 1 Dears. C. C. 273.

It is undeniable that this reputation was largely made by Parke (1834-55). "Baron Surrebutter," as he was ironically named, was a modern Coke, profoundly learned in the common law and indefatigably industrious in its administration. He possessed the ability in grasping and fathoming a subject which is the supreme test of judicial power, and his extraordinary memory enabled him to draw at will upon his vast store of learning. It must be admitted that he was a man of high character and powerful intellect; no smaller man could have accomplished so much. For more than twenty years he was the ruling power in Westminster Hall. Considering the state of the law in his day and his fond adherence to its formalities and precedents, one's admiration for his undoubted ability gives way to surprise that he should have required such ascendency over his brethren. Even so great a lawyer as Willes said that "to him the law was under greater obligations than to any judge within legal memory." For more than twenty years he bent all the powers of his great intellect to foster the narrow technicalities and heighten the absurdities of the system of special pleading. The right was nothing, the mode of stating it everything. Conceive of a judge rejoicing at non-suiting a plaintiff in an undefended case, and reflecting only that those who drew loose declarations brought scandal on the law! Any attempt to change or ameliorate the law met with his uncompromising opposition. "Think of the state of the record," was his invariable response to every effort to escape from the trammels of technicality. He defeated the act of parliament allowing equitable defences in common law actions by the exaction of all but impossible conditions, and expressed satisfaction in being able to do so. Broad-minded judges like Maule and Cresswell struggled in vain against his influence. "Well," Maule would say, "that seems a horror in morals and a monster in reasoning. Now give us the judgment of Baron Parke which lays it down as law." Parke stands at the head of the black-letter lawyers. It is related that once when one of his brethren was ill, Parke sent him a special demurrer. "It was so exquisitely drawn," he said, "that he felt sure it must cheer him to read it." "He loved the law," as Bramwell said, "and

like those who do so he looked with some distrust on proposals to change it." He sincerely believed that the interests of justice were best served by a strict adherence to technical rules. The sixteen volumes of reports by Meeson and Welsby were his especial pride. "It is a lucky thing that there was not a seventeenth volume," said Erle, "for if there had been the common law itself would have disappeared altogether amidst the jeers of mankind."[1] In these pages, indeed, he may be seen at his best and his worst. He was one of the last of the judges who systematically delivered written opinions. They were prepared with great fulness and care, and do not fall far short of two thousand in number. Alderson (1834-57) was a strong associate, learned, vigorous and efficient, and particularly capable as a criminal judge.[2] Valuable assistance, particularly in its equitable jurisdiction, was rendered in this court by Rolfe (1839-50), who subsequently reached a higher station as Lord Cranworth.

(c) *Ecclesiastical and Admiralty Courts*

Probate, matrimonial and admiralty affairs were administered for centuries by the civilians; but they left few records of their labors. As a system of judicial precedents this juris-

[1] When asked once why he had not written a book he replied: "My works are to be found in the pages of Meeson and Welsby." These volumes are the best monument of his industry. As most of the opinions are rendered by him, it is unnecessary to undertake to give a comprehensive selection. The following will suffice as examples: Norton *v.* Elain, 2 M. & W. 461; Langridge *v.* Levy, 2 do. 461; Nepean *v.* Knight, 2 do. 894; Doe d. Rees *v.* Williams, 2 do. 749; Harris *v.* Butler, 2 do. 539; Jackson *v.* Cummings, 5 do. 342; Evans *v.* Jones, 5 do. 77; Merry *v.* Green, 7 do. 623; Acton *v.* Blundell, 12 do. 324; King *v.* Hoare, 13 do. 494.

Among his leading opinions in the House of Lords and Privy Council are Atwood *v.* Small, 6 Cl. & F.; Shore *v.* Wilson, 9 do. 353; O'Connell's case, 11 do. 155; Gibson *v.* Small, 4 H. L. Cas. 352; Jeffreys *v.* Boosey, 4 do. 842; Chasemore *v.* Richards, 7 do. 349; Wicker *v.* Hume, 7 do. 165; Dolphin *v.* Robbins, 7 do. 390; Wing *v.* Angrave, 8 do. 183; Brook *v.* Brook, 9 do. 195; Lynch *v.* Knight, 9 do. 587; Barry *v.* Buttin, 2 Moo. P. C. 480; Calder *v.* Halket, 3 do. 28.

[2] Hadley *v.* Baxendale, 9 Ex. 341; Wood *v.* Leadbitter, 13 M. & W. 840; King *v.* Hoare, 13 do. 494; Skeffington *v.* Whitehurst, 1 Y. & C. 1; Startup *v.* Macdonald, 12 L. J., Ex. 477; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Gibson *v.* Small, 4 do. 352; Jeffreys *v.* Boosey 4 do. 842; O'Connell's case, 11 Cl. & F. 155; Wright *v.* Tatham, 5 do. 670.

diction is the creation of the nineteenth century. While the main stream of legal business flowed through the Inns of Court and Westminster Hall, a close body of advocates and proctors, in the quiet backwaters of Doctors' Commons, under the shadow of St. Paul's, placidly pursued their vocation. In their cloister-like seclusion the learned doctors caused scarcely a ripple on the surface of legal affairs; no report was issued of their proceedings, and to the world at large they were unknown. From this obscurity the ecclesiastical and admiralty jurisdiction was rescued by the genius of Lord Stowell.

The brothers William and John Scott, who were destined in after life, as Lords Stowell and Eldon, to make such lasting impression on their chosen branches of English jurisprudence, were strikingly dissimilar in mental temperament. The strength of intellect which in the case of Eldon was applied with indefatigable industry to the confinement within rigid limits of the doctrines of a remedial system, was employed by Stowell in laying the foundation of the law of the sea in accordance with the principles of universal justice. Lord Stowell was a man of the most scholarly attainments — the friend of Johnson, Burke and Reynolds, and a keen participant in the intellectual movements of his time. The cosmopolitan sources of the civil law, which he originally studied as part of a liberal education — its philosophical, literary and historical associations — led him to adopt it as a vocation. The choice was most happy. He had the good fortune to live in an age peculiarly calculated to exercise and exhibit his great faculties. The greatest maritime questions that have ever presented themselves for adjudication arose in his time out of those vast European wars in which England obtained the sovereignty of the seas. Most of these questions were of first impression, and could be determined only by a cautious process of deduction from fundamental principles. The genius of Stowell, at once profound and acute, vigorous and expansive, penetrated, mastered and marshalled all the difficulties of these complex inquiries, and framed that comprehensive chart of maritime law which has become the rule of his successors.

His first judicial service was as judge of the Consistory Court of London, where for ten years he delivered discourses on the regulation of the domestic forum which are exemplary alike in morals and in taste. In this jurisdiction, involving the most sacred rights of individuals and the best interests of society, his benevolent wisdom is indelibly recorded. Such cases as Dalyrymple *v.* Dalyrymple, on the nature, origin and sanctity of marriage; Evans *v.* Evans, the first great case on cruelty; Loveden *v.* Loveden; Sullivan *v.* Sullivan, and many others to be found in the contemporary reports of Haggard and Phillimore, are rare specimens of legal philosophy and practical ethics. In the case of Evans *v.* Evans, for instance, he benevolently points out to the parties the limits of his powers:

"The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its means merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to separate those who wish to live separate from each other, who cannot live together with any degree of harmony and, consequently, with any degree of happiness; but my situation does not allow me to indulge in the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether these reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its

indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

But the highest sphere in which he exercised his faculties was the Court of Admiralty, where for a period of thirty years he was rather a law-giver than a judge. Except a few manuscript notes, and occasional references to tradition and personal memory, there were no precedents for his guidance in adjudicating upon the novel cases arising out of the most important war in English history. He was free to be guided by the writers on Roman, canon and international law, and by the historical material with which his wide reading had made him familiar. At the same time the unequalled variety of cases which came before him enabled him to give unity and consistency to a whole department of law. The legal interruption to navigation which both belligerent parties may create against neutrals, the rights of joint captors, cases of unlawful detention and seizure, the force and construction of different treaties, the existence of an actual blockade, the condemnation of merchant ships for resisting search, questions of domicile, the extent of the protection of cartel, the extent of territorial claims, the validity of orders in council — these are among the subjects adjudicated by him with such unerring accuracy that, though often appealed from, it is said that not one of his judgments was reversed. Upon many maritime points his judgments are

still the only law; and little popular as they were at the moment among Americans, who often suffered by them, they have since been accepted by our courts as authoritative. Fortified by a store of knowledge at once profound and extensive, combining all the materials that indefatigable research, close and minute observation and intense study could provide, the judgments of Lord Stowell in international law have passed into precedents equal, if not superior, to those of the venerable authors of the science, Puffendorf, Grotius and Vattel. His work, like theirs, was animated by the spirit of universal justice. "I trust," he said in the celebrated case of the Swedish Convoy, 1 C. Rob. 349, "that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me; namely, to consider myself stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nature holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting in Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question."

"If ever the praise of being luminous could be bestowed upon human compositions," says Brougham, "it was upon his judgments." Aware of the value of his productions he bestowed extreme care in their preparation. In a few instances his language may seem somewhat stilted; the attention to diction may occasionally degenerate into purism; but the symmetry and elegance of the whole confirm Lord Lynd-

hurst's opinion that it is as vain to praise as to imitate him. Probably his finest performance, from all points of view, is his luminous exposition in the case of the Gratitudine, 3 C. Rob. 240, of the power of the master of a vessel to hypothecate her cargo. But it is little, if any superior to the following: The Maria, the case of the Swedish Convoy, 1 C. Rob. 340; the case of the Slave Grace, 2 Hagg. Adm. 94; the Jane and Matilda, 1 Hagg. Adm. 187; the Neptune, 1 Hagg. Adm. 227; Le Louis, 2 Dods. Adm. 210.[1]

Stowell was followed in succession by Sir Christopher Robinson (1828-33), and Sir John Nichol (1833-38), whose short service was respectable, but not particularly distinguished. The next judge of this court maintained the high standard set by Stowell. Lushington (1838-67) was a man of high character, vast learning and sound judgment, who, during a service almost equal to that of Stowell in duration, administered the varied duties of his court with such accuracy and good sense that his judgment was seldom appealed from and rarely reversed. "All who ever heard one of those luminous expositions of law," says a contemporory, "must remember the effect produced in court when, often without taking time to consider his judgment, Dr. Lushington would deliver one of those masterpieces of judicial wisdom and legal learning which rank him among the first of English jurists." With maritime law in particular his name is permanently associated. The ancient jurisdiction of the Admiralty was largely restored by various statutes during his tenure, and it was finally made a court in 1861. Then the Crimean war, bringing in its train many questions of the

[1] Following is a fairly comprehensive list of his most important contributions to international law: The Santa Cruze, 1 C. Rob. 50; Mercurius, *ib.* 80; Frederick Molke, *ib.* 86; Betsy, *ib.* 93; Flad Oyen, *ib.* 135; Hendrick and Maria, *ib.* 146; Columbia, *ib.* 154; Mentor, *ib.* 179; Jouge Margaretha, ib. 189; Hoop, *ib.* 196; Two Friends, *ib.* 271; Vrow Margaretha, *ib.* 336; Maria, *ib.* 340; Immanuel, 2 C. Rob. 186; Indian Chief, 3 C. Rob. 12; Portland, *ib.* 41; Twee Gebroeder, *ib.* 162, 336; Inuan, *ib.* 167; Atlas, *ib.* 299; Bremen Flugge, 4 C. Rob. 90; Anna Catharina, *ib.* 107; Fortuna, *ib.* 278; Venus, *ib.* 355; Phoenix, 5 C. Rob. 20; Carlotta, *ib.* 54; Boedes Lust, *ib.* 233; Anna, *ib.* 373; Orozambo, 6 C. Rob. 430; Atalanta, 6 *ib.* 440; Neptunus, 6 *ib.* 403; Madison, Edwards, 224; Coylon, 1 Dods. 505; Eliza Ann, *ib.* 244; Fanny, 2 Dods. 210; Le Louis, *ib.* 210.

rights of neutrals, blockade and contraband of war, enabled him to build up a high reputation as an authority on international law. The ecclesiastical controversies of his time, arising out of the ritualistic movement in the English Church, were also determined by him with broad-minded liberality.[1]

(*d*) *Courts of Appeal*

The right of appeal is a modern conception. Down to very recent times it was rigidly withheld save in a strictly limited class of cases; and even in those cases in which an appeal was allowed the appellate jurisdiction was administered on principles which were anomalous and irrational in the extreme. In common law cases only matters of error apparent on the record were reviewable, and no appeal lay on a motion for a new trial or to enter a verdict on a non-suit. No error lay upon a special case framed by consent without a trial, but only from a special verdict where the parties had arranged or the judge had directed at the trial a special statement of the facts; in other words, the expense and delay of a useless trial were required as a condition of appeal. And even where appeal was possible the appellant was held to the strictest observance of all the difficult formalities involved in challenging the direction of a judge by means of a bill of exceptions.

The Exchequer Chamber, the intermediate court of appeal in common law, practically dates from 1832. The Court of Appeal in Chancery was not established until 1851. The courts of final appeal, the House of Lords and the Privy Council, are of great antiquity; but prior to the nineteenth century their judicial functions were of secondary impor-

[1] Some of Lushington's conspicuous cases in Admiralty are: The Milan, Lush. 388; Franciska, 2 Spink's Adm. and Ecc. 1; Banda and Kirwee Booty, L. R., 1 A. and E. 109; Batavia, 9 Moo. P. C. 286; Europe, Br. and Lush. 89; Pacific, ib. 245; Helen, L. R., 1 A. and E. 1.

In matrimonial affairs see Dysart *v.* Dysart, 3 Notes of Cases, 324; Williams *v.* Brown, 1 Curt. 53; Braithwaite *v.* Hook, 8 Jur. (N. S.) 1186.

His principal ecclesiastical cases are: Williams *v.* Bishop of Capetown; Westerton *v.* Liddell; Ditcher *v.* Denison; Burder *v.* Heath; Bishop of Salisbury *v.* Williams; Gorham *v.* Bishop of Exeter; Long *v.* Bishop of Capetown; and the Colenso case.

tance. The appellate jurisdiction is almost entirely a creation of the nineteenth century. This late development may be explained in part, so far at least as the common law jurisdiction is concerned, by the efficiency of the trial courts. The three great common law courts in banc administered the system then in force as well as any court could administer it. It was not until the breakdown of the common law courts in banc that more liberal rights of appeal became necessary. Moreover, the House could at all times avail itself of the advice of the common law judges. This advice, it is true, they were not bound to follow, but, in fact, it was seldom overridden. In chancery, until the creation of the Court of Appeal in Chancery, the situation was not so satisfactory. The chancellor sat alone on appeal from the vice-chancellor and from the master of the rolls (often his superiors in technical learning); and there was usually small satisfaction in pursuing an appeal to the House of Lords, because, owing to the defective organization of that tribunal, there, too, the chancellor usually dominated. The advice of the chancery judges was not available, because the House had no authority to summon them unless, as rarely happened, they were also peers.

A Court of Exchequer Chamber existed from the earliest times, both as a court of error and a court of debate. As a court for debate it consisted of the assembled judges, presided over by the lord chancellor, where matters of importance and difficulty were discussed before judgment was rendered in the court below (e. g. Calvin's case).[1] By 31 Edw. III., c. 12, it was constituted a court of error from the common law side of the Exchequer, and in it sat the Lord Chancellor, the Lord High Treasurer and the judges of the other courts. In 1585 another court was created to take error

[1] It was in the Exchequer Chamber that the judges assembled when they were consulted by the king. These consultations were frequent in early times. The judges were consulted by Richard II as to his kingly power; by Henry VII as to whether the devolution of the crown upon him purged him of his attainder by Richard III; by Henry VIII as to whether on a bill of attainder a person need be heard in his own defence. The practice became so common that in 1591 the assembled judges volunteered some good advice on the subject of illegal commitments.

from the King's Bench. It was composed of the judges of the Common Pleas and the Exchequer. Both these courts were finally merged by statute (11 George IV and 1 William IV) into a court of appeal from all three common law courts, appeals from one court being heard by the judges of the other two. This continued to be the intermediate court of appeal in common law until the Judicature Act. As thus constituted it was at times a most powerful court. Its practical operation was, however, somewhat restricted. Occupied with the labors of their own courts, the judges were irregular in attendance. And the general satisfaction given by the common law courts in banc was evidenced by a limited right of appeal.

During the first half of the life of the court its most active members were Tindal and Parke; but valuable assistance was rendered by Denman, Patteson, Coleridge and Alderson. During the second period the active participants were Willes, Erle, Blackburn, Bramwell, Pollock, Wightman, Cockburn, Williams and Martin. During the forty-five years of the court's existence it heard only about eight hundred appeals, and nearly two-thirds of these were heard during the last half of the period. The Queen's Bench supplied the largest quota of these appeals, although the Exchequer was not far behind. Appeals from the Common Pleas were comparatively few in number. Of the eight hundred judgments reviewed by the court, a little more than one-fourth were reversed — somewhat less than the usual proportion. There was a remarkable consensus of opinion among the judges in this court, the number of cases in which there was a division of opinion being less than fifty.

The importance of the House of Lords as a court of final review in civil actions is a matter of recent development. After the break up of the Curia Regis and the establishment of the three courts of common law there remained in the sovereign a residuary power covering cases where the courts were not strong enough to do justice, or were deficient in rules applicable to the case or were alleged to committed error. In time the King in Council (at first the Star Chamber, and latterly the Privy Council) became the tri-

bunal for the determination of cases where, from the greatness of the offender, or the magnitude of the issue, the ordinary courts were inadequate to do justice. The King in Chancery (by the Lord Chancellor) acquired exclusive jurisdiction in all cases where the rigor of the common law had to be relaxed by supplemental rules, and the appellate jurisdiction in case of error passed into the hands of the House of Lords. The extent of the jurisdiction of the House was long a matter of controversy. Its common law jurisdiction in error, which was settled in the first year of Henry VII, was decisively vindicated in the case of Ashby *v.* White, 14. St. Tr. 695. Its appellate jurisdiction in equity was clearly recognized by the statute of 27 Elizabeth, c. 28, and has been unquestioned since the case of Shirley *v.* Fagg, 6 St. Tr. 1121. In early times the House claimed and occasionally exercised an original jurisdiction between party and party; but this claim was finally abandoned after the conflict over the case of Skinner *v.* East India Co., 6 St. Tr. 709, in 1688. Jurisdiction over Scotch appeals dates from the Act of Union of 1707. Irish appeals have long been heard in the House. In 1696, and again in 1719, the Irish House of Lords claimed jurisdiction; this claim was allowed in 1783, but in 1800 it was finally taken away by the Act of Union.

Yet, even late in the eighteenth century the House was only beginning to be regarded as a regular court of justice. Its composition remained uncertain until it was finally settled by statute under the Judicature Act. The original conception doubtless implied the judgment of the whole House assisted by the advice of the assembled judges. Of course the lord chancellor presided, and there were generally eminent lawyers among the peers who would presumably lead in the discussion. The reports of the judicial proceedings of the House prior to the nineteenth century are so meagre that it is impossible to ascertain the character of their discussions. The earliest report of their judicial proceedings by Shower (1694-1733) — a brief report of about fifty cases confined mainly to a statement of the issues and the actual judgment of the House — was considered by the House an infringe-

ment of its privileges. The same meagreness characterizes other reporters of the eighteenth century: Colles (1697-1713) and Brown (continued by Tomlins, 1702-1800). Hall states that in his day judgment was regularly given by the majority of voices. In 1689 the judgment in the case of Titus Oates was affirmed by a vote of thirty-five to twenty-three, in opposition to the unanimous opinion of the assembled judges. The judgment of the Queen's Bench in the celebrated case of Ashby *v.* White, 1 Bro. P. C. 62, in 1703, was reversed in the House by a general vote of fifty to sixteen.[1] As late as 1806 lay peers voted in the case of Lord Hertford's guardianship of Lord Seymour's daughter. But the theory of final decision by a combination of lay and legal minds gradually broke down. Lay peers were, as a rule, little disposed to attend the hearing of purely private and technical cases; and they soon practically lost their right to sit even in cases of quasi-political and general public interest. The matter came to an issue in O'Connell's case, 11 Cl. F. 155, in 1844, when the lay peers, in deference to the Duke of Wellington, finally waived their right to vote. The last occasion on which a lay peer voted was the case of Bradlaugh *v.* Clarke, 8 App. Cas. 354, when Lord Denman, son of Lord Chief Justice Denman, voted. Lord Denman had been educated for the bar, but he did not come within the recognized definition of a "law lord," i. e., one who had held high judicial office; yet the law officers of the government were of opinion that the vote was lawful.

The other component part of the composition of the ancient tribunal, the assembled judges, has also practically disappeared. The right of the House of Lords to summon the judges at the beginning of each Parliament to be present for the purpose of assisting the House, when required, in the determination of legal questions, is of great antiquity. But, although the judges still receive this summons, they no longer attend unless specially summoned for a particular

[1] Some of the other cases in which the lay peers participated were Douglas *v.* St. John (Lord's Journal, XXXII, 264), in 1769; Alexander *v.* Montgomery (Lord's Journal, XXXIII, 519), in 1773; Hill *v.* St. John (Lord's Journal, XXXIV, 443), in 1775; Bishop of London *v.* Fytche (Lord's Journal, XXXVI, 687), in 1783.

purpose. It seems to have been a common practice of the House during the eighteenth century to consult the judges. During the first quarter of the nineteenth century Lord Chancellor Eldon and Lord Redesdale, who performed most of the judicial functions of the House, seldom called for their views. During the period from the retirement of Eldon to the Judicature Act the judges were frequently consulted, and almost all the recorded advisory opinions of the judges come within this period. Since the Judicature Act the judges have been consulted in only four cases.[1] The establishment of permanent courts of appeal has obviated the necessity for such consultations. In practice this method of consideration was subject to several objections. The judges were busy in their own courts and were irregular in responding. Moreover, the manner in which the House put questions of law, without regard to the form in which the questions arose, or to points actually raised, often made it difficult for the judges to give a satisfactory answer.[2] Indeed, in the matter of the Westminster Bank, 2 Cl. & F. 192, the judges declined to answer on the ground that the question was "proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing acts of Parliament." However, in the matter

[1] Mordaunt *v.* Moncrieff, 1 Pr. & Div. App. 374, upon the question whether the statutory proceeding for dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or a wife who prior to the institution of such proceedings had become incurably insane; Allison *v.* Bristol Marine Insurance Co., 1 App. Cas. 214; Dalton *v.* Angus, 6 App. Cas. 742, as to the right of lateral support for buildings; and the celebrated trade union case of Allen *v.* Flood, (1898) A. C. 1.

[2] These difficulties were clearly defined by Justice Maule in M'Naghten's case, 10 Cl. & F. 199, where he hesitated to answer the questions propounded, "first, because they do not appear to rise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel the more the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal cases."

of the Islington Market Bill, 3 Cl. & F. 512, the judges gave their opinion on a bill pending in Parliament; and it will be remembered that the judges were called upon for their opinions on the law of libel when Fox's bill on that subject was pending in Parliament. The judges are called upon simply to advise; the decision rests with the House alone. Lord Campbell expressed the accepted doctrine in Burdett *v.* Spilsbury, 10 Cl. & F. 413: "When your lordships consult the Queen's judges I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give." Individual lords have taken a different view of their duty, noticeably Lord Wynford.[1] Still, there are only five instances in modern times in which the House has rendered judgment contrary to the opinion of a majority of the judges.[2]

The House of Lords reports from 1827 to 1900 contain one hundred and twenty-five cases in which the judges have been called upon for advice. Of this number not more than a score are in any sense landmarks in legal history. Indeed, aside from the relative unimportance of most of these cases, it is difficult to understand upon what principle the House acted in determining when the judges should be assembled. For in twenty-four cases there was no difference of opinion from the beginning of the case in the trial court to its final conclusion in the House of Lords; and in fifty-eight cases the asembled judges were unanimous in opinion. The form of judgment in the House is that of a motion, as in ordinary debates, recorded in the journal of the House. The House, unlike the Privy Council,[3] holds itself bound by its own judgments. It also differs from the Privy Council in its privilege of summoning the judges.

[1] Atty. Gen. *v.* Winstanley, 5 Bligh (N. S.) 144.

[2] O'Connell *v.* The Queen, 11 Cl. & F. 232, on the validity of a general judgment when some of the counts in an indictment are bad; Jeffreys *v.* Boosey, 4 H. L. 815, on copyright; Unwin *v.* Heath, 5 H. L. recover for damage necessarily resulting from the exercise of powers conferred by Parliament; and Allen *v.* Flood, (1898) A. C. 1.

[3] Cushing *v.* Dupuy, 5 App. Cas. 409.

The reports of Dow (1812-18) and of Bligh (1819-21) covering the long chancellorship of Lord Eldon, indicate the defects of the House as an appellate tribunal. During this time the judicial functions of the House were performed by Eldon, assisted from time to time by Redesdale, the Irish chancellor. So far as their attainments in equity were concerned these two eminent judges left little to be desired. But Eldon often sat alone. Inasmuch as three peers were required to constitute a House, it often became necessary to catch a bishop or two, or press one or more lay peers into service, to act as dummies, and then the lord chancellor, gravely assisted by these two mutes, finally disposed of appeals from his own decisions. As the Earl of Derby said to his colleagues in 1856, they were upon such occasions "like the lay figures which are introduced in a painter's studio for the purpose of adding to the completeness of the judicial tableau." In spite of its manifest absurdity this system was viewed with veneration. The satire of Swift did not prevent Lord Hardwicke from saying that if he went wrong in Penn *v.* Baltimore[1] his errors would be corrected by "a senate equal to that of Rome itself." Yet in every case that went to the House during his chancellorship Hardwicke himself constituted that senate, and in judicial solitude he affirmed his own excellent judgments. And we read in Blackstone the wondrous tale of peers "bound upon their conscience and honor (equal to other men's oaths) to be skilled in the laws of their country!" It may be imagined that such a tribunal would also be likely to discourage common law appeals, particularly in view of Eldon's assertion of his undoubted right to override the judgment of the assembled judges of the common law courts.

Upon the retirement of Eldon the judicial functions of the House were largely dominated for more than twenty years by Lord Brougham. During the period from the resignation of Eldon in 1827 to 1850 there were only three Chancellors, — Lyndhurst, Brougham and Cottenham. Lord Lyndhurst's judicial services in the House were comparatively unimportant. His experience had been in common law;

[1] I Ves. Sr., 446.

moreover, his great abilities were political rather than judicial, and when in office his attendance on judicial business was brief and irregular. Lord Cottenham, on the other hand, was an eminent lawyer. During the whole period of Brougham's supremacy, and until the chancellorship of St. Leonards, aside from occasional assistance from Lord Langdale, the Master of the Rolls, he was the only competent equity judge in the court. The Irish chancellors, Manners and Plunkett, sat occasionally, but their service was inconspicuous. But Cottenham, a pure lawyer, profoundly versed within the narrow sphere of equity, but knowing little besides, was not constituted by mental temperament to take the same view of things as the versatile Brougham. In common law authority, on the other hand, the court was somewhat better, owing to the elevation to the peerage of several common law judges. Best, whose service as a legal peer, under the title of Lord Wynford, was second only to Brougham's in duration, was a regular attendant on judicial business for a few years only; long before his death he ceased to sit. Chief Justice Tenterden sat quite regularly from his elevation to the peerage in 1827 to his death in 1832. His successor, Denman, was raised to the peerage a few years later expressly to assist Brougham in appellate work, but owing to the heavy work of his own court his attendance was irregular. With the accession of Lord Campbell in 1841, by virtue of his appointment to the Irish chancellorship, the House enjoyed the services of a thoroughly competent common law judge. The uncertain composition of the court was, however, a serious drawback. A litigant had no assurance that his appeal would be heard by a judge whose learning and experience in the particular subject was equal to that of the judge from whom he appealed. If Brougham's technical knowledge had been equal to his energy and assurance, the situation would have been better; but it must be said that his work, except in Scotch appeals, is not of a high order. During the ten years from 1850 to 1860 five chancellors succeeded one another in rapid succession: Truro, St. Leonards, Cranworth, Chelmsford and Campbell. Truro left appellate work to Brougham, and St. Leonards and Cran-

worth, who frequently sat without a third peer, were so notoriously at odds that judgments were constantly affirmed on appeal in consequence of a dead-lock. To such grounds of complaint may be added the intermittent sittings of the court and consequent delays, its extreme disregard of the proceedings and engagements of the other courts, its absolute irresponsibility, and the immense expense attendant upon its procedure. Its habit of transacting legal business through the legislative form of general debate has always been a serious drawback. It always conduces to the dignity of a court, and to the authority of the rules which it lays down for future guidance, to formulate a single considered opinion clearly expressing the grounds upon which the judgment is based. Under the practice of the House, where each judge usually gives independent expression to the reasons upon which his vote is based, it is often extremely difficult to extract the *ratio decidendi.*

The judicial functions of the Privy Council arise out of its ancient position as the *concilium ordinarium* of the King, which decided cases that were too important for the ordinary courts but not of sufficient importance for the House of Lords. From this source sprang the Star Chamber and the Court of Requests as off-shoots. The first instance of the exercise of independent appellate jurisdiction by the Privy Council occurs in the reign of Elizabeth, when it took jurisdiction of an appeal from the Channel Islands. Coke calls the Council a board, not a court; and Hale, in treating systematically of all the existing jurisdictions, mentions it only in connection with its subservience to the House of Lords. By gradual encroachment, however, the Council built up a formidable jurisdiction. In the reign of Charles II it acquired jurisdiction of ecclesiastical and maritime appeals. Its judicial functions were placed upon a modern basis by the establishment of the Judicial Committee of the Privy Council (3 and 4, Wm. IV, c. 41), with jurisdiction principally over appeals from the colonies and in ecclesiastical and admiralty cases.[1]

[1] Prior to this time the only Privy Council reports, aside from occasional decisions contained in the early House of Lords reports, were

For nearly two decades the labors of the Judicial Committee were borne mainly by Parke and Brougham. Some of Brougham's most useful services were rendered in this court, where his encyclopedic mind and liberal views are displayed to best advantage. These two judges were to a great extent relieved by the accession in 1844 of Kingsdown, who served in this court with great distinction for more than twenty years. Kingsdown was one of the great judges of his time. Although a lawyer of vast and varied learning, his grasp of principle led him to deal but little with precedents. In the formulation of the conclusions of the court, in which he bore the principal part, his refined taste and fastidious use of language made his opinions models of judicial expression. From 1854 he practically took charge of appeals in prize cases, interpreting the law of blockade, capture and prize with marked liberality towards freedom of trade. His opinions in the cases of The Franciska, The Gerasimo, and Dyke *v.* Wolford, in the eighth volume of the State Trials, are good specimens of his style and method.[1]

II. From the Common Law Procedure of 1852 to the Judicature Acts of 1873-75

A well defined change in the administration of English law occurred shortly after the middle of the century. Years of

those of Acton and Knapp. The former (1809-11) is made up mostly of brief opinions in prize and colonial cases by Sir William Grant, who was during the early part of the century the dominant influence in the court. The reports of the court under its modern establishment begin with Knapp (1829-36), and the two series of his successor, Moore, overlap the authorized reports.

[1] The following are among his ablest opinions in various branches of the law: Schacht *v.* Otter, 9 Moo. P. C. 150; Allen *v.* Maddock, 11 do. 438; Baltazzi *v.* Ryder, 12 do. 168; Kirchner *v.* Venus, 12 do. 361; Secretary of State of India *v.* Kamachee Boye Sahaba, 13 do. 22; Bland *v.* Ross, 14 do. 210; Ward *v.* McCorkill, 15 do. 133; Attorney General of Bengal *v.* Ranee Surnomoye Dossee, 2 Moo. P. C. (N. S.) 22; Cleary *v.* McAndrew, 2 do. 216; Brown *v.* Gugy, 2 do. 341; Austen *v.* Graham, 1 Spink 357; The Otsee, 2 do. 170; The Julia, Lush. 224; The Hamburgh, Br. and Lush. 271. His opinions in ecclesiastical cases were likewise characterized by breadth of mind. Among his most prominent cases of this kind are Gorham *v.* Bishop of Exeter, Liddell *v.* Weaterton, Long *v.* Bishop of Capetown, and the Essays and Reviews case.

agitation against the anomalies and abuses of the prevailing legal system culminated about that time in a series of practical reforms which brought the administration of justice into something like accord with the world of affairs. From this time forward the law ceased to appear to be designed as a restraint upon human activity. First and foremost was the Common Law Procedure Act of 1852. This great measure and its immediate successors largely transformed the ancient procedure. Causes of action by and against the same parties were permitted to be joined, and several equitable defences were allowed. Special demurrers were abolished, together with much of the ancient verbiage, and only such statements as must be proved were essential in pleading. In 1851 that final absurdity in the law of evidence which closed the mouth of the very person who knew most about the matter in dispute was abolished, and the testimony of interested witnesses became simply a matter of credibility. In equity a series of practical reforms removed many of the most obvious defects of procedure; additional vice-chancellors were appointed in 1851 to cope with the burden of arrears, and, above all, in the same year, a permanent court of appeal in chancery was established. The confusion and absurdities of the ecclesiastical administration of probate and matrimonial affairs were finally removed in 1858 by the creation of an independent court for probate and matrimonial causes. The demand for the infusion of new blood into the court of final appeal was also recognized. The Court of Crown Cases Reserved, where points of criminal law could be reviewed, dates from 1848.

But institutions are of little utility unless they are administered by men who are in sympathy with their purpose and spirit. From this point of view the middle of the century is of even greater significance as a turning point in legal history, for it marks the advent of Willes, Bramwell and Blackburn in common law, and of Knight-Bruce, Turner and Page-Wood in equity. Under the guidance of such minds, in which technical learning and common sense were combined in large measure, the law ceased to act as a sort of surprise upon mankind, and the realization of rights became practicable. A few years later the larger interests of the law

in the court of final appeal were for the first time adequately administered by the master minds of Westbury and Cairns. This period has been aptly termed by Sir Frederick Pollock the classical period of English law.

(*a*) *Common Law Courts*

The central figure in the Court of Queen's Bench throughout this period was Blackburn. But he was ably assisted, and in some respects supplemented, by the chief justice of the court, Sir Alexander Cockburn (1859-80).

The large measure of public attention which Sir Alexander Cockburn commanded during his lifetime probably led to an undue estimate of the permanent value of his judicial services. Along with gifts which readily attract public admiration, he had an eye for effect little short of dramatic; and his distinguished manner was calculated to impress the senses even when his judgment failed to satisfy the understanding. Still, even a cursory examination of his work reveals singular ability. Combining in an eminent degree logical and imaginative qualities of mind, he was not only a consummate advocate, but also a distinguished judge. Possibly there have been more eminent advocates; certainly there have been more profound judges; but rarely a man who united to such an extent the attributes of each. Like Erskine and Brougham, with whom alone he shares the highest honors of forensic advocacy at the English bar, his mind was more capacious than powerful, clear rather than profound. In judgment he surpassed both, and the acute sensibility which was his most prominent characteristic, manifested itself in a range of imagination to which neither of his great rivals could make any pretension. Indeed, such was the range of his imagination that, had it been balanced by equal strength in reasoning faculty, his mental equipment would have been unsurpassed. But the acute sensibility that characterized his temperament was itself of no inconsiderable aid in the successful discharge of his judicial functions. The law is not merely a system of rules, nor is its administration simply the application of these rules by rigid logical deduction.

Since the law is designed to serve the needs of mankind, its efficient administration requires a clear and just appreciation of the facts to which it is to be applied. The successful investigation of facts is therefore an essential preliminary to, and a most important element of, a just determination. And a learned lawyer who is wanting in imagination often misapprehends the bearing upon the facts of rules of which he has no full and pregnant, but only a dry and technical, knowledge. Of course, the value of such qualities depends upon the extent to which they coexist with a logical basis in the understanding; but in the perfect coördination of these diverse qualities resides the highest judicial capacity. In Cockburn's equipment imaginative qualities certainly predominated. His mind was perhaps too quick and susceptible to admit of the tenacity essential to the highest excellence in the formal exposition of legal doctrines. Hence he was strongest in dealing with facts. At *nisi prius* his grace of manner, his knowledge of the world, his refined and eloquent diction, and his lucid and orderly intellect, combined to make him an ideal judge. His most conspicuous effort in this sphere was his charge to the jury in the memorable Tichborne case, in the course of which he formulated with eloquence and force the true functions of judges and juries:

"In my opinion a judge does not discharge his duty who contents himself with being a mere recipient of evidence, which he is afterwards to reproduce to the jury without pointing out the facts and inferences to which they naturally and legitimately give rise. It is the business of the judge so to adjust the scales of the balance that they shall hang evenly. But it is his duty to see that the facts as they arise are placed in the one scale or the other according as they belong to one or the other. It is his business to take care that the inferences which properly arise from the facts are submitted to the consideration of the jury, with the happy consciousness that if he go wrong there is the judgment of twelve men having experience in the every day concerns of life to set right anything in respect of which he may have erred. . . . In the conviction of the innocent, and also in the escape of the guilty, lies, as the old saying is, the con-

demnation of the judge. . . . You have been asked, gentlemen, to give the defendant the benefit of any doubts you may entertain. Most assuredly it is your duty to do so. It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to the benefit must be the doubt that a rational, that a sensible man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. . . . I should be the last man to suggest to any individual member of the jury that if he entertains conscientious, fixed convictions, although he may stand alone against his eleven fellow jurors, he should give up the profound and unalterable convictions of his own mind. . . . But then we must recollect that he has a duty to perform, and that it is this. He is bound to give the case every possible consideration before he finally determines upon the course he will pursue, and if a man finds himself differing from the rest of his fellows with whom he is associated in the great and solemn function of the administration of justice, he should start with the fair presumption that the one individual is more likely to be wrong than the eleven from whom he differs. He should bear in mind that the great purpose of trial by jury is to obtain unanimity and put an end to further litigation; he should address himself, and in all diffidence in his own judgment, to the task he has to perform, and carefully consider all the reasons and arguments which the rest of the body are able to put forward for the judgment they are ready to pronounce, and he should let no self-conceit, no notion of being superior to the rest in intelligence, no vain presumption of superiority on his part, stand in the way. . . . That is the duty which the juryman owes to the administration of justice and the opinion of his fellows, and therefore I must protest against the attempt to encourage a single juryman, or one or two among a body of twelve, to stand out resolutely, positively, and with fixed determination and purpose, against the judgment and opinion of the majority. . . . There is but one course to follow in the discharge of great public duties. No man should be insensible to public opinion who has to discharge

a public trust. . . . But there is a consideration far higher than that. It is the satisfaction of your own internal sense of duty, the satisfaction of your own conscience, the knowledge that you are following the promptings of that still, small voice which never, if we listen honestly to its dictates, misleads or deceives — that still, small voice whose approval upholds us even though men should condemn us, and whose approval is far more precious than the honor or applause we may derive, no matter from what source." [1]

By way of disparagement, it was said that Cockburn acquired his knowledge of legal principles while sitting on the bench beside Blackburn. Beyond doubt Blackburn's vigorous intellect was the ruling power in the Queen's Bench throughout Cockburn's service; but, with his great natural acquisitive powers and assiduous application, Cockburn certainly acquired a firm grasp of the fundamental principles of the law. If the scope and activity of his intelligence, and the variety of his pursuits, to some extent impaired the fulness and accuracy of his knowledge of its details, his keen insight and knowledge of the world, acquired through cultivation, travel and extensive intercourse with all classes of men, frequently saved him from pitfalls into which less worldly men would have fallen.. On the whole, his influence has perhaps been felt more in the impulse and direction which he gave to certain topics than in any direct contribution to its formal contents.

The doctrine of partial insanity may be directly traced to his efforts. This doctrine was formulated by him in defending M'Naghten, in 1843, and the advisory opinions rendered by the judges to the House of Lords in a subsequent investigation of the case lent support to his theory. In the subsequent case of Banks *v.* Goodfellow, 5 Q. B. 549, he applied the doctrine to testamentary cases in terms which have since been generally accepted. His reasoning is that whatever may be the psychological theory as to the indivisibility

[1] Among other *causes célèbres* in which he presided were the Matlock will case; the Wainwright murder case, a leading case on circumstantial evidence; the convent case of Saurin *v.* Starr, an action by a sister of mercy against her mother superior for assault, and Reg. *v.* Gurney, a famous case of fraud conspiracy.

of the mind, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The pathology of mental disease shows that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties may be disordered, leaving the rest undisturbed — that while the mind may be overpowered by delusions which utterly demoralize it, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs of life.

On the law of libel — particularly with respect to the public press — Cockburn made a durable impression. In the leading case of Wason *v.* Walter, 4 Q. B. 73, he established the reservation in favor of privileged publications on its true foundation; i. e. that the advantage of publicity to the community at large outweighs any private injury that may be done. He also gave a strong impulse to the prevailing rule with respect to the limits of public criticism. His general principle was perfect freedom of discussion of public men, stopping short, however, of attacks on private character and reckless imputation of motives. When, therefore, a writer goes beyond the limits of fair criticism in making imputations on private character, it is no defence that he believed his statements to be true. "It is said that it is for the interests of society that the public conduct of men should be criticised without any other limits than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country if we were to sanction attacks upon them destructive of their honor and character, and made without any foundation. Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations upon his

motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." [1]

Lord Campbell records in his diary in June, 1856: "Having occasion for a new judge to succeed Erle, made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown, whereas several Whig Queen's Counsel, M. P.'s, were

[1] Campbell *v.* Spottiswood, 3, B. & S. 769. See also Hunter *v.* Sharp, 4 F. & F. 983, as to the protection afforded with respect to statements of motive.

One of his most valuable judgments is his exhaustive examination of the nature and limits of martial law in his charge to the grand jury charged with the investigation of the conduct of Colonel Nelson and Lieutenant Brand in the suppression of the Jamaica insurrection in 1865. In the "Franconia" case, 2 Ex. D. 63, he delivered a most elaborate opinion on the jurisdiction over the sea within the three-mile zone.

Among his valuable contributions to the criminal law are Reg. *v.* Hicklin, 3 Q. B. 360, as to the bearing of motive in criminal acts; Reg. *v.* Charlesworth, 9 Cox Cr. Cas. 45, and Reg. *v.* Winsor, 10 Cox Cr. Cas. 303, as to whether in criminal cases a mistrial is a bar; Reg. *v.* Rowton, 10 Cox Cr. Cas. 28, on the testimony admissible to prove good character; Reg. *v.* Carden, 14 Cox Cr. Cas. 363, as to whether mandamus will lie to compel a magistrate to receive evidence.

The following commercial cases will repay examination: Goodwin *v.* Robarts, 10 Ex. 337, on the negotiability of foreign script; Sacramanga *v.* Stamp, 5 C. P. D. 295, as to whether ship owners are liable for the loss of a cargo in a deviation for the purpose of saving life; Nugent *v.* Smith, 1 C. P. D. 423, on the liability of carriers by sea; Twycross *v.* Grant, 26 P. D. 469, a case of fraudulent prospectus; Rouquette *v.* Overman, 10 Q. B. 524, as to the bearing of the *lex loci* of performance on bills of exchange; Bates *v.* Hewitt, 2 Q. B. 595, upon the obligation to disclose material facts in contracts of insurance, and Frost *v.* Knight, 7 Ex. 111, where the doctrine of Hochster *v.* De la Tour, 2 E. & B. 678, was applied to a contract in which performance depended upon a contingency. It may be pointed out in this connection, that the significance of Cockburn's important opinion in Goodwin *v.* Robarts, mentioned above, lies in its repudiation of Blackburn's conservative view of trade customs as expressed in Crouch *v.* Credit Foncier, 8 Q. B. 376.

See, also, his learned opinion in Phillips *v.* Eyre, 4 Q. B. 225, another case arising out of the Jamaica insurrection; his elaborate discussion of the nature and effect of foreign judgments in Castrique *v.* Imrie, 30 L. J., C. P. 177; and the celebrated ecclesiastical controversy, Martin *v.* Mackonochie, 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Cas. 424, in which the writ of prohibition issued by Cockburn was set aside on appeal.

considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the *Times* and other newspapers. . . . This was the sort of thing: 'Everybody has been going about town asking his neighbour, who is Mr. Colin Blackburn? The very ushers in the courts shake their heads and tell you they never heard of such a party.' 'His legal claims to this appointment stand at a minimum.' 'The only reason which can be assigned for this strange freak of the Chancellor is that the new puisne judge is a Scotchman.'" But Lyndhurst came to his rescue in the House of Lords. "I have been asked," he said, "who is Mr. Blackburn, and a journal which takes us all to task by turns has asked somewhat indignantly, 'Who is Mr. Blackburn?' I take leave to answer that he is a very learned person, a very sound lawyer, an admirable arguer of a law case and eminently fitted for a seat on the bench." Never was a prediction more completely realized. This unknown Scotch lawyer proved himself to be the greatest common law judge of the century, and was destined in his long career of nearly thirty years in the Queen's Bench, the Exchequer Chamber and the House of Lords, to make a larger volume of substantial contributions to English law than any other judge in English history save only Mansfield. From the outset he easily held his own with such judges as Cockburn, Wightman, Lush, Archibald and Field, and it was not long before he was recognized as the corner stone of the Queen's Bench. In commercial law, of which he was completely master, he alone saved his court from being overshadowed by the authority of the Common Pleas under Willes. In real property law, also, he had no superior among his associates; and he was such a good all-round lawyer that even in those branches where a colleague was something of a specialist, he easily took second place. An acute observer has thus described the Court of Queen's Bench in action during Blackburn's supremacy: "So keen and alert was his mind, so full of the rapture of the strife, that in almost all cases it was he who in the point to point race made the running or picked up the scent. On such occasions all the papers and authorities in a case seemed to be drawn by a sort of magnetic

attraction to his desk. And behind them he would sit with his wig on the back of his head, plunging his short-sighted eyes into one and another, firing off questions in quick succession at counsel on both sides, raising difficulties and objections, and at last, when the point was cleared, handing the conclusive document to the Lord Chief Justice, who, meanwhile, had often been leaning back in his chair in amused enjoyment of the scene, but, always ready to intervene at the psychological moment and bear off the honors of a point, or to enforce the conclusion in a judgment of inimitable force and diction."

It is obvious that the law reports furnish no adequate memorial of the services of such a judge. Yet the volume of his work is immense. His name appears in almost every case, and, although his opinions are often admirably terse, he hardly ever simply concurred; on the other hand, he delivered the judgment of the court oftener than any of the puisnes. When he does undertake to formulate his views he gives fully the process by which he reaches his conclusion. While not so profuse in the use of authorities as Willes, his review of the cases is always thorough and interesting. He had no graces of style or flashes of imagination, but every conclusion is worked out with the hard headed and closely knit logic of his race. With a mind as vigorous as Jessel's, and a humor, when called for, as caustic, he was always conscientiously scrupulous in the discharge of his judicial functions. Turner *v.* Walker, 1 Q. B. 118, illustrates his candor.

It is impracticable to give within brief limits more than an illustration of Blackburn's vast contributions to the law. In mere volume his work was equalled during the century by Parke alone. There are more than six hundred cases in the reports in which he formulated in detail the reasons which influenced his judgment, and in more than one-quarter of these cases he delivered the unanimous opinion of the court. The list[1] of cases cited in the note will give some indication

[1] In the Court of Queen's Bench: Campbell *v.* Spottiswoode, 32 L. J., Q. B. 185; Lloyd *v.* Guibert, 33-241, etc.; Burges *v.* Wickham, 33-17; Coe *v.* Wise, 33-281; Moody *v.* Corbett, 34-166; Maurpoice *v.* Westley, 34-229; Wilson *v.* Bank of Victoria, 36-89; Fleet *v.* Perrins, 37-223; Allen *v.* Graves, 39-157; Godard *v.* Gray, 40-62; Ionides *v.* Pacific Ins.

of his work as a justice of the Court of Queen's Bench, as a member of the Court of Exchequer Chamber, as an adviser to the House of Lords, and as a member of the court of final appeal.

As a general illustration of his method of exhausting a subject, both from principle and from precedent, reference may be made to his examination, in the case of Capital and Counties Bank *v.* Henty, 7 App. Cas. 741, of the modern law of libel. The value of the details of his elaborate arguments may be observed in his admirable statement in Cole *v.* North Western Bank, 10 C. P. 362, of the difficulties which the common law put in the way of the customs of merchants. Lord Blackburn contributed a leading case to the reports, not after his death, like Lord St. Leonards, but while serving

Co., 41-33; Lloyd *v.* Spence, 41-93; Newby *v.* Van Oppen, 41-188; Armstrong *v.* Stokes, 41-253; Crouch *v.* Credit Foncier Co., 42-183; Searle *v.* Laverick, 43-43; Queen *v.* Castro, 43-105; Taylor *v.* Greenhalg, 43-168; Ionides *v.* Pender, 43-227; Bettini *v.* Gye, 45-209; Mackenzie *v.* Whitworth, 45-233; Lindsay *v.* Cundy, 45-381; Queen *v.* Collins, 45-413; Shand *v.* Bowes, 45-507.

In the Court of Exchequer Chamber: Santos *v.* Illidge, 29 L. J., C. P. 348; Fitzjohn *v.* Mackinder, 30-257; Jones *v.* Tapling, 31-342; Blades *v.* Higgs, 32-182; Xenos *v.* Wickham, 33-13; Lee *v.* Jones, 34-131; Appleby *v.* Meyers, 36-331; Holland *v.* Hodgson, 41-146; Brunsmead *v.* Harrison, 41-190; Clarke *v.* Wright, 30 L. J., Ex. 113; Fletcher *v.* Rylands, 35-154; Duke of Buccleuch *v.* Met. Bd. of Wks., 39-130; Riche *v.* Ashbury Co., 43-177; Thorn *v.* Mayor of London, 44-62.

Advisory opinions in House of Lords: Cox *v.* Hickman, 8 H. L. C. 277; Betts *v.* Menzies, 10-131; Peek *v.* No. Staffordshire Ry., 10-473; Harwood *v.* Gt. Northern Ry., 11-666; Mersey Docks *v.* Gibbs, 11-686; 1 E. & I. App. 102; Rankin *v.* Potter, 6-97; Hammersmith Ry. *v.* Brand, 4-236; Great Western Ry. *v.* Sutton, 4-236; Castrique *v.* Irvine, 4-425; Hollins *v.* Fowler, 7-757.

In the House of Lords: Direct U. S. Cable Co. *v.* Anglo-Am. Tel. Co., 2 App. Cas. 410; Bowes *v.* Shand, 2-455; McKinnon *v.* Armstrong, 2-531; Brogden *v.* Met. Ry. Co., 2-666; Rossiter *v.* Miller, 3-115; Orr Ewing *v.* Registrar, 4-479; Kendall *v.* Hamilton, 4-541; Fairlee *v.* Boosey, 4-726; Sturla *v.* Freccia, 5-639; Peorks *v.* Moseley, 5-714; Met. Asylum Dist. *v.* Hill, 6-202; Jennings *v.* Jordan, 6-711; Dalton *v.* Angus, 6-808; Capital & Counties Bk. *v.* Henty, 7-769; Countess of Rothes *v.* Kircaldy Waterworks, 7-700; Sarf *v.* Jardine, 7-345; Rhodes *v.* Rhodes, 7-197; Maddison *v.* Alderson, 8-487; Hughes *v.* Percival, 8-445; Bradlaugh *v.* Clarke, 8-369; Harvey *v.* Farnie, 8-57; Singer Mfg. Co., *v.* Loog, 8-28; Thomson *v.* Weems, 9-677; Fookes *v.* Beer, 9-614; Mersey Steel Co. *v.* Naylor, 9-442; Collins *v.* Collins, 9-228; Smith *v.* Chadwick, 9-192; Lyell *v.* Kennedy, 9-84; Ewing *v.* Orr Ewing, 9-42; 10-499; Speight *v.* Gaunt, 9-15; Svendsen *v.* Wallace, 10-409; Baroness Wenlock *v.* River Dee Co. 10-358; Met. Bank *v.* Pooley, 10-220; Sewell *v.* Burdick, 10-90; Seath *v.* Moore, 11-369; London Ry. *v.* Truman, 11-58.

as a judge. A litigant named Rosanna Fray, who felt aggrieved at his disposition of her case, sued him for damages, and the case of Fray *v.* Blackburn, 3 B. & S. 576, formally established the principle that no action will lie against a judge of a superior court for anything done in his judicial capacity, although it be alleged to have been done maliciously and corruptly.

Besides Wightman and Crompton (1853-65) in the earlier part, the other principal puisnes in the Queen's Bench during the period were Mellor (1861-79), Shee (1863-68), and Lush (1865-80). Lush was the ablest of these judges; he closed his painstaking and useful service in the Court of Appeal.

During this period the Court of Common Pleas grew rapidly in importance and reached its highest standard. After Cockburn's short service in this court (1856-59) the succeeding chiefs were Erle (1859-66), and Bovill (1866-73). In this court Erle added to the substantial reputation that he had made on the Queen's Bench. The Court of Common Pleas under his presidency, as the Attorney-General said on his retirement, "obtained the highest confidence of the suitor, the public and the profession." Bovill was unsurpassed in his practical mastery of commercial law, but his work as a judge suffered from want of more careful reflection in reaching conclusions.

The genius of this court, however, was Willes (1855-71), who was universally regarded by his contemporaries as the most learned lawyer of his time. He is said to have read systematically all the reports, from the first Year Book to the last volume of Meeson and Welsby. He was consequently familiar with the history of the law, and understood the relation which the principles of his day bore to past times. He was intimately acquainted with all the changes which the common law had undergone, and with all the rules and forms of the ancient system of pleading. He knew by heart every old term and maxim. To this thorough knowledge of the principles and history of English law in all its branches he added an extensive and accurate acquaintance with foreign systems of jurisprudence. To the great fountain head of

civil law he habitually resorted for suggestion and comparison and analysis. Withal, his vast learning was his servant, not his master. And he could be as forcible with brevity as he was impressive in learning. Although his opinions are generally full and completely reasoned, his conclusion in the bankruptcy case of Marks *v.* Feldman, 5 Q. B. 284, is one of the shortest opinions on record: "*Dolus circuiter non purgatur.*" He constantly drew upon his vast store of case law for illustration and argument, to the unfailing interest of the profession, if not with uniform success with reference to the issue; but he never relied on mere authority where a principle could be discovered. An occasional tendency toward academical refinements, apparently inseparable from most scholastic minds, may be observed in his work, but it is almost invariably confined to the details of his exposition. His substantial conclusion is always marked by sound common sense. Unlike so many of his associates, whose technical learning was inferior to his own, he had no respect for technicalities, which he never hesitated to brush aside when they interfered with an obvious principle. It was this combination of mastery of detail and good sense which led to his employment in the preparation of the common law procedure acts. No one less familiar with the useless subtleties and effete technicalities of the legal system of that time, or less endowed with the breadth of mind necessary to free himself from their trammels, could have effected so completely and satisfactorily the revolution brought about by those acts.

Although reserved in disposition, among his intimates he seems to have been a singularly attractive personality. The authority of judicial station never dimmed the finer sensibilities of his nature. He was a man of the broadest culture, and seems to have taken all knowledge for his province. The classics were his familiar companions, and he found time to master all the spoken languages of Europe. The tone of his mind is largely reflected in the poetry of Wordsworth, of which he was a diligent student and admirer. In the unremitting performance of his judicial duties and the indefatigable pursuit of knowledge his over-worked mind finally gave way, and, in a moment of temporary insanity, he committed

suicide. His remarks in the Fernandez contempt case, 30 L. J., C. P. 321, in answer to the suggestions of counsel that the dignity and privileges of the court were involved, may be taken as a true index to his judicial character: "I take leave to say that I am not conscious of the vulgar desire to elevate myself, or the court of which I may be a member, by grasping after pre-eminence which does not belong to me, and that I will endeavor to be ever valiant in preserving and handing down those powers to do justice and to maintain truth which, for the common good, the law has entrusted to the judges." [1]

Besides Williams, who continued his service in this period, valuable assistance was rendered by Byles (1858-73), Keating (1859-75), and M. E. Smith (1865-71). Byles contributed largely to the popularity of the court in commercial

[1] Some of his most elaborate and exhaustive opinions are Beamish *v.* Beamish, 9 H. L. C. 274, an examination of the ecclesiastical sanctions to the contract of marriage; *Ex parte* Fernandez, 30 L. J., C. P. 321, on the validity of a commitment for contempt by a court of assize; Lloyd *v.* Guibert, I Q. B. 115, as to what law governs as to sea damage in a contract of affreightment; Exposito *v.* Bowden, 8 St. Tr. 817, as to the effect on a contract of affreightment of trading with an enemy; Mayor of London *v.* Cox, 3 E. and I. App. 252, on the history and principles of the practice of foreign attachment; Notara *v.* Henderson, 7 Q. B. 225, on the duties of the master of a vessel; Seymour *v.* London and Insurance Co., 41 L. J., C. P. 193, on contraband of war; Phillips *v.* Eyre, 6 Q. B. 1, on the jurisdiction of English courts over acts committed abroad; Mody *v.* Gregson, 4 Ex. 49, as to the application of the doctrine of warranty in a sale by sample; Dawkins *v.* Lord Rokeby, 4 F. and F. 829, as to absolute privilege in libel; Henwood *v.* Harrison, 7 C. P. 606, on fair criticism of matters of public interest; Shrewsbury *v.* Scott, 6 C. B. 1, on the disabilities of Catholics with respect to real property. It may be said of all these opinions, as Lord Campbell said in the House of Lords of Willes's opinion in Beamish *v.* Beamish, that they "display extraordinary research and will hereafter be considered a repertory of all the learning to be found in any language upon the subject." For further study, see also: Cook *v.* Lister, 13 C. B. (n. s.) 543 (bills of exchange); Dakin *v.* Oxley, 15 C. B. (n. s.) 646 (charter party); Gt. Western Ry. *v.* Talley, 6 C. P. 44 (negligence); Hall *v.* Wright, 29 L. J., Q. B. 43 (breach of promise); Intermaur *v.* Dames, 1 C. P. 274 (negligence); Ionides *v.* Marine Ins. Co., 14 C. B. (n. s.) 259 (insurance); Kidston *v.* Empire Marine Ins. Co., 1 C. P. 535 (insurance); Malcomson *v.* O'Dea, 10 H. L. 611 (evidence); Mountstephen *v.* Lakeman, 7 Q. B. 196 (statute of frauds); Patter *v.* Rankin, 3 C. P. 562 (marine insurance); Ryder *v.* Wombell, 4 Ex. 32 (infant's necessaries); Reg. *v.* Rowton, 10 Cox Cr. Cas. 37 (evidence); Reuss *v.* Picksley, 1 Ex. 342 (statute of frauds); Santos *v.* Illidge, 28 L. J., C. P. 317 (emancipation act); Wilson *v.* Jones, 2 Ex. 139 (insurance); Bonillon *v.* Lupton, 15 C. B. (n. s.) 113 (marine insurance).

cases, in which he was extremely accurate. Smith was an all-round influence for good; sagacious, sensible and practical, he added to the high standing of his tribunal.

During this period the Court of Exchequer declined in reputation, particularly during the latter half. Kelly, who succeeded Pollock in 1866 as Chief Baron, was old and soon became infirm; and an ill-assorted collection of barons, of whom Martin was the ablest,[1] detracted from the unity and authority of the court. Nevertheless, this court was distinguished throughout the period by the services of Bramwell (1856-76).

In any consideration of modern English judges Baron Bramwell must hold a conspicuous place. In mere length of service (thirty-six years) he is surpassed in modern times only by Baron Parke, whom he succeeded. He is an interesting link between the past and the present. Coming to the bar soon after Lord Tenterden apologetically made a few changes in the supposed perfections of the common law, he lived to frame the Common Law Procedure Act and to assist in the final overthrow of the old system by the Judicature Act. He was doubtless a great lawyer and a learned judge, but his marked personality exerted an influence not limited by learning — the breezy, invigorating influence of sturdy common sense caustically applied to particular problems. In almost every respect he was a complete contrast to his prosaic predecessor, Baron Parke. He chose to mask a genial and generous nature under the garb of humorous cynicism; but in reality he was no cynic. Throughout his career he was one of the most popular as well as interesting of the judges. With a personality as vigorous as that of Maule or of Westbury, he was one of the sturdiest, manliest and kindest of men.[2] He did not always respect conventional tradi-

[1] Miller *v.* Salomons, 7 Ex. 475, etc.; Embrey *v.* Owen, 6 *ib.* 353; Bellamy *v.* Majoribanks, 7 *ib.* 389; Crouch *v.* Great Northern Ry., 11 *ib.* 742; Hubbertsty *v.* Ward, 8 *ib.* 330; Read *v.* Legard, 6 *ib.* 636; Dublin Ry. *v.* Black, 8 *ib.* 181.

[2] Upon his retirement he could recall only one unpleasantness. "Once a very old and dear friend of mine provoked me so much and made me so angry that I actually threatened to commit him, and I remember that on my asking him what he would have done if I had committed him, he answered promptly, 'Move for my own discharge.'"

tions, and his plain directness of speech sometimes shocked sensitive people. In the fearless discharge of his judicial functions he was never subservient to public opinion. Some observations in a charge having met with applause, he paused and then said quietly, "I recall those words — I must have been saying something foolish."

Bramwell received his legal training in the strictest school of special pleading, and was familiar with all its mysteries. But he was not, like Parke, blind to the defects of the system. "I think," he said, "that some twenty or thirty years hence, when the present generation of lawyers has ceased to exist, it will scarcely be believed that such a state of things did exist in a civilized country." Consequently, when public opinion was ripe for a change, Bramwell was chosen for the task. It was conceded that Bramwell and Willes did most of the work. The final overthrow of the old system by the Judicature Acts received his cordial support.

He occasionally showed the effect of overtraining in the dialectic of special pleading in his fondness for framing dilemmas (see his opinion in the Bernina case, 13 App. Cas. 11) and, more rarely, in the maintenance of metaphysical positions somewhat removed from common sense. One of the most conspicuous instances of this susceptibility to scholastic logic was his contention that an action for malicious prosecution will not lie against a corporation (Abrath *v.* North Eastern Ry., 11 App. Cas. 247). A corporation, he maintained, is incapable of malice or motive; if the stockholders direct a malicious prosecution they are personally liable, while such action by the directors would be *ultra vires*.[1] Another characteristic perversion was his application of the maxim *volenti non fit injuria*. "It is a rule of good sense," he said in Smith *v.* Baker, (1891) A. C. 325, "that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say, 'I will undertake the risk for so much, and

[1] Observe, also, his position on the liability for rent of an original lessee whose assignee has become bankrupt and disclaimed the case. Smyth *v.* North, 7 Ex. D., 250.

if hurt you must give me so much more, or an adequate equivalent for the hurt.' But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk and did not bargain for a compensation if hurt; in effect he undertook the work with its risks for his wages and no more. He says so. Suppose he had said, 'If I am to run this risk you must give me six shillings a day, and not five shillings,' and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, 'No, I will only give the five shillings.' None. I am ashamed to argue it." He reargued the same matter in Membery *v.* Great Western Ry. 14 App. Cas. 179: "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is *volens?* Willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will; but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *nolens* is the opposite of *volens*, its negative. There are two men; one refuses to do work, wills not to do it, and does not do it. The other grumbles, but wills to do it and does it. Are both men *nolens*, unwilling? Suppose an extra shilling induced the man who did the work. Is he *nolens* or has the shilling made him *volens?* There seems to be a strange notion that a man who does a thing and grumbles is *nolens*, is unwilling, has not the will to do it, or that there is something intermediate *nolens* and *volens*, something like a man being without a will and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of a certain to an uncertain law not make him *volens* as much as any other motive? There have been any infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new."

The truth is, the good Baron's political views were so pronounced that in a certain class of cases they influenced his

judicial opinions. He was the stoutest of liberals, and looked with alarm upon modern socialistic tendencies — "grandmotherly protection," he termed it. "Please govern me as little as possible," he said. This was his point of view on many legal doctrines.[1] Sometimes this tendency moved in directions where his fearless independence and plain speech were most needed. In the trades union case, R. *v.* Druitt, 10 Cox Cr. Cas. 592, he asserted in broad terms that by the common law of England the liberty of a man's mind and will, how he should bestow himself and his means, his talents and his industry, was as much the subject of the law's protection as was that of his body. Certain details of his exposition of the law in that case have since been regarded as *obiter dicta*, but his views deserve careful consideration. Nothing could be saner than his views in the great Mogul Steamship case (1892), A. C. 25, on the vital subject of freedom of trade. "It is admitted," he said, "that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of fair competition? What is unfair that is neither forcible nor fraudulent? It seems strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection." The inquiry, "What is unfair that is neither forcible nor fraudulent?" is the sum and substance of his legal and political philosophy. Throughout his judicial and political career he stood firmly on the ground of strict adherence to contract. "A bargain is a bargain," he used to say; and he strongly deprecated making contracts for people, whether by legislation or through equity. It may be inferred, therefore, that he had little sympathy with certain equitable doctrines. In the case of Salt *v.* Northampton, (1892) A. C. 18, on the validity of fetters on redemption in mortgage transactions, he took occasion to say: "Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise

[1] See his articles on "Drink" in Nineteenth Century, May and June, 1885, and his pamphlet "On the Liabilities of Masters to Workmen for Injuries from Fellow-Servants," London, 1880.

ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise, and probably to undo this would be more costly and troublesome than to continue it." And he adverts, in Derry *v.* Peck, 14 App. Cas. 337, to what he considered the mistake made by courts of equity in "disregarding a valuable general principle in their desire to effect what is, or is thought to be, justice in a particular instance." But if he was inclined to lean too much toward the legal as distinguished from the equitable view of rights, he seldom failed to temper his common law views with the good sense which gives to technical rules their just limitations. Bramwell was quick to see the weak side of a case against a railway corporation. This tendency was not, however, an original prejudice, but rather an effort to rectify the injustice done by misdirected sympathy for the weaker side. "Let us hold to the law. If we want to be charitable, let us gratify ourselves out of our own pockets" (1891) A. C. 346. The authorities, he said on another occasion, "show a generous struggle on the one hand to make powerful companies liable to individuals, and on the other hand an effort for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly" (13 App. Cas. 51). "It does not follow that if a man dies in a fit in a railway carriage there is a *prima facie* case for his widow and children, nor that if he has a glass in his pocket and sits on it and hurts himself, there is something which calls for an answer or explanation from the company."

Aside, however, from the well-recognized class of cases in which he was known to entertain favorite prepossessions, he was a sound judge. As a whole, clearness of perception, strength of judgment and wide acquaintance with the world of affairs are indelibly stamped upon his work. On many occasions his quick perception, good sense and dry humor were admirable solvents to the doubts and difficulties of his more subtle-minded brethren. A good instance is his char-

acterization of the distinction sought to be made in Derry *v.* Peek, 14 App. Cas. 337, between legal and actual fraud: "I do not think we need trouble ourselves about 'legal fraud,' nor whether it is a good or bad expression, because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase 'legal fraud' except when actual fraud cannot be established. 'Legal fraud' is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks that a claim is somehow made out." In commercial law, in particular, he was a recognized authority. His powerful dissenting opinion in the Vagliano case (1891), A. C. 107, shows his familiarity with the subject. It was he who suggested the theory of limited liability. In the domain of torts, the application of the doctrine *sic utere tuo ut alienum non laedas* in Rylands *v.* Fletcher was due, in the first instance, to Bramwell, who differed from the other judges in the Exchequer.

Probably he was at his best sitting with a special jury. There, what has been aptly called the high initial velocity of his mind in mastering facts, assaying evidence and applying general principles to particular facts, came into full play. His insight into human nature was keen: he knew its weaknesses and its faults, and humbug had no chance before him. The force of common sense and caustic humor could go no further than his admirable charges to juries. In a case where a farmer was charged with shooting at a boy who was stealing apples, after a lengthy argument by the counsel for the defendant, Bramwell charged the jury as follows: "Considering the materials he had, I am surprised, gentlemen, that the learned counsel did not make his speech longer. I, however, shall leave the case to you in eight words: The prisoner aimed at nothing and missed it." He had, moreover, rare skill in putting his view of a case before a jury without seeming to take a side. His highly original and independent mind contributed much to enliven the reports of his time. His clear and analytical intellect expressed itself

in a vigorous and epigrammatic style which is as rare in the reports as it is refreshing. No man appeared to think less of words and more of substance, yet few Englishmen have used their mother tongue with greater effect. His discussion, in the case of the Commissioners of the Income Tax *v.* Pemsel, (1891) A. C. 531, as to what constitutes a charity, is a good example of his happy colloquialism:

"I hold that the conversion of heathens and heathen nations to Christianity or any other religion is not a charitable purpose. That it is benevolent, I admit. The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the fagots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent make the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours. But what is a charitable purpose? Whatever definition is given, if it is right as far as it goes, in my opinion this trust is not within it. I will attempt one. I think a charitable purpose is where assistance is given to the bringing up, feeding, clothing, lodging and education of those who from poverty, or comparative poverty, stand in need of such assistance — that a temporal benefit is meant, being money or having a money value. This definition is probably inefficient. It very likely would not include some charitable purposes, though I cannot think what, and include some not charitable, though also I cannot think what; but I think it substantially correct, and that no well-founded amendment of it would include the purposes to which this fund is dedicated. . . . I think there is some fund for providing oysters at one of the Inns of Court for the Benchers; this, however benevolent, would hardly be called charitable; so of a trust to provide a band of music on the village green."

For authorities however venerable, if irrational or founded on doubtful principles, he had scant respect. "I am prone," he once said, "to decide cases on principles, and when I think I have got the right one I am apt (I hope I am not presumptuous), like Caliph Omar, to think authorities wrong or needless." He was well equipped with self-confidence. "Lord Cairns was a great lawyer and a consummate judge," he said in one case, "but I differ with him unhesitatingly." He was too tenacious of his personal opinions, some thought. The view that posting acceptance of an offer which never reaches the offerer constitutes a contract, is one of the doctrines to which he would not assent.[1] It is often amusing to observe his efforts to enforce his favourite views. In the Membery case[2] his discussion of the doctrine *volenti non fit injuria* was really unnecessary to the determination of the issue. This is the way he introduces it: "Of course it is in a sense not necessary that I should express an opinion on this, as the ground I have just mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not *obiter*, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff, and I decide against him on both, one as much as the other."[3]

[1] British and American Tel. Co. *v.* Colson, 6 Ex. 118; Household Fire Insurance Co. *v.* Grant, 4 Ex. D. 216.

[2] 14 A. C. 179.

[3] Baron Bramwell's principal efforts are: Derry *v.* Peek, 14 App. Cas. 337 (deceit); Jackson *v.* Insurance Co., 10 C. P. 25 (marine insurance); Hall *v.* Wright (breach of promise); Bullen *v.* Sharp, 1 C. P. 86 (partnership); Debenham *v.* Mellon, 5 Q. B. D. 394 (wife's necessaries); Rankin *v.* Patter, 6 E. and I. App. 131 (marine insurance); Reg. *v.* Druitt, 10 Cox Cr. Cas. 592; Commrs. of Income Tax *v.* Pemsel, (1891) A. C. 531 (charity); Mogul Steamship Co. *v.* McGregor, (1892) A. C. 25 (conspiracy); Mills *v.* Armstrong, 13 A. C., 1 (negligence); Capital and Counties Bank *v.* Henty, 7 A. C. 741 (libel); Degg *v.* Midland Ry. 1 H. and W. 781 (master and servant); Jones *v.* Tapling, 31 L. J., C. P. 342 (easements); Gray *v.* Carr, 6 Q. B. 522 (shipping); Hammersmith Ry. *v.* Brand (damage for vibration); Bryant *v.* Foot, 3 Q. B. 497 (prescription); Rodocanachi *v.* Elliott, 9 C. P. 578 (marine insurance); Mullinger *v.* Florence, 3 Q. B. D. 484 (liens); Clark *v.* Molyneux, 3 Q. B. D. 237 (libel); Massam *v.* Cattle Food Co., 14 Ch. D. 763 (trade name); Honck *v.* Muller, 7 Q. B. D. 92 (sales); Sewell *v.* Burdick, 10

(b) *Chancery Courts*

The courts of equity responded slowly to the spirit of reform. A new and better period in chancery may be said to have begun with the accession of Lord Westbury to the woolsack in 1861. During the succeeding fifteen years the Chancery was presided over by Westbury, Cairns, Hatherley and Selborne. Of these judges, Westbury, Cairns and Selborne rank among the most distinguished names known to English law.

Lord Westbury once said of a distinguished contemporary that "the monotony of his character was unrelieved by a single fault." From such a characterization Westbury himself was surely exempt. With professional capacity of the highest order he combined peculiarities of mind and faults of character which marred much of his work. His eminence as a lawyer was unquestioned by his bitterest enemies. Baron Parke considered him the greatest advocate at the bar; Sir George Jessel described him as a man of genius who had taken to the law. Gladstone, who had frequent occasion to learn the temper of Westbury's mind, said of him: "It was subtlety of thought, accompanied with the power of expressing the most subtle shades of thought in clear, forcible, and luminous language, which always struck me most among the gifts of Lord Westbury. In this extraordinary power he seemed to have but one rival among all the men,

A. C. 74 (bill of lading); Britton *v.* Gt. Western Cotton Co., 7 Ex. 130 (master and servant); Duke of Buccleuch *v.* Board of Works, 3 Ex. 306; Reg. *v.* Castro, 5 Q. B. D. 507 (criminal procedure); Drew *v.* Nunn, 4, Q. B. D. 668 (agency); Ryder *v.* Wombell, 3 Ex. 218 (infants' necessaries).

Some of his more characteristic opinions as to method and tendencies are: Abrath *v.* Northeastern Ry., 11 A. C. 247 (malicious prosecution); Great Western Ry. *v.* Bunch, 13 A. C. 31 (negligence); Membery *v.* Gt. Western Ry., 14 A. C. 179; Sullivan *v.* Metcalfe, 5 C. P. D. 469 (company); Salt, *v.* Marquis of Northampton, (1892) A. C. 18 (mortgage); Bamford *v.* Turnley, 3 B. and S. 62 (nuisance); Bridges *v.* No. London Ry. (negligence); Twycross *v.* Grant, 2 C. P. D. 469 (company).

His dissents are always vigorous and original. See the following: Bank of England *v.* Vagliano, (1891) A. C. 107 Smith *v.* Baker, (1891) A. C. 525; Household Fire Ins. Co. *v.* Grant, 4 Ex. D. 216 (contract); Riche *v.* Ashbury Co., 9 Ex. 224 (company); Jackson *v.* Met. Ry., 2 C. P. D. 125 (negligence); Johnson *v.* Roylton, 7 Q. B. D. 438 (sales); Gray *v.* Fowler, 8 Ex. 249 (vendor and purchaser).

lawyers and non-lawyers, of his age. I may be wrong, but the two men whom, in my own mind, I bracketed together were Lord Westbury and Cardinal Newman." It was this rare combination of thought and expression which particularly distinguished him. His power of lucid statement, which was accompanied by a rare capacity for marshaling a multitude of facts and collateral details in their logical order, arose from readiness and clearness of conception. "Clearness of expression," he said, "measures the strength or vigor of conception. If you have really grasped a thought, it is easy enough to give it utterance." His mental bent was almost wholly judicial; he convinced by appeals to sober judgment rather than to considerations of expedient or sentiment; and the elevation which he gave to the simplest discussion arose from his habit of bringing the driest details to the test of original principles.

Westbury's most conspicuous defect was an arrogant consciousness of intellectual superiority, manifesting itself, with utter disregard for the feelings of others, in fondness for caustic wit and rather spinous humor. He was too much in the habit of what his biographer has termed thinking aloud, without regard to the effect which the expression of his thoughts might have on others. His deliberate method of setting people right provoked intense irritation; when roused by pretentiousness or humbug, his sarcasm fell with blistering effect. In fact he bids fair to be remembered by the public at large merely as the author of innumerable sharp sayings. He took a characteristic part in the theological controversies of the time; baiting the bishops in the House of Lords was his favorite occupation. By his judgments in the case of the authors of "Essays and Reviews" and the Colenso case, he was said to have "dismissed hell with costs and taken away from the orthodox members of the Church of England their last hope of everlasting damnation." His description of a synodical judgment as "a well-lubricated set of words, a sentence so oily and saponaceous that no one could grasp it," has never been forgotten. The consequence of his unfortunate lack of restraint was that his enemies not only succeeded in blocking the great scheme

of law reform which seems to have been the one continuous purpose of his life, but also contrived to make so much of a case of official delinquency in the distribution of the patronage of his office that Westbury resigned after a vote of censure. It may suffice to say that his personal honor was in no way involved. Since Westbury's day other men, better suited by temperament for the patient diplomacy by which alone radical legislative action is attained, have carried on the work of law reform which he began; and as the outline of his splendid conception is gradually filled in by accomplished fact, it becomes us to remember him for his aspirations as well as for his actual achievements.

The law reports contain about two hundred and fifty cases in which Lord Westbury formulated an opinion. In reading them, one is struck with his facility in stripping cases of complicated and bewildering detail, and reducing them to simple, intelligible propositions. Impatient of authority, he sought to ground his conclusions upon elementary principles. It is common to find in his work such opening statements as these: "My lords, we are all exceedingly glad when, in a collection of miserable technicalities such as these which are before us here, we can find our way to something like a solid and reasonable ground of decision" (5 E. & I. App. 25). "There is no difficulty at all in the matter, and if the general rules of law were more steadily kept in view it would be unnecessary to range up and down a variety of decisions, because those rules would afford the best answer and secure the removal of every difficulty" (5 E. & I. App. 529). His skill in exposition was of the highest order. His statement of the principles of extra-territorial jurisdiction in Cookney *v.* Anderson, 32 L. J., Ch. 427, is a good illustration of his style and method. Although his lack of respect for authority sometimes led him to go somewhat beyond the mark, his mental acuteness was restrained, in the exercise of his judicial functions at least, by good sense.[1]

[1] For example, in Overend *v.* Gibbs, 5 E. and I. App. 495, he offers the following sensible reflection:

"I think it would be a very fatal error in the verdict of any court of justice to attempt to measure the amount of prudence that ought to be

His substantial contributions to the law deal mostly with topics upon which there was a conflict of opinion, or which fall outside the ambit of well-settled authority. His great opinion in the case of Taylor *v.* Meads, 4 DeG., J. & S. 597, on the testamentary capacity of married women, is a good illustration of his remarkable skill in settling discussion of a complex subject. The domain of what has been called private international law afforded scope for his peculiar powers.[1] Trade-marks and patents were also congenial subjects.[2] He made several contributions of importance to the law of prescriptive easements.[3] Other miscellaneous decisions will be recognized by the professional reader as legal landmarks.[4]

It is difficult to characterize the mind and career of Lord Cairns (1868; 1874-80) without seeming to exaggerate. It may therefore be well to quote, at the outset, the deliberate opinion of his life-long professional and political antagonist, Lord Selborne. Referring to Lord Salisbury's statement that Cairns "had an eminence not often granted to

exercised by the amount of prudence which the judge himself might think under similar circumstances he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind as conducted in the mercantile world, will know that there is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent, in the purchase of a business concern, those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character."

[1] Udny *v.* Udny, 1 Sc. & Div. App. 457; Cookney v. Anderson, 32 L. J. Ch. 427; Ex parte Chavasse, 34 L. J., Bank. 17; Enohin *v.* Wylie, 10 H. L. Cas. 1; Bell *v.* Kennedy, 1 Sc. & Div. App. 320, and Shaw *v.* Gould, 3 E. & I. App. 80.

[2] Leather Cloth Co., *v.* Leather Cloth Co., 33 L. J. Ch. 199; McAndrew *v.* Bassett, 33 L. J. Ch. 561; Witherspoon *v.* Currie, 5 E. & I. App. 521; Hills *v.* Evans, 31 L. J. Ch. 458;. Betts *v.* Menzies, 10 H. L. Cas. 151.

[3] Tapling *v.* Jones, 11 H. L. Cas. 303; Suffield *v.* Brown, 33 L. J. Ch. 249; Backhouse *v.* Bonomi, 9 H. L. Cas. 503.

[4] Holroyd *v.* Marshall, 10 H. L. Cas. 208; Cooper *v.* Phibbs, 2 H. L. Cas. 149; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 649; Blades *v.* Higgs, 11 H. L. Cas. 630; Isenberg *v.* East Indian Estates Co., 33 L. J., Ch. 392; Lister *v.* Perryman, 5 E. & I. App. 538; Sackville West *v.* Holmesdale, 5 E. & I. App. 565.

a single man, in that he was equally great as lawyer, statesman and legislator," Selborne said: "Even that enumeration of his titles to greatness fell short of the truth; for he was also a great orator, and a man exemplary in private life. It would be difficult to name any chancellor (except Lord Hardwicke) who was certainly his superior, or indeed in all respects his equal. Lord Somers was a greater statesman, Lord Lyndhurst a greater orator, Lord Eldon a more profoundly learned lawyer; but the degree in which they severally excelled him in these respects was less than that in which he excelled them in other qualities, more necessary than statecraft or eloquence and not less necessary than learning for a great judge; and the gifts which in them shone separately were in him combined. Lord Thurlow, Lord Rosslyn and Lord Westbury had not less ability; but he was more of a statesman, a more persuasive orator and on the whole a better judge than any of them. There have been chancellors, such as Lord Talbot, Lord Cranworth and Lord Hatherley, whose private virtues were not less conspicuous and whose public reputation was not less honorable, yet who were not, like him, as fit to play a great part in political as in judicial affairs."[1] By Jessel, Benjamin, and his most distinguished contemporaries, he was regarded as the ablest lawyer of his day. It may be said at the outset that his high reputation derived no adventitious support from personal affection. He was never popular. His manner was austere, cold and sternly self-repressive. This was undoubtedly due in a large measure to continual ill health. His gloomy religious views may also have influenced his temperament. Religion, indeed, seems to have enlisted the deepest feelings of his nature. It was with him the paramount consideration, in comparison with which, he once said, all else — honor, reputation, wealth, recreation — were "nothing, absolutely nothing." A stern Protestant in his views of ecclesiastical polity, he disliked with all the strength of his austere nature the tolerance of modern thought.

The most obvious characteristic of his career is his astonishing versatility. At the outset of his professional labors

[1] Personal and Political Memoirs, pt. 2, vol. 1, pp. 157, 158.

his constitutional diffidence was so great that he deemed himself fitted only for chamber practice. He soon gained confidence in his powers, however, and at an early age became the acknowledged leader of the chancery bar. Although his professional labors were confined almost entirely to equity cases, he argued many Scotch and ecclesiastical appeals with marked ability; and on the rare occasions when he appeared before a jury — such as the Windham lunacy case, and the Alexandra case, arising out of our Civil War — he displayed, as if by intuition, the most consummate powers of popular advocacy. In public life, too, he displayed a capacity for statesmanship which few great lawyers have possessed. He was not only "great in council," as Disraeli said, but, next to the Prime Minister himself, he was the ablest orator of the Conservative party. Almost alone among great lawyers, he seems to have had a strong apprehension of the class of considerations which determine party policy and influence public opinion. Legal distinctions, it has often been pointed out, are so specific in kind that they seem to incapacitate ordinary minds for the apprehension of moral and political distinctions. Distinguished lawyers in public life are apt to become either so merged in mere party advocacy that they cease, like Westbury, to exhibit individual character and conviction, or, like Selborne, when once they leave the firm ground of legal principle, they lean toward extreme views on either side from sheer want of apprehension of the intermediate resting places of political thought. But Cairns' public speeches are replete with independent political thought and strong personal conviction, and his sagacity is as keen and his logic as close on subjects of purely political interest as on legal topics. In manner, both at the bar and in public life, he was Scotch rather than Irish, logical rather than emotional. His great speech on the Reform Bill of 1867 was described by one of his opponents as "frozen oratory;" "It flows like the water from a glacier; or rather it does not flow at all, for though Cairns never hesitates or recalls a phrase, he can scarcely be called a fluent speaker. His words rather drop with monotonous and inexorable precision than run on in a continuous stream.

The several stages of his speech are like steps cut out of ice, as sharply defined, as smooth and as cold." There was a studied absence of passion, and an entire concentration on thought, clear exposition and remorseless logic. Beneath his cold exterior, however, there was the deepest feeling. Occasionally, when he was deeply moved, this suppressed fire came to the surface. One of these occasions was the disestablishment of the Irish Church, which aroused the deepest feelings of his nature. An eye witness to the final debate relates how "the Lord Chancellor, pale, emaciated, evidently very ill, but possessed by a spirit which no physical infirmities could overcome, stood at the side of the woolsack pouring forth for hours an unbroken stream of clear and logical eloquence against the measure before the House." [1]

An examination of Cairns's judgments is apt, on first view, to be somewhat disappointing. In the first place, ill health constantly interfered with his work. He participated in the hearing of less than four hundred cases during his whole judicial career. In more than half of these cases he did not formulate an independent opinion. Moreover, Cairns seldom explained the process by which his mind reached a result. Yet his mind was severely logical; he had attained the perfect mental discipline which enabled him to follow without reflecting on the rule. With his swift, strong, subtle instinct for the truth, he was able to disregard the slow, syl-

[1] The peroration of his speech on the English humiliation in the Transvaal has often been admired as a specimen of parliamentary eloquence: "I wish that while the Transvaal remains, as you say it does, under our control, the British flag had not been first reversed and then trailed in insult through the mud. I wish that the moment when you are weakening our empire in the East had not been selected for dismembering our empire in South Africa. These are the aggravations of the transaction. You have used no pains to conceal what was humbling, and a shame which was real you have made burning. But the transaction without the aggravation is bad enough. It has already touched, and will every day touch more deeply, the heart of the nation. Other reverses we have had, other disasters; but a reverse is not dishonor, and a disaster does not necessarily imply disgrace. To Her Majesty's government we owe a sensation which to this country of ours is new and is certainly not agreeable.

'In all the ills we ever bore,
We grieved, we sighed, we toiled, we wept;
We never blushed before.'"

logistic processes along which ordinary minds move. He made no display of learning, like Willes and Blackburn, though his learning was unquestioned. He exhausted the argument from principle, and only in conclusion illustrated it by reference to a few leading cases. His solution of the great case of Rylands *v.* Fletcher, 3 E. & I. App. 330, on the "duty of insuring safety," is a typical illustration of his method. Ward *v.* Hobbs, 4 App. Cas. 19, is one of the rare instances in which he exposed the process by which he reached his conclusion. For a specimen of his skill in exposition reference may be made to his address to the jury in the celebrated Windham lunacy case: "It may be convenient to remind you what the precise issue is. You are to decide whether Mr. Windham is incapable of managing his affairs — not whether he is of unsound mind, but whether he is incapable of managing his affairs by reason of unsoundness of mind. The object of making that distinction is plain and simple. There are many cases in which a man may be said to be incapable of managing his affairs. He may be incapable by reason of ignorance, or on account of inexperience and want of peculiar skill, or because of a preference for literary or other pursuits of a kind utterly unconnected with the management of property, or in consequence of a ruinous and inveterate habit of gambling. Such a person may justly be said, in a certain sense, to be incapable of managing his affairs, and, indeed, the Roman law made no distinction between unthrifts and idiots. But in England a man cannot be deprived of his personal liberty or his property on the ground of incapacity, until a jury of his countrymen are satisfied, first, that he is incapable of managing his affairs, and, secondly, that his incapacity arises from unsoundness of mind. Moreover, you are to bear in mind that the presumption is in favor of sanity, and that it lies upon those who allege unsoundness to make out and prove their case. I call your attention to the peculiar nature of the insanity alleged in the petition against Mr. Windham. It is not an ordinary case of insanity accompanied by delusions — a case in which the great and critical test of sanity is the absence or presence of hallucinations

— but a case of imbecility approaching to idiocy, or amounting to unsoundness of mind. In a case of insanity accompanied by delusions, the mode of investigating it, so as to arrive at the truth, is a matter of great difficulty and doubt; but in a case of imbecility, where there is either no mind at all or next to none, the task of coming to a right or just decision is comparatively easy. It is impossible for a man who is said to have only a limited amount of mind, or none at all, to assume at any moment or for any purpose a greater amount of mind than he really possesses. If the mind is not there, or only there in a certain small and limited quantity, no desire on the part of the individual to show a greater amount of mind, or to assume the appearance of a greater amount of mind, can supply him with that which nature has denied him. Hence when a man is charged with imbecility, if it can be shown that for a considerable time and in various situations he has acted like a natural being, any acts of folly which might be alleged against him should be carefully, deliberately and keenly investigated, because at first sight it is next to impossible that a man can at certain times assume a mind and intelligence which are wholly absent."

Although a scholar of the highest attainments, Cairns' opinions are never academic. The frugality of his style is in marked contrast to the fertility of thought. Of words or illustrations or expository digressions, he is sparing to a fault; he never relaxes the tension of the argument. These characteristics point toward the most conspicuous quality of his work — lucidity. The most complex legal problem seemed to present no difficulty to his mind. He disembarrassed himself of details and grasped principles, and by strict logical deduction from general principles about which there could be no dispute, he not only settled the law, but also terminated discussion.[1] He had, moreover — and this was his crowning gift — that cultured imagination which is essential to the highest juridical art. Imagination, after all, is, for the most part, simply depth and breadth

[1] A comparison between his solution of the case of Goodwin *v.* Robarts, 1 App. Cas. 488, with Chief Justice Cockburn's judgment in the lower court (10 Ex. 337) will illustrate his habit of seeking ultimate principles.

of insight; and, far from being detrimental to judicial thought, surely no quality could be more desirable in the administration of the law than the intellectual and imaginative insight which goes to the heart of things and expresses in perfect form a rule for future guidance. The luminous effect of Cairns' imagination may be observed to splendid advantage in the case of Gardner *v.* London, etc., Ry., 2 Ch. App. 201, on the vexed question of the relative rights and obligations of railway companies and their debenture holders. The briefs of counsel on either side will indicate the doubt and conflict of opinion in which the subject was involved. Cairns' solution of the problem by reference to a going concern as a "fruit-bearing tree" is highly imaginative, and was so convincing that further discussion ceased. In the vibration case of Hammersmith Ry. *v.* Brand, 4 E. & I. App. 215, involving the right to recover for damage incident to authorized acts, he failed for once to convince his colleagues. Probably his most important contributions to the law lie within the domain of company affairs. But they are scarcely superior to his judgments in cases of contract. One of his most original contributions to jurisprudence is his series of decisions as arbitrator in the complicated affairs of the Albert Insurance Company. This company was the final result of various financial transformations, and many of the claims against it turned upon the doctrine of novation. Cairns took an advanced position with respect to the assent of the debtor to novation, justifying his position by considerations drawn from the rapidly changing nature of commercial transactions in the present day.[1] As a law reformer he was the worthy successor of

[1] See Cairns' Decisions in the Albert Insurance Company Arbitration, 1870-'72, particularly Kennedy's case, p. 5.

Following is a full list of Cairns' most important opinions: Company law — Erlanger *v.* Phosphate Co., 3 App. Cas. 1234; Ashbury Ry. Co. *v.* Ritchie, 7 E. & I. App. Cas. 663; Peek *v.* Gurney, 6-402; Reese Mining Co., *v.* Smith, 4-77; Houldsworth *v.* Evans, 3-263; In re Reese Silver Mining Co., 2-604; Gardner *v.* London, C. & D. Ry., 2 Ch. App. 201; Hoole *v.* Gt. Western Ry. 3-262; Princess of Reusse *v.* Bos. 5 E. & I. App. 199; Evans *v.* Smallcombe, 3-249; Gillespie *v.* Glasgow Bank, 4 App. Cas. 636.

Contracts — Cundy *v.* Lindsay, 3 App. Cas. 463; Rossiter *v.* Miller, 3-1129; Hussey *v.* Horne-Payne, 4-316; Brogden *v.* Metropolitan Ry. Co.,

Westbury. Although the Judicature Act of 1873 was passed under Lord Selborne's chancellorship, public opinion had been aroused and the main outlines of the reform suggested by Cairns, who was chairman of the first Judicature Commission of 1866. It was he who influenced the modification of the act so as to retain the final appellate jurisdiction of the House of Lords.[1]

Hatherley (1868-'72) sustained on the woolsack the reputation which he had made as vice chancellor. He was an accurate and sound judge, although somewhat overshadowed by his distinguished contemporaries. He thought so quickly and expressed his opinion so readily (he always delivered oral judgments) that his opinions lacked form. Lord Campbell, on appeal, once commented strongly on the "prodigious

2-672; Rhodes *v.* Forwood, 1-261; Thorn *v.* Mayor of London, 1-126; Lakeman *v.* Mountstephen, 7 E. & I. App. 20.

Torts — Metropolitan Ry. Co. *v.* Jackson, 3 App. Cas. 196, Dawkins *v.* Rokeby, 7 E. & I. App. 753; Bridges *v.* No. Condon Ry., 7-537; Hammersmith Ry. *v.* Brand, 4-215; Rylands *v.* Fletcher, 3-330; Prudential Ins. Co. *v.* Knott 10 Ch. App. 144.

Wills — Fulton *v.* Andrew, 7 E. & I. App. 456; Omahoney *v.* Burdett, 7-392; Hill *v.* Crook, 6-283; Harrington *v.* Harrington, 5-109; Sackville West *v.* Holmesdale, 4-571; Bowen *v.* Lewis, 9 App. Cas. 904; Singleton *v.* Tomlinson, 3-413; Thomson *v.* Eastwood, 2-227.

Mercantile Law — Bowes *v.* Shand, 2 App. Cas. 455; Goodwin *v.* Roberts, 1-488; Ward *v.* Hobbs, 4-19; Steel *v.* State Steamship Co., 3-75; Vyse *v.* Foster, 7 E. & I. App. 728; Morgan *v.* Laixviere, 7-429; Shotsman *v.* Ry. Co. 2 Ch. App. 332; In re Agra & Masterman's Bank, 2-391.

Miscellaneous — Lyon *v.* Fishmonger's Co., 1 App. Cas. 670 (riparian rights); Swindon Waterworks Co. *v.* Nav. Co., 7 E. & I. App. 701 (do.); Kendall *v.* Hamilton, 4 A. C. 512 (joint and several liability); Doherty *v.* Allman, 3-716 (injunction); Singer Mfg. Co. *v.* Wilson, 3-381 (trade mark); De Thoren *v.* Atty. Gen., 1-688 (Scotch marriage); Clark *v.* Adie, 2-317 (patent); Harrison *v.* Anderson Foundry Co., 1-575 (do.); Corser *v.* Cartwright, 7 E. & I. App. 734 (estate); Nickalls *v.* Merry, 7-538 (broker); Shropshire etc. Co., *v.* Queen, 7-504 (equitable mortgage); Beattie *v.* Lord Ebury, 7-108; Lamaire *v.* Dixon, 6-474 (specific performance); Ferguson *v.* Wilson, Ch. App. 77 (do.); Maxwell *v.* Hogg, 2-307 (copyright); United States *v.* Wagner, 2-582 (foreign state as plaintiff); Patch *v.* Ward, 3-203 (fraud); Lloyd *v.* Banks, 3-488 (notice); Parker *v.* McKenna, 10-114 (trustees); Wilson *v.* Merry, 1 Sc. & Div. App. 328 (fellow servant); Redsdale *v.* Clifton, 2 P. D. 276; Attwood *v.* Maude, 3 Ch. App. 369; Gisborne *v.* Gisborne, 2 App. Cas. 300.

[1]Among his other legislative achievements are the Conveyancing Act, the Vendors' and Purchasers' Act, and the Registry Act. The only statute which bore his name, however, was the act enabling the Chancery Courts to give damages in lieu of specific performance or injunction.

length" and slipshod style of his judgments. He was amiable and exceedingly religious. "The monotony of his character," said Westbury, "was unrelieved by a single fault." [1]

Sir John Romilly (1851-'73) presided over the Rolls Court during this period, when the work of the court was rapidly increasing. His numerous decisions display industry rather than breadth and grasp. His haste in disposing of cases led him sometimes to decide without sufficiently considering the principles involved and the precedents by which they were governed, and he was often reversed on appeal. Vice chancellors of various degrees of ability served during this period. Upon the promotion of Knight-Bruce in 1851, and of Turner in 1853, to the Court of Appeals in Chancery, and of Rolfe, in 1851 to the woolsack, the office was held during the next fifteen years by Kindersley (1851-'66), Stuart (1852-'71) and Page-Wood (1853-'68). Kindersley was a sound equity lawyer, whose decisions were seldom reversed. His opinions are, as a rule, based upon broad principles, and bear the impress of a superior mind. Stuart was the weakest of the later vice chancellors, and was generally reversed on appeal. A witty barrister once placed an appeal from his decision on the calendar of motions of course. Page-Wood was one of the most competent and satisfactory judges holding this office. It was as vice chancellor that he laid the basis of the reputation in equity which led to his appointment as chancellor. The principal vice chancellors in later times were Malins (1866-'81), and Bacon (1870-'86). Gifford (1868-'69) and James (1869-'70) spent a brief period in this court on their way to the Court of Appeal, and Hall (1873-'82) was not particularly distinguished. Malins, in spite of judicial peculiarities, was a

[1] Castrique *v.* Imrie, 4 E. & I. App. 414; Barber *v.* Meyerstein, 4 do. 317; Aister *v.* Perryman, 4 do. 521; Knox *v.* Gye, 5 do. 656; Daniel *v.* Metropolitan Ry., 5 do. 49; Overend *v.* Gurney, 5 do. 480; Rankin *v.* Potter, 6 do. 83; Bain *v.* Fothergill, 7 do. 170; Orr Ewing *v.* Colquhoun, 2 App. Cas. 839; Thorn *v.* Mayor of London, 1 do. 120; Rhodes *v.* Forwood, 1 do. 256; Bowes *v.* Shand, 2 do. 455; Brogden *v.* Metropolitan Ry., 2 do. 666; Rossiter *v.* Miller, 3 do. 1124; Kendall *v.* Hamilton, 4 do. 504; Sturla *v.* Freccia, 5 do. 623; Harrod *v.* Harrod, 1 K. & J. 4; Reade *v.* Lacy, 1 J. & H. 524.

competent equity lawyer, and the reports contain some excellent expositions by him of various branches of real property law. Bacon, the last of the vice chancellors, was a man of varied accomplishments, not the least of which was the literary skill which makes his opinions such entertaining reading.

(c) *Probate, Divorce and Admiralty Courts*

The outcry against the ecclesiastical administration of probate and matrimonial affairs at length became too formidable to be resisted. The inefficiency of most of the judges, the variations of practice and procedure, the expense, the delay, the frequently inconsistent and mistaken views of law and of fact adopted by the different authorities, the anachronism of a system which permitted civil rights to be decided by judges neither appointed by nor responsible to the Crown, called loudly for reform. The humorous absurdity of many of the ancient abuses have been preserved in lasting caricature by Dickens in "David Copperfield." The practical objection to the jurisdiction was that, in the absence of its power to bind the heir in relation to land, there might be a decision one way in the ecclesiastical courts as to personal property, and another at common law as to real estate, arising out of the same document. It seems incredible that such a state of affairs could have lasted for centuries.

With respect to matrimonial affairs the conditions were quite as unsatisfactory. The abuses of the procedure of the ecclesiastical courts had affected the trial of these causes to such an extent that redress was practically denied to persons of moderate means. To obtain an absolute divorce resort had to be made to Parliament, and the cost of carrying a bill through both Houses was practically prohibitive. Justice Maule brought out the incongruities of the law with characteristic irony in passing sentence in a bigamy case. "I will tell you," he said, addressing the prisoner, "what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes

that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the ecclesiastical courts for a divorce *a mensa et thoro*. That would have cost you £200 or £300 more. When you had obtained a divorce *a mensa et thoro* you had only to obtain a private act of Parliament for a divorce *a vinculo matrimonii*. This bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would have cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country where there is one law for the rich and another for the poor. You will be imprisoned for one day."

Finally, in 1857, this anomalous condition of affairs came to an end. The ecclesiastical courts were by statute divested of all power to entertain suits relating to probate of wills and grants of administration, to declare the validity of marriages, and pronounce divorces *a mensa et thoro*, and such jurisdiction was conferred upon a new court of common law, which was to sit in Westminster Hall in two divisions, called respectively the Court of Probate and the Court for Divorce and Matrimonial Causes. The success of the change depended largely upon the judge who should first exercise the new jurisdiction. Fortunately, Cresswell was transferred from the Common Pleas. He was a strong, able and experienced judge, and a man of the world, and justified every reasonable expectation. Under his guidance the procedure of the court was adapted to modern ideas, witnesses were examined *viva voce* in open court, a concise form of pleading was introduced, and parties could, upon application, have any disputed matter of fact tried by a jury. The reports of Swabey and Tristram, which contain his clear and concise opinions and charges to juries, are monuments of learning and common sense; and so skilfully, and with such foresight, were the modern foundations of this jurisdiction laid that his judg-

ment is said to have been only once reversed.[1] Wilde, an industrious and painstaking judge, who is best remembered by his subsequent title as a legal peer, Lord Penzance, succeeded Cresswell in 1863, and in turn gave way to Hannen in 1872, on the eve of the Judicature Act.

Lushington continued his distinguished labors in admiralty and ecclesiastical affairs until 1867, when he was succeeded by Phillimore (1867-83). Through his voluminous writings and his work on the bench, Phillimore attained great distinction. A new practice and a rapidly increasing volume of litigation gave rise to novel and intricate problems. His elaborate opinions are replete with historical knowledge, and are always luminously expressed. In 1875, under the Judicature Act, he became a member of the Probate, Divorce and Admiralty Division of the High Court.[2]

(*d*) *Court of Appeal in Chancery*

The Court of Appeal in Chancery, which was established in 1851, was throughout its brief history one of the most satisfactory courts that ever administered English law. The original lords justices were Knight-Bruce (1851-66), and Rolfe (1851-52). Rolfe was soon made chancellor, and Turner (1853-67) succeeded him. The court for fifteen years consisted of Knight-Bruce and Turner — an ideal court, animated by profound knowledge of law, and marked aptitude in its successful application to new conditions. Turner was on all occasions courageous in expanding the remedial powers of the court to meet modern developments; and so anxious

[1] Hope *v.* Hope, 1 Sw. & Tr. 94; Keats *v.* Keats, 1-346; Mette *v.* Mette, 1-416; Tallemache *v.* Tallemache, 1-561; Tompkins *v.* Tompkins, 1-168; Ward *v.* Ward, 1-185; Egerton *v.* Brownlow, 4 H. L. 1; Sutton *v.* Sadler; Coxhead *v.* Richards, 2 C. B. 569.

[2] Some of his notable admiralty cases are: The Charkieh, 4 Adm. & Ecc. 50; The Tentonia, 3 do. 394; The Halley, 2 do. 3; The Circassian; The Constitution; The Parlement Belge, 5 P. D. 197; The City of Mecca, 5 do. 28; The Macleod, 5 do. 254; R. *v.* Keyn, 2 Ex. D. 63.

In probate and matrimonial affairs see Cheese *v.* Lovejoy, 2 P. D. 25; Sottomayer *v.* De Barros, 49 L. J. P. 1; Baker *v.* Baker, 5 P. D.

His most remarkable ecclesiastical judgment is Martin *v.* Mackonochie, 2 Adm. & Ecc. 116. Others of importance are the well-known cases of Elphinstone *v.* Purchas, Sheppard *v.* Bennett, Boyd *v.* Phillipotts, Jenkins *v.* Cook, and the Colenso case.

was Knight-Bruce to shake off the trammels of technical procedure when they interfered with what he conceived to be the justice of the case, that in some of his decisions as vice chancellor (generally overruled by Cottenham) he anticipated reforms which shortly followed. One of Knight-Bruce's most prominent characteristics was his fastidious English; and a certain irrepressible humor pervaded his gravest judgments. So vigorous and original was his mind, so animated and epigrammatic his style, so constant his flow of humor, that his opinions are veritable oases in the dreary wastes of the chancery reports. These sentences are taken at random: "Men may be honest without being lawyers, and there are doings from which instinct without learning may make them recoil." "Some breaches of good manners are breaches of law also." "The decree in this case is a matter of course unless the court and the laws of this country are to be reconstructed with a view to this particular case." See, also, his highly characteristic opinion in Thomas *v.* Roberts, where the father of a child had joined a new sect and had gone to live in "a sort of spiritual boarding-house," to which, as a home for the child, Knight-Bruce said he would prefer a "camp of gypsies."[1] The contrast between Knight-Bruce and Turner in their habits of thought and modes of expression — the vivacity and dry humor of the one and the steadiness and gravity of the other — blended admirably in result.[2]

[1] Thomas *v.* Roberts, 3 De G. & Sm. 758; Walter *v.* Selfe, 4 do. 315; Prince Albert *v.* Strange, 2 do. 652; *Re* Cumming, 1 De G., M. & G. 559; Kekewich *v.* Manning, 1 do. 176; Burgess *v.* Burgess, 3 do. 896; Briggs *v.* Penny, 3 De G., M. & S. 525.

[2] A fine illustration of their benevolent wisdom is their disposition of the case of Stourton *v.* Stourton, 8 D. M. & G. 760, where it was sought to interfere with the education of a child who was being reared by his guardians in a different faith from that professed by the boy's father. The judges had an interview with the child, and Lord Justice Knight-Bruce expressed the opinion that "the Protestant seed sown in his mind has taken such hold that if we are to suppose it to contain tares they cannot be gathered up without great danger of rooting up also the wheat with them. Upon much consideration, I am of the opinion that the child's tranquillity and health, his temporal happiness and, if that can exist apart from his spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavor at effacing his Protestant impressions not to render any such attempt unsafe and improper." And Lord Justice Turner sagely adds, in answer to the argument that the child was too young to have formed fixed opinions: "May it not be that the impressions which have been formed might lead to the

Several distinguished chancery lawyers sat in this court for brief periods. Cairns (1866-68) and Page-Wood (1868) were elevated to the woolsack, and Rolt (1868-69), Selwyn (1868-69) and Gifford (1869-70) died in office. During his brief service as lord justice, Cairns justified the expectations raised by his distinguished career at the bar. He began in this court the splendid service which, continued in a higher tribunal, placed him in the front rank of English judges. In 1870 the unity of the court was again restored under James (1870-81) and Mellish (1870-77). James was a most eminent judge, exceptionally learned, and gifted with rare power in the formulation of principles. Cairns said of him that he had a no less admirable share of common sense than of law. In quoting his own decisions he would humorously add, "which is an authority though I joined in it." His comprehension of a case was rapid and masterly, and his memory marvelous. Bramwell said of him that "he possessed every quality and accomplishment that a judge needed. He had a very great intellect, at once keen and profound. He was a consummate lawyer, thoroughly imbued with legal principles. He was a man of vast experience, not merely in the law, but in those things which make a man what is commonly called a man of the world, fitted to deal with the affairs of the world. He had but one desire when he took his seat upon the bench, and that is, that justice should be done according to right. It was said of him, and truly, that he was rapid in the formation of his opinions and confident in the expression of them, and so he was, and so a man of his ability had a right to be; but I can say this of him, that a more candid man never lived, nor one more ready to renounce an opinion, though he had given expression to it in the most confident way, if he thought it was wrong." His most substantial contributions to the law were in the domain of company, bankruptcy and patent law.[1]

instruction which would be given being received with carelessness or indifference, or, which would certainly not be less dangerous or less destructive to the character of the boy, with affected acquiescence?"

[1] Harvey *v.* Farnie, 6 P. D. 35; Niboyet *v.* Niboyet, 4 do. 1; Massam *v.* Cattle Food Co., 14 Ch. D. 748; *In re* Campden's Charities, 18 do. 310; New Sombrero Co. *v.* Erlanger, 5 do. 73; Smith *v.* Anderson,

Mellish was considered by many eminent judges the ablest advocate of his time before a court in banc. Lord Selborne said of him that "as an advocate he was distinguished above all other men whom I remember at the bar by the candor of his arguments and by the decision with which he threw aside everything which did not seem to him relevant to the case and deserving of serious consideration by the court which he was addressing." Mellish belonged to the common law bar, but his mastery of the principles of jurisprudence and the judicial quality of his intellect qualified him to sit in any court. He came to the bench with an impaired constitution, which limited his work both in quality and in extent; but his subtle mind, stored with the learning of the common law, in combination with James' profound knowledge of equity, made a most satisfactory court of appeal, and justified the subsequent establishment of a single court of appeal in law and equity.[1]

(e) *The House of Lords and the Privy Council*

The ultimate reorganization of the House of Lords as an appellate tribunal owes much to Lord Westbury. As the leader of the chancery bar and a law officer of the government, it was his caustic wit that concentrated attention upon the defects of the existing system and overcame the inertia of public sentiment; and subsequently, as lord chancellor, it was he who brought to the discharge of his judicial functions the commanding ability which led the way to better things.[2]

15 do. 247; *Re* Goodman's Trusts, 44 L. T. 527; Wimbleton Conservators *v.* Dixon, 1 Ch. D. 362; Pike *v.* Fitzgibbon, 14 do. 837; *In re* Agar Ellis, 10 do. 49; *Re* Canadian Oil Works, 10 Ch. App. 599; Barnes *v.* Addy, 9 Ch. 244; Day *v.* Brownrigg, 10 Ch. D. 294; Johns *v.* James, 8 do. 744; Macdonald *v.* Irvine, 8 do. 101; Rogers *v.* Ingham, 3 do. 351; Nitro Phosphate Co. *v.* London, etc., Docks, 9 do. 503.

[1] Nugent *v.* Smith, 1 C. P. D. 423; Nichols *v.* Marsland, 2 Ex. D. 1; Aynsley *v.* Glover, 10 Ch. 283; Hext *v.* Gill, 7 do. 712; Crook *v.* Hill, 6 do. 311; Lindsay *v.* Cundy, 2 Q. B. D. 96; Dickinson *v.* Dodds, 2 Ch. D. 463; Wimbleton Conservators *v.* Dixon, 1 Ch. D. 362; Rogers *v.* Ingham, 3 do. 351; *Re* South Wales, etc., Co., 2 do. 763; Hopkins *v.* Great Northern Ry. Co., 2 Q. B. D. 228.

[2] His various arguments in answer to the supporters of the old order of things afford fine specimens of his powers. For instance, in reply to the contention that judgments of the highest authority had been rendered in the House by the chancellor alone, he said: "If there be a sin-

It was finally determined to reinforce and infuse adequate ability in the House by the creation of life peers. The plan itself was admirable, but the elevation of Baron Parke as Lord Wensleydale, in pursuance of the plan, was not calculated to further liberal views. Wensleydale came to the House of Lords after his long domination in the common law courts — and, it may be added, just as his domination ceased. The Common Law Procedure Act seemed to him a desecration of the sacred system of special pleading, and led to his retirement from the Exchequer. The atmosphere of the House during his twelve years' service was not congenial to his peculiar powers. Lord Campbell, whose unquestioned learning was his servant, not his master, combated here, as he had in the courts below, the narrow technicalities within which Wensleydale sought to confine the common law. Then the preponderance of equity lawyers, due to the rapid succession of chancellors, was little calculated to lend support to his general views. A far more accomplished lawyer was added to the court in 1858 in the person of Lord Kingsdown, after his brilliant services in the Privy Council. From the chancellorship of Westbury (1861-65) a new period may be said to begin. Himself one of the ablest lawyers who ever held the seals, Westbury had the assistance of four ex-chancellors and two legal peers. The chancery element now predominated, and the eminent ability of the succeeding chancellors, Cairns, Hatherley and Selborne, maintained this ascendancy for the remainder of the period. In 1867 the court was further strengthened by the addition of a distinguished Scotch lawyer, Lord Colonsay. In 1869 Sir James Wilde was also

gle judge who, by the common consent of mankind, embodies the highest qualities of a judge, then the decisions of that individual, being uniform, certain, definite and clear, would be of the highest possible value; precisely as if you had an arbitrary government, with absolute authority vested in a man of the highest possible moral and intellectual perfections, one would desire to live under that government rather than any other. But it is so difficult to obtain such a man, and still more a succession of such men, that it is impossible, particularly in the case of a tribunal which has causes brought before it from all quarters of the globe, involving all possible questions, to suppose that one individual will at all times be equal to the satisfactory determination of such a vast and multitudinous assembly of subjects; therefore it is that we desire a greater number of minds than one, in order that some may supply what is wanting in others."

raised to the peerage as Lord Penzance. The court now, for the first time, gave satisfaction, particularly in equity. The reports of its decisions, as contained in the last volumes of Clark's House of Lords Cases, the English and Irish Appeal Cases (1865-75), and the Scotch and Divorce Appeal Cases (1865-75) are of the first importance. They deal less with public and more with private cases, and the discussion of legal principles is much more scientific than any of the prior debates of the House.

In the Privy Council during this period Kingsdown received valuable assistance from Knight-Bruce, who was learned in foreign systems of jurisprudence, and from Turner, Penzance and Westbury. Peel and Colville had great weight in Indian appeals. By a statute of 34 and 35 Victoria, provision was made for the addition of four paid judges, in consequence of which the court was strengthened by the appointment of Peacock, Collier, Montague E. Smith and Byles. Byles' service was unimportant, and Peacock confined his attention mainly to Indian appeals; but Collier and Smith were able and industrious judges. Collier took an important part in formulating the opinions of the court, and the work performed by Smith was both considerable in amount and of permanent value. These judges were assisted principally by Cairns and Penzance.

III. From the Judicature Acts of 1873-75 to the End of the Century

In his great speech introducing the Judicature Act of 1873, Lord Selborne enumerated the principal defects of the existing system under four heads: (1) The artificial separation of legal and equitable jurisdictions; (2) divided courts and divided jurisdictions; (3) lack of cheapness, simplicity and uniformity of procedure; (4) necessity of improving the constitution of the court of appeals. "We must bring together," he said, "our many divided courts and divided jurisdictions by erecting or rather re-erecting — for after all there was in the beginning of our constitutional sys-

tem one supreme Court of Judicature — a supreme court which, operating under convenient arrangements and with a sufficient number of judges, shall exercise one single undivided jurisdiction, and shall unite within itself all the jurisdictions of all the separate superior courts of law and equity now in existence." [1] Accordingly the Curia Regis of the Norman kings was taken as a model, and all the existing courts were consolidated into one Supreme Court of Judicature.[2]

This Supreme Court was divided into two sections, the High Court of Justice and the Court of Appeal. The High Court is a court of first instance, exercising general jurisdiction in civil and criminal matters. It consisted originally of five divisions, corresponding to the old courts, of which it was made up. But in 1881 the Common Pleas and Exchequer were finally abolished; and by subsequent legislation the Court of the Master of the Rolls was likewise abolished, and that judge was placed at the head of a division of the Court of Appeal. The court now sits in three divisions: King's Bench, Chancery, and Probate, Divorce and Admiralty. The business assigned to each division corresponds to its ancient jurisdiction; but the changes effected by the Judicature Act are these: any judge may sit in any court belonging to any division, or may take the place of any other judge, and any relief which might be given by any of the courts whose jurisdiction is now vested in the supreme court may be given by any judge or division of the supreme court, and any ground of claim or defence which would have been recognized in any of the old courts may be recognized by any division of the new court. Where the rules of equity, common law and admiralty conflict, equity prevails in the absence of specific provisions. Besides this uniform administration of the principles of law and equity, the act also provided a common and simple code of procedure. The main characteristics of this procedure are similar to those which have long

[1] Hansard's Parl. Debates, vol. 214, pp. 331, 337.

[2] The first Judicature Act was passed in 1873, and was designed to take effect in 1874; but this not being practicable its operation was postponed until 1875, when a second act was passed, and the judges took their seats as members of the Supreme Court.

been familiar in this country: a single form of action for the protection of all primary rights, whether legal or equitable; a limited pleading characterized by a plain and concise statement of the substantive facts; provision for rejoinder of different causes of action and the bringing in of new parties, with a view to the adjustment of the substantial rights of all the parties and the complete determination of the whole controversy in a single action.

In some respects this great measure of reform has failed to meet the expectations of its supporters. In accordance with the original design, the chancery judges ceased to be vice-chancellors, and as justices of the High Court took turns with the judges of the Queen's Bench in going on circuit to try common law cases. But the practice was soon abandoned, and the chancery judges now confine themselves to the administrative and other business for which they have special aptitude. Hence the dividing line between the two ancient jurisdictions is still observed. In other respects the original scheme of assimilation has broken down. Probate, divorce and admiralty matters still form a class by themselves; bankruptcy affairs have a court of their own, and separate courts sit for the trial of commercial and of railway and canal cases.

(*a*) *The High Court of Justice*

The establishment of a permanent Court of Appeal under the Judicature Act has served to detract from the relative importance of the judges of the High Court. The presidents of the three great divisions are of course most conspicuous. The presiding judge of the Queen's Bench Division is now the Lord Chief Justice of England. Lord Coleridge, the first chief to assume this title, succeeded Cockburn in 1880. Like Cockburn he was a man of ripe scholarship and polished eloquence, and as a presiding magistrate he left nothing to be desired in the way of dignity and urbanity. With an intellect quite as strong and with even broader views, he was nevertheless inferior to Cockburn in industry and application. He did not seem to enjoy wrestling with principles and author-

ities in the solution of difficult problems, and was content to contribute less to the law than colleagues not so gifted. Occasionally a case of general public interest roused him from his seeming indifference, and on such occasions his work was so admirable as to prompt a feeling of regret that he was not more assiduous in the exercise of his undoubted ability. The reports contain several such expositions of the law, animated by learning, exquisite diction, elevation of sentiment and liberality of thought. The interesting case of Reg. *v.* Dudley, 15 Cox Cr. Cas. 624, where the issue was whether shipwrecked persons were justified in taking the life of one of their number in order to save themselves from death by starvation, displays his powers at their best. His statement of the modern law relating to blasphemy, on the trial of Ramsey and Foote, 48 L. T. 733, is in every way a notable effort. With his ready wit and fluent tongue, Coleridge was perhaps at his best when sitting with a jury. In summing up a case he was always admirable.[1]

Russell, who succeeded Coleridge as chief justice in 1894, had been for many years the leader of the common law bar. Although not a profound lawyer, he was a man of great force, and displayed commendable energy in the furtherance of practical reforms in the procedure of his division. The institution of the new court for commercial causes was largely due to him. Like many of his predecessors he displayed great ability as a criminal judge. He enjoyed the distinction of being the first Roman Catholic to hold the office of chief justice since the Reformation.

The lord chancellor, the president of the Chancery Division, now practically confines his judicial labors to the House of Lords. The first president of the Probate, Divorce and Admiralty Division was Hannen. With his knowledge of the law relating to the various sections of his court, his pains-

[1] Other evidences of his ability may be found in Reg. *v.* Bradlaugh, 15 Cox Cr. Cas. 225; Usill *v.* Hales, 3 C. P. D. 319; Reg. *v.* Labouchere, 15 Cox Cr. Cas. 423; Mogul Steamship Co. *v.* McGregor, 21 Q. B. D. 544; Reg. *v.* Keyn, 2 Ex. D. 63; Twycross *v.* Grant, 2 C. P. D. 469; Bowen *v.* Hall, 6 Q. B. D. 333 (dissenting); Ford *v.* Wiley, 16 Cox Cr. Cas. 688; Bradlaugh *v.* Newdigate, 11 Q. B. D. 1.; Currie *v.* Misa, 10 Ex. 153 (dissenting); Mackonochie *v.* Penzance, 4 Q. B. D. 697; *Ex parte* Daisy Hopkins, 17 Cox Cr. Cas. 448.

taking industry, absolute impartiality and keen sense of the value of evidence, he won universal esteem. The spirit which animated his labors was displayed in his address at the conclusion of the hearing before the Parnell Commission, over which he presided. In speaking of the responsibility of the judges he said that one hope supported them: "Conscious that throughout this great inquest we have sought only the truth, we trust that we shall be guided to find it, and set it forth plainly in the sight of all men." His opinions, which are more fully reasoned than those of Cresswell, are notable for their graceful diction and apt illustrations.[1] Among the more prominent justices of the Queen's Bench Division during this period were Hawkins[2] and Stephen,[3] whose specialty was criminal law, Mathew and Wright in commercial law, and Chitty and Kay in equity.

(b) *The Court of Appeal*

The second section of the Supreme Court, the Court of Appeal, is composed of the Master of the Rolls and five Lords Justices, with the heads of the three great divisions of the High Court, the Lord Chancellor, the Lord Chief Justice and the President of the Probate, Divorce and Admiralty Divisions, as members *ex officio*. It exercises a general appellate jurisdiction in civil cases from the determinations of the High Court. It was originally planned to make this the final court of appeal, but the pressure from the House of Lords was too strong, and in the end the judicial functions of the House were left undisturbed; so that the Supreme

[1] Boughton *v.* Knight L. R. 3 P. 64; Durham *v.* Durham; Sugden *v.* St. Leonards, 1 P. D. 154; Gladstone *v.* Gladstone; Crawford *v.* Dilke; Frederick Legitimacy Case; Niboyet *v.* Niboyet, 4 P. D. 1; Smee *v.* Smee, 5 P. D. 84; Sottomayor *v.* De Barros, 5 P. D. 94; Bloxam *v.* Favre, 9 P. D. 130; Harvey *v.* Farine, 52 L. J. P. 53; Peek *v.* Derry, 37 Ch. D. 591; Haster *v.* Haster, 42 L. J. P. 1; Duke of Buccleuch *v.* Met. Bd. Wks. 5 E. and I. App. 418; Bailey *v.* De Crespigny, 4 Q. B. 184.

[2] *Re* Castioni, 17 Cox Cr. Cas. 237; R. *v.* Curtis, 15 do. 749; R. *v.* Clarence, 58 L. J., Mag. Cas. 10; R. *v.* Lillyman, 65 do. 195; Ford *v.* Wiley, 16 Cox Cr. Cas. 688.

[3] R. *v.* Tolson, 23 Q. B. 169; D. *v.* Serné, 16 Cox Cr. Cas. 311; R. *v.* Clarence, 16 do. 523; R. *v.* Cox, 15 do. 612; R. *v.* Price, 15 do. 393; R. *v.* Doherty, 16 do. 307.

Court is supreme only in name. The original conception of this court, as a single court in law and equity, was that the contact of minds trained in the different systems would subject the current ideas and tendencies of the rival systems to scrutiny, and thereby dispel confusion, explode inveterate fallacies, and give increased clearness and force to principles of permanent value. But here, as in the court of first instance, this expectation has not been realized. The Court of Appeal now sits in two divisions, chancery appeals being allotted to one division, common law appeals to the other; and it usually happens that chancery appeals are heard by chancery lawyers and common law appeals by lawyers trained in the common law. Nevertheless, this court has given general satisfaction. It is, indeed, as one of its most distinguished members called it, the backbone of the judicial system.

The principal judges of the first decade of the court, during the service of Sir George Jessel as master of the rolls (1873-83), were James (to 1881), Baggallay (1875-85), Bramwell (1876-81), Brett (1876-97), and Cotton (1877-90).

Jessel's short service of less than ten years sufficed to give him a place in the narrow circle of great judges. Other judges have been more subtle in intellect, but in swiftness and sureness of apprehension, in grasp of facts, tenacity of memory and healthy superiority to mere precedent, he presented a combination of qualities not to be found to the same degree in any other judge of his time. His quickness of perception amounted almost to intuition. His learning was profound; yet he was no mere follower of precedent, no mere directory of cases. He was able to take up the confused mass of the law and mould it to the ends of justice. No matter what the subject under discussion was — and no branch of the law seemed unfamiliar to him — he was alike clear, practical and profound. Such achievements are possible only to a man gifted with the swiftest apprehension and the most ample and tenacious memory. It was these faculties which enabled him to deal with such extraordinary sagacity with facts, however numerous and complicated, and to deliver occasionally those judgments in which the statement of facts gives at once the

reasoning and the conclusion. The excellence of his judicial opinions becomes truly marvelous when we are assured that he never reserved judgment, except in deference to the wishes of a colleague, and that he never read a written opinion. A remarkable feat of this kind was his decision in the great Epping Forest case, concerning the ancient rights of twenty manors. The hearing lasted twenty-two days, one hundred and fifty witnesses having been examined. Jessel delivered judgment orally immediately upon conclusion of the evidence, and no appeal was taken from his decision, although the largest forest in the vicinity of London was thereby thrown open to the public. "I may be wrong," he once said, "and doubtless I sometimes am; but I never have any doubts."

Apart from the soundness of his conclusions, his opinions are always expressed with vigorous and pungent emphasis. His work is conspicuous for the spirit in which he approached his cases. "There is a mass of real property law," he frankly told a friend, "which is nonsense. Look at things as they are and think for yourself." This he certainly did. No judge has ever been plainer in denunciation of ancient technicalities. In Couldrey *v.* Bartrum, 19 Ch. D. 394, he said: "According to the English law a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse or a canary or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English law he could not take 19s. 6d. in the pound. That was one of the mysteries of the English common law, and as every debtor had not on hand a stock of canary birds or tomtits or rubbish of that kind it was felt desirable to bind the creditors," etc. Of authorities which conflicted with his views of equity he was not always as tolerant as he was in the case of Jackson's Will, 13 Ch. D. 189, where, in speaking of the question whether a reversionary interest in personality should be excluded from a gift of "any estate or interest whatever," he said: "I see no reason whatever why it should; but not wishing to speak disrespectfully of some of the decisions I shall say nothing further about it." In *Re* National Funds Assurance Co., 11 Ch. D. 118, he began his opinion thus: "This question is one of great diffi-

culty by reason of the authorities, and my decision may possibly not be reconcilable with one or more of them. In the view which I take of them I think they do not, when fairly considered, prevent my arriving at the conclusion at which I should have arrived had there been no authorities at all." He was equally unceremonious in dealing with the opinions of his colleagues. In referring, in *Re* Hallett's Estate, 13 Ch. D. 676, to a decision by Mr. Justice Fry, where that learned judge had felt himself "bound by a long line of authorities," Jessel said: "That being so, I feel bound to examine his supposed long line of authorities, which are not very numerous, and show that not one of them lends any support whatever to the doctrine or principle which he thinks is established by them." At all events he was no respecter of persons. In Johnson *v.* Crook, 12 Ch. D. 439, he took a view contrary to most of the other equity judges, and despatched them in order. After quoting from Vice-Chancellor Wood he says: "All I can say about it is that it was simply a mistake of the Vice-Chancellor, and that is how I shall treat it." Then, quoting from Lord Chelmsford's opinion, he adds: "I am no Œdipus; I do not understand the passage." Further on he remarks: "Lord Selborne says, 'Lord Thurlow said' so and so. There is a very good answer to that — he did not say so." "What is the proper use of authorities?" he inquire in *Re* Hallett's Estate, 13 Ch. D. 676. He declares it to be "the establishment of some principle which the judge can follow out in deciding the case before him." Jessel had a convenient application of this rule by means of which even the decision of a higher court was not binding unless it decided a principle which he recognized as such. In *Re* International Pulp Co., 6 Ch. D. 556, where he was pressed with the authority of two cases previously decided by a higher court, he said: "I will not attempt to distinguish this case from the cases before the Court of Appeal, but I will say that I do not consider them as absolutely binding upon me in the present instance, and for this reason, that as I do not know the principle upon which the Court of Appeal founded their decision I cannot tell whether I ought to follow them or not. If these decisions do lay down any principle

I am bound by it; but I have not the remotest notion what that principle is. Not being at liberty to guess what the principle of those decisions is, I am only bound to follow them in a precisely similar case; consequently, as the legal decisions do not stand in my way, I dismiss the summons with costs."

It is remarkable that so strong and positive a mind should have gone wrong so seldom. In the few cases in which he was reversed his errors came from his keen sense of justice and impatience with the law's delays.[1] His complacency was never disturbed by reversals. "That is strange," he said when his attention was called to the fact that the Court of Appeal had reversed one of his decisions; "when I sit with them they always agree with me." Jessel's mental fibre was so strong that it was coarse grained. He lacked the cultivated imagination of such men as Cairns, whom, alone of his contemporaries, he conceded to be his superior, and second only to Hardwicke. In the rank of supremacy in the long line of chancery judges he modestly placed himself third.[2]

Bramwell had few of those subtle and impressives attributes which go toward the make-up of a great judge of appeal. It would be idle to compare him as such with such contemporaries as Cairns, Selborne or Bowen. But his sturdy common sense was an invaluable influence for good among associates differently constituted. In the Court of Appeal, sitting with

[1] See Coventry and Dixon's case, 14 Ch. D. 660.

[2] Jessel's work may be studied in the following list of representative opinions: *Re* Hallett's Estate, 13 Ch. D. 693; Smith *v.* Chadwick, 46 L. T. 702, 20 Ch. D. 67; Wallis *v.* Smith, 21 Ch. D. 243; *Re* Campden's Charities, 18 Ch. D. 310; Baker *v.* Sebright, 13 Ch. D. 179; Rossiter *v.* Miller, 36 L. T. 304; Adams *v.* Angell, 5 Ch. D. 634; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275; Carter *v.* Wake, 4 Ch. D. 605; Dymond *v.* Croft, 3 Ch. D. 512; *Re* Eager, 32 Ch. D. 86; Flower *v.* Lloyd, 6 Ch. D. 297; Freeman *v.* Cox, 8 Ch. D. 148; *Re* Hargreave's Contract, 32 Ch. D. 454; Henty *v.* Wrey, 21 Ch. D. 332; Patman *v.* Harland, 17 Ch. D. 353; Redgrave *v.* Hurd, 20 Ch. D. 1; Richards *v.* Delbridge, L. R. 18 Eq. 11; Steed *v.* Preece, L. R. 18 Eq. 192; Sutton *v.* Sutton, 22 Ch. D. 511; Tussaud *v.* Tussaud, 9 Ch. D. 363; Walsh *v.* Lonsdale, 21 Ch. D. 9; Couldery *v.* Bartrum, 19 Ch. D. 394; Sugden *v.* St. Leonards, 1 P. D. 154; *Ex parte* Reynolds, 20 Ch. D. 294; Suffell *v.* Bk. of England, 9 Q. B. D. 555; Mersey Steel Co. *v.* Naylor, 9 Q. B. D. 648; Aynsley *v.* Glover, 18 Eq. 544; Speight *v.* Gaunt, 22 Ch. D. 727; Ewing *v.* Orr Ewing, 22 Ch. D.; *Re* W. Canada Oil Co. 17 Eq. 1 (first case); *Ex parte* Willey, 74 L. T. 366 (last case).

Brett and Mellish, he supplemented the impetuosity of the former and the somewhat academic narrowness of the latter. Sitting in equity with Jessel and James he was not so much in his element. On one occasion, in following the chancery judges in giving opinion in an equity case, he said: "Having listened all day to things which I don't think I ever heard of before, I can safely say I am of the same opinion and for the same reasons." His pronounced views upon the desirability of holding people to their bargains prompted little sympathy with certain equitable doctrines. Cotton, through a longer term of service, made a very respectable reputation. He brought to the discharge of his judicial duties the clearness of thought and thorough preparation which had characterized his vast labors as an equity lawyer, and, notwithstanding a certain want of facility in expression, his numerous opinions (for he was rarely satisfied with mere acquiescence) will repay careful study.[1] Upon the death of Jessel in 1883 he became more prominent as the presiding judge of the chancery division of the court.

When Brett (better known by his subsequent title, Lord Esher) was made one of the first judges of the Court of Appeal he had already served an apprenticeship of eight years as a judge of the Court of Common Pleas. Being further promoted to the post of master of the rolls in 1883, he served until 1897, thus completing a continuous service of thirty years. Unfortunately for his reputation, he clung to office so long after age had impaired his usefulness that he was often spoken of by his contemporaries with reproach. But no one who has examined with any care the total result of his long service will be apt to overlook its value. That he was a learned lawyer, particularly in the domain of commercial law, cannot be gainsaid; shortly after his accession to the bench we find the learned Willes adopting and commending the opinion of his young associate.[2] Still, it was rather as

[1] Johnstone *v.* Milling, 16 Q. B. D. 460; Henty *v.* Capital & Counties Bank, 7 do. 174; Davies *v.* Davies, 36 Ch. D., 359; Allcard *v.* Skinner, 36 do. 145; Tod Heatley *v.* Benham, 40 do. 97; Angus *v.* Dalton, 6 App. Cas. 779; Harney *v.* Farnie, 6 P. D. 35; Niboyet *v.* Niboyet, 4 do. 1; *Re* Goodman's Trusts, 44 L. T. 527; Turton *v.* Turton, 61 do. 571; Kensit *v.* Great Eastern Ry., 51 do. 863; Hunt *v.* Clarke, 61 do. 343.

[2] Gray *v.* Carr, 6 Q. B. 554.

an invigorating influence that his services were of most value. He resembled Bramwell in an ingrained aptitude for logic, and often displayed a tendency to reach beyond established authorities and the particular facts of individual cases for broad principles and logical symmetry. It must be confessed, also that he sometimes went to the other extreme in his desire to do full justice in particular cases. "The law of England," he once said, "is not a science. It is the practical application of the rule of right and wrong to the particular case before the court, and the canon of law is that that rule should be adopted and applied to the case which people of honor, candor and fairness in the position of the two parties would apply in respect of the matter in hand." In the pursuit of this laudable end he occasionally seemed to overlook the necessity for fixed principles. He was independent to a fault, and frequently differed from his colleagues. When a precedent stood in his way he did not hesitate to pass it by. "There is no such thing in law," he said, "as a rule which says that the court shall determine that to be true which the court believes and knows to be untrue." All his learning and experience had been in common law, and, like most of his colleagues, he was not above an occasional sneer at equity. But in the practical administration of justice as a judge of appeal he was, perhaps, next to Bowen, the common law judge who displayed least bigotry in favor of common law technicalities as opposed to equity. However little his style may be admired, his opinions are, in substance, invariably interesting and suggestive.[1]

[1] The following cases will give an accurate idea of his great labors: Le Lievre *v.* Gould, (1893) 1 Q. B. 491; Johnstone *v.* Milling, 16 Q. B. D. 460; The Bernina, 12 P. D., 58; Mitchell *v.* Darley Main Colliery, 14 Q. B. D. 125; Bowen *v.* Hall, 6 do. 333; Randall *v.* Newson, 2 do. 102; Mogul Steamship Co. *v.* McGregor, 23 do. 598; Johnson *v.* Rovlton, 7 do. 438; Harrison *v.* Duke of Rutland, (1893) 1 Q. B. 142; Niboyet *v.* Niboyet, 4 P. D. 1; Currie *v.* Misa, 10 Ex. 153; R. *v.* Judge of the City of London Court, 66 L. T. 135; The Gas Float Whitton, 65 L. J., P. 17; Dawkins *v.* Antrobus, 17 Ch. D. 615; Angus *v.* Dalton, 6 App. Cas. 779; Drew *v.* Nunn, 4 Q. B. D. 661; R. *v.* Keyn, 2 Ex. D. 63; R. *v.* Bunn, 12 Cox Cr. Cas. 338; Brunsden *v.* Humphrey, 14 Q. B. D. 141; Thomas *v.* Quartermaine, 18 do. 685; Finlay *v.* Chirney, 20 do. 494; Merivale *v.* Carson, 20 do. 275; Henty *v.* Capital & Counties Bank, 7 Q. B. D. 174; Mackonochie *v.* Penzance, 4 do. 697; Abrath *v.* North Eastern Ry., 11 do. 440; Sewell *v.* Burdick, 13 do. 159; Rankin *v.* Potter, 6 E. & I.

Under the service of Esher as master of the rolls his principal associates were Lindley (1881-99) and Fry (1883-92) in equity, and Bowen (1882-94) and A. L. Smith (1892-1900) in common law.

After a laborious career at the chancery bar Lord Lindley spent six years as a judge in the Court of Common Pleas, and thus came to the Court of Appeal thoroughly equipped. Had other judges been equally well trained, Lord Selborne's original scheme for the consolidation of law and equity might have been realized. As it happened, Lindley found his sphere of usefulness in the chancery division of the Court of Appeal, where for twenty years his accurate and methodical mind set a high standard of efficiency for his associates. As a specialist he completely mastered the law relating to companies and to partnership. His opinions are logical, comprehensive and convincing, and the only criticism that the most captious could make is that when any of his brethren dissent he is apt to wander off in all the by-paths of the subject in his evident desire to fortify his conclusion.[1] Lord Justice Fry was one of the greatest technical masters of modern equity,

App. 83; Hollins *v.* Fowler, 7 do. 762; The Parlement Belge, 5 P. D. 197; Bridges *v.* No. London Ry., 7 E. & I. App. 213; Bank of England *v.* Vagliano, 61 L. T. 420; Medawar *v.* Grand Hotel Co., 64 do. 851; R. *v.* Barnado, 64 do. 73; Castillian *v.* Preston, 49 do. 29; Ballard *v.* Tomlinson, 52 do. 952; The Pondita, 51 do. 849; Macdougall *v.* Knight, 55 do. 274; The Moorcock, 60 do. 654; Searles *v.* Scarlett, 66 do. 837; Campania de Mocambique *v.* British So. Africa Co., 66 do. 773; South Hettor Coal Co. *v.* News Asso., 63 do. 293; Meux *v.* Great Eastern Ry., 64 do. 657; Wakelin *v.* London & South Western Ry., 65 do. 224; Seton *v.* Lafone, 57 do. 547; Walter *v.* Everard, 65 do. 443; Salmon *v.* Warner, 65 do. 132; Cleaver *v.* Mutual Life Asso., 66 do. 220; Royal Aquarium *v.* Parkinson, 66 do. 513; Turton *v.* Turton, 61 do. 571.

[1] R. *v.* Keyn, 2 Ex. D. 63; The Bernina, 12 P. D. 58; Angus *v.* Clifford, 6 App. Cas. 779; Scaramanga *v.* Stamp, 4 C. P. D. 316; Hollins *v.* Merney, 13 Q. B. D. 305; Tod Heatley *v.* Benham, 40 Ch. D. 97; Dashwood *v.* Magniac, (1891) 3 Ch. 306; Allcard *v.* Skinner, 36 Ch. D., 145; Maxim-Nordenfelt case, (1893) 1 Ch. 631; Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 265; Dalton *v.* Angus, 6 App. Cas. 740; Smith *v.* Chadwick, 20 Ch. D. 67; Stuart *v.* Bell, 64 L. T. 633; Reddaway *v.* Hemp Spinning Co., 67 do. 301; Whitwood Chemical Co. *v.* Hardman, 64 do. 716; *Re* Piercy, 78 do. 277; *Re* Perry Almshouses, 79 do. 366; Lyons *v.* Wilkins, 79 do. 709; Pemberton *v.* Hughes, 80 do. 592; Low *v.* Bonvière, 65 do. 533; McClatchie *v.* Hasham, 65 do. 691; Ballard *v.* Tomlinson, 52 do. 942; White *v.* White, 62 L. J., Ch. 342; Lemmon *v.* Webb, 63 do. 570; Hudson *v.* Ashby, 65 do. 515; Powell *v.* Birne Vinegar Co., 65 do. 563; Macduff *v.* Macduff, 65 do. 700; Hardacker *v.* District Council, 65 L. J., Q. B. 363; Speight *v.* Gaunt, 22 Ch. D. 727.

and contributed materially to the high standing of the court.[1]

Laymen have seldom found the law reports entertaining reading. Lord Bowen is probably the only judge in recent times whose work has commanded general interest. The reason is not far to seek. Besides grasp of principle, breadth of view and cogent reasoning, the style is so lucid, the illustrative matter so aptly chosen, the analogies so dexterously handled, the whole fabric of the exposition so admirably articulated, that he may be said to have combined, to an extent unsurpassed in English law, legal learning and literary form. He had a refreshing conception of intellectual reserve, a fine sense of proportion and wholesome mental habits of discrimination; and he expounded the historical evolution of legal principles in a style so pure, accurate and distinguished that it appeals to all persons of cultivated taste. In comparison with contemporaries who were his peers in intellectual power, he may be said to have shared with Westbury, Cairns and Selborne a precision of thought and logical faculty which rendered his mind capable at once of entertaining the broadest views and the most subtle distinctions. But he lacked their versatility. He was perhaps the equal of Blackburn and Jessel in legal learning, without the pedantry of one or the dogmatism of the other. But he fell short of them in energy. In affinity and contrast Cairns probably furnishes the best comparison. Cairns has never been surpassed in intuitive insight in legal principles; his judgments are illuminations rather than ratiocinations. Bowen shows us the process by which he arrives at a conclusion; we may observe the penetration and precision of a severely logical mind. Cairns was a genius; Bowen was a scholar.

The most obvious characteristic of Bowen's opinions is purity, ease and accuracy of style. Along with legal acquirements which he shared with many of his judicial contempo-

[1] Cochrane *v.* Moore, 25 Q. B. D. 57; Davies *v.* Davies, 36 Ch. D. 359; Northern Counties Fire Ins. *v.* Whipp, 26 do. 482; Miles *v.* New Zealand Co. 32 do. 266; Nitro-Phosphate Co. *v.* London Docks Co., 9 do. 503; Fritz *v.* Hobson, 14 do. 42; Smith *v.* Chadwick, 20 Ch. D. 67; Dalton *v.* Angus, 6 App. Cas. 740; Roussilon *v.* Roussilon, 14 Ch. D. 358; Salmon *v.* Warner, 65 L. T. 132; Walter *v.* Everard, 65 do. 445; Wallis *v.* Smith, 47 do. 389; Campania de Mocambique *v.* British So. Africa Co., 66 do. 773; R. *v.* Jackson, 64 do. 679.

raries, he had what is rare in such minds, a keen sense of literary form — "an instinctive preference for the right way of saying a thing, and the literary conscientiousness which impelled him to seek for the best expression of his thoughts." In distinction of style his only equal among contemporary writers on legal subjects was Sir Henry Sumner Maine; he had no rival on the bench. One may find in his work aphorisms and lucid definitions which crystallize a principle in a phrase. Such, for instance, is his remark in a case of deceit that "the state of a man's mind is as much a fact as the state of his digestion;" and his statement that a person's knowledge of danger is the "vanishing point" of the liability of the occupier of premises. But the power of expressing the most subtle shades of thought which made Westbury, for instance, such a source of legal maxims, manifested itself in Bowen's work rather in the production of a total effect or artistic whole. He had great skill in graphic illustration. Witness his forcible illustration in the Mogul Steamship case of the expedient by merchants of sowing one year a crop of unfruitful prices in order, by drawing away competition, to reap a fuller harvest of profits in the future; and his query in the same case whether it would be an indictable conspiracy to drink all the water from a common spring in time of drought. Among other instances are his illustration in Hutton *v.* Railway Company [1] of sending all the porters at a railway station to have tea in the country at the company's expense; his success in laying bare the issue in Thomas *v.* Quartermaine [2] by reference to a builder employed to make repairs; his query in the Carbolic Smoke Ball case [3] whether everybody who sought to find a dog for a reward must sit down and write a note to the owner accepting the proposal; his illustration in the Queensland Bank case [4] of being waylaid in Pall Mall; and his reference in Saunders *v.* Weil [5] to the Apostles' spoons.

The law, to Lord Bowen, was not a mere collection of rules. "There is no magic at all in formalities," he said. He recognized, to use his own language, the duty of endeavoring

[1] 23 Ch. D. 654. [2] 18 Q. B. D. 694. [3] (1893) 1 Q. B. 265.
[4] 37 Ch. D. 479. [5] (1893) 1 Q. B. 474.

to apply legal doctrines so as to meet "the broadening wants or requirements of a growing country, and the gradual illumination of the public conscience." In the course of a bold application of an established principle he said: "It is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments. . . . The instance to which the legal principle is now for the first time adopted by this court may be new, but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of watercourses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forests, so the English law accommodates itself to new forms of labor and new necessities of [arbor] culture." Dashwood *v.* Magniac, (1891) 3 Ch. 306. Therefore, in applying, in a leading modern case, the ancient rule as to contracts in restraint of trade, he said:

"A covenant in restraint made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenant made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of Mitchell *v.* Reynolds, 1 P. Wms. 181, sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass to a different atmosphere from that of Mitchell *v.* Reynolds. To apply to such transactions at the present time the rule that was invented centuries ago in order to discourage the oppression of English traders and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs and advertisements have centralized business and altered the entire aspect of local restraints on trade. The rules, however, still exist, and it is desirable that they should be understood to remain in force. Great

care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions." Maxim-Nordenfelt Co. *v.* Nordenfelt, (1893) 1 Ch. 631.

Bowen vitalized and enforced his exposition of legal principles by reference to history. "The only reasonable and the only satisfactory way of dealing with English law," he once said, "is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it and it clothes itself with life." In his brilliant application of this method he avoided many of the errors which have resulted from the attempt to give a rational or scientific basis to doctrines which owe their origin to historical accidents. A brief quotation from his opinion in a *nisi prius* action for illegal distraint, in which it was claimed that the landlord had broken an outer door, will illustrate his use of the historical method: "The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence. The proposition that a man's house is his castle, which was crystallized into a maxim by the judgment in Semayne's case, and by Lord Coke, dates back to days far earlier still, when it was recognized as a limitation imposed by law on all process except that which was pursued at the King's suit and in his name. A landlord's right to distrain for arrears of rent is itself only a survival of one among a multitude of distraints which, both in England and other countries, belonged to a primitive period when legal procedure still retained some of the germs of a semi-barbarous custom of reprisals, of which instances abound in the early English books, and in the Irish Senchus Mor. Later, all creditors and all aggrieved persons who respected the King's peace, the sheriff in a civil suit and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of protection

against the outer world for his family, his goods and furniture and his cattle." American Must Corp. *v.* Hendry, 62 L. J., Q. B. 389.

His subtle intellect could not have made him the great judge that he was had it not been balanced by good sense. He was continually using the terms common law and common sense as equivalents; he likened the common law to an "arsenal of sound common sense principles." A multitude of illustrations could be given. One will suffice. In speaking of the standard to be used in weighing the evidence as to whether a certain hospital was an "annoyance" to neighboring inhabitants, he said: "'Annoyance' is a wider term than nuisance, and if you find a thing which really troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house, — if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment or discomfort. You must take sensible people; you must not take fanciful people on the one side or skilled people on the other; and that is the key as it seems to me of this case. Doctors may be able to say, and, for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighborhood. But the fact that some doctors think there is, makes it evident at all events that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for any ordinary person who lives in the neighborhood to be troubled in his mind by the apprehension of such risk, it seems to me that there is danger of annoyance, though there may not be a nuisance." Tod-Heatly *v.* Benham, 40 Ch. D. 611. No better illustration of the triumph of reason and common sense over technicalities can be found in the reports than Bowen's judgment in Ratcliffe *v.* Evans, (1892) 2 Q. B. 529.

The Maxim-Nordenfelt case and the Mogul Steamship case are probably his greatest efforts, illustrating as they do all his peculiar powers. For a brief example of clear

exposition reference may be made to the case of Smith *v.* Land & House Property Corporation, 28 Ch. D. 14, where the vendee under a contract for the sale of certain property resisted an action for specific performance on the ground of misrepresentation, the vendor having stated that the property was let to "a most desirable tenant," when in fact the tenant had been in arrears on his last quarter's rent, and soon afterward went into liquidation: "It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to another is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the property is let to a most desirable tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Mid-

summer, I think it was not. . . . In my opinion a tenant who had paid the last quarter's rent by driblets under pressure must be regarded as an undesirable tenant."

His subtlety in legal analysis may be seen to good advantage in Le Lievre *v.* Gould and Angus *v.* Clifford. What could be clearer, to give a single quotation, than his statement in Badeley *v.* Consolidated Bank, 38 Ch. D. 262, of the manner in which the lower court had gone wrong on an issue of partnership: "The question is whether there is a joint business or whether the parties are carrying on business as principals and agents for each other. Now where has Mr. Justice Stirling gone wrong? He has gone wrong because he has not followed that test. What he has done is this. He has taken one of the circumstances which in many cases affords an ample guide to truth; he has taken that circumstance as if, taken alone, it shifted the *onus* of proof — as if it raised a presumption of partnership — and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now that cannot be a right way of dealing with the case. You have a group of facts — A, B, C, D, E and F — and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that if A stood alone it would shift the *onus* of proof, and then to look over B, C, D, E and F and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised."

Besides the Maxim-Nordenfelt case, see Finlay *v.* Chirney, Dashwood *v.* Magniac, Steinman *v.* Angier Line and Brunsden *v.* Humphrey, for applications of the historical method. Allcard *v.* Skinner is one of the finest specimens of his style at its best. Borthwick *v.* Evening Post, Hutton *v.* West Cork Ry. Co., and the Carbolic Smoke Ball case are characteristic specimens of his colloquial style. Whatever the form of the argument may be — whether pure development of principle without the citation of a single authority (Allcard *v.* Skinner), or elaborate analysis and review of a mass of conflicting cases (Phillips *v.* Homfray, Mitchell *v.* Darley

Main Colliery Co.); a perfect example of systematic logic (Ratcliffe *v.* Evans, Quartz Hill Gold Mining Co. *v.* Eyre), or a series of detailed answers to specific points urged in argument (Carlill *v.* Carbolic Smoke Ball Co.); statutory construction (Hewlett *v.* Allen, Thomas *v.* Quartermaine), or argument on the facts (Medawar *v.* Grand Hotel Co., Abrath *v.* Northeastern Ry. Co.) — we invariably find the same characteristic precision, sense of proportion, force and completeness of logic. Whatever the form, the result was well described by him in the course of his opinion in *Re* Portuguese, etc., Mines, 45 Ch. D. 60: "As soon as one applies one's mind to dissect the ingenious argument, the light breaks through and makes the case perfectly plain."[1]

(*c*) *The House of Lords*

The membership of the House of Lords as a judicial tribunal is confined by the Judicature Act to Lords of Appeal, i. e., the Lord Chancellor of Great Britain, Lords of Appeal in Ordinary (limited to four), and peers who have held high

[1] For Lord Bowen's substantial contributions to English law the following cases may be cited:

Maxim-Nordenfelt Gun and Ammunition Co. *v.* Nordenfelt, (1893) 1 Ch. 631, which settled the law as to contracts in restraint of trade; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, on the limits of trade selfishness by way of combination to exclude rivals; Thomas *v.* Quartermaine, 18 Q. B. D. 685, on the duty of owners of premises, and the doctrine *volenti non fit injuria;* Le Lievre *v.* Gould, (1893) 1 Q. B. 491, on the limits of the law of negligence; Ratcliffe *v.* Evans, (1892) 2 Q. B. 524, on the evidence admissible to sustain an action for defamation; Finlay *v.* Chirney, 20 Q. B. D. 494, and Phillips *v.* Homfray, 24 Ch. D. 453, on the maxim *actio personalis moritur cum persona;* Dalton *v.* Angus, 6 App. Cas. 779, on the right to subjacent support; Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256, on the essential requisites to the formation of a contract; Cochrane *v.* Moore, 25 Q. B. D. 57, on the vexed question of the passing of property by voluntary gift; Smith *v.* Land & House Property Corporation, 28 Ch. D. 7, on actionable misrepresentation; *Re* Hodgson, 31 Ch. D. 177, on the rights in equity of creditors of joint debtors; Quartz Hill Gold Mining Co. *v.* Eyre, 11 Q. B. D, 674, on malicious prosecution as a cause of action; Brunsden *v.* Humphrey, 14 Q. B. D. 141, and Mitchell *v.* Darley Main Colliery Co., 14 Q. B. D. 125, on the doctrine of *res judicatae;* Jacobs *v.* Crédit Lyonnaise, 12 Q. B. D. 598, on the *lex loci contractus* and *vis major;* Johnstone *v.* Milling, 16 Q. B. D. 460, on the limits of repudiation as a breach of contract; Merivale *v.* Carson, 20 Q. B. D. 275, on the distinction between fair public comment and privileged communications in the law for libel; Newbigging *v.* Adam, 34 Ch. D. 582, on relief

judicial office. High judicial office means the office of Lord Chancellor of Great Britain or Ireland, of a paid judge of the Judicial Committee of the Privy Council, or of a judge of one of the superior courts of Great Britain or Ireland. As a judicial tribunal the House reached its highest usefulness under the Judicature Act. With a membership defined by statute, with a reasonable assurance of regular attendance (brought about by relieving the lord chancellor from his ancient duties as a judge of first instance), with the appointment of paid judges as lords in ordinary, and the elevation to the peerage of several eminent and experienced judges, the composition of the court has given much satisfaction. In sheer ability, with Cairns, Selborne and Hatherley in equity, and Blackburn, Bramwell, Watson and Herschell in common law, no other English court has ever equalled it. During this period there have been only four chancellors, Cairns, Selborne, Herschell and Halsbury. Cairns lived until 1885, Selborne and Herschell almost to the end of the century. The most distinguished English lords have been Blackburn, Bramwell, Penzance, Field, Macnaghten[1] and Davey. Untimely death deprived the court of the services of two of its most promising members, Hannen and Bowen. Watson was the ablest of the Scotchmen, the others being Gordon and Shand. O'Hagan ranks at the head of the Irish

in equity in cases of fraud and misrepresentation; Angus *v.* Clifford, (1891) 2 Ch. 449, on actionable misrepresentaion; Allcard *v.* Skinner, 36 Ch. D. 145, on undue influence; Speight *v.* Gaunt, 22 Ch. D. 727, on the duties of trustees; Hammond *v.* Bussey, 20 Q. B. D. 93, applying the doctrine of Hadley *v.* Baxendale, 9 Ex. 341; Castellian *v.* Preston, 11 Q. B. D. 397, on the recovery under fire insurance policies; Steinman *v.* Angier Line, (1891) 1 Q. B. 619, on recovery under a bill of lading for loss by theft; Svensden *v.* Wallace, 13 Q. B. D. 69, on the scope of general average contribution; Abrath *v.* Northeastern Ry. Co., 11 Q. B. D. 440, on the nature of the burden of proof; Hutton *v.* West Cork Ry. Co., 23 Ch. D. 654, on the corporate power to remunerate directors for past services; Baroness Wenlock *v.* River Dee Co., 36 Ch. D. 684, on the limits of the corporate capacity to contract; *Re* Portuguese Consolidated Copper Mines, 45 Ch. D. 16, on the doctrine of ratification; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co., 18 Q. B. D. 714, on the liability for fraudulent acts of an agent.

[1] Solomon *v.* Solomon, (1897) A. C. 22; Ooregum Gold Mining Co. *v.* Roper, (1892) A. C. 125; Nordenfelt *v.* Maxim-Nordenfelt Co. (1894) A. C. 535; Tailby *v.* Official Receiver, 13 App. Cas. 523; Trevor *v.* Wentworth, 12 App. Cas. 409; Drummond *v.* Van Ingen, 12 App. Cas. 284.

representation, which includes Fitzgerald, Ashbourne and Morris.

In his obituary eulogy on Lord Selborne in the House of Lords, Lord Rosebery felicitously compared Selborne with those great ecclesiastics by whom equity was originally administered. "There was something in his austere simplicity of manner which recalled those great lawyers of the middle ages who were also churchmen, for to me Selborne always embodied that great conception and that great combination." Selborne (1872-74; 1880-85) was not only, like Cairns, an ardent churchman; he had also something of the ecclesiastical cast of mind and impassive manner. But he had, above all, that intuitive insight into legal principles and power of grasping and expounding facts which are certain tests of legal genius. With intellectual gifts of the highest order he combined habits of patient industry, without which intuitions are deceitful and gifts of exposition vain. The terms in which a contemporary observer described his characteristics at the bar, bring out clearly the qualities upon which his success was founded. "At this time there were three great advocates before all others, Bethel [Lord Westbury], Palmer [Lord Selborne], Cairns. Each of them had his own points of superiority, though each was very good at all points. Cairns excelled in strong common sense and broad, lucid arrangement of facts; Bethel in force of exposition and direct attack on his opponent, whether counsel or judge; Palmer in power of work, in knowledge of his briefs, in ready memory and vast resources of case law, in subtlety and great skill in addressing himself to unforeseen emergencies. He could perform the most difficult operations of strategy, changing front in the face of the enemy. It was an admirable sight to see him turning the flank of a hostile position taken up by the court, such as Bethel would have attacked in front; rounding off an angle here, attenuating a difference there; bringing some previously neglected portion of the case into relief, relegating others to the background, and so restoring the battle. What gave Palmer the superiority in these movements (apart from the great versatility and adaptability of his mind and his complete command of

temper) was above all his perfectly accurate and ready knowledge of every detail of his case."

His marked characteristic as a judge was his profound knowledge of case law and his masterly dealing with it. In this respect he has seldom been surpassed. It was his habit to extract the ruling principle of prior decisions, and then to trace the development of the branch of law under discussion.[1] From his conservative regard for precedent he was essentially a sound judge. He was inferior to Cairns in terseness, clearness and force because he indulged himself in his remarkable gift of subtlety. Beyond certain limits subtlety ceases to be desirable in the exposition of practical rules of human conduct. While many of his opinions are masterpieces of luminous reasoning, he had too often a habit of pursuing a fine train of reasoning on a matter collateral to the main issue. This undue prominence of matters of minor importance and trains of reasoning running off into collateral matters, explain the absence of proportion which characterizes some of his work. But his statements of legal propositions are carefully worded with a far seeing regard for the future, and few hasty *dicta* are to be found in his opinions.

Although he was great in council and dextrous in debate, he did not display in political life the marvelous adaptability which was so conspicuous in Cairns. In some respects he would seem to have been better equipped for public life than his great rival. He had larger and more genial sympathies, and his flowing and diffuse style was more apt to impress the public mind than the highly concentrated manner of Cairns. But his ecclesiastical subtlety again hampered his influence. And he was prone to rely upon considerations too purely moral and speculative to exert any considerable influence on public opinion. Hence the arguments by which he attempted to support a conclusion were often far more conspicuously vulnerable and far more offensive to his adversaries than the conclusion itself. As a law reformer alone Selborne takes a high rank. The reforms inspired by Brougham in 1832 had been followed at fitful in-

[1] Aylesford v. Morris, 8 Ch. App. 484; Noble v. Willock, 8 Ch. App. 778.

tervals by the successive acts which, from 1847 onward, under the guidance of Cranworth, Westbury and Cairns, had eradicated most of the perversities of ancient procedure. But the most radical and comprehensive legal reform of the century was accomplished by Selborne in the passage of the Judicature Acts.[1]

When Blackburn (1876-87) was appointed one of the first lords of appeal in ordinary under the Judicature Act it afforded satisfactory evidence to the profession that a new era in the court of final appeal had in reality begun. Blackburn had given abundant evidence of his complete mastery of the common law, and he soon showed that his grasp of Scotch and colonial and ecclesiastical law was no less strong. In chancery appeals he did not hesitate to express independent views, but he was naturally overshadowed by the authority of Cairns and Selborne. In common law appeals his pre-eminence was undisputed. It was not until the last year or two of Blackburn's service that Watson began to take a prominent part in English appeals, and the sturdy Bramwell did not become a member of the court until 1882.

Lord Watson (1880-99), the ablest judge contributed by

[1] Some of Selborne's more important opinions are: Maddison *v.* Alderson, 8 App. Cas. 467 (statute of frauds); Debenham *v.* Mellon, 6 App. Cas. 24 (wife's necessaries); Dalton *v.* Angus, 6 App. Cas. 740 (easements; Sewell *v.* Burdick, 10 App. Cas. 74 (bill of lading); Pearks *v.* Moseley, 5 App. Cas. 714 (bequest); Lyell *v.* Kennedy, 14 App. Cas. 448 (real property); Sturla *v.* Freccia, 5 App. Cas. 623 (evidence); Speight *v.* Gaunt, 9 App. Cas. 1 (trust); Bank of England *v.* Vagliano, (1891) A. C. 107; Duncan *v.* Wales Bank, 6 App. Cas. 8 (bill of exchange); Harvey *v.* Farnie, 8 App. Cas. 43 (Scotch divorce); Mackonochie *v.* Penzance, 6 App. Cas. 424 (ecclesiastical law); Whyte *v.* Pollock, 7 App. Cas. 400 (will); Mayor of London *v.* London Bank, 6 App. Cas. 393 (attachment); Mersey Steel Co. *v.* Naylor, 9 App. Cas. 434 (contracts); London, etc., Ry. *v.* Truman, 11 App. Cas. 45; Drummond *v.* Van Ingen, 12 App. Cas. 284; Ewing *v.* Orr-Ewing, 10 App. Cas. 499; Minors *v.* Battison, 1 App. Cas. 428; Sarf *v.* Jardine, 7 App. Cas. 345; Singer Mfg. Co. *v.* Loog, 8 App. Cas. 15; Kendal *v.* Hamilton, 4 App. Cas. 504; Brogden *v.* Met. Ry., 2 App. Cas. 666; Capital and Counties Bank *v.* Henty, 7 App. Cas. 741; Erlanger *v.* Phosphate Co., 3 App. Cas. 1218; Dublin Ry. Co. *v.* Slattery, 3 App. Cas. 1155; Lyon *v.* Fishmonger's Co., 1 App. Cas. 662; Clyde Navigation Co. *v.* Barclay, 1 App. Cas. 790; Bradlaugh *v.* Clarke, 8 App. Cas. 345; Foakes *v.* Beer, 9 App. Cas. 605; Earl of Aylesford *v.* Morris, 8 Ch. App. 484; Ex. parte Watkins, 8 Ch. 520; Cooper *v.* McDonald, 16 Eq. 258; Ayerst *v.* Jenkins, 16 Eq. 275; Freke *v.* Lord Carbery, 16 Eq. 461; Noble *v.* Willock, 8 Ch. App. 778; Cooper *v.* Macdonald, 16 Eq. 258.

Scotland to the House of Lords, was one of the most remarkable judicial characters of his time. In the domain of Scots law, to which his predecessors had mainly confined their attention, he displayed at the outset his eminent qualifications for judicial office. But Watson was not content to play a minor part. He proceeded to study English law; and, as his confidence in his knowledge increased, the modest expression of opinion with which he had been content in his earlier cases, gave way, shortly before Blackburn's retirement, to those masterly expositions of English law for which, after the death of Herschell, he was unsurpassed by any of his associates. It is only necessary to mention in support of this statement such cases as Smith *v.* Baker, Allen *v.* Flood, Clarke *v.* Carfin Coal Company, Solomon *v.* Solomon, Macdonald *v.* Whitfield, Nordenfelt *v.* Maxim-Nordenfelt, and Mogul Steamship Co. *v.* McGregor. His long and splendid service in the Judicial Committee of the Privy Council would alone place him in the front rank of modern judges. His opinions in Le Mesurier *v.* Le Mesurier and Abdul Messih *v.* Fassa, on the intricate subject of domicile, to cite only two examples, are as luminous as they are exhaustive. In ecclesiastical appeals, also, Presbyterian though he was, he took a prominent part.

His knowledge of English case law was, under the circumstances, extraordinary; yet it can hardly be said to have exceeded his grasp of principle and certainty of judgment. Witness his sensible and suggestive reflections in refusing to adhere to a strict observance of the old doctrine with respect to restraint of trade: "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to and for promoting the interests of its commerce must, as time advances, and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national

policy. Their function when a case like the present is brought before them is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community." Nordenfelt *v.* Maxim-Nordenfelt, (1894) A. C. 514.

To literary form and refinement of style Watson appears to have been wholly indifferent. Clear, direct and compact in expression, his opinions are nevertheless not without charm from simplicity of diction and the occasional use of the quaint legal phraseology of his native land. Probably the best expression of this is his interesting opinion in the matrimonial case of Mackenzie *v.* Mackenzie, (1895) A. C. 384. "There can be hardly a more odious form of cruelty," he says in one place, "than a deliberate attempt to wound the feelings of a mother through her affection for her infant child. It is nevertheless true that the law of Scotland permits a married man to gratify his taste for that species of cruelty, subject to these conditions, that it must be practiced upon his own wife, and that he must stop short of injuring her health of mind or body or of rendering her existence intolerable. How far he can carry his experiments without exceeding the limits so prescribed, and thereby becoming guilty of legal *saevitia*, must depend very much upon the circumstances of the case, and, in particular, upon the victim's capacity of endurance." [1]

In the House of Lords Bramwell (1882-92) exerted, in

[1] Lord Watson's ablest efforts are: English Appeals: Allen *v.* Flood, (1898) A. C. 1; Smith *v.* Baker, (1891) A. C. 325; Scholfield *v.* Londesborough, (1896) A. C. 514; Johnson *v.* Lindsay, (1891) A. C. 371; Nordenfelt *v.* Maxim-Nordenfelt, (1894) A. C. 514; Mogul Steamship Co. *v.* McGregor, (1892) A. C. 52; The Bernina, 13 App. Cas. 1; Solomon *v.* Solomon, (1897) A. C. 22; Trevor *v.* Whitworth, 12 App. Cas. 409; Bank of England, *v.* Vagliano, (1891) A. C. 107; Ooregum Gold Mining Co. *v.* Roper, (1892) A. C. 25; Tailby *v.* Official Receiver, 13 App. Cas. 523; Wakelin *v.* London and S. W. Ry. Co., 12 App. Cas. 41; London

the main, the same general influence for good that characterized his earlier judicial service. Perhaps his unconventionality was even more conspicuous in his new surroundings. Although he was to some extent overshadowed by the commanding authority of Blackburn, he was sturdily independent in his views. And even when wrong — for he was often in the minority — he used his mother-tongue with the same directness and dry humor. At a very advanced age he showed no decay in mental power; his strong opinion in the Vagliano case was delivered in his eighty-second year. But it is observable that his personal views on certain topics which had not commanded judicial assent became in later years more pronounced and extreme.

Lord Herschell's conspicuous judicial service in the House of Lords (1886-99) entitles him to a place among the great judges of the last quarter of the century. If he fell short of Cairns' breadth of mind and lacked Selborne's subtlety, he had, nevertheless, in large measure, the qualities which make for judicial excellence. His most prominent characteristics were indefatigable industry, thoroughness and accuracy. Not even Selborne more completely exhausted a subject than Herschell did in such leading cases as Derry *v.* Peek, Bank of England *v.* Vagliano, Allen *v.* Flood, London Joint Stock Bank *v.* Simmons, British South Africa Co. *v.* Mozambique, Russell *v.* Russell, Trego *v.* Hunt, and the Maxim-Nordenfelt case. In his zeal to leave no consideration unnoticed, he sometimes seems to wander around the issue, instead of aiming directly at it, as Cairns did. But this fault is confined mostly to his earlier opinions; his work improved steadily in structure and finish, and his best efforts are

Joint Stock Bank *v.* Simmons, (1892) A. C. 201; Bradford Corporation *v.* Pickles, (1895) A. C. 595; Lyell *v.* Kennedy, 9 App. Cas. 89; Enraght *v.* Lord Penzance, 7 App. Cas. 240.

Privy Council Appeals: Le Mesurier *v.* Le Mesurier, (1895) A. C. 517; Abdul Messih *v.* Farra, 13 App. Cas. 431; Huntington *v.* Attrill, (1893) A. C. 150; Gera *v.* Ciantra, 12 App. Cas. 557; Haggard *v.* Pelicier Frères, (1892) A. C. 61; Macdonald *v.* Whitfield, 8 App. Cas. 733.

Scotch Appeals: Mackenzie *v.* Mackenzie, (1895) A. C. 384; Collins *v.* Collins, 9 App. Cas. 205; Ewing *v.* Orr-Ewing, 10 App. Cas. 499; Clarke *v.* Carfin Coal Co., (1891) A. C. 412; Commissioners of Income Tax *v.* Pemsel, (1891) A. C. 531; Palmer *v.* Wicke, (1894) A. C. 318; Caird *v.* Sime, 12 App. Cas. 326; Rothes *v.* Kirkcaldy Water Works Commissioners, 7 App. Cas. 694; Harvey *v.* Farnie, 8 App. Cas. 62.

among the highest models of judicial exposition. He was a man of broad views. The basis of his very able opinion in the great case of Allen *v.* Flood, (1808) A. C. 1, is an illustration: "I do not doubt that every one has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection, as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused this right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling?"

Herschell believed that it was a judge's duty to interpret and administer the law, not to make it. He was sturdily averse to the process of refinement by means of which particular cases were withdrawn from the application of general rules. A characteristic illustration may be found in his opinion in the celebrated case of Russell *v.* Russell, (1897) A. C. 460, where it was sought to extend the legal doctrine with respect to cruelty in matrimonial relations so as to cover the facts of a particular case. "The only criterion of cruelty which I have heard suggested as warranting a judgment for the appellant, is whether the discharge of the duties of married life has become impossible owing to the

conduct of the respondent. How is the word 'impossible' to be interpreted in the proposition thus stated? . . . If it be extended to what is sometimes called 'moral' impossibility, a proposition could scarcely be conceived more elastic. It would afford no sort of guide, but would, in my opinion, unsettle the law and throw it into hopeless confusion. Views as to what is possible in this sense would differ most widely. . . . Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when, in short, the ordinary marital relation no longer prevailed. One opinion may be held by many that it would be well that in all such cases a judicial separation should be granted — that relief should always be given where the prospect of happiness so long as the parties cohabited appeared hopeless. But these are considerations for the legislature, not for the courts. . . . Our duty, on the present occasion, is to administer, not to make the law. I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves. But marital misconduct is, unfortunately, as old as matrimony itself. Great as have been the social changes which have characterized the last century, in this respect there has been no alteration, no new development. I think it is impossible to do otherwise than proceed upon the old lines."

While he believed that the amendment of the law should be left to the legislature, he was not unmindful of the hardship often occasioned by the application of established rules. But he held that "in laying down a proposition of law it is necessary to keep in view the consequences, and not to contemplate its operation in the particular case." Therefore, in holding, in Derry *v.* Peek, 14 A. C. 376, that an untrue statement made negligently, but with an honest belief in its truth, would not sustain an action for deceit, he said: "I have arrived, with some reluctance, at the conclusion to which I have felt myself compelled, for I think that those who put before the public a prospectus to induce them to embark

their money in a commercial enterprise, ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought, to some extent, to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done, the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent, whether his acts can or cannot be justly so designated." In common with many strong minded judges, Lord Herschell was much given to interrupting counsel during argument. His propensity in this direction is said to have been temporarily checked when, during the hearing of the case of Allen *v.* Flood, one of his more conservative colleagues remarked with caustic humor, "We can all pretty well understand from the present proceedings what amounts to molesting a man in his business." [1]

Lord Halsbury enjoys the double distinction of having risen to the woolsack from the criminal bar, and of having

[1] The following are Lord Herschell's ablest opinions: Allen *v.* Flood, (1898) A. C. 1; Nordenfelt *v.* Maxim-Nordenfelt, (1894) A. C. 535; British South Africa Co. *v.* Mozambique, (1893) A. C. 602; Bank of England *v.* Vagliano, (1891) A. C. 107; Solomon *v.* Solomon, (1897) A. C. 22; Russell *v.* Russell, (1897) A. C. 395; Smith *v.* Baker, (1891) A. C. 325; Derry *v.* Peek, 14 App. Cas. 359; The Bernina, 13 App. Cas. 1; Reddaway *v.* Banham, (1896) A. C. 207; London Joint Stock Bank *v.* Simmons, (1892) A. C. 201; Trego *v.* Hunt, (1896) A. C. 7; Concha *v.* Concha, 11 App. Cas. 541; White *v.* Mellin, (1895) A. C. 155; Ooregum Gold Mining Co. *v.* Roper, (1892) A. C. 125; Trevor *v.* Whitworth, 12 App. Cas. 409; Alexander *v.* Jenkins, (1892) 1 Q. B. 797; Mackenzie *v.* Mackenzie, (1895) A C. 388; Wild *v.* Waywood, (1892) 1 Q. B. 783; Tabley *v.* Official Receiver, 13 App. Cas. 523; Hawthorn *v.* Fraser, (1892) 2 Ch. 27; Commissioners of Income Tax *v.* Pemsel, (1891) A. C. 531; London County Council *v.* Erith, (1893) A. C. 562; Ward v. Dunscomb, (1893) A. C. 369; Barnado *v.* McHugh, (1891) A. C. 388; Woodward *v.* Goulston, 11 App. Cas. 469; Makin *v.* Atty Gen., (1894) A. C. 57.

held this high office under three administrations. These facts are, in themselves, evidence of varied ability and marked force. If he does not possess the profound knowledge of equity which distinguished his more eminent predecessors, his wide experience at the bar developed other gifts not less essential than learning to the successful discharge of the multifarious duties with which the chancellor is now charged. A distinguished French observer has described the English chancellor as a living image of the Trinity, embodying in his own person the three branches of government. As a peer, as speaker of the House of Lords, and as a member of the cabinet, he participates in legislation. As the creator of judges, with extensive administrative duties in regard to the courts, he represents the executive. In his judicial capacity he is president of the Court of Appeal and of the High Court, with a statutory right of sitting as a judge of first instance, if he so desires. Many years have passed since the chancellor sat as a judge of first instance, and, except when an occasional press of business may demand his presence in the Court of Appeal, his judicial duties are now confined to the House of Lords. As presiding judge of the court of final appeal, Lord Halsbury has served through many years with credit to himself and to the satisfaction of the bar. Among colleagues of greater special acquirements he has displayed unfailing tact and self-reliance, and the record of his judicial service reveals the good sense which results from wide experience with men and affairs.[1]

(*d*) *The Judicial Committee of the Privy Council*

The Judicial Committee of the Privy Council is composed of the Lord President, such members of the Privy Council

[1] Some of the best specimens of his powers are: Allen *v.* Flood, (1898) A. C. 1; Monson *v.* Madam Tassaud, 63 L. J., Q. B. 454; R. *v.* Jackson, 64 L. T. 679; Derry *v.* Peek, 14 App. Cas. 337; Membery *v.* Great Western Ry., 14 App. Cas. 179; Great Western Ry. *v.* Bunch, 13 App. Cas. 31; London, etc., Ry. *v.* Truman, 11 App. Cas. 45; Adam *v.* Newbigging, 13 App. Cas. 308; Macdougall *v.* Knight, 60 L. T. 762; Cox *v.* Halles, 63 L. T. 679; Bank of England *v.* Vagliano, (1891) A. C. 107; London Joint Stock Bank *v.* Simmons, (1892) A. C. 201; Mogul Steamship Co. *v.* McGregor, (1892) A. C. 25; Smith *v.* Baker, (1891) A. C. 325; Russell *v.* Russell, (1897) A. C. 395.

as hold or have held high judicial office, the Lords Justices of Appeal and a limited number of Privy Councillors appointed by the Crown. In recent years several colonial judges have been added to the tribunal, thus bringing it in closer touch with the vast empire for which it administers justice. Its jurisdiction includes colonial, Indian and ecclesiastical appeals, petitions for the prolongation of letters patent, and matters specially referred to it by the Crown. The tribunal was dominated for many years by the vast learning and powerful intellect of Lord Watson, who sat in this court for a longer period than any permanent member, except Lord Kingsdown, by whom alone Watson's substantial contributions to imperial law are equalled.

The variety, novelty and importance of the questions coming before this tribunal lend to it an interest which transcends the merits of individual controversies. The cases specially referred to it by the Crown often involve questions of fundamental importance; and, apart from the recognized right of appeal from the colonies, the Privy Council may give special leave to appeal in cases of general or constitutional importance, or in criminal cases where grave injustice may have been done.[1] Moreover, there is hardly any system of civilized law which does not prevail in some parts of the vast empire subject to the jurisdiction of this court, — in the West Indies the civil law of Spain, in Canada the civil law of France, in Africa the Roman law as modified by the Dutch, in India the laws of the Hindoo and the Mohammedan. Therefore, whether ultimately incorporated with the House of Lords to form a single court of appeal for the whole empire, or exercised as heretofore in an independent tribunal, this great imperial jurisdiction, sustaining diverse customs and principles of conduct which have been stamped with the approval of generations, is a matter of vast moral as well as legal significance. It is an effort to heed the cry of humanity for justice and peace among men.

[1] *Re* Skinner, 3 P. C. 451; Prince *v.* Gagnon, 8 App. Cas. 102; *Re* Dillet, 12 App. Cas. 459; Levien *v.* Reg., 1 P. C. 536.

21. AN AMERICAN LAW STUDENT OF A HUNDRED YEARS AGO[1]

By James Kent[2]

New York, October 6th, 1828.

DEAR SIR:—Your very kindly & friendly letter of the 15th ult. was duly received, and also your argument in the Case of *Ivey vs. Pinson.* I have read the Pamphlet with much interest & pleasure. It is composed with masterly ability, of this there can be no doubt, & without presuming to give any opinion on a great case, still *Sub Judice,* & only argued before me on one side, I beg leave to express my highest respect for the law reasoning & doctrine of the argument, & my admiration of the spirit, & eloquence which animate it. My attention was very much fixed on the perusal, & if there be any lawyer in this State who can write a better argument in any point of view I have not the honor of his acquaintance.

As to the rest of your letter concerning my life & studies, I hardly know what to say, or to do. Your letter & argument, & character & name have impressed me so favorably, that I feel every disposition to oblige you, if it be not too much at my own expense. My attainments are of too ordinary a character, & far too limited, justly to provoke such curiosity. I have had nothing more to aid me in all

[1] A letter to a correspondent in Tennessee, printed in the Green Bag (Boston: Boston Book Co.), 1897, volume IX, pp. 206-211, with the following note: "This letter was recently found in the old Capitol at Jackson, Miss. There is no record showing how it got there. The Thomas Washington to whom it was addressed was a lawyer of some note who lived at Nashville, Tenn."

[2] 1763-1847. Judge of the Supreme Court of New York, 1798; chief justice of the same Court, 1804-1814; chancellor of New York, 1814-1823. Further biographical and bibliographical data appear in the letter.

my life than plain method, prudence, temperance & steady persevering diligence. My diligence was more remarkable for being steady & uniform, than for the degree of it, which never was excessive, so as to impair my health or eyes, or prevent all kinds of innocent & lively recreation. I would now venture to state briefly but very frankly & at your special desire, somewhat of the course & progress of my studious life. I know you cannot but smile at times at my simplicity, but I commit myself to your indulgence & honor.

I was educated at Yale College & graduated in 1781. I stood as well as any in my class, but the test of scholarship at that day was contemptible. I was only a very inferior classical scholar, & we were not required, & to this day I have never looked into a Greek book but the New Testament. My favorite studies were Geography, History, Poetry, bellesletter, &c. When the College was broken up & dispersed in July 1779 by the British, I retired to a country village & finding Blackstone's com. I read the 4th volume, parts of the work struck my taste, & the work inspired me at the age of 16 with awe, and I fondly determined to be a lawyer. In November 1781 I was placed by my father with Mr. (now called Judge) Benson, who was then attorney general at Poughkeepsie on the banks of the Hudson, & in my native County of Dutchess. There I entered on law, & was the most modest, steady, industrious student that such a place ever saw. I read the following winter *Grotius & Puffendorf* in huge folios, & made copious extracts. My fellow students who were more gay and gallant, thought me very odd and dull in my taste, but out of five of them four died in middle life drunkards. I was free from all dissipation, and chaste as pure virgin snow. I had never danced, or played cards, or sported with a gun, or drank anything but water. In 1782 I read *Smollets* history of England, & procured at a farmers house where I boarded, *Rapins History* (a huge folio) and read it through; and I found during the course of the last summer among my papers, my M. S. abridgment on *Rapins* dissertation on the laws and customs of the Anglo Saxons. I abridged Hales history of the common law, and the old books of practice, and read parts of

Blackstone again & again. The same year I procured *Humes* History and his profound reflections & admirable eloquence struck most deeply on my youthful mind. I extracted the most admired parts and made several volumes of M. S. S. I was admitted to the bar of the Supr. Court in January 1785, at the age of 21, and then married *without one cent of property;* for my education exhausted all my kind father's resources and left me in debt $400.00, which took me two or three years to discharge. Why did I marry? I answer that.

At the farmers house where I boarded, one of his daughters, a little modest, lovely girl of 14 generally caught my attention & insensibly stole upon my affections, & I before I thought of love or knew what it was, I was most violently affected. I was 21. and my wife 16 when we married, *& that charming lovely girl has been the idol & solace of my life,* & is now with me in my office, unconscious that I am writing this concerning her. We have both had uniform health & the most perfect & unalloyed domestic happiness, & are both as well now & in as good spirits as when we married. We have three adult children. My son lives with me and is 26, & a lawyer, & of excellent sense, & discretion, & of the purest morals. My eldest daughter is well married, & lives the next door to me, with the intimacy of our family, my youngest daughter is now of age, she lives with me, & is my little idol.

I went to housekeeping at Poughkeepsie, 1786, in a small, snug cottage, & there I lived in charming simplicity for eight years. My practice was just about sufficient to redeem me from debt, & to maintain my wife & establishment decently, and supply me with books about as fast as I could read them. I had neglected & almost entirely forgotten my scanty knowledge of the Greek & Roman classics, & an accident turned my attention to them very suddenly. At the June Circuit in 1786, I saw Ed. Livingstone [1] (now the codifier for Louisiana) & he had a pocket Horace & read some passages to me at some office & pointed out their beau-

[1] For the work of Edward Livingstone in American law, see Essay No. 15, *ante* (Dillon: Bentham's Influence in the Reforms, etc.). — Eds.

ties, assuming that I well understood Horace. I said nothing, but was stung with shame & mortification, for I had forgotten even my Greek letters. I purchased immediately Horace and Virgil, a dictionary & grammar, and a Greek Lexicon & grammar and the testament, & formed my resolution promptly and decidedly to recover the lost languages.

I studied in my little cottage mornings and devoted an hour to greek and another to latin daily, I soon increased it to two for each tonge in the 24 hours, my acquaintance with the languages increased rapidly. After I had read Horace and Virgil I ventured upon Livy for the first time in my life, & after I had completed the Greek Testament I took up the Iliad, & I can hardly describe at this day[1] with which I progressively read and studied in the original *Livy* & the Iliad. It gave me inspiration, I purchased a French Dictionary & grammar & began French & gave an hour to this language daily. I appropriated the business part of the day to law, & read Co. Litt, & made copious notes. I devoted evening to English literature in company with my wife. From 1788 to 1798 I steadily divided the day into five portions, & alotted them to *Greek, Latin, law and business, French & English.* I mastered the best of the *Greek, Latin* and *French* classics, & as well as the best English & law books at hand & read Machiavel & all collateral branches of English history, such as Libeletines H. 2nd Bacons H. 7th. Lord Clarendon on the great Rebellion, &c. I even sent to England as early as 1790 for Warbertons divine legation Lusiad.

My library which started from nothing grew with my growth, & it has now attained to upwards of 3,000 volumes, & it is pretty well selected, for there is scarcely a work, authority or document referred to in the 3 volumes of my commentaries but what has a place in my own library, next to my wife, my library has been the solace of my greatest pleasure & devoted attachment.

The year 1793 was another era in my life, I removed from Poughkeepsie to the city of New York, with which I had become well acquainted, & I wanted to get rid of the incum-

[1] Words omitted in original.

brance of a dull law partner at P, but though I had been in practice nine years, I had acquired very little property. My furniture & library were very scanty, & I had not $500 extra in the world. But I owed nothing, & came to the City with good character & with a scolar's reputation. My newspaper writings, & speeches in the assembly had given me some notoriety. I do not believe any human being ever lived with more pure and perfect domestic repose & simplicity & happiness than I did for those nine years.

I was appointed professor of law in Columbia College late in 1793 & this drove me to deeper legal researches. I read that year in the original Bynkersheek Quinctillion & Ciceros rhetorical works, besides reports and digests, & began the compilation of law lectures. I read a course in 1794 & 5 to about 40 gentlemen of the first rank in the City. They were very well received, but I have long since discovered them to have been slight & trashy productions. I wanted Judicial labors to teach me precision. I dropped the course after one term, & soon became considerably involved in business, but was never fond of, nor much distinguished in the contentions of the bar.

I had commenced in 1786 to be a zealous Federalist & read everything on politics. I got the Federalist almost by heart, and became intimate with Hamilton. I entered with ardor into the federal politics against France in 1793, & my hostility to the French democracy, & to French power beat with strong pulsation down to the battle of Waterloo, now you know my politics.

I had excellent health owing to the love of simple diet, & to all kinds of temperance, & never read late nights. I rambled daily with my wife on foot over the hills, we were never asunder. In 1795 we made a voyage through the lakes George & Champlain. In 1797 we run over the 4 New England States. As I was born and nourished in boyish days among the highlands East of the Hudson, I have always loved rural & wild scenery, & the sight of mountains & hills, & woods & streams always enchanted me, and do still. This is owing in part to early associations, & it is one secret of my uniform health & chirfulness.

In 1796 I began my career of official life. It came upon me entirely unsolicited & unexpected. In Feby 1796 Governor Jay wrote me a letter stating that the office of *Master in Chancery* was vacant, & wished to know confidentially whether I would accept. I wrote a very respectful but very laconic answer. It was "That I was content to accept of the office if appointed." The same day I received the appointment, & was astonished to learn that there were 16 professed applicants all disappointed. This office gave me the monopoly of the business of that office, for there was but one other master in N York. The office kept me very busy in petty details and outdoor concerns, but was profitable. In March 1797 I was appointed *Recorder of N. York.* This was done at Albany, & without my knowledge that the office was even vacant or expected to be. The first I heard of it was the appointed announced in the papers. This was very gratifying to me, because it was a judicial office. I thought that it would relieve me from the drudgery of practice & gave me a way of displaying what I knew; & of being useful entirely to my taste. I pursued my studies with increased appetite & enlarged my law library very much. But I was encumbered with office business, for the governor allowed me to retain the other office also, & with these joint duties & counsel business in the Sup. Court, I made a great deal of money that year. In Feby 1798 I was offered by Gov Jay & accepted the office of youngest *Judge of the Supreme Court.* This was the summit of my ambition. My object was to return back to Poughkeepsie, & resume my studies, & ride the circuits, & inhale country air, & enjoy *otium cum dignitate.* I never dreamed of volumes of reports & written opinions. Such things were not then thought of. I retired back to P in the Spring of 1798 & in that Summer rode all over the Western wilderness & was delighted. I returned home and began my Greek & Latin, & French, & English, & law classics as formerly, & made wonderful progress in books that year.

In 1799 I was obliged to remove to Albany, in that I might not be too much from home, *& there I remained stationary for 24 years.* When I came to the bench there

([1]) no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was. I first introduced a thorough examination of cases & written opinions. In Jany T 1799 the 2d case reported in 1st Johnsons cases, of *Ludlow vs. Dale*[2] is a sample of the earliest. The judges when we met all assumed that foreign sentences were only good prime facie. I presented and read my written opinion that they were conclusive & they all gave up to me & so I read it in court as it stands.[3] This was the commencement of a new plan, & then was laid the first stone in the subsequently erected temple of our jurisprudence.

Between that time & 1804 I rode my share of circuits, attended all the terms, & was never absent, & was always ready in every case by the day. I read in that time ([4]) and completely abridged the latter, & made copious digests of all the English new reports and treatises as they came out. I made much use of the *Corpus Juris*, & as the Judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethern to rout & carry my point by mysterious want of French and civil law. The Judges were republicans & very kindly disposed to everything that was French, & this enabled me without exciting any alarm or jealousy, to make free use of such authorities & thereby enrich our commercial law.

I gradually acquired preponderating influence with my brethern, & the volumes in Johnson after I became Ch. J in 1804 show it. The first practice was for each judge to give his portion of opinions when we all agreed, but that gradually fell off, but for the two or three last years before I left the bench, I gave the most of them. I remember that in 8th Johnson all the opinions one Term are *per curiam*. The fact is I wrote them all, & proposed that course to avoid

[1] Words omitted in the original.
[2] Probably January, 1806, 1st Case in 1 John. Ludlow *v.* Bowne.
[3] For a note indicating an error of memory in Chancellor Kent's allusion to the tenor of this decision, see Professor Schofield's article in 1 Illinois Law Rev. p. 257. — Eds.
[4] Blank in the original.

existing jealousy & many a per curiam opinion was so inserted for that reason.

Many of the cases decided during the 16 years I was in the Supr. Court were labored by me most unmercifully, but it was necessary under the circumstances in order to subdue opposition. We had but few American precedents. One judge was democratic, and my brother *Spencer* particularly of a bold, vigorous, dogmatic mind, & overbearing manner. English authorities did not stand very high in those feverish times, & this led me a hundred times to attempt to bear down opposition, or flame it by exhausting research & overwhelming authority. Our Jurisprudence was probably on the whole improved by it. My mind certainly was roused, & was always kept ardent and inflamed by collision.

In 1814 I was appointed Chancellor. The office I took with considerable reluctance. It had no claims. The person who left it was stupid, & it is a curious fact that for the nine years I was in that office, there was *not a single decision, opinion or dictum of either of my two predecessors* (*Ch. Livingston & Ch.* ([1])) from 1777 to 1814 cited to me or even suggested. I took the court as if it had been a new institution, & never before known to the U. S. I had nothing to guide me, & was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable under our constitution. This gave me great scope, & I was only checked by the revision of the Senate & court of Errors. I opened the gates of the court immediately, & admitted almost gratuitously the first year 85 counsellors, though I found there had not been but 13 admitted for 13 years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Ch. reports.

My study in Equity jurisprudence was very much confined to the topics elicited by the cases. I had previously read, of course, the modern Equity reports, down to the time, & of course I read all the new ones as fast as I could procure them. I remember reading Pear Williams as early as 1792 and made a digest of the leading doctrines. The

[1] Blank in original.

business of the court of chancery oppressed me very much, but I took my daily exercise, & my delightful country rides among the Catskill or the Vermont mountains with my wife, & kept up my health and spirits. I always took up the cases in their order, & never left one until I had finished it. This was only *doing one thing at a time.* My practice was first to make myself perfectly & accurately (mathematically accurately) master of the facts. It was done by abridging the bill, & then the answers, & then the depositions, & by the time I had done this slow tedious process I was master of the cause & ready to decide it. I saw where justice lay and the moral sense decided the cause half the time, & I then sed down to search the authorities until I had exhausted my books, & I might once & a while be embarrassed by a technical rule, but I *most always found principles suited to my views of the case,* & my object was to discuss a point (1) as never to be teazed with it again, & to anticipate an angry & vexatious appeal to a popular tribune by disappointed counsel.

During those years at Albany, I read a great deal of English literature, but not with the discipline of my former division of time. The avocations of business would not permit it. I had dropped the Greek as it hurt my eyes. I persevered in Latin, & used to read Virgil, Horace, Juvenal, Lucan, Salust, Tacitus, &c & Ciceros offices, & some of them annually. I have read Juvenal, Horace & Virgil eight or ten times. I read a great deal in Pothiers works and always consulted him when applicable. I read the Ed & Q reviews & Annl register *ab initio* & thoroughly, & voyages & travels & the Waverley novels &c, as other folks did. I have always been excessively fond of voyages and travels.

In 1823 a solemn era in my life arrived. I retired from the office at the age of 60, & then immediately with my son visited the Eastern States. On my return the solitude of my private office & the new dinasty did not please me. I besides would want income to live as I had been accustomed. My eldest daughter was permanently settled in N York, & I resolved to move away from Albany, & I ventured to come

1 "So" omitted.

down to N. Y. & be Chamber Counsel, & the trustees of Columbia College immediately tendered me again the old office of professor which had been dormant from 1795. It had no salary, but I must do something for a living, & I undertook (but exceedingly against my inclination) to write & deliver law lectures. In the two characters of Chamber Counsellor and College lecturer, I succeeded by steady perseverance beyond my most sanguine expectations, & upon the whole the five years I have lived here in this City since 1823 have been happy & prosperous, & I live aside of my daughter, & I take excursions every Summer with my wife & daughter all over the country. I have been twice with he [1] Canada & in every direction. I never had better health. I walk the battery uniformly before breakfast. I give a great many written opinions, & having got heartily tired of lecturing I abandoned it, & it was my son that pressed me to prepare a volume of lectures for the press. I had no idea of publishing them when I delivered them. I wrote over one volume & published it as you know. This led me to remodel & enlarge, & now the 3rd volume will be out in a few days, & I am *obliged to write a 4th to complete my law.*

My reading now is as you may well suppose, quite desultory, but still I read with as much zeal and pleasure as ever, I was never more engaged in my life than during the last Summer. I accepted the trust of receiver to the Franklin (insolvent) Bank, & it has occupied, & perplexed, & vexed me daily, & I had to write part of the 3rd volume, & search books a good deal for that very object, and I have revised the proof sheet.

If I had a convenient opportunity (though I do not see how I can have one) I would send the 3rd volume out to you, & another to our excellent friend, Governor Carroll, to whom I beg you will be so good as to present my best respects & the expression of my great esteem.

Your suggestion of an Equity treatise contains a noble outline of a great & useful work, but I cannot & will not enter on such a task I have much more to lose than to gain & I am quite tired of Equity law. I have done my part, &

[1] So in original.

choose to live more at my ease, & to be prepared for the approaching infirmities of age. — On reviewing what I have written, I had thoughts of burning it, I speak of myself too entirely, & it is entirely against my habit or taste, but I see no other way fairly to meet your desires.

I am with great respect and good wishes,

JAMES KENT.

Thomas Washington, Esq.